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# CRIMINAL LAW IN TENNESSEE IN 1979 — A CRITICAL SURVEY

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## I. INTRODUCTION

In substantive criminal law, the highlight of 1979[1] was the decision of *Leech v. American Booksellers Association*,[2] which declared the Tennessee Obscenity Act of 1978[3] unconstitutional.[4] The Tennessee courts also made an effort to clarify the confused parameters of the kidnaping statute.[5] The Tennessee Supreme Court attacked the age-old quandary whether a person can be guilty of attempting to receive stolen property if the property received is not stolen.[6]

The Supreme Court of the United States handed down several significant fourth amendment decisions involving vehicle stops,[7] temporary field detentions,[8] probable cause,[9] vehicle

1. This survey encompasses decisions reported in the National Reporter System and selected unreported cases decided during 1979.

2. 582 S.W.2d 738 (Tenn. 1979).

3. TENN. CODE ANN. §§ 39-3001 to -3038 (Supp. 1978) (current version at TENN. CODE ANN. §§ 39-3001 to -3016 (Supp. 1980)).

4. *See* text accompanying notes 86-129 *infra*.

5. TENN. CODE ANN. § 39-2601 (1975).

6. Bandy v. State, 575 S.W.2d 278 (Tenn. 1979). *See* text accompanying notes 74-81 *infra*.

7. *See* text accompanying notes 130-36 *infra*.

8. *See* text accompanying notes 137-48 *infra*.

9. *See* text accompanying notes 149-54 *infra*.

searches,[10] standing,[11] and the fruits of an illegal arrest.[12] Tennessee courts continued to shed more heat than light on the status of the open fields exception to the search warrant requirement.[13] Both the United States and Tennessee Supreme Courts made significant pronouncements concerning the rights of juveniles who make incriminating statements.[14]

## II. OFFENSES

### A. *Homicide*

The Tennessee Court of Criminal Appeals examined the circumstances in which self-defense properly may be pleaded in *Kennamore v. State*.[15] The accused had been injured seriously when struck on the head with a bottle by the victim. The accused then beat the victim into submission, ran to his truck to get his shotgun, and fatally shot the victim. The accused maintained that he could not see well because of the injury and fired because he believed the victim was advancing upon him. Following a conviction of voluntary manslaughter, the accused appealed a denial of a self-defense instruction to the effect that if the defendant was without fault, was in a place he had a right to be, and was placed in reasonable apparent danger of losing his life, "he need not retreat, but may stand his ground, and repel force by force."[16] The Tennessee Court of Criminal Appeals affirmed the conviction and acknowledged that there was no duty to retreat from one's home, but maintained that "the linchpin, of self-defense is the necessity to kill at the time the act is carried out."[17] The court quoted as good law *Nelson v. State*,[18] a

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10. *See* text accompanying notes 186-205 *infra*.
11. *See* text accompanying notes 206-15 *infra*.
12. *See* text accompanying notes 155-61 *infra*.
13. *See* text accompanying notes 174-85 *infra*.
14. *See* text accompanying notes 244-66 *infra*.
15. TENN. ATT'Y GEN. ABSTRACT, Vol. V, No. 2, p. 7-8 (Tenn. Crim. App. Feb. 15, 1979). The Tennessee Supreme Court affirmed the court of criminal appeals' decision in 604 S.W.2d 856 (Tenn. 1980).
16. TENN. ATT'Y. GEN. ABSTRACT, Vol. V, No. 2, p. 7 (Tenn. Crim. App. Feb. 15, 1979).
17. *Id.* at 7-8.
18. 32 Tenn. 237, 2 Swan 139 (1852).

pre-Civil War case which held that to be entitled to plead self-defense, a defendant " 'must give back to the wall.' "[19] The *Kennamore* court held that "[t]he rule does not permit the taking of human life to prove one to be a 'true man' nor to preserve one's pride or vindicate a wrong. . . . The 'true man doctrine' places barbaric emphasis on manliness unleavened by a proper sensitivity to the value of human life."[20] While rejecting the true man notion, Judge Byers dissented and maintained that the applicability of self-defense should not be affected by whether the accused retreated.[21]

### *B. Kidnaping*

The crime of kidnaping is committed by "[a]ny person who forcibly or unlawfully confines, inveigles, or entices away another, with the intent to cause him to be secretly confined, or imprisoned against his will, or to be sent out of the state against his will."[22] Confusion has resulted from this statutory definition because, while ostensibly codifying the common-law crime of kidnaping, the statute included false imprisonment as well. At common law, kidnaping was defined as forcibly abducting a person and sending him or her to another country.[23] The crime is not complete unless there is an asportation of the victim.[24] Although in *Brown v. State*[25] the Tenessee Court of Criminal Appeals held that secrecy is also an element of the common-law offense, this is less than clear. Professor Perkins notes that secrecy is "common in kidnaping,"[26] but he does not go so far as to label it an element. Professor Anderson does not discuss secrecy

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19. *Id.* at 255, 2 Swan at 150.

20. TENN. ATT'Y GEN. ABSTRACT, Vol. V, No. 2, p. 8 (Tenn. Crim. App. Feb. 15, 1979).

21. *Id.*

22. TENN. CODE ANN. § 39-2601 (1975).

23. R. PERKINS, CRIMINAL LAW 176 (1969) [hereinafter cited as PERKINS]; 1 WHARTON'S CRIMINAL LAW & PROCEDURE § 371, at 735 (R. Anderson ed. 1957) [hereinafter cited as WHARTON].

24. PERKINS, *supra* note 23, at 177-78; WHARTON, *supra* note 23, § 381, at 747-48.

25. 547 S.W.2d 57 (Tenn. Crim. App. 1978).

26. PERKINS, *supra* note 23, at 178.

in his consideration of kidnaping.[27] Curiously, the *Brown* court cited an annotation in support of the statement that "[o]ther states, relying on the common law, have construed their statutes to require secrecy or asportation or both."[28] The cited annotation, however, stated flatly that "[s]ecrecy was not an element"[29] of kidnaping at common law.

Whether the Tennessee statute requires asportation or secrecy depends on what words are modified by the adverbs "away" and "secretly." The crime is committed by one who "confines, inveigles, or entices away" the victim. If the word "away" modifies only "entices," then the act of detaining the victim at the point of confrontation would fall within the statute.[30] Moreover, the *mens rea* required by the statute is an intent to do one of three things: "[T]o cause him to be secretly confined, or imprisoned against his will, or to be sent out of the state against his will."[31] Only the third possibility necessitates an intent to asport. This question appeared to be unequivocally resolved in *Cowan v. State*,[32] which affirmed a conviction for kidnaping without a showing of asportation. The defendant had detained and terrorized two teen-age couples parked in a lovers' lane for seven hours by seizing and retaining the ignition key to their automobile. The court concluded simply that the victims had been confined unlawfully within the meaning of the statute.[33]

Eleven years later, with no effort to reconcile *Cowan*, the Tennessee Court of Criminal Appeals held in *McCracken v. State*[34] that both asportation and secrecy were elements of the statutory offense, and that failure to allege these elements in the presentment voided the conviction. To reach this result the court construed the word "away" to modify not only "entices," but also "confines" and "inveigles," thereby concluding that

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27. WHARTON, *supra* note 23, §§ 371-378, at 735-45.

28. 574 S.W.2d at 61 (citing 68 A.L.R. 712).

29. Annot., 68 A.L.R. 719, 720 (1930).

30. See the hypothetical suggested in Cook, *Criminal Law in Tennessee in 1973—A Critical Survey*, 41 TENN. L. REV. 203, 215-16 (1974).

31. TENN. CODE ANN. § 39-2601 (1975).

32. 208 Tenn. 512, 347 S.W.2d 37 (1961).

33. *Id.* at 516, 347 S.W.2d at 39.

34. 489 S.W.2d 48 (Tenn. Crim. App. 1972).

proof of asportation was required.[35] Similarly, the word "secretly" was read to modify not only "confined" but also "imprisoned," and thus, the court concluded that secrecy was essential to the crime.[36] The court made no reference to the intent required by the third alternative: "to cause him . . . to be sent out of the state against his will."[37] Presumably, the court recognized the syntactical objection to applying "secretly" to this clause, because the introductory words "to be" isolated the third alternative from the others.[38] Thus, *McCracken* left open the possibility of secrecy being eliminated as an element of kidnaping in those instances in which the intent is to send the victim out of the state against his or her will.

Subsequent cases acknowledged *McCracken* as settling the elements of kidnaping.[39] In one decision, *Jackson v. State*,[40] the court particularly noted the requirement of secrecy, but since the case concerned the confinement of the victim, the requirement of secrecy clearly was applicable.

In *Brown v. State*,[41] however, the court once again concluded that neither secrecy nor asportation is an essential element of kidnaping as defined by the statute. The accused assaulted the victim in his motel room, bound and gagged him, placed him in the closet, and subsequently robbed him. The conviction for kidnaping was appealed on the ground that there was no evidence of asportation.[42] The court concluded that much of the confusion respecting the meaning of the statute had resulted from a failure to recognize that section 39-2601 of the Tennessee Code Annotated encompasses not only kidnaping but also false imprisonment.[43] The three designated intentions in the statute

35. *Id.* at 52.

36. *Id.* at 52-53.

37. TENN. CODE ANN. § 39-2601 (1975).

38. The statute requires that the accused intend the victim "*to be* secretly confined, or imprisoned against his will, or *to be* sent out of the state against his will." *Id.* (emphasis added).

39. *See* Cherry v. State, 539 S.W.2d 51, 53 (Tenn. Crim. App. 1976); McBee v. State, 526 S.W.2d 124, 126 (Tenn. Crim. App. 1974).

40. 540 S.W.2d 275, 276 (Tenn. Crim. App. 1976).

41. 574 S.W.2d 57 (Tenn. Crim. App. 1978).

42. *Id.* at 59.

43. *Id.* at 61.

provide separate and distinct bases for conviction, and "[t]he proscribed acts are disjunctive and independent of one another."[44] The gravamen of the offense was the intent to harm the victim in the manner described; whether the *modus operandi* involved moving or confining the victim, secrecy or openness, the harm is essentially the same. This recognition that, notwithstanding the chapter designation in the Code the statute defines a set of offenses broader than kidnaping, may help eliminate the confusion which has resulted from an over-reliance upon common-law elements in construing the statute.

### *C. Incest*

When the same conduct is enjoined by a general statute and a more specific statute, a fundamental rule of statutory construction prescribes that the more particular provision should control.[45] In *State v. Nelson*[46] the accuseds' conduct was within the statute proscribing carnal abuse of a female under the age of twelve[47] and also within the incest statute.[48] The defendants contended that they could be charged only under the latter provision, which more particularly encompassed their illegal behavior.[49] The appellate court was unpersuaded, and found that the two statutes were "specific to the same degree";[50] therefore, an indictment could be returned properly under either statute.

### *D. Robbery*

A Tennessee statute in force for over a century provides:

> If any person or persons disguised or in mask, by day or by night, shall enter upon the premises of another, or demand en-

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44. *Id.*

45. 2A J. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 51.05 (4th ed. 1972).

46. 577 S.W.2d 465 (Tenn. Crim. App. 1978), *cert. denied, id.* (Tenn. 1979).

47. TENN. CODE ANN. § 39-3705 (1975) (repealed by Act of June 5, 1979, ch. 429, §§ 1-13, 1979 Tenn. Pub. Acts 1095).

48. TENN. CODE ANN. § 39-705 (1975).

49. The minimum punishment was five years under the incest statute and ten years under the carnal knowledge statute. *See id.* §§ 39-705, -3705.

50. 577 S.W.2d at 466.

> trance or admission into the house or inclosure of any citizen of this state, it shall be considered prima facie that his or her intention is to commit a felony, and such demand shall be deemed an assault with the intent to commit a felony . . . .[51]

This provision has been construed in only two previous cases, both decided shortly after its passage. In *State v. Box*[52] the court held that it was not necessary to allege that the acts were done with the intent to commit a felony.[53] The court reasoned that the legislative intent was to punish the act of entering or attempting to enter premises while disguised. The statements of prima facie intent to commit a felony were simply the "reasons given for the infliction of the punishment rather than conditions upon which the punishment of the offender is made to depend."[54] In *Walpole v. State*[55] the court acknowledged that the statute was enacted as a response to the terrorism of the Ku Klux Klan.[56] It agreed with the conclusion reached in *Box* that "[t]he mere entry in disguise upon the premises of another is made prima facie evidence of an intention to commit a felony, and this of itself is a substantive offense, from which there is no escape, except by proof that there was in fact no purpose to commit crime."[57]

In *State v. Bryant*[58] the supreme court rejected the *Box* and

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51. TENN. CODE ANN. § 39-2802 (1975).

52. 1 Tenn. Cas. (1 Shan.) 461 (1875).

53. "The statute declares that the acts themselves shall be evidence of an intent to commit a felony . . . ." *Id.* at 464.

54. *Id.* at 464-65.

55. 68 Tenn. (9 Bax.) 370 (1878).

56. It is apparent that the object of this statute was to repress a great evil which arose in this country after the war, and which grew to be an offense of frequent occurrence, that of evil-minded and mischievous persons disguising themselves to terrify or to wrong those who happened to be the objects of their wrath or resentment. This was a kind of mob law, enforced sometimes by a multitude of vagabounds, who grew to be a great terror to the people, and placed human life and property at the mercy of bad men, whose crimes could scarcely ever be punished, because of the disguises under which they were perpetrated.

*Id.* at 371-72.

57. *Id.* at 372.

58. 585 S.W.2d 586 (Tenn. 1979).

*Walpole* decisions in light of their "strained and unreasonable construction of the statute."[59] A more plausible interpretation, the court submitted, was that the offense consists of two elements: "1) Entry upon the premises of another while masked, 2) with the intent to commit a felony."[60] Given this interpretation, the issue then arose whether an intent to commit a felony was a permissible inference to be drawn from masked entry. The Tennessee Court of Criminal Appeals had relied upon *Tot v. United States*[61] and its progeny[62] which required that the inference must be such that "it can at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend."[63] Subsequent to the court of criminal appeals' decision, however, the United States Supreme Court handed down *Court of Ulster County v. Allen*[64] in which the inference question was reexamined. The Court distinguished mandatory presumptions, to which the *Tot* standard would apply, from permissive inferences that place no burden of proof on the accused and allow, but do not require, "the trier of fact to infer the elemental fact from proof by the prosecutor of the basic one."[65] In cases of permissive inferences, the party challenging the use must "demonstrate its invalidity as applied to him."[66]

In *Bryant* the Tennessee Supreme Court determined that

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59. *Id.* at 588 n.1.

60. *Id.*

61. 319 U.S. 463 (1943).

62. *See* Barnes v. United States, 412 U.S. 837 (1973); Turner v. United States, 396 U.S. 398 (1970); Leary v. United States, 395 U.S. 6 (1969).

63. 395 U.S. at 36.

64. 442 U.S. 140 (1979).

65. *Id.* at 157.

66. *Id.*

> Because this permissive presumption leaves the trier of fact free to credit or reject the inference and does not shift the burden of proof, it affects the application of the "beyond a reasonable doubt" standard only if, under the facts of the case, there is no rational way the trier could make the connection permitted by the inference. For only in that situation is there any risk that an explanation of the permissible inference to a jury, or its use by a jury, has caused the presumptively rational factfinder to make an erroneous factual determination.

*Id.*

the statutory presumption before it was permissive, not mandatory[67] and then turned to the facts of the case. The evidence left no doubt that two companions of the accused had entered the premises with the intent to rob. Under such circumstances, the use of the permissive inferences against the accused was proper. Because the instruction given the jury at least suggested a mandatory presumption, the case was remanded for further proceedings.[68]

### *E. Receiving and Concealing Stolen Property*

Among the classic logical puzzles in criminal law is whether a conviction for an attempted crime should be sustained when the crime attempted is, under the circumstances, legally impossible.[69] In regard to the offense of receiving stolen property, the cases of *People v. Jaffe*[70] and *People v. Rojas*[71] frequently are juxtaposed. In both cases, the accused had attempted to receive stolen property, but unknown to him, the property had been recovered and, therefore, was not in fact stolen property at the time of the transfer. In *Jaffe* the court held that the conviction could not stand, because "the act, which it was doubtless the intent of the defendant to commit would not have been a crime if it had been consummated."[72] In *Rojas* the court reasoned that since the act and intent of the accused were unaffected by the objective nature of the property, the conviction should be

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67. 585 S.W.2d at 589.

68. On retrial, the trial judge will instruct the jury fully concerning the nature of the permissive inference established by the statute, assuming of course that there is sufficient evidence introduced at trial to make the inference a rational one. The instructions should indicate that the jury may, *but need not*, infer that a person intended to commit a felony from the fact of his entry upon the premises of another while masked. The jury should be further instructed that the inference has no effect on the requirement that the State prove all elements of the offense beyond a reasonable doubt.

*Id.* at 590.

69. The most familiar portrayal of the dilemma is the hypothetical case of Lady Eldon's french lace, first suggested in 1 WHARTON, CRIMINAL LAW 304 n.9 (12th ed. 1932).

70. 185 N.Y. 497, 78 N.E. 169 (1906).

71. 55 Cal. 2d 252, 358 P.2d 921, 10 Cal. Rptr. 465 (1961).

72. 185 N.Y. at 501, 78 N.E. at 169.

sustained.[73]

The Supreme Court of Tennessee was faced with this issue for the first time in *Bandy v. State*,[74] wherein the accused had requested another to burglarize a store and deliver the stolen property to him. An officer discovered the property prior to delivery, and the thief permitted the officer to hide in the trunk of his car when he delivered the property to the accused. Upon receipt of the property by the accused, the officer emerged and made the arrest. The accused was convicted of concealing stolen property[75] and he subsequently appealed.[76]

The Tennessee Supreme Court held that a conviction for concealing stolen property could not be sustained, because the property was not in fact stolen at the time of the acts of the accused. The court, however, did find that a conviction for attempt[77] would be appropriate and expressly adopted the rationale of *Rojas* as opposed to *Jaffe*. Because the attempt was a lesser included offense,[78] it was within the power of the appellate court to modify the judgment,[79] but only if the court imposed the minimum sentence permitted for the lesser crime.[80] Since there was no minimum punishment prescribed in the attempt statute,[81] the court remanded the case for a jury determination of punishment.

As in the case of larceny, receiving and concealing stolen property is a more serious crime if the property received has a

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73. "In our opinion the consequences of intent and acts such as those of defendants here should be more serious than pleased amazement that because of the timeliness of the police the projected criminality was not merely detected but also wiped out." 55 Cal. 2d at 258, 358 P.2d at 924, 10 Cal. Rptr. at 468.

74. 575 S.W.2d 278 (Tenn. 1979).

75. TENN. CODE ANN. § 39-4218 (1975) (amended 1980).

76. 575 S.W.2d at 278.

77. TENN. CODE ANN. § 39-603 (1975).

78. *See* State v. Staggs, 544 S.W.2d 620 (Tenn. 1977).

79. *See generally* Corlew v. State, 181 Tenn. 220, 180 S.W.2d 900 (1944); Peters v. State, 521 S.W.2d 233 (Tenn. Crim. App. 1974).

80. 181 Tenn. at 220, 180 S.W.2d at 900.

81. The statute called for "imprisonment in the penitentiary not exceeding five (5) years, or, in the discretion of the jury, by imprisonment in the county workhouse or jail not more than one (1) year, and by fine not exceeding five hundred dollars ($500)." TENN. CODE ANN. § 39-603 (1975).

value in excess of two hundred dollars.[82] In *Baker v. State*[83] the court addressed the issue whether valuation should be made at the time of the theft or at the time the property was received by defendant. The property stolen in *Baker* was blank checks of only nominal value at the time of the theft. When received by the accused, however, each check had been forged for an amount in excess of one hundred dollars. Following the weight of authority from other jurisdictions,[84] the court concluded that the value of the stolen goods should be determined at the time of receipt.[85]

### *F. Obscenity*

The much-celebrated Tennessee Obscenity Act of 1978[86] was declared unconstitutional in *Leech v. American Booksellers Association*[87] and the prior obscenity law was reinstated.[88] Justice Fones, writing for an unanimous court, noted that it was the court's prerogative to construe the state constitutional counterpart to the first amendment of the federal constitution to prohibit all regulation of pornography, although it had no inclination to do so.[89] On the other hand, the court could not impose a more restrictive standard than that mandated by the United States Supreme Court in *Miller v. California*[90] and its progeny. Beyond the first amendment consideration, the court was also

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82. The 1979 amendment to §§ 39-4217 to -4218 of the Tennessee Code Annotated substituted the words "two hundred" for "one hundred."

83. TENN. ATT'Y GEN. ABSTRACT, Vol. V, No. 1, p. 6-7 (Tenn. Crim. App. Dec. 27, 1978).

84. The court cited Thompson v. United States, 464 F.2d 538 (5th Cir. 1972), involving stolen money orders. *See also* United States v. McClain, 545 F.2d 988 (5th Cir. 1977); United States v. Devall, 462 F.2d 137 (5th Cir. 1972); United States v. Walker, 432 F.2d 995 (6th Cir. 1970); Herman v. United States, 289 F.2d 362 (5th Cir. 1961); Boorstine v. State, 126 Ga. App. 90, 190 S.E.2d 83 (1972); People v. Cobetto, 66 Ill. 2d 488, 363 N.E.2d 854 (1977).

85. TENN. ATT'Y GEN. ABSTRACT, Vol. V, No. 1, p. 7 (Tenn. Crim. App. Dec. 27, 1978).

86. Act of Apr. 12, 1978, ch. 846, §§ 1-8, 1978 Tenn. Pub. Acts 1031 (current version at TENN. CODE ANN. §§ 39-3001 to -3016 (Supp. 1980)).

87. 582 S.W.2d 738 (Tenn. 1979).

88. *See* Act of Mar. 12, 1974, ch. 510, §§ 1-17, 1974 Tenn. Pub. Acts 276.

89. 582 S.W.2d at 745.

90. 413 U.S. 15 (1973).

concerned with provisions of the Act which were too vague to satisfy federal and state constitutional requirements.[91]

In *Miller* the Court articulated a three-pronged test for determining whether a work was obscene:

> (a) [W]hether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest, . . . ; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.[92]

The Tennessee Act, in the words of the *Leech* court, "expand[ed] the *Miller* guidelines by eight lengthy and unique definitions of terms found therein."[93] The court focused its scrutiny upon these definitions.

In *Pinkus v. United States*[94] the United States Supreme Court had interpreted the term "average person" to include both sensitive and insensitive people. "[T]he community includes all adults who constitute it . . . ."[95] The Tennessee definition, however, was not limited to adults; it included "all individuals, irrespective of age."[96] But the Supreme Court had precluded such a definition in *Pinkus*: "[C]hildren are not to be included for these purposes as part of the 'community' as that term relates to the 'obscene materials . . . .' "[97] To hold otherwise would be tantamount to reducing the permissible standard of communication for adults to that acceptable for children. The *Leech* court found that to include children in the definition of average person unconstitutionally restricted freedom of expres-

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91. 582 S.W.2d at 746 (citing U.S. CONST. amend. XIV; TENN. CONST. art. 1, § 8).

92. 413 U.S. at 24.

93. 582 S.W.2d at 746. The prior Obscenity Act had defined the terms "average person," "contemporary community standards," "taken as a whole," "appeals to," "prurient interest," "sexual conduct depicted in a patently offensive way," "unwholesome," and "value." *Id.*

94. 436 U.S. 293 (1978).

95. *Id.* at 300.

96. Act of Apr. 12, 1978, ch. 846, § 2, 1978 Tenn. Pub. Acts 1034. *See* 582 S.W.2d at 746.

97. 436 U.S. at 297.

sion secured by the first amendment.[98]

The definition of average person was further limited under the Tennessee Obscenity Act to one whose "attitude is the result of human experience, understanding, development, culturalization, and socialization in Tennessee."[99] This, the court concluded, called for the impossible task of separating those influences derived from sources within the state from those outside the state.[100] While *Miller* had acknowledged the legitimacy of local community standards in identifying obscenity, "it is patently impermissible to attempt to localize the sources of stimuli, experience, etc., that contribute to one's 'attitude.' "[101] To the extent that such a dismembering was possible, and assuming that the Tennessee stimuli would garner a more restrictive attitude on free expression, the constitutional flaw was essentially the same as that resulting from including children in the definition of average person.[102]

A third aspect of the term "average person" as defined in the Tennessee Act limited the hypothetical attitude "to that which is personally acceptable, as opposed to, that which might merely be tolerated."[103] Again, the United States Supreme Court had precluded such a conceptualization of the average person. In *Smith v. United States*[104] the Court stated that "contemporary community standards must be applied by juries in accordance with their own understanding of the tolerance of the average

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98. 582 S.W.2d at 747.

99. Act of Apr. 12, 1978, ch. 846, § 2, 1978 Tenn. Pub. Acts 1034.

100. 582 S.W.2d at 748.

> Tennesseans do not live in isolation from the remainder of the world, even if they do not travel beyond state boundaries. Most, if not all, Tennessee communities and vicinages have adults residing therein (1) who were educated in our sister states or foreign lands, (2) who have traveled extensively and acquired foreign culture, or (3) who were born, developed, cultured and socialized in other states and foreign lands. But, the definition would require screening out those "foreign" influences, taking into consideration only that portion of their attitudes that resulted from experience, etc., in Tennessee.

*Id.*

101. *Id.*

102. *Id.*

103. Act of Apr. 12, 1978, ch. 510, § 2, 1978 Tenn. Pub. Acts 1034.

104. 431 U.S. 291 (1977).

person in their community."[105] Once again, the *Leech* court found the Tennessee definition unconstitutionally restrictive.[106]

The term "contemporary community standards" was defined in the Tennessee Act as expressions "deemed proper and appropriate and . . . accepted in Tennessee society."[107] Cryptically, the court declared this definition unconstitutional for the reasons discussed in invalidating the definition of average person.[108] It is not, however, apparent that the argument applies. This definition is confined explicitly to adult expression and does not attempt to isolate insular influences. Although the term "accepted" is used, it is not contrasted with tolerance. Given the aggregate constitutional shortcomings identified by the court, the point is inconsequential. Nevertheless, it would not appear too difficult to construe this definition as compatible with the federal standards.

The meaning of the phrase "taken as a whole" as used in the *Miller* test was addressed in *Kois v. Wisconsin*,[109] a case in which a state court found two photographs accompanying a newspaper article to be obscene. The United States Supreme Court held that the test was whether the photographs were "rationally related" to the article and whether the article was "a mere vehicle for the publication of the pictures."[110] In contrast, the Tennessee Act provided that bound volumes such as magazines

> may not be considered as a whole unless there is such interdependence of, between, or among the separate pieces that to remove any one of them materially would change the type, as opposed to the quality, of the volume . . . otherwise, each separate piece or pictorial or combination of them shall be separately taken as a whole.[111]

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105. *Id.* at 305.

106. 582 S.W.2d at 748.

107. Act of Apr. 12, 1978, ch. 510, § 2, 1978 Tenn. Pub. Acts 1034. *See* 582 S.W.2d at 748.

108. 582 S.W.2d at 748. *See* text accompanying notes 95-106 *supra*.

109. 408 U.S. 229 (1972).

110. *Id.* at 231.

111. Act of Apr. 12, 1978, ch. 510, § 2, 1978 Tenn. Pub. Acts 1035. *See* 582 S.W.2d at 749.

The *Leech* court concluded that this innovation eliminated the rational relationship test of *Kois* and gave carte blanche authority to condemn entire volumes upon a finding that an isolated portion was obscene. Once again, the Act was irreconcilable with the minimum standards mandated by the first amendment.

The phrase "prurient interest" was defined in *Roth v. United States*[112] as a "shameful or morbid interest in nudity, sex, or excretion, . . . if it goes substantially beyond customary limits of candor in description or representation of such matters."[113] The phrase was employed without further explication in *Miller*, except that its application was limited to sex.[114] The Tennessee Act defined prurient interest as "that quality inherent in all human beings which when aroused evokes feelings of shame, embarrassment, disgust, or revulsion or evidences mental, emotional or physical pathology, or is degrading in that it elicits unwholesome lusts, cravings, or longings."[115] The *Leech* court held that "[b]y failing to include the essential element that the interest appealed to and aroused must be sex, the definition is overbroad and constitutionally infirm."[116]

An additional term appearing in the Tennessee Act which is not included in the *Miller* definition is the term "unwholesome," defined as

> that which, if continued, would present an obstacle or impairment to culturalization according to prevailing norms and mores in society, including, but not limited to the removal of feel-

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112. 354 U.S. 476 (1957).

113. *Id.* at 487 n.20 (quoting MODEL PENAL CODE § 207.10(2) (Tent. Draft No. 6, 1957)).

114. 413 U.S. at 24.

115. Act of Apr. 12, 1978, ch. 510, § 2, 1978 Tenn. Pub. Acts 1035. *See* 582 S.W.2d at 749.

116. 582 S.W.2d at 750. To the extent that the rationale for the ban on obscenity is the public affront generated by such expression, the Tennessee definition may be more plausible than that of the Supreme Court. The latter has, without explanation, confined obscenity to what is more accurately identified as pornography. The Tennessee definition is subject-matter neutral, focusing instead upon effects, and therefore is more compatible with broader first amendment principles. The *Leech* court nevertheless was correct in its conclusion that the Act is incongruent with the extant federal constitutional standard.

> ings of guilt in contravention of cultural teachings that guilt is the normal feeling providing inhibition which discourages similar performances under like circumstances.[117]

The *Leech* court held that the phrase "norms and mores in society" was too vague to survive constitutional scrutiny.[118]

The Tennessee Act defined the clause "patently offensive" broadly to include "a detailed description of sex, in any context."[119] As the Act failed to comply with the *Miller* guidelines in this respect,[120] the first amendment requirements were again not satisfied.

Finally, the third prong of the *Miller* test was paralleled in the Tennessee Act by a definition of the term "value" which required that the challenged work must be (1) "an essential part of the exposition of ideas," and (2) "of more than slight social interest as a step to truth."[121] But even if these conditions were satisfied, the work might nevertheless be condemned (3) if the benefit derived was "clearly outweighed by the social interest in public order, public decency, and public morality."[122] Each of these components of the definition of value were held void for vagueness and overbreadth.[123]

The Tennessee Supreme Court briefly turned its attention to the portion of the Act that identified parties subject to its criminal sanctions as "a person, corporation or any other taxable

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117. Act of Apr. 12, 1978, ch. 510, § 2, 1978 Tenn. Pub. Acts 1035-36. *See* 582 S.W.2d at 750.

118. "[E]very individual tends to regard his own views and behavior to be consistent with, and representative of, the norms and mores of society." 582 S.W.2d at 750. The court considered "norms and mores" less ascertainable than "institutions of the United States and the State of Washington." *Id.* at 750, 751 (citing Baggett v. Bullitt, 377 U.S. 360 (1964)).

119. 582 S.W.2d at 751 (construing Act of Apr. 12, 1978, ch. 510, § 2, 1978 Tenn. Pub. Acts 1036-37).

120. *Miller* provided two examples of a permissible statutory definition of prohibited pornographic portrayals: "(a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated. (b) Patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals." 413 U.S. at 25.

121. Act of Apr. 12, 1978, ch. 510, § 2, 1978 Tenn. Pub. Acts 1036. *See* 582 S.W.2d at 752.

122. *Id.*

123. 582 S.W.2d at 753.

entity."[124] Notwithstanding a gallant effort by the state,[125] the court was persuaded that the taxable-nontaxable entity distinction was "too vague to inform men of common intelligence who is included and who is exempt."[126] Furthermore, were the Act construed to exempt certain religious, charitable, scientific, or educational corporations, "the classification would have no rational basis in the context of the criminal offense involved herein and would be void under the Equal Protection Clause."[127]

In sum, the Tennessee Supreme Court declared void the definitional subsections and the section identifying the parties and left "a criminal act with no legally cognizable offense and no identifiable parties to charge."[128] Thus, the court found itself with no alternative but to declare the entire Act void.[129]

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124. Act of Apr. 12, 1978, ch. 510, § 2, 1978 Tenn. Pub. Acts 1038. *See* 582 S.W.2d at 753.

125. From the state's assignment or error:

> Use of the suffix "able" normally has reference to whether a thing is possible or impossible. If a car is repairable, it can be fixed. On the other hand, if a car is irrepairable, it is impossible to fix it. If terrain is traversable, it is possible to traverse it. If terrain is untraversable, it is impossible to traverse it. Thusly, if an entity is taxable, it is possible to tax it. If it is non-taxable, it is impossible to tax it. It is that simple.

582 S.W.2d at 753.

126. *Id.* at 755.

127. *Id.*

128. *Id.*

129. While the Act did contain a severability clause, the court correctly viewed this as "a mere aid to interpretation," *id.* at 756, and not as precluding a total invalidation once the major components had been eliminated. The court aptly quoted a passage from Art Theater Guild, Inc. v. State *ex rel.* Rhodes, 510 S.W.2d 258 (Tenn. 1974), in which a prior obscenity statute had been invalidated:

> "[W]e fail to find any basis for doing anything other than holding T.C.A. § 39-3007 unconstitutional and leaving it to the legislature to adopt a new obscenity statute which fully complies with all the requisites of Miller v. California, *supra*. Moreover, for this Court to do anything more would have the effect of our rewriting Tennessee's present obscenity statute. The function of this Court is to interpret a statute against the constitution of this State and that of the United States and we will not and cannot usurp the prerogatives of the legislature by supplying essential elements to a statute which have been omitted by that body."

582 S.W.2d at 756 (quoting 510 S.W.2d at 261).

## III. PROCEDURE

### A. Arrest

#### 1. Vehicle Stops

In *Delaware v. Prouse*[130] the United States Supreme Court addressed the issue

> whether it is an unreasonable seizure under the Fourth and Fourteenth Amendments to stop an automobile, being driven on a public highway, for the purpose of checking the driving license of the operator and the registration of the car, where there is neither probable cause to believe nor reasonable suspicion that the car is being driven contrary to the laws governing the operation of motor vehicles or that either the car or any of its occupants is subject to seizure or detention in connection with the violation of any other applicable law.[131]

A patrolman had stopped an automobile for what he called a routine driver's license check. As he walked toward the vehicle, he smelled the odor of marijuana; when he looked inside, he observed marijuana on the car floor. The admissibility of the seized marijuana as evidence was the subject of the litigation.

The Court concluded that the stop was constitutionally impermissible, and that the marijuana was the fruit of the illegality and therefore inadmissible. The Court held:

> [E]xcept in those situations in which there is at least articulable and reasonable suspicion that a motorist is unlicensed or that an automobile is not registered, or that either the vehicle or an occupant is otherwise subject to seizure for violation of law, stopping an automobile and detaining the driver in order to check his driver's license and the registration of the automobile are unreasonable under the Fourth Amendment.[132]

The Court expressly left open the question of the use of roadblock-type stops to check all automobiles or drivers during a particular time period,[133] and implied that such practices would

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130. 440 U.S. 648 (1979). *See* 47 TENN. L. REV. 477 (1980).

131. *Id.* at 650.

132. *Id.* at 663.

133. *See* J. COOK, CONSTITUTIONAL RIGHTS OF THE ACCUSED—PRETRIAL RIGHTS § 8 (1972) [hereinafter cited as PRETRIAL RIGHTS].

be legitimate. The principal concern was the "unbridled discretion of police officers" to stop vehicles at random.[134] In a concurring opinion Justice Blackmun, joined by Justice Powell, went further to suggest that "other not purely random stops (such as every 10th car to pass a given point)" would also be permissible.[135] Justice Rehnquist, the lone dissenter, argued that if all vehicles could be stopped, and every tenth vehicle could be stopped, then there was no reason why a single vehicle could not be stopped, if indeed the stop was purely random.[136]

### 2. Temporary Detention

An issue unaddressed by *Terry v. Ohio*[137] and its progeny is whether the power to detain an individual creates an obligation for the detainee to dissuade the officer of his suspicion. In *Brown v. Texas*[138] two police officers, while cruising in a patrol car, observed the accused and another man walking away from one another in an alley in an area with a high incidence of drug traffic. They stopped the accused and, pursuant to a state statute,[139] asked him to identify himself and explain what he was doing. One of the officers testified that he stopped the accused because the situation "looked suspicious and we had never seen that subject in that area before."[140] The officers did not claim to suspect the accused of any specific misconduct, nor did they have any reason to believe he was armed. When the accused refused to identify himself, he was arrested for violating the statute which made it a criminal act for a person to refuse to give his name and address to an officer "who has lawfully stopped him and requested the information."[141] A motion by the accused to set aside on constitutional grounds an information charging him with violation of the statute was denied, and the accused was convicted and fined. The Supreme Court reversed upon a

134. 440 U.S. at 661.
135. *Id.* at 664 (Blackmun, J., concurring).
136. *Id.* (Rehnquist, J., dissenting).
137. 392 U.S. 1 (1968).
138. 443 U.S. 47 (1979).
139. TEX. PENAL CODE ANN. tit. 8, § 38.02(a) (Vernon 1974).
140. 443 U.S. at 49.
141. TEX. PENAL CODE ANN. tit. 8, § 38.02(a) (Vernon 1974).

finding that "the officers lacked any reasonable suspicion to believe appellant was engaged or had engaged in criminal conduct."[142] The Court noted that it was not required to decide whether an individual could be punished for refusing to identify himself if he were subject to a lawful investigatory stop.[143]

The propriety of a detention under circumstances short of probable cause arose in Tennessee in *Hughes v. State*.[144] Hughes and Neese, two college students, drove to a combination grocery store and restaurant around midnight. Neese asked the owner if the store was open, and when told that it was, returned to the automobile. Following a brief conversation, Hughes drove away. Neese returned to the store, bought a soft drink and some snacks, and browsed the magazine rack and other parts of the store. Because his suspicion was aroused, the owner of the store telephoned the police and requested that they investigate. The owner did not articulate particular facts giving rise to his suspicion.[145] Upon arriving at the store, the officers asked Neese to step outside, identify himself, and sit in the rear seat of the patrol car. The officers maintained that Neese was free to go, but since there were no interior door handles in the back seat, he could only have left with the assistance of someone outside. The court was thus convinced that he was detained for fourth amendment purposes.[146] Although a radio check indicated that Neese had no criminal record, he was kept in the back of the patrol car while the officer left in search of Hughes, who was not suspected of any criminal activity. Hughes was found on an interstate ramp and followed the officer back to the store. Hughes

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142. 443 U.S. at 53.

143. *Id.* at 53 n.3.

144. 588 S.W.2d 296 (Tenn. 1979).

145. This is the *sole* information upon which the police acted. There is no proof that the police officers knew the proprietor or that he was reliable. There is no indication that his establishment was located in a high crime area and none that any crime had been committed or was about to be committed. Herbert advised of no specific fact that would constitute "strange or suspicious" conduct. And it must be borne in mind that Neese was in a public business during the hours it was open to the public.

*Id.* at 299.

146. *Id.*

was asked to exhibit his driver's license, and when he rolled down the window, the officer smelled burning marijuana. Then the vehicle was searched and a quantity of marijuana was found, which led to the conviction of the defendant.[147] The Tennessee Supreme Court reversed the conviction and held that there was an insufficient basis for the initial detention of Neese, and that the subsequent search of the vehicle occupied by Hughes similarly was tainted.[148]

### 3. Probable Cause

To satisfy the requirements of the fourth amendment, an arrest must be based on probable cause. If probable cause is not present at the time the arrest is made, it is immaterial that the arresting officer was correct in his suspicions. Conversely, if probable cause exists, the arrest will be valid even though it is later determined that the arrested individual was not implicated in any crime.[149] In *Michigan v. DeFilippo*[150] the Supreme Court was concerned with the validity of an arrest made in good faith reliance on an ordinance that subsequently was declared unconstitutional. Detroit police officers found the accused in an alley with a woman who was in the process of lowering her slacks. When asked for identification, the accused gave inconsistent and evasive responses. He was arrested for violating a Detroit ordinance which provided that a police officer could question an in-

147. Whether the officer directed Hughes to roll down the window or he did so voluntarily was a matter in dispute, but the court's disposition of the case made resolution of the issue unnecessary. Defendant ultimately was convicted of possession of marijuana for the purpose of resale. *Id.* at 297-98.

148. The court viewed "the activities of Neese and Hughes as being inseparable for purposes of adjudicating the Fourth Amendment rights of Hughes." *Id.* at 308. While this is in a sense true, it should be understood that Hughes would lack standing to object to any violation of Neese's fourth amendment rights. Here, there was no more justification (indeed less) for detaining Hughes than there had been for detaining Neese. Had Neese, however, confessed that he and Hughes were preparing to rob the store, Hughes could have been arrested for the conspiracy, even though Neese's rights had been violated. No fourth amendment right of Hughes would have been compromised in the gaining of the probable cause.

149. *See* Hill v. California, 401 U.S. 797 (1971).

150. 443 U.S. 31 (1979).

dividual if the officer had reasonable cause to believe that the individual's behavior called for further investigation for criminal activity.[151] The ordinance further provided that it was unlawful for any person so stopped to refuse to identify himself and produce evidence of his identity.[152] In the search which followed, the officers discovered drugs on the person of the defendant, who was then charged with a drug offense, rather than with violation of the ordinance. The trial court denied a motion to suppress the evidence found in the search. The Michigan Court of Appeals reversed and held that the Detroit ordinance was unconstitutionally vague, that both the arrest and search were invalid because the accused had been arrested pursuant to the ordinance, and that the evidence obtained in the search should have been suppressed on federal constitutional grounds, even though it was obtained as a result of an arrest pursuant to a presumptively valid ordinance.[153] The United States Supreme Court reversed and remanded the case, holding that at the time of the arrest the officer had probable cause, and that the subsequent invalidation of the ordinance on grounds of vagueness did not undermine the validity of the arrest.[154]

### 4. Fruits of Illegal Arrest

In *Dunaway v. New York*,[155] a case virtually indistinguishable from *Brown v. Illinois*[156] in which the Supreme Court held a confession excludable as the fruit of an illegal arrest, the Court held that a suspect could not be subjected to custodial interrogation on less than probable cause.[157] A police detective had questioned a jail inmate regarding the implication of the accused in an attempted robbery and homicide, but the detective did not learn enough to establish probable cause to arrest. Nevertheless, the accused was picked up and brought in for questioning. He was given *Miranda* warnings, waived his right to counsel, and

151. *See* 443 U.S. at 33 n.1.
152. *Id.*
153. 80 Mich. App. 197, 262 N.W.2d 921 (1977).
154. 443 U.S. at 40.
155. 442 U.S. 200 (1979).
156. 422 U.S. 590 (1975).
157. 442 U.S. at 216.

eventually made statements and drew sketches that incriminated him in the offense. A motion to suppress the statements and sketches was denied, and the accused was convicted. The New York Court of Appeals affirmed the conviction,[158] but the United States Supreme Court vacated the judgment and remanded the case for further consideration in light of *Brown*.[159] On remand the trial court granted the motion to suppress, but the appellate division reversed, and held that although the police lacked probable cause to arrest the accused, officials nevertheless could detain an individual upon reasonable suspicion for questioning for a reasonable period of time, so long as fifth and sixth amendment rights amply were protected, and that, in any event, the taint of any illegal detention was sufficiently attenuated.[160] The Supreme Court granted certiorari, reversed the conviction, and found that the administering of *Miranda* warnings, as in *Brown*, could not serve to eliminate the effect of a fourth amendment violation or sanction the admissibility of its fruits.[161]

### *B. Search and Seizure*

#### 1. Plain View

A peculiar corollary of the plain view exception to the warrant requirement is the notion that for the evidence to qualify for the exception, its discovery must be inadvertent. The inadvertency requirement had its genesis in *Coolidge v. New Hampshire*[162] in which the exception was said to be inapplicable "where the discovery is anticipated, where the police know in advance the location of the evidence and intend to seize it."[163] Given the constitutional preference for warrants, the Court reasoned that requiring a prior judicial authorization for the seizure when the presence of the evidence was already known imposed

158. People v. Dunaway, 35 N.Y.2d 741, 320 N.E.2d 646, 361 N.Y.S.2d 912 (1974).

159. Dunaway v. New York, 422 U.S. 1053 (1975).

160. People v. Dunaway, 61 A.D. 2d 299, 402 N.Y.S.2d 490 (1978).

161. 442 U.S. at 216.

162. 403 U.S. 443 (1971).

163. *Id.* at 470.

no inconvenience.[164]

In a concurring and dissenting opinion, Justice White challenged the inadvertency requirement as being at odds with the purposes served by the fourth amendment.[165] He hypothesized a case in which a house was searched pursuant to a warrant authorizing the seizure of a rifle purportedly used in a murder.[166] In the course of the search, two photographs of the victim were found in plain view, one unexpected, the other anticipated. The inadvertency requirement would permit the seizure of the first but not the second photograph, a result that achieved consistency with the principle of requiring warrants when feasible, but was actually counterproductive to the protection of fourth amendment values.[167] The likely scenario in such a case would be for the police to return to the magistrate for a second warrant authorizing the seizure of the anticipated items that they had now observed. Ultimately, the accused would have been the victim of two separate invasions of his privacy, instead of one.

Such a rule will have the effect of encouraging police to enumerate all the items they wish to seize at the time the warrant is sought. This is a laudable result and would be a compelling reason for the inadvertency requirement if police actually gained some advantage from failing to make such an enumeration. In actuality, the opposite is true. The police are only permitted to search in those areas where the enumerated items might be found and only until they have found them all; however, the potential range of the search and the possibility of discovering unenumerated items in plain view is greater when the list of specified items is larger. Only in a case in which the officers are truly looking and expect to find evidence of a crime wholly unrelated to the subject of the affidavit might it be said that a subterfuge is being used, but such cases can be distinguished and held unconstitutional for that very reason.[168]

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164. *Id.* at 470-76.

165. *Id.* at 515-18 (White, J., concurring and dissenting).

166. *Id.* at 516 (White, J., concurring and dissenting).

167. *Id.* at 516-18 (White, J., concurring and dissenting).

168. Cases holding an arrest, valid in itself, insufficient to support a search incident to the arrest when the search was the primary motivation for the arrest, would appear analogously applicable here. *See* PRETRIAL RIGHTS, *supra* note 133, § 44, at 278 n.1.

While the inadvertency requirement of *Coolidge* was supported by only four Justices, and the Court has not had occasion to apply the notion since, it nevertheless has been accepted widely by lower courts as an integral part of the plain view exception.[169] An issue unaddressed in *Coolidge* and ignored by lower courts prior to *United States v. Hare*[170] was the precise meaning of inadvertence. In *Hare*, officers had obtained a warrant to search the accused's home for firearms and ammunition. In addition to nineteen firearms and a quantity of ammunition, the officers seized narcotics and narcotics paraphernalia. This evidence was excluded by the district court on the ground that the officers had expected to find narcotics, and the warrant had therefore been used as a subterfuge to search for evidence of drug offenses.[171] The court of appeals reversed, finding that the lower court erred in defining inadvertent as "unexpected" or "unanticipated."[172] The difficulty arose from the fact that the evidence could be expected or anticipated, but the expectation might fall short of probable cause. Without probable cause, it would not have been possible to obtain a warrant for the particular seizure at the outset. The result would be the creation of a class of items that simply could not be seized—neither with a warrant for lack of probable cause, nor under the plain view exception for lack of inadvertence. The logical solution was to interpret inadvertent to mean lack of probable cause to believe the evidence would be discovered at the site of the search.[173]

### 2. Open Fields

The continuing vitality of the open fields exception to the warrant requirement has preoccupied Tennessee courts for the past several years.[174] The controversy has centered upon

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169. *See id.* § 47, at 310 n.15.

170. 589 F.2d 1291 (6th Cir. 1979).

171. *Id.* at 1293.

172. *Id.* at 1293-94.

173. *Id.* at 1294.

174. *See* Cook, *Criminal Law in Tennessee in 1976-77—A Critical Survey*, 45 TENN. L. REV. 1, 28-30 (1977); Cook, *Criminal Law in Tennessee in 1977-78—A Critical Survey*, 46 TENN. L. REV. 473, 505-07 (1979) [hereinafter cited as *1977-78 Survey*].

whether the *Katz v. United States*[175] reasonable expectation of privacy conceptualization of the fourth amendment would require a search warrant for an open field area. In *State v. Wert*[176] the Tennessee Court of Criminal Appeals had so concluded, albeit over a vigorous dissent. The following year, in *Sesson v. State*,[177] the same court distinguished *Wert*, but Judge Tatum, the dissenter in *Wert*, concurred insisting that *Wert* should be overruled as an aberration.[178]

The issue was finally addressed by the Tennessee Supreme Court in *State v. Lakin*.[179] Officers had received a tip that "either a moonshine still or a marijuana patch" would be found on a named farm.[180] Within two hours after receiving the tip, officers went to the farm and finding no one there, followed a path a quarter of a mile to a barn, and from there followed another path that led to a marijuana patch some fifty to one hundred feet away. The Tennessee Court of Criminal Appeals had excluded the seized marijuana under the authority of *Wert*. While affirming the judgment, the Tennessee Supreme Court nevertheless took the opportunity to express its disapproval of the reasoning in *Wert*. The court noted that the decision establishing the open fields doctrine, *Hester v. United States*,[181] had been cited by the Supreme Court as authoritative since *Katz*,[182] although it conceded that the facts in *Hester* were substantially dissimilar to those in the present case.[183]

The court noted that the use of the phrase "open fields" or a similar alternative was no substitute for a factual analysis of the reasonableness of the search. While this is undeniably cor-

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175. 389 U.S. 347 (1967).

176. 550 S.W.2d 1 (Tenn. Crim. App.), *cert. denied, id.* (Tenn. 1977).

177. 563 S.W.2d 799 (Tenn. Crim. App.), *cert. denied, id.* (Tenn. 1978).

178. *Id.* at 803-04 (Tatum, J., concurring).

179. 588 S.W.2d 544 (Tenn. 1979).

180. *Id.* at 545.

181. 265 U.S. 57 (1924).

182. *But see* Air Poll. Bd. v. Western Alfalfa Corp., 416 U.S. 861 (1974).

183. "There, police officials went upon the premises of the defendant and concealed themselves at a distance of from fifty to one hundred yards from his residence. They saw him dispense illegal whiskey and recovered containers when he and one of his customers discarded them while fleeing from the officers." 588 S.W.2d at 547.

rect, the essence of the dispute is which question is the appropriate one: (1) did the search occur in an open field, or (2) did the search invade a reasonable expectation of privacy? Ironically, in the final analysis, the supreme court has not taken issue with the result in *Wert* but has affirmed the decision in *Lakin*. The dispute would appear to be a tempest in a tea pot. *Wert* did no more than hold, in the words of the *Lakin* court, that the open field doctrine "had been significantly modified by later decisions, particularly *Katz v. United States*."[184] In the present case, the court of criminal appeals apparently found that the reasonable expectation of privacy protected by *Katz* had once again suffered an intrusion. The supreme court preferred to hold that the search was unreasonable, because the area "was not 'wild and wasteland' which might be 'roamed at will without a search warrant.' "[185] It remains problematic whether the differing approaches would ever lead to differing results.

### 3. Vehicles

In 1977 in *United States v. Chadwick*[186] the United States Supreme Court held that a footlocker seized from the trunk of an automobile incident to an arrest could not be searched later without first obtaining a warrant.[187] Although the prosecution had not argued the vehicle exception on appeal, the dissent contended that the vehicle search would have applied had the officers waited until the vehicle was moving and then stopped it.[188] While the majority left little doubt that the vehicle exception would no more justify the search than the arrest exception,[189] the possibility was not completely laid to rest until the decision

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184. *Id.* at 546.

185. *Id.* at 549. It would appear unlikely that officers could have obtained a warrant in any event. An informant who is unsure whether the illegal presence is a moonshine still or a marijuana patch would appear to be of dubious reliability. Apparently this was the sole source of information leading to the search.

186. 433 U.S. 1 (1977).

187. *See 1977-78 Survey, supra* note 174, at 499-502.

188. 433 U.S. at 22-23 (Blackmun and Rehnquist, JJ., dissenting).

189. *See 1977-78 Survey, supra* note 174, at 502 n.185; text accompanying note 174 *supra*.

in *Arkansas v. Sanders*.[190] Acting on information from an informant that the accused would arrive at an airport carrying a green suitcase containing marijuana, police officers placed the airport under surveillance. They observed the accused retrieve a green suitcase from the airline baggage service, place it in the trunk of a taxi, and enter the vehicle with a companion. When the taxi drove away, two of the officers stopped it and requested the driver to open the trunk. The officers then opened the suitcase and discovered marijuana. The accused was charged with possession of marijuana with intent to deliver. A motion to suppress the evidence obtained from the suitcase was denied by the trial court and the accused was convicted. The state supreme court reversed, ruling that the marijuana should have been suppressed because it was obtained in an unlawful search. The Supreme Court agreed. Conceding that "[a] closed suitcase in the trunk of an automobile may be as mobile as the vehicle in which it rides,"[191] once the suitcase had been seized and was within the control of the police, no exigency remained to justify a warrantless search.

Justice Blackmun, joined by Justice Rehnquist, dissented as they had in *Chadwick*, submitting that, rather than clarifying *Chadwick*, the Court had left the proper result "hanging in limbo"[192] when a vehicle search turns up "[a] briefcase, [a] wallet, [a] package, [a] paper bag . . . an orange crate, a lunch bucket, an attache case, a dufflebag, a cardboard box, a backpack, a totebag, [or] a paper bag."[193]

Even without probable cause to believe that seizable evidence will be found within, searches are frequently sustained under the inventory theory when police have gained lawful custody of the vehicle. The United States Supreme Court has sustained such searches when the vehicle is subject to forfeiture because of its use,[194] when the vehicle is itself the instrumentality of a crime,[195] and when the vehicle has been involved in an acci-

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190. 442 U.S. 753 (1979).
191. *Id.* at 763.
192. *Id.* at 768 (Blackmun and Rehnquist, JJ., dissenting).
193. *Id.* at 768, 772 (Blackmun and Rehnquist, JJ., dissenting).
194. Cooper v. California, 386 U.S. 58 (1967).
195. Harris v. United States, 390 U.S. 234 (1968).

dent but the intoxicated driver is in no condition to make arrangements for its removal from the highway.[196] In the most recent inventory search case to reach the Court, *South Dakota v. Opperman*,[197] the vehicle of the accused had been ticketed at three in the morning for being illegally parked. Seven hours later the vehicle was ticketed a second time, and arrangements were made to have it impounded. At the impound lot, an officer observed a watch on the dash board. The vehicle thereupon was unlocked and inventoried, which led to the discovery of a plastic bag of marijuana and the subsequent conviction of the accused for possession of marijuana. The Supreme Court sustained the inventory search and noted several factors that made the official conduct reasonable. Initially, the police had not acted precipitously; the vehicle had been impounded only after it had remained parked illegally for an extended period and was the subject of multiple parking violations. The owner had not been present when the impoundment decision was made, and therefore he could not make alternative arrangements for the protection of his belongings. The impoundment had been in accordance with standard procedures of the police department, procedures that were common throughout the country. Furthermore, there was no evidence of a pretextual inventory as a subterfuge for a search for evidence of crime.[198]

It is hardly surprising that the *Opperman* rationale has been very popular with lower courts in sustaining vehicle inventories.[199] Nevertheless, the holding is limited as the Supreme Court of Tennessee recognized in *Drinkard v. State*.[200] The accused had been arrested for driving while intoxicated and was advised that, pursuant to police regulations, his automobile would be impounded and inventoried.[201] The accused, however,

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196. Cady v. Dombrowski, 413 U.S. 433 (1973).

197. 428 U.S. 364 (1976).

198. Nevertheless, on remand the Supreme Court of South Dakota persisted in its previous determination that the search was unreasonable and this time based its decision on the state constitution. State v. Opperman, 247 N.W.2d 673 (S.D. 1976).

199. *See* PRETRIAL RIGHTS, *supra* note 133, § 61, at 206 n.143 (Supp. 1979).

200. 584 S.W.2d 650 (Tenn. 1979).

201. *Id.* at 651-52 & 651 n.1.

requested that his female companion, who was not intoxicated and was capable of driving the vehicle, be permitted to drive the car away. The request was refused on the ground that the woman was neither the wife of the arrestee nor the owner of the vehicle. The automobile was searched completely prior to the arrival of the wrecker, and marijuana was discovered in a closed box on the front seat and in a rolled-up grocery sack in the trunk.[202] The Tennessee Supreme Court, holding that the search was unreasonable, articulated a standard not inconsistent with the *Opperman* holding:

> [I]f the circumstances that bring the automobile to the attention of the police in the first place are such that the driver, even though arrested, is able to make his or her own arrangements for the custody of the vehicle, or if the vehicle can be parked and locked without obstructing traffic or endangering the public, the police should permit the action to be taken rather than impound the car against the will of the driver and then search it.[203]

The court noted that police regulations could not serve to legitimate an illegal search, a result similar to that reached by other state courts.[204] A final point urged by the prosecution—that an intoxicated driver is per se incompetent both to authorize another to take control of his automobile and to absolve the police of any liability—was also rejected because such a finding would be inconsistent with the judicial recognition that intoxicated persons effectively can consent to tests for intoxication, consent to search, and make admissible confessions.[205] Incapacity is a

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202. *Id.* at 652. The *Chadwick* implications, *see* text accompanying notes 186-89 *supra*, were not considered by the court.

203. 584 S.W.2d at 653.

204. *Id.* at 654. *See, e.g.*, Virgil v. Superior Court, 268 Cal. App. 2d 127, 73 Cal. Rptr. 793 (1968), *quoted in* Drinkard v. State, 584 S.W.2d 650, 653 (Tenn. 1979); Chuz v. State, 330 So. 2d 166 (Fla. App. 1976); State v. Ludvicek, 147 Ga. App. 784, 250 S.E.2d 503 (1978); Wagner v. Commonwealth, 581 S.W.2d 352 (Ky. 1979); State v. LaRue, 368 So. 2d 1048 (La. 1979); State v. Goodrich, 256 N.W.2d 506 (Minn. 1977); State v. Patterson, 583 S.W.2d 277 (Mo. App. 1979); State v. Sawyer, 571 P.2d 1131 (Mont. 1977); State v. Slockbower, 79 N.J. 1, 397 A.2d 1050 (1979); State v. Hardman, 17 Wash. App. 910, 567 P.2d 238 (1977).

205. 584 S.W.2d at 654.

question of fact, and the State had made no showing in *Drinkard* that the accused was too intoxicated to transfer custody of the automobile to his companion.

### 4. Standing

Twenty years ago, in *Jones v. United States*,[206] the Supreme Court held that a party would have standing to object to a search if he was "legitimately on [the] premises" at the time of the search.[207] Jones was found to have standing to object to the search of the apartment of a friend who had provided him with a key and authorized him to use it. In *Rakas v. Illinois*[208] the Supreme Court held not only that the *Jones* decision had gone too far, but that the development of fourth amendment jurisprudence was not served by the use of the standing requirement.[209] Henceforth, the Court simply would address whether the defendant had a recognizable fourth amendment interest that was violated by the official activity.[210]

The accused in *Rakas* had been passengers in an automobile driven by the owner that had been stopped and searched shortly following an armed robbery. A box of rifle shells was found in the locked glove compartment and a sawed-off rifle under the front passenger seat. Although the accused did not assert ownership of either item, they nevertheless contended they could challenge the constitutionality of the search, either under a broadened standing requirement permitting the target of the search to raise the issue, or more narrowly under *Jones*, since they were legitimately in the vehicle at the time of the search.[211]

The Court declined to expand the class of parties who might raise a fourth amendment objection, and disapproved *Jones* to the extent that it appeared to afford standing in the case.[212] It was concluded that "the better analysis forthrightly focuses on the extent of a particular defendant's rights under the Fourth

206. 362 U.S. 257 (1960).
207. *Id.* at 267. *See* PRETRIAL RIGHTS, *supra* note 133, § 76, at 446 n.16.
208. 439 U.S. 128 (1978). *See* 46 TENN. L. REV. 827 (1979).
209. 439 U.S. at 142-48.
210. *Id.* at 139.
211. *Id.* at 132-33.
212. *Id.* at 141-43.

Amendment, rather than on any theoretically separate, but invariably intertwined concept of standing."[213] The Court had no quarrel with the conclusion in *Jones*, which was in retrospect entirely consistent with the *Katz*[214] reasonable expectation of privacy conceptualization of the fourth amendment:

> [T]he holding in *Jones* can best be explained by the fact that Jones had a legitimate expectation of privacy in the premises he was using and therefore could claim the protection of the Fourth Amendment with respect to a governmental invasion of those premises, even though his "interest" in those premises might not have been a recognized property interest at common law.[215]

Unlike *Jones*, the accused in the present case could not claim a legitimate expectation of privacy either in the locked glove compartment or under the seat, and therefore their fourth amendment interests were not compromised.

### *C. Extradition*

In *Michigan v. Doran*[216] the United States Supreme Court considered the scope of the judicial inquiry into a grant of extradition. Respondent had been arrested in Michigan and charged with receiving and concealing a stolen truck. The truck had been stolen in Arizona, and authorities in that state were notified of the arrest. Thereafter the Governor of Arizona issued a requisition for extradition, with an arrest warrant, two supporting affidavits, and the original complaint on which the charge was based.[217] The Governor of Michigan in turn issued a warrant for respondent's arrest and extradition.[218]

The respondent sought a writ of habeas corpus in a Michigan court, contending that the extradition warrant was invalid because it did not comply with the Uniform Criminal Extradition Act.[219] The writ was twice denied, and the denial was sus-

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213. *Id.* at 139.
214. Katz v. United States, 389 U.S. 347 (1967).
215. 439 U.S. at 143.
216. 439 U.S. 282 (1978).
217. *Id.* at 284.
218. *Id.*
219. MICH. COMP. LAWS ANN. §§ 780.1 to -.31 (1968).

tained by the Michigan Court of Appeals. The Michigan Supreme Court reversed the trial court's order and mandated the release of respondent.[220] The court relied upon a provision of the Uniform Act, also in effect in Tennessee,[221] which required that an affidavit must "substantially charge" the fugitive with having committed a crime under the law of the demanding state.[222] Reading this provision in tandem with *Gerstein v. Pugh*,[223] the state supreme court had concluded that the courts of an asylum state could review the action of the governor in granting extradition, including a reexamination of the factual basis for the finding of probable cause asserted by the demanding state.[224]

The Supreme Court reversed, placing primary focus on the extradition clause of the federal constitution.[225] "The purpose of the Clause," the Court said, "was to preclude any state from becoming a sanctuary for fugitives from justice of another state and thus 'balkanize' the administration of criminal justice among the several states."[226] Extradition was intended to be summary and mandatory, without the preliminary inquiry typically employed following an arrest. In an early decision[227] the Court had said that the obligation of the governor of the asylum state was "merely ministerial,"[228] and in the present case the Court observed that the "governor's grant of extradition is prima facie evidence that the constitutional and statutory re-

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220. *In re* Doran, 401 Mich. 235, 258 N.W.2d 406 (1977).

221. TENN. CODE ANN. §§ 40-1001 to -1035 (1975).

222. *Id.* § 40-1010.

223. 420 U.S. 103 (1975). The *Gerstein* decision mandated a prompt hearing on probable cause for an incarcerated person arrested without a warrant.

224. 401 Mich. at 240-42, 258 N.W.2d at 408-09.

225. 439 U.S. at 286-90. The extradition clause provides that

> A person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.

U.S. CONST. art. IV, § 2, cl. 2.

226. 439 U.S. at 287.

227. Kentucky v. Dennison, 65 U.S. 717, 24 How. 66 (1860).

228. *Id.* at 106.

quirements have been met."[229] On a petition for writ of habeas corpus, the only questions for a court are "(a) whether the extradition documents on their face are in order; (b) whether the petitioner has been charged with a crime in the demanding state; (c) whether the petitioner is the person named in the request for extradition; and (d) whether the petitioner is a fugitive."[230] So viewed, the demand in the present case was sufficient, and the courts of the asylum state were bound constitutionally under the extradition clause to accept the judicial determination of the demanding state. Once the governor of the asylum state had issued the warrant for arrest and extradition, no further judicial inquiry into probable cause in the asylum state was permissible.[231]

### *D. Self-Incrimination*

The privilege against self-incrimination is satisfied by granting potential grand jury witnesses immunity from the use of their testimony as evidence against them; their testimony before the grand jury may therefore be compelled without fear of constitutional deprivation.[232] In *New Jersey v. Portash*[233] the Supreme Court considered whether such immunized grand jury testimony could be used to impeach the credibility of a testifying defendant. The accused, a township mayor, was subpoenaed to appear before a state grand jury, at which time it was agreed that his testimony could not be used in a subsequent criminal proceeding. The accused was thereafter indicted for misconduct in office, and before trial, defense counsel sought a ruling that the immunized testimony would not be admitted.[234] The trial judge refused to so rule, submitting that the testimony could be used for impeachment under appropriate circumstances. Because of this ruling, the accused did not take the stand. The New Jersey appellate court reversed his conviction and held that the use of such testimony to impeach would have violated the privilege against self-incrimination and that the decision of the

229. 439 U.S. at 289.
230. *Id.*
231. *Id.* at 298 (Blackmun, Brennan, and Marshall, JJ., concurring).
232. Kastigar v. United States, 406 U.S. 441 (1972).
233. 440 U.S. 450 (1979).
234. *Id.* at 452.

accused not to testify resulted from the erroneous ruling of the trial court.[235] On appeal, the prosecution argued that (1) the accused could not invoke the privilege because he did not take the stand, and that (2) immunized grand jury testimony could be used for impeachment purposes.[236] The Supreme Court affirmed the decision in favor of the accused. As to the first point, since the state appellate court had concluded that the issue had been raised properly, the Supreme Court saw no reason to disagree. Moreover, the Court had held in *Brooks v. Tennessee*[237] that the privilege implicates a right to testify,[238] and that it was evident that the right of the accused had been chilled in this case. Secondly, the prosecution had relied upon *Harris v. New York*[239] and *Oregon v. Hass*[240] for its argument that the testimony could be used for impeachment purposes. However, in both those cases the Court had noted explicitly that the statements used for impeachment were not coerced or involuntary. In the present case, to the contrary, "[t]estimony given in response to a grant of legislative immunity was the essence of coerced testimony."[241] The matter here implicated was "the constitutional privilege against compulsory self-incrimination in its most pristine form,"[242] and the balancing approach employed in *Harris* and *Hass* was inapplicable.[243]

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235. State v. Portash, 151 N.J. Super. 200, 376 A.2d 950 (1977).

236. *Id.* at 207-09, 376 A.2d at 954.

237. 406 U.S. 605 (1972).

238. *Id.* at 612-13. *See* Cook, *Criminal Law in Tennessee in 1972—A Critical Survey*, 40 TENN. L. REV. 569, 610-12 (1972).

239. 401 U.S. 222 (1971).

240. 420 U.S. 714 (1975).

241. 440 U.S. at 459.

242. *Id.*

243. There were two concurring opinions, involving four justices, although both opinions indicate that the author joined in the opinion, as well as the decision, of the Court. *Id.* at 460 (Brennan and Marshall, JJ., concurring); *id.* at 462 (Powell and Rehnquist, JJ., concurring). Justice Blackmun, joined by Chief Justice Burger, dissented, maintaining that the claimed burden on the right to testify was too speculative to warrant reversal of the conviction. *Id.* at 463 (Blackmun J., and Burger, C.J., dissenting). *See* Oregon v. Hass, 420 U.S. at 724 (Brennan and Marshall, JJ., dissenting); *id.* at 726 (Marshall and Brennan, JJ., dissenting); Harris v. New York, 401 U.S. at 226 (Brennan, Douglas, and Marshall, JJ., dissenting).

## E. Confessions

### 1. Juveniles

Among the rights granted by the *Miranda* decision[244] is the right to consult with an attorney prior to interrogation.[245] Most courts that have addressed the issue have held that there is no right to consult anyone other than counsel,[246] although a few have recognized the right of a minor to consult his or her parents.[247] In *Fare v. Michael C.*[248] the Supreme Court considered whether law enforcement officers must honor the request of a juvenile to consult with his probation officer. The accused, a sixteen year old on probation by order of the juvenile court, was taken into custody by police on suspicion of murder. Before being questioned at the station house, he was advised fully of his *Miranda* rights. He requested to see his probation officer, but when the request was denied, he stated that he would talk to the officers without consulting an attorney and proceeded to make statements and draw sketches implicating himself in the murder. When the accused was charged in juvenile court with the murder, he moved to suppress the incriminating statements and sketches on the ground that they had been obtained in violation of *Miranda*, because the request to see his probation officer constituted an invocation of his fifth amendment right to remain silent, just as if he had requested the assistance of an attorney. The court denied the motion and held that the facts showed the respondent had waived his right to remain silent, notwithstanding his request to see his probation officer.[249] The California Supreme Court reversed, holding that the request to see the probation officer was a per se invocation of the fifth amendment privilege against self-incrimination in the same way the request for an attorney was found to be in *Miranda*.[250] The holding was

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244. Miranda v. Arizona, 384 U.S. 436 (1966).

245. *See* J. Cook, Constitutional Rights of the Accused—Trial Rights § 80, at 309-13 (1974) [hereinafter cited as Trial Rights].

246. *Id.* at 314 n.56.

247. *Id.* n.57.

248. 442 U.S. 707 (1979).

249. *Id.* at 712.

250. *In re* Michael C., 21 Cal. 3d 471, 579 P.2d 7, 146 Cal. Rptr. 358 (1978).

based on the court's view that a probation officer occupied a position of trust that would make it normal for the juvenile to turn to the officer when apprehended by the police. The court also cited a state law that required the officer to represent the juvenile's interest.[251]

The Supreme Court reversed and remanded. Assuming without deciding that *Miranda* applied with full force in juvenile proceedings,[252] the Court concluded that consultation with a probation officer was not a protected right. *Miranda* was based on the "perception that the lawyer occupies a critical position in our legal system because of his unique ability to protect the Fifth Amendment rights of a client undergoing custodial interrogation."[253] Not only is a probation officer not similarly qualified, but the duty of the probation officer may be in sharp conflict with the interest of the juvenile.[254] Whether the juvenile effectively waived his *Miranda* rights was to be determined by an inquiry into the totality of the circumstances surrounding the interrogation;[255] the record in the present case supported a finding of effective waiver.

While the reluctance of the Court to modify the *Miranda* requirements is hardly surprising, the case would appear to be more appropriately examined under a due process standard of fundamental fairness and de facto voluntariness.[256] The record suggests that the accused's probation officer was the only person he trusted. Given the particular vulnerability of juveniles to official overbearing, and given the seriousness of the offense with which the accused in this case was charged, the denial of access to the only individual the accused expressed a desire to speak to might well have a bearing on the voluntariness of the subsequent confession. While the majority is correct that the probation officer *might* induce improperly the accused to confess, that is a separate issue determinable on the facts. For instance, as-

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251. *Id.* at 476, 579 P.2d at 10, 146 Cal. Rptr. at 361 (citing CAL. WELF. & INST. CODE §§ 280 & 650 (West 1980) & CAL. PENAL CODE § 830.5 (West 1980)).

252. 442 U.S. at 717 n.4.

253. *Id.* at 719.

254. *Id.* at 721.

255. *Id.* at 724-25.

256. *See id.* at 732-34 (Powell, J., dissenting).

sume that a properly trained probation officer, cognizant of the seriousness of the charges, would advise the juvenile to obtain the services of an attorney. If the accused then elected to talk to the police, there would be a far stronger case for a finding of waiver than that presented by the record.

In Tennessee, a juvenile taken into custody must be (1) released to his or her parents, (2) taken before the juvenile court, or (3) delivered to a custodian designated by the court "within a reasonable time."[257] A statement obtained from a juvenile in the course of a violation of the statute "shall not be used against him."[258] In *Colyer v. State*[259] the court was called upon to decide whether a statement obtained in violation of these provisions, but otherwise admissible, should be excluded from evidence in a criminal, as opposed to a juvenile, court.

The accused was arrested for rape about 9:00 p.m. the day following the perpetration of the offense. He was taken to the sheriff's office where, after effectively waiving his *Miranda* rights, he made a statement that was used at his criminal trial for rape to impeach his testimony. In affirming the conviction the court held that since the provision embracing the exclusionary rule referred to an "extra-judicial statement . . . obtained in the course of violation of this chapter,"[260] its application should be confined to proceedings in juvenile courts. The court reasoned that since an adult could in no event avail himself to the special protections of the juvenile code, a juvenile subject to being treated as an adult should be treated equivalently.

This conclusion would not appear to be as logically inevitable as the court suggests. Justice Henry, in dissent, called attention to *State v. Strickland*,[261] in which the court had said that confessions obtained in violation of the prompt release statute "were not admissible before the Juvenile Court or the Circuit Court."[262] The majority distinguished *Strickland* on the ground

257. TENN. CODE ANN. § 37-215 (1977).

258. *Id.* § 37-227(b).

259. 577 S.W.2d at 460 (Tenn. 1979).

260. TENN. CODE ANN. § 37-227(b) (1977), *discussed in* 577 S.W.2d at 463.

261. 532 S.W.2d 912 (Tenn. 1975), *cert. denied*, 425 U.S. 940 (1976). *See* 577 S.W.2d at 463 (Henry, J., dissenting).

262. 532 S.W.2d at 918.

that the issue there was the admissiblity of a confession at a transfer hearing in juvenile court or on appeal and at a *de novo* hearing on the question of transfer in circuit court.[263]

More to the point, however, is the language and the purpose of the exclusionary provision. The statute states quite simply that the statement "shall not be used against him."[264] Chief Justice Henry submitted that the language was "not susceptible to an erosive construction that would limit its sweep to procedures in the juvenile court."[265] Furthermore, it was uncontroverted that the prompt release statute was violated. If the purpose of this statute is to protect juveniles because of their particular vulnerability to government officials, that intent is unaffected by whether they ultimately are tried in juvenile court or criminal court. If anything, the fact that the charges are very serious ones would countenance greater caution in protecting the juvenile. Chief Justice Henry observed that while the "statutory metamorphosis" had transformed the defendant from a boy to a man, he nevertheless remained a boy.[266]

### 2. Waiver of Rights

The effectiveness of the waiver of *Miranda* rights was before the Supreme Court in *North Carolina v. Butler*.[267] The accused, charged with kidnaping, armed robbery, and felonious assault, was given the *Miranda* rights on a printed form. He acknowledged that he understood them, but refused to sign the waiver at the bottom of the form. When the officers said they wished to talk to him, he responded, "I will talk to you but I am not signing any form,"[268] and then made an inculpatory statement. The state supreme court held that the statement was inadmissible, because there had been no specific waiver as required by *Miranda*. The United State Supreme Court disagreed. While acknowledging that "[a]n express written or oral statement of waiver . . . is usually strong proof of the validity of that

263. 577 S.W.2d at 462.
264. TENN. CODE ANN. § 37-227(b) (1977).
265. 577 S.W.2d at 465 (Henry, C.J., dissenting).
266. *Id.* (Henry, C.J., dissenting).
267. 441 U.S. 369 (1979).
268. *Id.* at 371.

waiver,"[269] it was neither dispositive nor essential. The question was one of fact, and even the silence of the accused, when coupled with the surrounding circumstances, could lead to the conclusion that the accused had effectively waived his rights.[270]

### *F. Right of Confrontation*

In 1968 the Supreme Court held in *Bruton v. United States*[271] that an accused was denied the sixth amendment right of confrontation when a codefendant's confession, introduced at a joint trial, implicated him, and the confessing defendant did not take the stand.[272] In *Parker v. Randolph*[273] the Court in a plurality opinion[274] held *Bruton* inapplicable when the accused has confessed, and his confession interlocks with that of the codefendant. Justice Rehnquist reasoned that the right to cross-examine the confessor "has far less practical value to a defendant who has confessed to the crime than to one who has consistently maintained his innocence."[275] In *Bruton* the Court was concerned that an instruction to limit the jury's consideration of a confession to the guilt of the confessor would be inadequate to safeguard the right of confrontation. Here the Justices concluded that "[t]he possible prejudice resulting from the failure of the jury to follow the trial court's instructions is not so 'devastating' or 'vital' to the confessing defendant to require departure from the general rule allowing admission of evidence with limiting instructions."[276]

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269. *Id.* at 373.

270. *Id.* Justice Brennan, joined by Justices Marshall and Stevens, dissented. *Id.* at 377 (Brennan, Marshall, and Stevens, JJ., dissenting).

271. 391 U.S. 123 (1968).

272. *See* TRIAL RIGHTS, *supra* note 245, § 12, at 42-51.

273. 442 U.S. 62 (1979).

274. Justice Rehnquist was joined by Chief Justice Burger and Justices Stewart and White. *Id.* at 64. Justice Blackmun, concurring, concluded that *Bruton* was applicable, but that any error was harmless. *Id.* at 77 (Blackmun, J., concurring).

275. *Id.* at 73.

276. *Id.* at 74-75.

## G. Fair Trial

### 1. Presumption of Innocence

The constitutionality of a jury instruction charging that "[t]he law presumes that a person intends the ordinary consequences of his voluntary acts,"[277] was considered by the United States Supreme Court in *Sandstrom v. Montana*.[278] The accused was charged with deliberate homicide, and the defense sought to prove that as a result of mental disorder the accused had not killed the victim deliberately. Over defense objection, the jury was instructed that the law presumes that a person intends the ordinary consequences of his voluntary acts, an instruction that the defense contended shifted the burden of proof on the issue of purpose or knowledge to the defense, and thereby violated the due process clause. A conviction of deliberate murder was affirmed by the state supreme court.[279] The United States Supreme Court granted certiorari and reversed.

The Court was concerned that a reasonable jury might have understood the instruction as a conclusive presumption of intent, or, at least, as a direction to find intent unless the defendant proved the contrary. In *In re Winship*[280] the Court had held "that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."[281] The charge in *Sandstrom* required proof that the crime was committed purposely or knowingly. If the challenged instruction was interpreted as a conclusive presumption, it would "*conflict with the overriding presumption of innocence with which the law endows the accused and which extends to every element of the crime.*"[282] If the instruction was interpreted as shifting the burden of persuasion to the defendant, the *Winship* standard would again be violated, because a similar in-

277. Sandstrom v. Montana, 442 U.S. 510, 513 (1979).

278. *Id.* at 510.

279. State v. Sandstrom, 580 P.2d 106 (Mont. 1978).

280. 397 U.S. 358 (1970).

281. *Id.* at 364.

282. Sandstrom v. Montana, 442 U.S. 510, 522 (quoting Morissette v. United States, 342 U.S. 246, 275 (1952)).

struction was found constitutionally deficient in *Mullaney v. Wilbur*.[283] In *Mullaney* the jury had been told that if the prosecution established that a homicide was both intentional and unlawful, malice aforethought could be implied unless the defendant proved by a fair preponderance of the evidence that he acted in the heat of passion. Such an instruction was held to violate the due process clause of the fourteenth amendment. In light of these decisions, the Court was persuaded that the instruction in the present case was constitutionally unacceptable.

### 2. Public Trial

The rarely litigated sixth amendment right to a public trial was examined by the Supreme Court in *Gannett Co. v. DePasquale*.[284] At issue was the independent right of the public to attend a pretrial judicial proceeding when the accused, the prosecution, and the trial judge had all agreed to close the hearing in the interest of a fair trial. The accused were charged with grand larceny, robbery, and second degree murder. The victim had been found shot with his own gun, his body weighted with anchors and tossed into a lake. Interest was sustained in the press over a ninety-day period by the inability of police to find the body, by later confessions of the accused, and by the recovery of the purported murder weapon. The defense, at a pretrial hearing, sought to suppress tangible evidence and statements made to the police. Defense attorneys argued that the degree of adverse publicity had jeopardized the ability of the defendants to receive a fair trial,[285] and they requested that the public and press be excluded from the hearing. The prosecution did not oppose the motion. The following day a reporter for the petitioner objected to the exclusion and demanded a transcript of the hearing. The request was denied, and the New York appellate court sustained the ruling of the trial court.[286]

The Supreme Court affirmed. While the Court could have limited the ruling and distinguished a pretrial suppression hear-

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283. 421 U.S. 684 (1975).

284. 443 U.S. 368 (1979).

285. *Id.* at 375-77.

286. Gannett Co. v. DePasquale, 43 N.Y.2d 370, 372 N.E.2d 544, 401 N.Y.S.2d 756 (1977).

ing from a trial on the merits, it instead chose to treat the right to a public trial as applicable to a pretrial hearing and concluded that the right was created for the benefit of the accused. There was no comparable right on the part of the public to access to a criminal trial. While open judicial proceedings were required at common law, the Court was not persuaded that the common law rule had been elevated to a constitutional rule by the passage of the sixth amendment.[287] Moreover, even the common law rule did not grant access to a pretrial hearing.[288]

Finally, assuming that first amendment interests were implicated by the exclusion order, the proper course was that taken by the trial court: a balancing of the right of access by the press and public against the right of the accused to a fair trial.[289] The Court noted that at the time the closure motion was made by the accused, no one in the court room, including the reporter for the petitioner, objected. Nevertheless, counsel for petitioner was thereafter given an opportunity to be heard. "The trial judge concluded after making this appraisal that the press and the public could be excluded from the suppression hearing and could be denied immediate access to a transcript, because an open proceeding would pose a 'reasonable probability of prejudice to these defendants.' "[290] Moreover, the denial of access was only temporary; once the trial court was convinced that the danger of prejudice had been dissipated, the press and the public were accorded a full opportunity to scrutinize the transcript of the suppression hearing.[291]

Justice Blackmun, speaking for four members of the Court, concurring and dissenting, submitted that the Court previously had recognized that the sixth amendment implicated interests beyond those of the accused.[292] In a discussion of the right to a speedy trial in *Barker v. Wingo*,[293] the Court had observed that "there is a societal interest in providing a speedy trial which ex-

287. 443 U.S. at 384-91.
288. *Id.* at 387-90.
289. *Id.* at 392-93.
290. *Id.*
291. *Id.* at 393.
292. *Id.* at 415 (Blackmun, J., concurring and dissenting).
293. 407 U.S. 514 (1972).

ists separate from, and at times in opposition to, the interests of the accused."[294] In *Singer v. United States*[295] the Court had rejected the contention of the accused that the right to trial by a jury implicated an absolute right of the accused to be tried by a judge alone. In *Faretta v. California*[296] the Court, while recognizing the right of an accused to forego the assistance of an attorney in the presentation of his defense, found an independent right of self-representation in the sixth amendment but failed to make it absolute. Justice Blackmun concluded that in order to close a hearing, the accused should be required to establish a substantial probability that (1) "irreparable damage to his fair-trial right will result from conducting the proceeding in public";[297] (2) "alternatives to closure will not protect adequately his right to a fair trial";[298] and (3) "closure will be effective in protecting against the perceived harm."[299]

### 3. Jury Instructions

Trial judges in Tennessee are required "to charge the jury as to all of the law of each offense included in the indictment, without any request on the part of the defendant to do so."[300] In *Howard v. State*[301] the defendant who gained entry to a schoolhouse by throwing a brick through a window subsequently was indicted for third degree burglary.[302] The defense requested an instruction on the offense of criminal trespass, which was refused. The issue on appeal was whether criminal trespass was a lesser included offense of burglary. The Supreme Court of Tennessee held that it was not, and concluded that for the purpose of jury instruction "an offense is necessarily included in another if the elements of the greater offense, as those elements are set

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294. *Id.* at 519.
295. 380 U.S. 24 (1965).
296. 422 U.S. 806 (1975).
297. 443 U.S. at 441 (Blackmun, J., dissenting).
298. *Id.* (Blackmun, J., dissenting).
299. *Id.* at 442 (Blackmun, J., dissenting).
300. TENN. CODE ANN. § 40-2518 (Supp. 1980).
301. 578 S.W.2d 83 (Tenn. 1979).
302. *Id.* at 84. Defendant was indicted under TENN. CODE ANN. § 39-904 (1975).

forth in the indictment, include, but are not congruent with, all the elements of the lesser [offense]."[303] Because an element of the crime of criminal trespass was a breach of the peace, which was not an element of third degree burglary, the instruction on the former properly was disallowed. Principal reliance was placed on *Wright v. State*,[304] which the majority maintained implicitly adopted the rule only now articulated. Chief Justice Henry, however, dissenting, contended that the *Howard* court's holding was "180 degrees removed from our holding in *Wright*."[305] In *Wright* the court had held that shoplifting was a lesser included offense of petit larceny. As in the present case, all of the elements of the lesser offense would not necessarily be proven in a conviction. But in *Wright*, the petit larceny charge was based upon the removal of goods from a display counter in a retail department store. The court was persuaded that "it would be utterly impossible to make out a case of petit larceny of merchandise from a retail mercantile establishment without establishing shoplifting."[306] Thus, the dissent in *Howard* reasoned that the majority had adopted an *evidentiary* test, rather than a *statutory* test—that is, the evidence used to prove the greater offense will of necessity prove the lesser one. In *Howard* the proof of burglary entailed proof of a criminal trespass, and, therefore, an instruction on the lesser offense was appropriate.

The confusion as to the holding in *Wright* results from the fact that the *Wright* court said one thing and did another. The dissent in *Howard* would appear correct in its insistence that the results in the two cases are inconsistent. However, in *Wright* the court adopted the test set out in *Johnson v. State*:[307] "The true test of which is a lesser and which is a greater crime is whether the *elements* of the former are completely contained within the latter, so that to prove the greater the State must first prove the elements of the lesser."[308] This test, taken in isolation, leads to the result reached by the majority in *Howard*. The dissent

303. 578 S.W.2d at 85.
304. 549 S.W.2d 682 (Tenn. 1977).
305. 578 S.W.2d at 86 (Henry, C.J., dissenting).
306. 549 S.W.2d at 685.
307. 217 Tenn. 234, 397 S.W.2d 170 (1965).
308. *Id.* at 243, 397 S.W.2d at 174 (emphasis added).

placed emphasis on the term "prove" in the quoted passage, but this simply ignores the portion of the sentence preceding the comma. On the other hand, placing emphasis on the elements portion of the test is not incompatible with the latter portion—if the elements are subsumed, then proof of the greater offense *will* prove the lesser one as well. The choice is thus clear: if the majority in *Howard* is correct as to the test, the result in *Wright* was wrong. If, however, the dissent is correct, then the statement of the test taken from *Johnson* is inaccurate. Support for the conclusion reached by the dissent can also be found in *Spencer v. State*,[309] in which joyriding[310] was held to be a lesser included offense of larceny.

### *H. Punishment*

#### 1. Ex post facto

The prohibition against ex post facto laws in the United States[311] and Tennessee[312] Constitutions bars the imposition of punishment that is greater than that provided by law at the time the offense occurred.[313] Notwithstanding the near identity of language in the two provisions, *Miller v. State*[314] illustrates the increasing frequency with which state courts have imposed more stringent constitutional standards in criminal prosecutions than those standards that are federally mandated.[315] At the time the accused committed the homicide for which he was convicted of first degree murder, the crime was punishable by a mandatory death penalty. A few months thereafter, the United States Supreme Court held the mandatory death penalty unconstitutional in cases from North Carolina[316] and Louisi-

309. 501 S.W.2d 799 (Tenn. 1973).

310. TENN. CODE ANN. § 59-504 (1961) (current version at TENN. CODE ANN. § 55-5-104 (1980)).

311. U.S. CONST. art. I, § 10.

312. TENN. CONST. art. I, § 11.

313. The landmark decision on the meaning of the ex post facto clause is Calder v. Bull, 3 U.S. 386, 3 Dall. 648 (1798).

314. 584 S.W.2d 758 (Tenn. 1979).

315. *See generally* Daughtrey, *State Court Activism and Other Symptoms of the New Federalism*, 45 TENN. L. REV. 731 (1978).

316. Woodson v. North Carolina, 428 U.S. 280 (1976).

ana.[317] In response to these decisions the Supreme Court of Tennessee declared the state mandatory death penalty unconstitutional in *Collins v. State*.[318] A discretionary death penalty statute, presumably in compliance with federal constitutional standards, was enacted thereafter[319] and was in effect at the time of the trial in the present case. The accused was convicted of first degree murder and sentenced to death. On appeal, the court affirmed the finding of guilt but reduced the sentence to life imprisonment, and held that because the death penalty statute in effect at the time the crime occurred was void, the only valid punishment for first degree murder was life imprisonment; to apply the later enacted death penalty provision to the case would violate the state constitutional prohibition against ex post facto laws.[320]

This conclusion would appear quite logical and would give little cause for dispute were it not for the fact that the United States Supreme Court had reached the opposite conclusion in a materially indistinguishable case. This led Justice Harbison, joined by Justice Fones, to dissent in *Collins*. In *Dobbert v. Florida*,[321] the Supreme Court had held that the federal ex post facto clause did not preclude the imposition of the death penalty, because the net effect of the change in the law from the time of the offense until the imposition of punishment was ameliorative—a mandatory death penalty was eliminated and was replaced by one with substantial procedural requirements that reduced the likelihood that the death penalty would be imposed. Insofar as the argument that no death penalty was in effect at the time of the crime, the Court responded that for purposes of the ex post facto clause, the important point was that the accused was on notice that the death penalty attached to convictions for first degree murder.[322] Justice Harbison maintained

317. Roberts v. Louisiana, 428 U.S. 325 (1976).

318. 550 S.W.2d 643 (Tenn. 1977).

319. TENN. CODE ANN. §§ 39-2402, -2404, -2406 (Supp. 1980).

320. 584 S.W.2d at 762.

321. 432 U.S. 282 (1977).

322. *Id.* at 297-98. Presumably, this argument would hold true only for cases involving punishment and not for cases in which the statute defining the offense is declared unconstitutional, but another statute, validly prohibiting the conduct of the accused, is enacted prior to trial. Justice Stevens, however,

that the majority in *Miller* had adopted the position of the dissenters in *Dobbert*, avoiding any need for reconciliation on the ground that it was interpreting the state constitution. But, he continued, the state constitution had "neither been cited, briefed nor argued in this case,"[323] and it therefore was inappropriate for the court sua sponte to conclude that the ex post facto clauses in the two constitutions led to contradictory results.

### 2. Death Penalty

Notwithstanding the readiness of the Supreme Court of Tennessee to impose a different standard for the prohibition of ex post facto law under the state constitution than that mandated under the federal constitution,[324] in *Cozzolino v. State*[325] the court held that the same standard would be applied insofar as the prohibitions against cruel and unusual punishment were concerned. Under these provisions[326] the death penalty was not invalid.

A second issue raised in *Cozzolino* was the introduction by the prosecution of evidence that the accused had committed crimes subsequent to the murder with which he was charged. The prosecution maintained that such evidence properly was considered by the trial court given the statutory proviso that "evidence may be presented as to any matter that the court deems relevant to the punishment."[327] The court concluded that the statute should not be read with such literalism since the purpose of the statute was to permit the jury to determine if there were aggravating or mitigating factors to be considered regarding the appropriate punishment. Evidence that did not speak to these considerations was irrelevant. The case was remanded for a new sentencing hearing.[328]

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dissenting in *Dobbert*, maintained that the reasoning of the majority could lead to such a result. *Id.* at 310 n.10 (Stevens, J., dissenting).

323. 584 S.W.2d at 763 (Harbison, J., dissenting).

324. *See* text accompanying note 315 *supra*.

325. 584 S.W.2d 765 (Tenn. 1979).

326. U.S. CONST. amend. 8; TENN. CONST. art. I, § 16.

327. TENN. CODE ANN. § 39-2404(c) (Supp. 1980).

328. Justice Harbison dissented on the ground that there were no mitigating circumstances proven that would warrant the court's abrogating the im-

### 3. Habitual Criminality

The habitual criminal statute[329] authorizes punishment of life imprisonment for persons previously convicted of the felonies defined in the statute. Petit larceny expressly is excluded from the specified offenses. In *Smith v. State*[330] the court considered first whether receiving stolen property under the value of $100 (which in the case of the theft would be only petit larceny) was excluded from the prescribed offenses and, second, whether petit larceny could in any event be the triggering offense for charging habitual criminality. As to the first question, notwithstanding the fact that receiving the fruits of petit larceny would not appear more serious than petit larceny and was punishable by statute as petit larceny, the court saw no choice but to read the statute literally: the legislature had made only one exception.[331] As to the second question, the court noted that petit larceny had not been excluded from the statutes defining the circumstances under which an habitual criminal charge could be brought.[332]

An accused charged under the habitual criminal statute "is entitled to be apprised of the accurate dates of the prior convictions which the state intends to rely on for enhanced punishment purposes."[333] In *Reed v. State*[334] the court held that the failure to do so required a vacation of the enhanced punishment. The more interesting point in *Reed*, and the point upon which the court divided, was whether the double jeopardy clause precluded retrial on the habitual criminal charge. The majority held that it did, relying on *Burks v. United States*[335] which held that the double jeopardy clause barred a retrial following a reversal on grounds of insufficient evidence. Upon petition to rehear on this issue, the prosecution argued that if an accused is found not

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position of the death penalty. 584 S.W.2d at 770 (Harbison, J., dissenting).

329. TENN. CODE ANN. § 40-2801 to -2807 (1975).

330. 584 S.W.2d 811 (Tenn. Crim. App.), *cert. denied, id.* (Tenn. 1979).

331. *See* Evans v. State, 571 S.W.2d 283, 286 (Tenn. 1978).

332. TENN. CODE ANN. §§ 40-2802, -2803 (1975).

333. Reed v. State, 581 S.W.2d 145, 148 (Tenn. Crim. App. 1978), *cert. denied, id.* (Tenn. 1979).

334. *Id.* at 149.

335. 437 U.S. 1 (1978).

guilty under the habitual criminal statute on one occasion, the same convictions may nevertheless be used to charge under the statute on a later occasion. The court conceded that it had so held in cases in which the second trial was for a different offense,[336] but the present case was distinguishable. Two cases were cited by the prosecution from other jurisdictions in which the same triggering offense had been used in both trials.[337] The court responded that such results could not survive *Burks*. Judge Dwyer, dissenting, maintained that the bifurcated proceedings on punishment enhancement had nothing to do with the determination of guilt, and therefore *Burks* was inapposite.[338]

### *I. Double Jeopardy*

#### 1. Identity of Offenses

The protection against double jeopardy precludes conviction for both an offense and a lesser included offense based on the same facts.[339] Relying upon a recent United States Supreme Court decision,[340] the Tennessee court held in *Briggs v. State*[341] that an accused cannot be convicted of felony murder[342] and the underlying felony.[343]

#### 2. Successive Federal-State Prosecutions

The Supreme Court has consistently held that a single crim-

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336. 581 S.W.2d at 150 (opinion on petition to rehear) (citing Pearson v. State, 521 S.W.2d 225 (Tenn. 1975); Glasscock v. State, 570 S.W.2d 354 (Tenn. Crim. App. 1978)).

337. 581 S.W.2d at 150 (opinion on petition to rehear) (citing Davis v. Bennett, 400 F.2d 279 (8th Cir. 1968), *cert. denied*, 395 U.S. 980 (1969); Branch v. Beto, 364 F. Supp. 938 (S.D. Tex. 1973)).

338. 581 S.W.2d at 151 (Dwyer, J., dissenting).

339. J. Cook, Constitutional Rights of the Accused—Post-Trial Rights § 65 (1976).

340. Harris v. Oklahoma, 433 U.S. 682 (1977).

341. 573 S.W.2d 157 (Tenn. 1978).

342. Tenn. Code Ann. § 39-2402 (Supp. 1980).

343. The prosecution was based on an earlier version of the statute, but the reasoning is equally applicable to the present form. *Compare* Tenn. Code Ann. § 39-2402 (1975) *with* Tenn. Code Ann. § 39-2402 (Supp. 1980).

inal act may be subject to prosecution in both federal and state courts without offending the protection against double jeopardy.[344] While the Tennessee Supreme Court acknowledged this rule in *Lavon v. State*,[345] the issue was raised whether a different result should be reached under the state constitution;[346] alternatively, the issue was whether some judicially fashioned limitation should be imposed on successive prosecutions. The accused had pleaded guilty to a federal charge of bank robbery and thereafter was indicted for the same crime under state law. As to the first possibility, the court saw no reason to depart from prior decisions interpreting the state double jeopardy clause in accordance with the federal standard.[347] The court was more hesitant as to the second argument, confessing to "grave doubts as to the inherent fairness of any procedure that forces an individual to defend himself against multiple prosecutions for the same crime."[348] Nevertheless, the court concluded that the price of departing from precedent exceeded the benefit thus derived, quoting Justice Holmes' admonition for prudence in such matters.[349] Justice Brock, joined by Chief Justice Henry, dissented, maintaining that the state constitutional prohibition against double jeopardy should be construed to prohibit such duplicative prosecutions.[350]

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344. *See* J. COOK, *supra* note 339, § 74.

345. 586 S.W.2d 112 (Tenn. 1979).

346. TENN. CONST. art. I, § 10.

347. *See* State v. Rhodes, 146 Tenn. 398, 242 S.W. 642 (1922); Beard v. State, 485 S.W.2d 882 (Tenn. Crim. App. 1972).

348. 586 S.W.2d at 114.

349. Stack v. New York, N.H. & H.R. Co., 177 Mass. 155, 158, 58 N.E. 686, 687 (1900).

350. 586 S.W.2d at 116 (Henry, C.J., and Brock, J., dissenting).

# SURVEY OF TENNESSEE PROPERTY LAW

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The author gratefully acknowledges the assistance of Sharon Barclay, a third-year law student at the University of Tennessee.

## I. INTRODUCTION

The Tennessee courts have made several significant decisions since the last *Survey of Tennessee Property Law* was written.[1] In cases concerning the remedies available to purchasers of defective new housing, the courts lengthened the list of exceptions to the harsh rule of caveat emptor and indicated that the rule may soon be discarded.[2] The Tennessee Supreme Court applied and clarified the scope of the doctrine of equitable estoppel to permit specific performance of an oral land sale contract; thus, the court demonstrated the effectiveness of this doctrine as a substitute for the rejected doctrine of part performance.[3] The questions raised by a grant of a future interest conditioned upon the first taker dying without issue were once again presented, and the supreme court in a salutary decision established that the questions were to be resolved primarily by reference to the grantor's intention, rather than by the rules of construction that had been applied somewhat mechanically in previous cases.[4] The cases discussed in this survey have in many respects clarified and sometimes modified Tennessee law. A general attitude of cautious progressiveness, indicating that necessary reforms will eventually be forthcoming, is discernible in many of the opinions.

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1. Sewell, *Survey of Tennessee Property Law*, 46 TENN. L. REV. 160 (1978) [hereinafter cited as Sewell]. The present survey encompasses decisions reported in volumes 552 through 599 of the Southwestern Reporter Second.

2. *See* text accompanying notes 142-75 *infra*.

3. Baliles v. Cities Service Co., 578 S.W.2d 621 (Tenn. 1979). *See* text accompanying notes 100-16 *infra*.

4. Collins v. Smithson, 585 S.W.2d 598 (Tenn. 1979). *See* text accompanying notes 48-79 *infra*.

## II. ESTATES IN LAND

### A. Concurrent Ownership

In the most common form of concurrent ownership,[5] the tenancy in common, each cotenant owns an undivided interest in the property and each has a right to possess the entire property.[6] A cotenant who earns more than his share of rents and profits from the property may be compelled to account to his cotenants for the excess.[7] Similarly, if the cotenants occupy a mutual fiduciary relationship, one cotenant who purchases the common property at a foreclosure or tax sale may be compelled to reconvey to the other cotenants their respective shares, if they offer to contribute their pro rata share of the cost of purchase.[8] The factual circumstances that give rise to a fiduciary relationship among cotenants vary from state to state.[9] Sometimes the cases of a single jurisdiction are in conflict; this was the status of Tennessee law when the recent case of *Watson v. United American Bank*[10] presented the question to the court of appeals.

Plaintiffs and the defendant bank in *Watson* were tenants in common, who had acquired their interests at different times and from different sources. When the common property was sold at foreclosure and purchased by the bank, plaintiffs sought to redeem their interest by contributing their pro rata share of the cost of purchase and by alleging that a fiduciary relationship existed between the parties. The court found that prior Tennessee cases precluded application of the administratively simple rule that a fiduciary relationship exists only when the cotenants

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5. The term "concurrent ownership" refers to situations in which two or more persons simultaneously have equal rights in the possession and use of property. *See* J. CRIBBET, PRINCIPLES OF THE LAW OF PROPERTY 94 (2d ed. 1975).

6. *See* 4A R. POWELL, POWELL ON REAL PROPERTY § 603 (P. Rohan rev. ed. 1979).

7. *See* II AMERICAN LAW OF PROPERTY § 6.14 (A. Casner ed. 1952) [hereinafter cited as AMERICAN LAW OF PROPERTY].

8. *Id.* § 6.16.

9. *See* 4A R. POWELL, *supra* note 6, § 605.

10. 588 S.W.2d 877 (Tenn. Ct. App.), *cert. denied, id.* (Tenn. 1979). A portion of the opinion concerning the circumstances under which a foreclosure sale may be set aside is discussed at text accompanying notes 121-27 *infra*.

acquire title simultaneously by descent, devise, or a single conveyance from a common grantor.[11] The rules gleaned from a synthesis of the Tennessee cases and applied in *Watson* were (1) tenants in common who acquire title at the same time from a single source are bound by a fiduciary relationship, absent proof that would compel a contrary result; and (2) tenants in common who do not acquire title at the same time from a single source are not bound by a fiduciary relationship, absent proof that would compel a contrary result.[12] These rules incorporate the suggestion of prior Tennessee cases that cotenants who acquire simultaneously from a common source may not be subject to a fiduciary relationship when some "special circumstances occur in the case,"[13] and the analogous rule that cotenants who do not acquire simultaneously from a common source are subject to a fiduciary relationship if the cotenants in fact share a relationship of trust.[14] The rules thus place some emphasis on what logically would appear to be of chief importance—the nature of the relationship of the parties—but the primary effect of the rules is to create presumptions dependent upon the manner of the parties' acquisition. The presumptions are not without logical foundation, however, since ordinarily tenants in common who acquire simultaneously from a common source are members of the same family.[15]

Another problem commonly occurring in cotenancy relation-

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11. *Id.* at 881. This test has been applied in many cases. *See* II AMERICAN LAW OF PROPERTY, *supra* note 7, § 6.16.

12. 588 S.W.2d at 882. Since the cotenants in *Watson* acquired title at different times from different sources, and since there was no proof of a relationship of trust, the court found that no fiduciary relationship existed and therefore plaintiffs were not entitled to redeem their interest. *Id.*

13. King v. Rowan, 57 Tenn. (10 Heisk.) 675, 683 (1873). *See also* Gass v. Waterhouse, 61 S.W. 450 (Tenn. Ch. App. 1900). "[T]he tenants in common may at times occupy such distinct and adverse relations, well known to each other, as to abrogate all trust obligations, and . . . where such adverse attitudes are known and recognized, one tenant in common may purchase for his own benefit an outstanding title . . . ." *Id.* at 453.

14. 61 S.W. at 453.

15. For example, tenancies in common are often created by a testamentary gift to two or more persons, or by intestate succession by two or more persons to assets of a decedent. *See* 4A R. POWELL, *supra* note 6, § 602. Persons who so acquire property are typically members of the same family.

ships arises when one cotenant encumbers the common property without the knowledge or consent of the other cotenants. This situation arose in *Glenn v. Webb*,[16] in which some of the cotenants mortgaged their interest in the common property without the knowledge of the others, and subsequently all the cotenants joined in conveying the entire property to plaintiffs. Because of the outstanding encumbrance, plaintiffs sued and recovered from all the cotenants for breach of the covenants in the warranty deed. On appeal the nonmortgaging cotenants argued that the action of their cotenants, taken without their consent, was not binding on them insofar as their interests were concerned. The court of appeals agreed that this is the "general law"[17] but held that the nonmortgaging cotenants, nevertheless, were liable for breach of the covenants of title made in the deed that the cotenants had jointly executed. The court suggested, however, that the nonmortgaging cotenants could seek redress from their former cotenants,[18] presumably based on ordinary principles of indemnity.[19] The case has an important lesson for cotenants: it is prudent to search the records for encumbrances created by one's own cotenants before conveying the common property by a deed containing covenants of title.

One means of terminating a tenancy in common is partition.[20] The scope of a court's authority in a partition action was addressed recently by the Tennessee Supreme Court in *Yates v. Yates*,[21] in which one cotenant sought a partition by sale while the other, asserting a debt owed her by her cotenant, prayed

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16. 565 S.W.2d 876 (Tenn. Ct. App. 1977), *cert. denied, id.* (Tenn. 1978).

17. *Id.* at 878. *See also* Campbell v. Miller, 562 S.W.2d 827 (Tenn. Ct. App.), *cert. denied, id.* (Tenn. 1977). The court in *Campbell* impliedly reaffirmed this rule but stated that a contract made with respect to the common property by only one tenant by the entirety was binding since it was acquiesced in and ratified by the other tenant. *Id.* at 832.

18. 565 S.W.2d at 879.

19. *See* Velsicol Chemical Corp. v. Rowe, 543 S.W.2d 337 (Tenn. 1976). "The right to indemnity may . . . arise . . . by operation of law to prevent an unjust result. This . . . may be because of a significant difference in the kind or quality of their conduct . . . ." *Id.* at 339.

20. *See* TENN. CODE ANN. §§ 23-2101 to -2152 (1955 & Supp. 1979) (current version at TENN. CODE ANN. §§ 29-27-101 to -219 (1980)).

21. 571 S.W.2d 293 (Tenn. 1978).

that the court vest all interests in the property in her. The counterclaim was granted by the chancellor, and the court of appeals affirmed. The supreme court reversed and remanded for a partition by sale and stated:

> While the Court has a statutory and inherent right to adjust the equities and settle all claims between or among the parties, it has no power to divest title out of one tenant and vest it in another. The statutory adjustment must be made by an appropriate allocation of the net sales proceeds, to be reflected in the Court's decree on distribution.[22]

This language indicates that the relief requested by counterclaimant is never obtainable in a partition action, even though such a request invokes the statute that authorizes the court to adjust the rights, titles, and interests in the property.[23] The court implied, however, that the lower court's divestiture and revestiture of title would have been upheld if counterclaimant's poorly drafted counterclaim properly had requested such relief in the form of a resulting or constructive trust.[24]

### *B. Leaseholds*

The Tennessee version of the Uniform Residential Landlord and Tenant Act, adopted in 1975,[25] is essentially protenant legislation which effects several salutary changes in this area of the

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22. *Id.* at 296. The court assumed that the property, a house on a city lot, was not susceptible of partition in kind. *Id.* at 296 n.4.

23. TENN. CODE ANN. § 23-2115 (1955) (current version at TENN. CODE ANN. § 29-27-113 (1980)). The court in *Yates* stated that respondent's counterclaim invoked this statute. 571 S.W.2d at 296.

24. 571 S.W.2d at 295. Commenting on the court of appeals' finding of a resulting trust and its affirmance of the chancellor's decree ordering the transfer of title, the court stated that "the relief granted is beyond the scope of the pleadings." *Id.*

25. TENN. CODE ANN. §§ 64-2801 to -2864 (1976 & Supp. 1980). Certain provisions of the Act were amended in 1978 to require that a tenant give his landlord notice in order to avail himself of the remedies provided for noncompliance with the Act or the lease, TENN. CODE ANN. § 64-2841(a) (Supp. 1980), or for failure to provide essential services. TENN. CODE ANN. § 64-2842(a) (Supp. 1980). Another change enables a tenant to recover reasonable attorney's fees incurred because of the landlord's noncompliance regardless of whether the noncompliance was willful. TENN. CODE ANN. § 64-2841(a) (Supp. 1980).

law.[26] The Act, however, applies only in the four counties with a population of more than 200,000.[27] Whether the new law represents a change in public policy with respect to Tennessee's other counties was considered by the court of appeals in *Schratter v. Development Enterprises, Inc.*[28] Plaintiffs, lessees of defendant, brought suit to recover losses sustained when defendant's agent negligently caused a fire in the apartment building where plaintiffs resided. The defendant was granted summary judgment on the basis of an exculpatory clause contained in the plaintiffs' lease. On appeal, plaintiffs argued that the state's public policy favoring freedom of contract in landlord-tenant relationships[29] had been changed by a provision of the Uniform Act prohibiting lease clauses in which the tenant "[a]grees to the exculpation or limitation of any liability of the landlord to the tenant arising under law."[30] The court of appeals agreed that exculpatory clauses are void as against public policy in the four metropolitan counties, but held that such clauses are valid in all other counties, including the county where this cause of action arose.[31] Hence, the exculpatory clause barred plaintiffs' action.[32]

The court noted the anomalous nature of this result: "Plaintiffs' argument that the public policy of the state should be uniform throughout is not without appeal. It is disconcerting that the rights of tenants in certain counties of the state should differ so greatly from the rights of tenants in the four metropolitan counties."[33] While the court recognized its "obligation to give effect to . . . the legislature's expressly stated intentions,"[34] it implicitly invited a direct challenge to the validity of the provision's limiting application of the Uniform Act to the four coun-

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26. *See generally* Sewell, *supra* note 1, at 169; 7 MEM. ST. U.L. REV. 109 (1976) [hereinafter cited as 7 MEM. ST. U.L. REV.].

27. TENN. CODE ANN. § 64-2802 (1976). The four counties are Hamilton, Knox, Davidson, and Shelby. 7 MEM. ST. U.L. REV., *supra* note 26, at 109.

28. 584 S.W.2d 459 (Tenn. Ct. App.), *cert. denied, id.* (Tenn. 1979).

29. *See* Chazen v. Trailmobile, Inc., 215 Tenn. 87, 384 S.W.2d 1 (1964).

30. TENN. CODE ANN. § 64-2813(a)(2) (1976).

31. 584 S.W.2d at 460.

32. The court also refused to find that such an exculpatory provision could be prohibited as one that "affects the public interest." *Id.* at 460-61.

33. *Id.* at 460.

34. *Id.*

ties: "Whether the classification of counties rests on a proper basis was not challenged in this case and is not before us for consideration."[35] It has been suggested that the exclusion of tenants outside the four metropolitan counties from the protection of the Uniform Act is premised not on an assumption that their bargaining power is equal to that of the landlords, but "probably . . . on the sufficiency of common law and prior statutory protection."[36] In light of *Schratter*, whether such protection is sufficient may be questioned.

A new statute, not part of the Uniform Act, departs from the general common-law rules concerning the notice required to terminate a leasehold. At least two months' notice is now required in all cases when a lessor intends to convert rental units to units for sale.[37] At common law, the notice required to terminate a leasehold depends upon the kind of leasehold involved. No notice is necessary to terminate a term of years.[38] The notice required to terminate a periodic tenancy[39] is determined by the period itself: if less than one year, the required notice is one full period, but if the period is one year, only six months' notice is required.[40] These rules were discussed recently in *Buchanan v. Johnson*,[41] in which the court of appeals distinguished between a "tenant under contract"[42] and a "tenant holding over from

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35. *Id.* at 460 n.1.

36. 7 MEM. ST. U.L. REV., *supra* note 26, at 109-10.

37. TENN. CODE ANN. § 64-2723 (Supp. 1980).

38. I AMERICAN LAW OF PROPERTY, *supra* note 7, § 3.88. A term of years or an estate for years is a tenancy for a fixed period, which may be one or more years or a fraction of a year. *Id.* §§ 3.13-.14.

39. A periodic tenancy is an indefinite tenancy "in which the estate continues for successive periods unless terminated at the end of a period by notice." *Id.* § 3.23.

40. Smith v. Holt, 29 Tenn. App. 31, 37, 193 S.W.2d 100, 102 (1945). Under the Uniform Residential Landlord and Tenant Act ten days' notice is required to terminate a week-to-week tenancy, and thirty days' notice is required to terminate a month-to-month tenancy. TENN. CODE ANN. § 64-2852 (1976).

At common law, notice was not necessary to terminate either of the other two kinds of leaseholds, the tenancy at will and the tenancy at sufferance. *See* I AMERICAN LAW OF PROPERTY, *supra* note 7, §§ 3.28, 3.32.

41. 595 S.W.2d 827 (Tenn. Ct. App. 1979) (dicta).

42. *Id.* at 831.

year to year"[43] and stated that only the latter is entitled to six months' notice of termination.[44] This language is confusing because a year-to-year periodic tenancy, for which six months' notice of termination is required, may be created either by contract[45] or by the tenant's holding over after an original term of a year or more.[46] Moreover, the Tennessee case cited in *Buchanan* for the proposition that only a tenant holding over from year to year is entitled to six months' notice of termination did not hold that a tenant under contract is not entitled to six months' notice but simply reiterated the common-law rules concerning the notice required to terminate periodic tenancies.[47] Since the court in *Buchanan* apparently intended merely to restate existing law, the purported distinction between a contractual tenancy and a holdover tenancy should be interpreted as a distinction between a term of years, for which no notice of termination is required, and a year-to-year periodic tenancy, for which six months' notice of termination is required.

### C. *Future Interests—Gifts Over Upon Dying Without Issue*

Deed and will provisions giving a future estate conditioned upon the first taker dying without issue continue to give rise to much litigation. Such a provision was involved in the 1976 case of *Harris v. Bittikofer.*[48] *Harris* raised the issues whether the language created a fee tail that was converted by statute to a fee simple and whether a substitutional or an alternative construction should be applied to determine when the first taker must die without issue in order for the gift over to take effect. In the more recent case of *Collins v. Smithson,*[49] the court resolved the same issues by an analysis divergent from that of *Harris.*

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43. *Id.*

44. *Id.*

45. I AMERICAN LAW OF PROPERTY, *supra* note 7, § 3.24.

46. Smith v. Holt, 29 Tenn. App. 31, 35, 193 S.W.2d 100, 101-02 (1945); I AMERICAN LAW OF PROPERTY, *supra* note 7, § 3.26.

47. Smith v. Holt, 29 Tenn. App. 31, 193 S.W.2d 100 (1945).

48. 541 S.W.2d 372 (Tenn. 1976). *See* Sewell, *supra* note 1, at 180-84.

49. 585 S.W.2d 598 (Tenn. 1979).

### 1. General Background

The fee tail estate was employed in feudal England as a device to keep land within a family for generation after generation, since the estate expired only when the line of lineal descendants of the first grantee ultimately ran out. The estate was created by the words "to *A* and the heirs of his body" or similar language, and its effect was to create successive life estates in *A* and his lineal descendants.[50] A fee tail could also be created by language giving a future estate conditioned upon the first taker dying without issue if the grantor or testator intended that phrase to denote an indefinite failure of issue. Indefinite failure of issue is failure of issue whenever the lineal descendants of the first taker run out, as opposed to definite failure of issue which is failure of issue only at the time of the first taker's death.[51] Since indefinite failure of issue was the preferred construction in English law,[52] the dying without issue language usually created a fee tail, whether the estate given the first taker was in fee or for life.[53]

By a statutory provision that has existed since Tennessee became a state, fee tail estates are abolished, and language that would have created a fee tail at common law creates a fee simple.[54] Another statute establishes that the preferred construction of the dying without issue terminology is the definite failure of issue construction, by which no fee tail is created, "unless the intention of such limitation be otherwise expressly and plainly declared in the face of the deed or will creating it."[55] In several Tennessee cases the statutory presumption that a definite failure of issue construction was intended has been ignored.[56] Much

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50. *See generally* I AMERICAN LAW OF PROPERTY, *supra* note 7, § 1.9.

51. *Id.* § 2.14.

52. *Id.*

53. *See* Machell v. Weeding, 8 Sim. 4, 7, 42 Rev. R. 79, 81 (1836):

> I consider it to be a settled point, that, whether an estate be given in fee or for life, or generally, without any particular limit as to its duration, if it be followed by a devise over in case of the devisee dying without issue, the devisee will take an estate tail.

54. TENN. CODE ANN. § 64-102 (1976).

55. TENN. CODE ANN. § 64-104 (1976).

56. *See* Harwell v. Harwell, 151 Tenn. 587, 271 S.W. 353 (1925) (devise in essence "to *A* and her bodily heirs, and if *A* should die leaving no heir, to the grantor's estate" held to denote indefinite failure of issue absent evidence tes-

confusion could be avoided if this statute were strictly applied so that the indefinite failure of issue construction, and hence, a fee tail, would be found only if the grantor or testator plainly spelled out his intent that the gift over take effect only when the entire line of the first taker's lineal descendants runs out.[57] The fact that this intent would be very unusual militates in favor of the preference for the definite failure of issue construction.

### 2. Creation of a Fee Tail

It was contended in both *Harris* and *Collins* that the language employed created a fee tail that was converted by statute to a fee simple. In *Harris* the devise was "in substantially the following form: To *A* for life, and her bodily heirs, if any; in case *A* should die leaving no bodily issue, and her husband survives her, then to *B* or her heirs."[58] The court held that this language did not create a fee tail, but rather created a life estate in *A* with alternate contingent remainders in *A*'s issue, if any, and *B*. The court based its conclusion on the nature of the estate given the first taker, *A*, and stated that when that estate is only one for life, a gift over on dying without issue will not transform the life estate into a fee tail.[59] On the other hand, the court stated in dicta that when the first taker receives an absolute estate, coupled with a gift over in default of issue, it "continues to be the law" that a fee tail is created, which is converted by statute to a fee simple.[60] The *Harris* court's approach to this issue has been criticized justly as "based on an artificial distinction between an absolute or lesser interest in the first taker,"[61] a distinction which the English common law did not recognize.[62] The more

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tator did not use words in technical sense); Scruggs v. Mayberry, 135 Tenn. 586, 188 S.W. 207 (1916) (devise in essence "to *A* and the heirs of his body, and if *A* should die without heirs, to *B*" held to denote indefinite failure of issue absent evidence testator did not use words in technical sense).

57. *See* Armstrong v. Douglas, 89 Tenn. 219, 14 S.W. 604 (1890), in which the court held the statute inapplicable because an indefinite failure of issue clearly was intended.

58. Sewell, *supra* note 1, at 181.

59. 541 S.W.2d at 374-77.

60. *Id.* at 375.

61. Sewell, *supra* note 1, at 182 n.111.

62. *See* note 53 *supra* and accompanying text.

relevant inquiry is whether the grantor or testator intended a definite or indefinite failure of issue construction. The *Harris* court eventually did hold, consistent with its finding no fee tail, that a definite failure of issue was intended, but the court did not rely on the statutory presumption in reaching this conclusion.[63]

In *Collins* the court was presented with language that, according to the dicta of *Harris*, would create a fee tail in Tennessee since an absolute interest rather than a life estate was given the first taker. The deed provision was as follows: "To . . . [*A*], her heirs and assigns, . . . [b]ut . . . in the event she . . . should die without issue the property herein conveyed shall revert back to [the grantors] or to [their] estate to be redistributed between [their] legal heirs."[64] The promise of the dicta in *Harris* that such language would create a fee tail was not fulfilled; the court found no fee tail and stated: "We find nothing in *Harris v. Bittikofer* . . . which requires such a result."[65]

Instead of focusing on the nature of the estate given the first taker, as in *Harris*, the *Collins* court treated the problem as one of determining the intention of the parties. The court recognized that a fee tail is created by dying without issue terminology only if the grantor or testator intended an indefinite failure of issue construction, that the statutory presumption is against such an intention, and that such an intention would be most unusual:

> Because the estate tail had . . . been abolished for more than one hundred years prior to the date when the deed in question was executed, we think that the possibilities are remote that these [grantors] intended to create such an estate . . . . It seems to us that it would have been a scrivener's error amounting almost to an accident if such an estate had resulted from the words used in this deed.[66]

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63. 541 S.W.2d at 384. In fact, this holding in *Harris* was made in the course of determining whether the substitutional or alternative construction should apply, rather than in the course of determining whether the language created a fee tail.

64. 585 S.W.2d at 600.

65. *Id.* at 603.

66. *Id.*

Although the court was not explicit about the nature of the interests created, since it ultimately held that *A*'s interest had become absolute upon the occurrence of certain events, the court, in effect, held that before those events occurred *A* had a fee simple subject to a contingent shifting executory interest in the grantors.[67]

After *Harris* and *Collins*, it seems unlikely that grants or devises using dying without issue terminology will be held to create a fee tail. Under *Harris* such a result is not possible if the interest given the first taker is less than absolute. Although this approach ignores the question whether a definite or an indefinite failure of issue construction was intended, it almost certainly effects the parties' intent in any event, since a fee tail would be converted by statute to a fee simple, an estate obviously not intended to be given the first taker when a less than absolute interest is described by the grant. Under *Collins* a fee tail will not be found even if the deed or will by its terms gives the first taker an absolute interest, unless, contrary to the statutory preference, the unusual indefinite failure of issue construction was intended. The statute that converts fee tails to fee simples will have only limited operation after *Harris* and *Collins*.[68]

### 3. Substitutional v. Alternative Construction

As indicated above, language such as "to *A* for life, but if *A* dies without issue, to *B*," or "to *A* and his heirs, but if *A* dies without issue, to *B*," should not, except in the unusual case, be held to create in the first taker a fee tail convertible to a fee simple. Instead, *A* should receive a life estate in the first example given and a fee simple subject to a contingent shifting executory interest in the second. The nature of the interest given *B* would be a contingent remainder in the first example and, in the second example, a contingent shifting executory interest.[69] In ei-

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67. Applying the substitutional construction, the court in fact held that the first taker's fee simple became absolute when she survived the grantors. *See* text accompanying notes 75-78 *infra*.

68. TENN. CODE ANN. § 64-102 (1976). The statute should continue to be applicable in instances in which traditional fee tail language, such as "to *A* and the heirs of his body" or "to *A* and his bodily heirs," is used.

69. An alternative future interest in *A*'s issue, if any, might be implied.

ther case, it would seem logical that *B*'s future interest vests whenever *A* dies without issue. This construction, variously termed a "straight definite failure of issue" construction[70] or an "alternative" construction,[71] has been applied in many Tennessee cases.[72] In other cases, however, the courts have applied what is called the "substitutional" construction, by which *B* takes only if *A* dies without issue before the death of the grantor or testator.[73] This construction, though it seems less likely to give effect to the grantor's or testator's intent than the alternative construction, tends to make title "more readily merchantable because either *A* or *B* will have an indefeasible interest on the testator's [or grantor's] death."[74]

The criteria for determining which construction should be applied were discussed in both *Harris* and *Collins*. In *Harris* the court applied the straight definite failure of issue construction and held that the alternate contingent remainderman, *B*, would take whether the first taker, *A*, died without issue before or after the death of the testator. Again, the nature of the estate given the first taker was accorded great importance. Since it was less than an absolute interest, the case was distinguishable from others in which the substitutional construction was applied.[75] In *Collins* an absolute interest was given the first taker, and the straight definite failure of issue construction was rejected in

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*See generally* V AMERICAN LAW OF PROPERTY, *supra* note 7, § 21.34; Annot., 22 A.L.R.2d 177 (1952).

70. Trautman, *Decedents' Estates, Trusts and Future Interests—1960 Tennessee Survey*, 13 VAND. L. REV. 1101, 1113 (1960).

71. Sewell, *supra* note 1, at 183.

72. The court in *Harris* cited and discussed many of the cases. 541 S.W.2d at 377-80.

73. The leading case is Meacham v. Graham, 98 Tenn. 190, 39 S.W. 12 (1897).

The phrase "grantor or testator" is used in the text since the court in *Collins* found the substitutional construction, usually applicable only to wills, to be applicable to a deed. *See* V AMERICAN LAW OF PROPERTY, *supra* note 7, § 21.51, stating that "no jurisdiction adopts the substitutional gift preference when the disposition [to *A* and his heirs, but if *A* dies without issue, to *B* and his heirs] is by deed."

74. Trautman, *supra* note 70. Other constructions are possible. *See* Sewell, *supra* note 1, at 182 n.115.

75. 541 S.W.2d at 377-80.

favor of the substitutional construction. In reaching this result, the court made no reference to the distinction drawn in *Harris* between the effect of an absolute and a lesser interest in the first taker. Instead, the court once again focused on the intention of the parties and concluded that their intention was that the estate in the first taker should become absolute and the gift over should become void if the first taker survived the grantors, regardless of whether the first taker later died without issue.[76] This intention was evidenced by language in the deed that indicated that the grantors, parents of the grantee, intended the grant as an advancement against the grantee's future inheritance which would "be held against her"[77] upon distribution of the parents' estates. The court stated:

> The requirement that the grantee account to the estate of her father or mother (the deed used the inexact phrase "our estate") is consistent with an intention that the grantee not be required to forfeit the property after their deaths and that if the reversion to the parents were to take effect, it would do so only if the grantee died without issue before they died. It would revert to them (or the survivor) for redistribution in that event, but would not revert if the grantee survived and made an accounting . . . .[78]

The court in *Collins* properly treated this constructional problem as one to be determined by the parties' intent and recognized that the straight definite failure of issue construction "would be the usual interpretation or construction."[79] On both issues—whether dying without issue terminology creates a fee tail and whether the substitutional or alternative construction should be applied—the *Collins* decision is a welcome step away from the *Harris* court's persistent emphasis on the nature of the

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76. 585 S.W.2d at 603-05.

77. *Id.* at 600. It is also perhaps noteworthy that the gift over in *Collins*, unlike the one in *Harris*, was to the grantors or their estate rather than to a third party. A gift over to the grantors seems to indicate that the grantors intended that the gift over would fail if the grantee survived the grantors. However, such an intent was not clearly evident in *Collins* since the gift over was "to [the grantors] or to [their] estate to be redistributed between [their] legal heirs." *Id.*

78. *Id.* at 605.

79. *Id.* at 604.

estate given the first taker and toward an emphasis on what should be determinative—the parties' intent.

## III. Interests in the Land of Another

### A. *Easements*

One of the means by which an easement may be terminated is abandonment. In *Hargis v. Collier*[80] it was argued that a public road had been abandoned because it had been used relatively infrequently for many years after a new road was built. The owners of the land on which the old road was located had fenced it off, but allowed adjacent landowners continued use of the old road. In finding that the public had not abandoned the road, the court clarified an earlier opinion which stated that a presumption of abandonment arises when the public ceases to use a road, adopts another, and acquiesces for three years in the use of the old road by the owner of the land on which it is located.[81] The earlier opinion stated that "all evidence indicating a contrary intention on the part of the public" must be absent for the presumption of abandonment to arise[82] and that "[t]he use of the old road by a few individuals in the immediate vicinity thereof, for the purposes of mere private convenience" is insufficient to rebut the presumption of abandonment by the public.[83] What purposes might constitute "purposes of mere private convenience" were not stated. The court in *Hargis* found that the adjacent landowners' use of the road was for more than "mere private convenience," since they used it for "ingress and egress to a portion of their property, to repair and maintain their property, and to transact business associated with their property."[84]

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80. 578 S.W.2d 953 (Tenn. Ct. App. 1978), *cert. denied, id.* (Tenn. 1979). The portion of this opinion dealing with adverse possession is discussed *infra* at text accompanying notes 224-28.

81. Shelby v. State, 29 Tenn. (10 Hum.) 164, 166 (1849).

82. *Id.*

83. *Id.* at 166-67.

84. 578 S.W.2d at 958. The court also found that the adjacent landowners had not abandoned their right to use the road, *id.*, a finding seemingly unnecessary in view of the holding that there was no abandonment by the public.

### B. Restrictive Covenants

Although restrictive covenants generally are required by the Statute of Frauds to be in writing,[85] they may in some circumstances be implied. In an important 1976 decision, the Tennessee Supreme Court adopted the doctrine of implied reciprocal negative easements, by which implied covenants arise through the sale of property, usually the sale of subdivision lots, pursuant to a general plan of development that involves uniform restrictions. These implied covenants attach to property that is included in the general plan but not made subject to express written covenants.[86] In a more recent case the supreme court discussed this doctrine as well as two other theories by which covenants may be implied.

In *Arthur v. Lake Tansi Village, Inc.*[87] plaintiffs contended that defendant, owner of a resort community in which plaintiffs resided, was prohibited by implied covenants from removing or relocating certain recreational facilities of the resort. The court considered the three theories by which implied covenants may arise: by necessity, by the doctrine of implied reciprocal negative easements, and by the conveyance of property with reference to a plat containing restrictions. Plaintiffs' first theory, implication by necessity, was found inapplicable. The court quoted with approval persuasive authority which stated that a restrictive covenant may be implied by necessity only when the covenant " 'was so clearly within the contemplation of the parties that they deemed it unnecessary to express it, and therefore omitted to do so.' "[88] The alleged covenants concerning the recreational facilities were found not to have been contemplated so clearly, and the court's summary rejection of plaintiffs' claim suggests that the theory of implication by necessity will be applied only in

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85. *See* RESTATEMENT OF PROPERTY §§ 522-23 (1944).

86. Land Developers, Inc. v. Maxwell, 537 S.W.2d 904 (Tenn. 1976), *discussed in* Sewell, *supra* note 1, at 187-88.

87. 590 S.W.2d 923 (Tenn. 1979).

88. *Id.* at 927 (quoting Danciger Oil & Refining Co. v. Powell, 137 Tex. 484, 490, 154 S.W.2d 632, 635 (1941)). The Texas court also stated that a restrictive covenant could be implied if necessary "to effectuate the full purpose of the contract as a whole as gathered from the written instrument." *Id.*

compelling circumstances.[89]

The court next considered plaintiffs' assertion that the implied covenants arose by the doctrine of implied reciprocal negative easements. The applicability of this doctrine depends upon the existence of a general plan of development with uniform restrictions. Therefore, the doctrine was found inapplicable because there was no general plan in existence at the time plaintiffs or their predecessors purchased their property, even though a general plan did emerge later.[90] This holding is consistent with the general rule that implied reciprocal negative easements arise only when property is sold *pursuant to* a general plan.[91] Next, the court found that the covenants insisted upon by plaintiffs could not be implied on the basis of recorded plats of the development because plaintiffs' deeds made no reference to the plats. Several plats of various parts of the large development had been recorded, and plaintiffs' deeds did not refer to those plats showing the recreational facilities that defendant planned to remove or relocate.[92]

Finally, the court concluded that even if implied restrictive covenants had arisen, they could not be enforced against the defendant, because he had purchased from the original developers for value without notice of the implied covenants.[93] The defendant clearly had no record notice since the alleged covenants, being unwritten, were not in defendant's chain of title, and the court found the record devoid of proof of actual notice. Another possibility, the doctrine of inquiry notice, by which a person who has actual notice of circumstances sufficient to put a prudent person on inquiry will be deemed to have notice of the facts that a reasonable inquiry would reveal,[94] was rejected by the court.

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89. 590 S.W.2d at 927.

90. *Id.* at 928.

91. See Sanborn v. McLean, 233 Mich. 227, 206 N.W. 496 (1925), the leading case on the subject of implied reciprocal negative easements. "Reciprocal negative easements are never retroactive; the very nature of their origin forbids. They arise, if at all, out of a benefit accorded land retained, by restrictions upon neighboring land sold by a common owner." *Id.* at 230, 206 N.W. at 497.

92. 590 S.W.2d at 929.

93. *Id.* at 929-31.

94. *See generally* IV AMERICAN LAW OF PROPERTY, *supra* note 7, § 17.11.

The rejection suggested that the doctrine has no application in the context of implied restrictive covenants: "The fact that a purchaser may know about certain characteristics of the land purchased will not necessarily impute knowledge as to any implied restrictions."[95]

Although the facts in *Arthur* probably would not have supported a finding that defendant had inquiry notice of the alleged covenants in any event, the suggestion that the doctrine is inapplicable in this context seems inappropriate. The doctrine of inquiry notice has been applied in other contexts in Tennessee cases[96] and has been applied in other jurisdictions to charge purchasers with notice of implied reciprocal negative easements.[97] The treatment given the doctrine in *Arthur* was consistent with the 1976 Tennessee case adopting the doctrine of implied reciprocal negative easements, in which the court held that a purchaser for value took free of the implied restrictions even though the purchaser had actual knowledge of recorded restrictions applicable to the other property included in the general plan.[98] It should be recognized that implicit rejection of the doctrine of inquiry notice in these cases undermines the doctrine of implied reciprocal negative easements to a large extent. Where the latter doctrine is applicable, purchasers of property subject to the implied covenants necessarily do not have record notice and in most circumstances do not have actual notice. If inquiry notice is inapplicable, such a purchaser, unless actually told of the restrictions, will take free of them, even though it might be appar-

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95. 590 S.W.2d at 930.

96. See Henderson v. Lawrence, 212 Tenn. 247, 369 S.W.2d 553 (1963) and Jarman v. Farley, 75 Tenn. 141 (1881), in which the court held that possession by one other than the vendor puts the purchaser on inquiry as to the possessor's rights in the property.

97. See Sanborn v. McLean, 233 Mich. 227, 232, 206 N.W. 496, 498 (1925), in which the court stated that "[c]onsidering the character of use made of all the lots open to a view of [the purchaser] when he purchased, we think he was put thereby to inquiry, beyond asking his grantor, whether there were restrictions." The court in *Sanborn* also found that the purchasers had record notice of the implied restrictions. *Id.* at 231-32, 206 N.W. at 497.

98. Land Developers, Inc. v. Maxwell, 537 S.W.2d 904, 914-15 (Tenn. 1976). Although such knowledge might constitute inquiry notice in an appropriate case, under the chain of title concept as applied in Tennessee it is not record notice. *See* Yates v. Chandler, 162 Tenn. 388, 38 S.W.2d 70 (1930).

ent to any person who viewed the area at the time of the purchase that a uniform scheme of restrictions was in effect. Effective implementation of the policy of protecting bona fide purchasers for value without notice certainly must require charging purchasers with inquiry notice of implied restrictions in appropriate cases.[99]

## IV. TRANSFERS OF LAND

### A. *The Land Sale Contract*

#### 1. Statute of Frauds

The Tennessee Statute of Frauds requires that a contract for the sale of an interest in land be written in order to be enforceable.[100] In a significant recent decision of the Tennessee Supreme Court, *Baliles v. Cities Service Co.*,[101] two important issues pertaining to this statute were discussed: what manner of writing satisfies the requirement of the statute and under what circumstances may an oral contract be specifically enforced on the basis of equitable estoppel.

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99. In another recent case of interest the court of appeals reaffirmed and applied the rule that restrictive covenants are to be strictly construed. The court held that a covenant restricting property to residential purposes only did not prohibit the construction of multiunit residential structures such as apartment buildings, rejecting the chancellor's finding that modern apartment buildings are primarily commercial in nature. Parks v. Richardson, 567 S.W.2d 465 (Tenn. Ct. App.), *cert. denied, id.* (Tenn. 1977).

100. TENN. CODE ANN. § 23-201 (1955):

> No action shall be brought . . . [u]pon any contract for the sale of lands, tenements, or hereditaments, . . . [u]nless the promise or agreement, upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person by him thereunto lawfully authorized.

*Id.* (current version at TENN. CODE ANN. § 29-2-101 (1980)).

In Tennessee the phrase "party to be charged" has been interpreted to mean in all cases the seller. This rule was recently applied in Bush v. Cathey, 598 S.W.2d 777 (Tenn. Ct. App. 1979), *cert. denied, id.* (Tenn. 1980), in which it was held that a contract signed by the seller was specifically enforceable by the buyers, even though one of the two buyers had signed the other's initials in accordance with the oral authorization of the other.

101. 578 S.W.2d 621 (Tenn. 1979). This case is discussed in 10 MEM. ST. U.L. REV. 107 (1979) [hereinafter cited as 10 MEM. ST. U.L. REV.].

In *Baliles* respondent had orally agreed to sell certain lots to petitioner's assignor. To enable petitioner's assignor to obtain a loan for construction on the lots, respondent sent the following letter, addressed to petitioner's assignor, to the lending institution: "Cities Service Company has agreed to sell you lots 99 and 100 in Cherokee Hills for residential purposes. As soon as residences are well under construction deeds to these lots will be delivered to you."[102] Petitioner's assignor then began construction on lot 100, but he encountered financial difficulties and released lot 99 to respondent. Later, petitioner's assignor assigned his interest in lot 100[103] to petitioner for $6,500.00, the value of the labor and materials that petitioner's assignor had expended in construction on the lot. When respondent thereafter refused to recognize petitioner's interest, petitioner brought an action seeking specific performance or, alternatively, damages for breach of contract.

The first issue considered by the supreme court was whether the letter written by respondent to the lending institution was sufficient to satisfy the Statute of Frauds, or, more particularly, whether the letter "show[ed], with reasonable certainty, the estate intended to be sold."[104] The court noted that the letter failed to describe the location and dimensions of lot 100 within Cherokee Hills or to designate the county and state in which Cherokee Hills was located.[105] Although it is established in Tennessee that these omissions may be remedied by parol evidence when "it does not reasonably appear that the description given would fit equally any other tract,"[106] the court in *Baliles* found that this was not the case.[107]

Having concluded that the contract did not comply with the

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102. 578 S.W.2d at 622.

103. He also attempted to assign his interest in lot 99, but this was ineffectual. *Id.* at 623.

104. *Id.* To satisfy the statute, a writing must contain the essential terms of the contract, including a description of the property sufficient "to identify and distinguish the particular tract from other lands." Wilson v. Calhoun, 157 Tenn. 667, 672, 11 S.W.2d 906, 907 (1928).

105. 578 S.W.2d at 623.

106. *Id.* (quoting Kirshner v. Feigenbaum, 180 Tenn. 476, 479, 176 S.W.2d 806, 807 (1944)).

107. 578 S.W.2d at 624.

Statute of Frauds, the court next considered whether the contract could be enforced on the basis of part performance or the doctrine of equitable estoppel. Tennessee and only three other states do not recognize the doctrine of part performance as a basis for allowing enforcement of an oral contract for the sale of land;[108] the court in *Baliles* stated that the nonapplicability of the doctrine "is now a rule of property in this state."[109] In the states that recognize part performance, a parol purchaser who takes possession, makes payments, makes improvements, or does some combination of these, generally is entitled to specific performance.[110] Equitable estoppel, which is recognized in Tennessee, may apply in a greater number of factual situations. The court in *Baliles* decreed specific performance and made clear the breadth of the doctrine:

> Equitable estoppel . . . arises from the "conduct" of the party, using that word in its broadest meaning, as including his spoken or written words, his positive acts, and his silence or negative omission to do any thing . . . . Its object is to prevent the unconscientious and inequitable assertion or enforcement of claims or rights which might have existed, or been enforceable by other rules of law, unless prevented by an estoppel . . . .[111]

Although several past Tennessee cases dealt with the doctrine of equitable estoppel, *Baliles* was the first in which the doctrine was applied to permit specific performance of an executory oral contract for the sale of a fee estate.[112] Although the court indicated that the doctrine will be applied only in "exceptional cases"[113] to prevent "hardship and oppression, verging on actual fraud,"[114] the doctrine, in fact, would seem to compel relief for parol purchasers of land under the same sort of circum-

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108. *See* 2 A. CORBIN, CONTRACTS § 443 (1950) (listing also Kentucky, Mississippi, and North Carolina).

109. 578 S.W.2d at 624.

110. *See* III AMERICAN LAW OF PROPERTY, *supra* note 7, § 11.7.

111. 578 S.W.2d at 624 (quoting Evans v. Belmont Land Co., 92 Tenn. 348, 365, 21 S.W. 670, 673-74 (1893) (quoting 2 J. POMEROY, A TREATISE ON EQUITY JURISPRUDENCE § 802 (1882))).

112. *See* 10 MEM. ST. U.L. REV., *supra* note 101, at 118.

113. 578 S.W.2d at 624.

114. *Id.*

stances that in the majority of jurisdictions usually requires relief under the doctrine of part performance. Indeed, the facts that were held to give rise to equitable estoppel in *Baliles* would probably compel relief under the doctrine of part performance: respondents' placing petitioner's assignor in possession, permitting him to construct improvements, and taking affirmative action to aid him in securing a loan for the construction.[115] However, equitable estoppel is the more flexible doctrine of the two, since its application is neither compelled by acts of possession, payment, or improvements, nor precluded by the absence of such acts.[116]

Unlike the Statute of Frauds of most states, the Tennessee statute does not apply to real estate brokerage contracts,[117] a fact recently lamented by the court of appeals in *Billington v. Crowder*.[118] The defendant landowner orally had expressed to plaintiff and other brokers his willingness to sell his property on certain terms but stipulated that he would not pay a broker's commission. Plaintiff produced a buyer whom the defendant rejected, and plaintiff filed suit seeking to recover a commission. Finding no express or implied obligation of the defendant to sell to any buyer produced by plaintiff or to pay any commission, the court rejected plaintiff's claim, and stated:

> There is considerable difference in the legal effect of say-

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115. *Id.*

116. *See* 10 MEM. ST. U.L. REV., *supra* note 101, at 119-20. This Note also suggests another difference, in that specific performance should be decreed on the basis of equitable estoppel only if restitution is not an adequate remedy. *Id.* at 120-27. One other difference is that while ordinarily only the party who has changed his position to his detriment may seek relief on the theory of equitable estoppel, the party who has not so changed position may be entitled to enforce the contract on the theory of part performance since the other party's acts prove the existence of the contract. *Compare* RESTATEMENT (SECOND) OF CONTRACTS § 197 (Tent. Draft No. 4, 1973) *with* Pearson v. Gardner, 202 Mich. 360, 168 N.W. 485 (1918).

117. *See* Alexander v. C.C. Powell Realty Co., 535 S.W.2d 154 (Tenn. Ct. App. 1975), *cert. denied, id.* (Tenn. 1976).

118. 553 S.W.2d 590 (Tenn. Ct. App.), *cert. denied, id.* (Tenn. 1977). Noting the numerous lawsuits based on oral brokerage contracts, the court stated, "Much difficulty and litigation could be avoided by legislation adding to the Statute of Frauds all contracts with brokers relating to the sale of realty . . . ." *Id.* at 595.

ing to a broker:

(1) You are authorized to try to sell my farm; and

(2) I will sell my farm on these terms to anyone. If you produce a buyer, I will sell to him; but you will have to get your commission from him.

In the first instance, there is an informal employment as agent with implied agreement to pay a commission for producing a buyer, which may be enforceable, though oral.

In the second instance, there is no agreement or expectation that the owner will pay any commission. This is merely an oral offer to sell land which is unenforceable.[119]

Although there is considerable difference in the legal effect of the two statements quoted above, there is obviously only slight difference in the terms of the two. When proof of the terms of brokerage contracts rests entirely on parol evidence, the possibility of mistake or of colorable claims by either brokers or sellers of real estate is great. As a practical matter, both parties should protect themselves by contracting in writing, even though a writing is not legally required.

### 2. Performance of the Contract

#### a. Financing Arrangements—Foreclosure

Real property subject to a mortgage or deed of trust frequently is sold at foreclosure for considerably less than its actual value. If the sale is conducted properly, however, the inadequacy of the sale price is not a ground to invalidate the sale "unless it is so great as to shock the conscience of the court."[120] A sale price equal to one-third of the value of the property sold at foreclosure was found sufficiently inadequate in *Watson v. United American Bank*.[121] This holding is important since Tennessee courts in past cases have not set aside foreclosure sales for inad-

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119. *Id.* at 593 (citations omitted).

120. Pugh v. Richmond, 58 Tenn. App. 62, 77, 425 S.W.2d 789, 796 (1967), *cert. denied, id.* (Tenn. 1968) (quoting Mitchell v. Sherrell, 11 Tenn. App. 210, 220 (1929), *cert. denied, id.* (Tenn. 1930)).

121. 588 S.W.2d 877 (Tenn. Ct. App.), *cert. denied, id.* (Tenn. 1979). A portion of this opinion concerning whether the relationship between tenants in common is a fiduciary one is discussed at text accompanying notes 10-15 *supra*.

equacy of price alone, but have always required the presence of other circumstances indicating inequity.[122] Although *Watson* is clear precedent for the proposition that a foreclosure sale may be set aside solely on the ground of inadequacy of price, plaintiffs in such cases would be prudent to plead any other possible circumstances showing inequity, however slight, since it is very difficult to predict whether an inadequate sale price will shock the conscience of a court. The court of appeals in *Watson* indicated that these other circumstances may be readily found. The court stated in dicta that the foreclosure sale in question could have been set aside even if the inadequacy of the sale price was not conscience-shocking, since the inadequate price was coupled with the failure of the holder of the trust deed to actually notify the debtors of the impending sale, another circumstance "rendering it inequitable for the sale to stand."[123] Since the foreclosed trust deed did not require actual notice[124] and the bank, in fact, did publish notice of foreclosure by newspaper in addition to posting notice at the front door of the county courthouse,[125] the court evidently applied quite literally the rule that only "slight proof of unfair conduct"[126] is necessary to set aside a foreclosure sale pursuant to a power of sale contained in a mortgage or deed of trust.[127]

In *Horne v. Payne*,[128] a case of first impression involving foreclosure under a deed of trust, the Tennessee Supreme Court held that an owner of property subject to a deed of trust may

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122. *See generally* 8 MEM. ST. U.L. REV. 871, 883-84 (1978) [hereinafter cited as 8 MEM. ST. U.L. REV.].

123. 588 S.W.2d at 882 (quoting Pugh v. Richmond, 58 Tenn. App. 62, 77, 425 S.W.2d 789, 796 (1967), *cert. denied, id.* (Tenn. 1968) (quoting Mitchell v. Sherrell, 11 Tenn. App. 210, 220 (1929), *cert. denied, id.* (Tenn. 1930))).

124. *Id.* at 882 n.3.

125. *Id.* at 879.

126. *Id.* at 882 (quoting Pugh v. Richmond, 58 Tenn. App. 62, 77, 425 S.W.2d 789, 796 (1967), *cert. denied, id.* (Tenn. 1968) (quoting Mitchell v. Sherrell, 11 Tenn. App. 210, 221 (1929), *cert. denied, id.* (Tenn. 1930))).

127. Foreclosure by power of sale involves sale by the mortgagee rather than by judicial process. *See generally* IV AMERICAN LAW OF PROPERTY, *supra* note 7, § 16.204; 8 MEM. ST. U.L. REV. 871, *supra* note 122. Apparently the sale in *Watson* was by power of sale, although the facts are not entirely clear in this regard.

128. 586 S.W.2d 101 (Tenn. 1979).

exercise a right of partial release provided for in the trust deed, thereby securing release of part of the property by tendering the amount of the debt allocable to that part, even though the debtor has defaulted and foreclosure proceedings have been commenced.[129] In so holding the court followed the rule prevailing in other jurisdictions[130] and approved a recent decision of the court of appeals.[131]

### b. Remedies for Breach

A remedy almost always available for breach of a land sale contract is specific performance, since each parcel of land is considered unique.[132] While uniqueness of land might seem somewhat irrelevant to the appropriateness of specific performance as a remedy for the seller, that remedy is nonetheless generally available to him. The Tennessee Supreme Court recently reaffirmed this rule in *Shuptrine v. Quinn.*[133] The court of appeals had found that the seller in a real estate contract breached by the buyer was limited to a damage remedy since the seller had failed to show that this remedy was inadequate.[134] The supreme court reversed, observing that, "more often than not, an award of damages is not an adequate remedy"[135] for breach of a land sale contract. Although the court indicated that specific performance is generally available when a buyer in a land sale contract defaults,[136] it did not foreclose the possibility that in some cases an award of damages would be an adequate remedy. In ordering specific performance, the court referred to the specific facts of *Shuptrine* that showed the remedy of damages to be

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129. *Id.* at 103.

130. *See* cases collected at Annot., 41 A.L.R.3d 7, 56-109 (1972).

131. Lambert v. Jones, 540 S.W.2d 256 (Tenn. Ct. App.), *cert. denied, id.* (Tenn. 1976).

132. *See generally* III AMERICAN LAW OF PROPERTY, *supra* note 7, § 11.68.

133. 597 S.W.2d 728 (Tenn. 1979).

134. *Id.* at 730.

135. *Id.*

136. The court quoted the reasons given in RESTATEMENT OF CONTRACTS § 360, Comment c (1932) in support of the seller's right to specific performance generally. 597 S.W.2d at 730.

inadequate.[137]

The remedies available to a buyer of property who is damaged by a mutual mistake concerning the quantity of land sold were discussed by the Tennesssee Supreme Court in *Mills v. Brown*.[138] The court stated that the usual remedy in sale by the acre cases is damages in the form of abatement of the purchase price.[139] Moreover, rescission is also available as an alternative remedy, and the election of remedies lies with the buyer.[140] Hence, the buyers in *Mills* were entitled to take advantage of appreciating land values by electing to affirm the sale and reselling at a profit, and in doing so did not forego their right to recover damages from their sellers.[141]

### 3. Sale of Defective New Housing

In recent years, many jurisdictions have rejected application of the rule of caveat emptor to the sale of new housing by a builder-vendor and have afforded relief to buyers of defective new housing on the basis of an implied warranty of fitness or habitability.[142] Tennessee is not among those jurisdictions,[143] but the Tennessee courts have carved out exceptions to the rule of

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137. Those facts included the uniqueness of the property, a $325,000.00 house; the limited number of prospective purchasers of such a house; and the seller's known desire to convert his investment quickly into cash. *Id.* at 731.

138. 568 S.W.2d 100 (Tenn. 1978).

139. *Id.* at 102. The corollary of this rule is that abatement is generally not permitted when the sale is in gross or by tract, in the absence of fraud. *Id.* See Vaughn v. Ray, 598 S.W.2d 772, 774 (Tenn. 1980), in which it was held that the buyers of a tract in gross were entitled to an abatement of the purchase price when the deficiency was 45.53% of the acreage stated.

140. 568 S.W.2d at 102.

141. *Id.* at 103. An extensive discussion of the remedies available to a land purchaser damaged by mutual mistake is found in Isaccs v. Bokor, 566 S.W.2d 532 (Tenn. 1978).

142. *See* Humber v. Morton, 426 S.W.2d 554 (Tex. 1968); Tavares v. Horstman, 542 P.2d 1275 (Wyo. 1975). The cases are collected at Annot., 25 A.L.R.3d 383 (1969).

143. The leading case for the proposition that caveat emptor applies to sales of realty is Smith v. Tucker, 151 Tenn. 347, 270 S.W. 66 (1925). A recent case dealing with the applicability of the doctrine of caveat emptor is Shores v. Spann, 557 S.W.2d 67 (Tenn. Ct. App.), *cert. denied, id.* (Tenn. 1977), *noted in* 8 MEM. ST. U.L. REV. 902 (1978).

caveat emptor and have characterized it as "fast becoming obsolete."[144] In recent Tennessee cases the courts have recognized various theories for recovery by buyers of defective housing that mitigate the harshness of the caveat emptor doctrine and indicate that it may soon be abrogated completely.

The most recent case that dealt with the sale of defective housing by a builder-vendor, *Zack Cheek Builders, Inc. v. McLeod*,[145] was decided by the Tennessee Supreme Court. The purchasers sought to recover damages for expenses they incurred in repairing their home after heavy rains caused landslides behind the house. They brought suit on several theories,[146] but the trial judge directed a verdict for defendants on all theories except negligent misrepresentation, the only theory involved on appeal. The recognition of a cause of action based upon the "newly-emergent"[147] theory of negligent misrepresentation represents a new addition to the list of exceptions to the caveat emptor rule in Tennessee,[148] a list that also includes exceptions for active fraud[149] and failure to disclose a known dangerous condition.[150]

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144. *See* Robinson v. Brooks, 577 S.W.2d 207, 208 (Tenn. Ct. App. 1978), *cert. denied, id.* (Tenn. 1979); Cooper v. Cordova Sand & Gravel Co., 485 S.W.2d 261, 267 (Tenn. Ct. App. 1971), *cert. denied, id.* (Tenn. 1972).

145. 597 S.W.2d 888 (Tenn. 1980).

146. The theories included negligence, strict liability, implied warranty, and negligent misrepresentation. *Id.* at 889.

147. *Id.*

148. The theory had earlier been approved in a case involving the negligent preparation of a survey and plat, Tartera v. Palumbo, 224 Tenn. 262, 453 S.W.2d 780 (1970), and by the courts of appeals in cases involving the sale of dwellings, Chastain v. Billings, 570 S.W.2d 866 (Tenn. Ct. App.), *cert. denied, id.* (Tenn. 1978); Hunt v. Walker, 483 S.W.2d 732 (Tenn. Ct. App. 1971), *aff'd, id.* (Tenn. 1972).

149. *See* Hunt v. Walker, 483 S.W.2d 732 (Tenn. Ct. App. 1971), *aff'd, id.* (Tenn. 1972); Dozier v. Hawthorne Dev. Co., 37 Tenn. App. 279, 262 S.W.2d 705, *cert. denied, id.* (Tenn. 1953). Relief was denied in *Dozier* because the court found that no representations had been made.

150. *See* Belote v. Memphis Dev. Co., 208 Tenn. 434, 346 S.W.2d 441 (1961). This exception, based upon RESTATEMENT OF TORTS § 353 (1934), was stated as follows: "[T]he vendor is liable in his failure to disclose a dangerous condition known to him, where he should have realized that the vendee could not know and probably would not discover the condition or its potentiality for harm." *Id.* at 438, 346 S.W.2d at 442. *Belote* involved personal injuries, but the exception there recognized was held to permit recovery for property damages

The tort of negligent misrepresentation is explained in the Restatement (Second) of Torts as follows:

> One who, in the course of his business, profession or employment, or in any transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.[151]

While recognition of the tort of negligent misrepresentation obviously represents a further chipping away at the rule of caveat emptor, it does not provide as broad a theory of recovery as does implied warranty since a plaintiff alleging negligent misrepresentation must prove defendant's negligence. In an action for breach of implied warranty, defendant's negligence or lack thereof is irrelevant.[152] Furthermore, contributory negligence is an affirmative defense in an action based on negligent misrepresentation,[153] while the availability of contributory negligence as a defense in an action based on an implied warranty is questionable.[154] This defense proved effective to defeat plaintiffs' claim in *McLeod*.[155]

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in Cooper v. Cordova Sand & Gravel Co., 485 S.W.2d 261, 267 (Tenn. Ct. App. 1971), *cert. denied, id.* (Tenn. 1972).

151. RESTATEMENT (SECOND) OF TORTS § 552(1) (1965).

152. *See* Rutledge v. Dodenhoff, 254 S.C. 407, 414, 175 S.E.2d 792, 795 (1970); 8 MEM. ST. U.L. REV. 902, 910-11 (1978).

153. RESTATEMENT (SECOND) OF TORTS § 552A (1965).

154. Although a purchaser may have a duty to inspect under the implied warranty of habitability theory, *see* text accompanying notes 160-63, *infra*, a federal district court making an educated guess about whether contributory negligence is a defense in a breach of implied warranty products liability case in Tennessee has stated: "In Tennessee, an action for breach of warranty has been viewed generally as one sounding in contract, as opposed to tort, law. Thus, it would seem that the tort concept of contributory negligence would have no application to such actions." Holt v. Stihl, Inc., 449 F. Supp. 693, 694 (E.D. Tenn. 1977) (citations omitted).

155. Zack Cheek Builders, Inc. v. McLeod, 597 S.W.2d 888 (Tenn. 1980). The primary issue in this case was, in fact, whether the trial judge had abused his discretion in permitting the defendants to amend their answer to add the defense of contributory negligence after judgment had been entered. The court held that he had not, since the issue of contributory negligence had been tried

In their petition for rehearing, the purchasers urged the supreme court to adopt and apply an implied warranty theory. In its opinion on the petition, the court stated that no implied warranties are recognized in the sale of real estate in Tennessee, and added:

> But even if we were to reverse our previous position on this question, an implied warranty of habitability would not be applicable to this case, because the disputed issue involved a problem with the land itself, and not with the dwelling situated on it. Since there is no allegation in the record that the house was defective in any way, or unfit for habitation, there would be no liability on the part of the builder-vendor under an implied warranty theory.[156]

Other courts, however, have held that implied warranties apply not only to dwellings but also to the sites upon which they are located. In a Pennsylvania case the court said:

> The developer holds himself out, not only as a construction expert, but as one qualified to know what sorts of lots are suitable for the types of homes to be constructed. Of the two parties to the transaction, the builder-vendor is manifestly in a better position than the normal vendee to guard against defects in the home site and if necessary to protect himself against potential but unknown defects in the projected home site.[157]

Although most of the courts that have applied implied warranties have done so in cases involving structural defects, several courts have found that an implied warranty was breached because of the unsuitable nature of the site on which the home was located.[158] The rationale of the implied warranty theory is that a buyer who is not in a position to discover defects should be able

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by implied consent of all parties. *Id.* at 891-92.

156. *Id.* at 892 (opinion on petition to rehear).

157. Elderkin v. Gaster, 447 Pa. 118, 130, 288 A.2d 771, 777 (1972).

158. *See, e.g.*, Mulhern v. Hederich, 163 Colo. 275, 430 P.2d 469 (1967) (soil defect caused foundation of home to shift); Glisan v. Smolenske, 153 Colo. 274, 387 P.2d 260 (1963) (same); Waggoner v. Midwestern Dev., Inc., 83 S.D. 57, 154 N.W.2d 803 (1967) (water from underground spring seeped into basement); House v. Thornton, 76 Wash. 2d 428, 457 P.2d 199 (1968) (unstable land caused foundation of home to shift).

to rely on a builder-vendor who holds himself out as skilled.[159] Hence, it is difficult to ascertain why the warranty should not also extend to the land on which the home is located, since the buyer ordinarily is unable to discover not only structural but also geological defects, and the builder-vendor ordinarily holds himself out as skilled not only in home construction but also in site selection.

Even if the court in *McLeod* had adopted and applied an implied warranty theory applicable to the sale of homes and home sites, plaintiffs might have been barred from recovery. There was evidence that the plaintiffs did not, before buying, look at the backyard, which was laced by ditches up to two feet deep, and plaintiffs' own geological experts testified that " 'anybody, including the plaintiffs', could have recognized the existence of previous landslides by a visual inspection of the backyard."[160] The court noted that under existing Tennessee law, a vendor is not required to disclose dangerous conditions " '*unless* the condition is one which . . . an inspection by the vendee would not discover.' "[161] Under the implied warranty of habitability theory, it may be that no implied warranty arises whenever a reasonable inspection would reveal the defect and its risks.[162] In the analogous situation involving the sale of personal property, the Uniform Commercial Code provides that implied warranties that would have otherwise existed are excluded.[163]

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159. *See* Tavares v. Horstman, 542 P.2d 1275, 1279 (Wyo. 1975).

160. Zack Cheek Builders, Inc. v. McLeod, 597 S.W.2d 888, 891 (Tenn. 1980). This was apparently the contributory negligence for which plaintiffs were found guilty by the jury.

161. *Id.* at 892 (quoting Belote v. Memphis Dev. Co., 208 Tenn. 434, 440, 346 S.W.2d 441, 443 (1961) (quoting RESTATEMENT OF TORTS § 353, Comment c (1934))). The vendor is also required to disclose dangerous conditions if, although they would be revealed by a buyer's inspection, " 'the vendor realizes the risk involved therein and has reason to believe the vendee will not realize it.' " *Id.*

162. No case dealing explicitly with this possibility has been found, although several applying the implied warranty theory have emphasized the fact that the defect was not one discoverable by the average home buyer. *See* Theis v. Heuer, 264 Ind. 1, 7, 280 N.E.2d 300, 303 (1972).

163. TENN. CODE ANN. § 47-2-316 (3)(b) (1979) provides: "[W]hen the buyer before entering into the contract has examined the goods . . . as fully as he desired or has refused to examine the goods there is no implied warranty

In a case decided by the court of appeals prior to the decision in *McLeod*, purchasers of defective new housing obtained relief under a theory that should contribute significantly to the further decimation of the rule of caveat emptor in Tennessee. In *Robinson v. Brooks*[164] the purchasers of a home that leaned and cracked as a result of a landslide at the site after the purchasers took possession filed suit against the builder-vendors and sought rescission of the sale contract and damages. The chancellor held for the purchasers and found the vendors negligent in assuming, without expert advice, that the site was suitable for building. The court of appeals affirmed and allowed rescission not on the basis of the negligence of the vendors but on the basis of the mutual mistake of the vendors and purchasers. The court stated the general rule that a contract may be rescinded if the parties are mutually mistaken, the mistake is material to the object of the contract, and the complainant was not negligent and suffered injury;[165] the court found that the facts of *Robinson* presented a proper case for rescission:

> The mistake . . . was mutual. Because of the lack of sufficient testing at the site, defendants were unaware of the dangerous nature of the colluvial soil or content of the fill. Plaintiffs, lacking any specialized construction or real estate knowledge, cannot be held to have the sophisticated knowledge required to recognize these difficulties upon a mere visual inspection of the premises.[166]

The mutual mistake theory of *Robinson* should prove to be a powerful new weapon in the arsenal of the purchaser of defective housing in Tennessee. The court stated that actual fraud

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with regard to defects which an examination ought in the circumstances to have revealed to him." *See also* Cardwell v. Hackett, 579 S.W.2d 186 (Tenn. Ct. App.), *cert. denied, id.* (Tenn. 1978).

Interestingly, the Uniform Land Transactions Act, which borrows heavily from the U.C.C., establishes an implied warranty of quality in § 2-309, and the methods of excluding or modifying that warranty, which are provided in § 2-311, are strikingly similar to those found in U.C.C. § 2-316, except that no provision concerning inspection by the buyer is included.

164. 577 S.W.2d 207 (Tenn. Ct. App. 1978), *cert. denied, id.* (Tenn. 1979).

165. *Id.* at 208-09.

166. *Id.* at 210.

was not necessary.[167] The exception for failure to disclose a known dangerous condition was not applicable because the condition was not known to the vendor.[168] The theory of negligent misrepresentation was not applicable because "no . . . representations were made . . . concerning the quality of construction or suitability of the building site."[169] Even under an implied warranty theory, plaintiffs might have been barred since the defect was in the land rather than the house.[170] Although the court in *Robinson* made no mention of implied warranties, it referred to the doctrine of caveat emptor as "fast becoming obsolete"[171] and cited Tennessee authorities "for comprehensive discussion of the inapplicability of caveat emptor in land sale contracts."[172] Although the court followed these remarks with the caveat that "rescission . . . is not looked upon lightly . . . [and] [i]t is available only under the most demanding circumstances,"[173] it would appear that the mutual mistake theory as applied is almost as broad as that of implied warranty. Neither theory requires that fraud or negligence of the vendor be shown, and both theories allow the purchaser to rescind or affirm the contract and collect

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167. *Id.* at 208-09.

168. The extent to which a vendor in Tennessee may be liable for failure to disclose a dangerous condition of which he *should have known* is unclear. Since the RESTATEMENT OF TORTS § 353 (1934) was adopted in Belote v. Memphis Dev. Co., 208 Tenn. 434, 236 S.W.2d 441 (1961), that section has been amended to provide that a vendor is liable for failure to disclose dangerous conditions of which he actually knows or *has reason to know.* RESTATEMENT (SECOND) OF TORTS § 353 (1965). *See also* Gasteiger v. Gillenwater, 57 Tenn. App. 206, 417 S.W.2d 568 (1966), *cert. denied, id.* (Tenn. 1967). "Knowledge of the existence of the dangerous condition by a vendor will be presumed where the building or dwelling sold was built by the vendors' workmen." *Id.* at 211-12, 417 S.W.2d at 571.

169. 577 S.W. at 207-08.

170. *See* text accompanying notes 144-59 *supra.*

171. 577 S.W.2d at 208.

172. *Id.* at 208 (citing Cooper v. Cordova Sand & Gravel Co., 485 S.W.2d 261 (Tenn. Ct. App. 1971), *cert. denied, id.* (Tenn. 1972) and Combs v. Hurst, No. 82 Hamblen Law (Tenn. Ct. App. E.D. Dec. 6, 1977) (unpublished opinion)). In another unpublished decision the court of appeals held that a builder-vendor of defective housing could be held liable either on a theory of strict liability or implied warranty. *See* Vincent v. Jim Walter Homes, Inc., No. 470 Hamilton Law (Tenn. Ct. App. E.D. Aug. 15, 1978), *cert. denied,* (Tenn. 1979).

173. 577 S.W.2d at 208.

damages.[174] Allowing rescission for mutual mistakes concerning the quality of the property sold appears to be little more than a disguised application of the doctrine of implied warranty.[175]

### *B. The Deed*

#### 1. Testamentary Character

An instrument alleged to be a deed, if testamentary in character, is void if not executed in accordance with the statutory requirements for wills.[176] In *Wright v. Huskey*[177] the court of appeals reiterated the test established by earlier Tennessee cases for determining whether an instrument is testamentary in character: the intention of the maker of the instrument is controlling, and if no present interest is conveyed, the instrument will be found testamentary.[178] The "deed" involved in *Wright* reserved to the grantor a life estate and an unlimited power to sell the property. The question before the court was whether the grantor was entitled to have title to the fee quieted in her. The court answered affirmatively, finding that the instrument was not a valid deed because it did not convey a present interest to

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174. See Isaacs v. Bokor, 566 S.W.2d 532 (Tenn. 1978) for discussion of the remedies available to a land purchaser damaged by mutual mistake.

It should be noted that a purchaser is not entitled to rescission on the basis of mutual mistake if the purchaser was contributorily negligent, *see* text accompanying note 165 *supra*, while contributory negligence may not be a bar to recovery under an implied warranty theory. *See* note 154 *supra* and text accompanying notes 160-63 *supra*.

175. Rescission on the basis of mutual mistake has been allowed in a few other jurisdictions that purport to adhere to the doctrine of caveat emptor. *See* cases collected at Annot., 50 A.L.R.3d 1188 (1973). In one such case, Davey v. Brownson, 3 Wash. App. 820, 478 P.2d 258 (1970), defendant argued that under the theory of mutual mistake, "any contract can be set aside under a set of circumstances rendering a building no longer attractive to a purchaser." *Id.* at 825, 478 P.2d at 261. The court disagreed, holding that "a purchaser is bound by facts a reasonable investigation would disclose." *Id.* Whether this renders the mutual mistake theory substantially different from the implied warranty theory is questionable. *See* text accompanying notes 160-63 *supra*.

176. The Tennessee statutes concerning execution of wills are TENN. CODE ANN. §§ 32-101 to -111 (1977).

177. 592 S.W.2d 899 (Tenn. Ct. App. 1979), *permission to appeal denied, id.* (Tenn. 1980).

178. *Id.* at 901.

the named grantees, and that it was not a valid will because of failure to comply with the statutory requirements for wills.[179] The holding that no present interest was conveyed was based in part on the grantor's testimony about the purpose of the instrument, which was to deprive her husband of any claim against the property while reserving for herself the use of the property and the right to sell it.[180] The court stated that this testimony showed "that she did not intend to grant a present interest."[181] Furthermore, the court viewed its holding as a logical corollary of the long-established rule that a grant of a life estate coupled with a grant of an unlimited power of disposition is a grant of the fee.[182]

The *Wright* decision does little to clarify the law in this confused area except to show that the only safe generalization that can be made is that the determination whether a particular instrument is testamentary depends on the particular facts relevant to the intent of the maker of the instrument. In *Wright*, the only power of disposition reserved to the grantor-life tenant was the power to sell. In a previous case in which an instrument was held testamentary, the power "to sell or dispose" was reserved to the grantor-life tenant.[183] In another case, an instrument was held to be a valid deed that transferred a present interest even though a power of revocation, a power presumably larger than the mere power to sell reserved in *Wright*, was reserved to the grantor-life tenant.[184] In addition, although the court in *Wright* analogized its holding to the long-established

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179. *Id.* at 902. It should be noted that even if the instrument had been executed in compliance with the requirements for wills, the plaintiff in *Wright* could have revoked the will. Often, however, the question whether an instrument is a deed or will does not arise until after the death of the maker of the instrument.

180. *Id.* at 901.

181. *Id.*

182. *Id.* at 902.

183. Ellis v. Pearson, 104 Tenn. 591, 592, 58 S.W. 318, 318 (1900).

184. Stamper v. Venable, 117 Tenn. 557, 97 S.W. 812 (1906). In this case the court found significant the fact that the grantor's life estate was not reserved in the original deed, but was conveyed to him by an instrument executed by his grantee contemporaneously with the execution of the original deed. *Id.* at 595, 97 S.W. at 814.

rule that a grant of life estate coupled with an unlimited power of disposition is a grant of the fee, the cases cited for this proposition[185] predate the enactment of a statute that presumably changes this rule and preserves the future estate insofar as the power of disposition remains unexercised.[186]

### 2. Rescission and Reformation

Deeds may be rescinded or reformed on several well-established grounds, such as mistake, fraud, duress, and undue influence.[187] A novel ground for rescission was urged on the court of appeals by plaintiffs in *McGill v. Headrick*,[188] who argued that their failure to read deeds that they signed as grantors was cause to set aside the deeds. The court resolved this question of first impression by applying the rule of several Tennessee contracts cases that one's failure to read a contract that he signs is no defense to its enforcement against him, in the absence of fraud.[189] The court also rejected plaintiffs' assertion that the deeds were invalid because no consideration was paid, and the court reiterated the established rule that a deed which recites a valuable consideration, even though none was paid, "passes title

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185. Deadrick v. Armour, 29 Tenn. (10 Hum.) 588 (1850); Davis v. Richardson, 18 Tenn. (10 Yer.) 290 (1837); David v. Bridgman, 10 Tenn. (2 Yer.) 557 (1831).

186. TENN. CODE ANN. § 64-106 (1976) provides:

> When the unlimited power of disposition, qualified or unqualified, not accompanied by any trust, is given expressly, in any written instrument, to the owner of any particular estate for life or years, legal or equitable, such estate is changed into a fee absolute as to right of disposition, and rights of creditors and purchasers, but subject to any future estate limited thereon or executory devise thereof, in event and so far as the power is not executed or the property sold for the satisfaction of debts during the continuance of the particular estate.

Cases decided since the enactment of this statute have not been consistent. *See* Sewell, *supra* note 1, at 186-87.

187. *See generally* III AMERICAN LAW OF PROPERTY, *supra* note 7, § 12.86.

188. 578 S.W.2d 377 (Tenn. Ct. App. 1978), *cert. denied, id.* (Tenn. 1979).

189. *Id.* at 383 (citing Hardin v. Combined Ins. Co. of America, 528 S.W.2d 31, 37 (Tenn. Ct. App.), *cert. denied, id.* (Tenn. 1975)); Baker v. Baker, 24 Tenn. App. 220, 235, 142 S.W.2d 737, 746, *cert. denied, id.* (Tenn. 1940).

in the absence of fraud or the intervention of the rights of third parties."[190]

A more traditional ground for rescission—undue influence—was raised in two cases decided by the Tennessee Supreme Court. In *Richmond v. Christian*[191] the sisters of the defendant sought to set aside their mother's deed of all her real estate to the defendant for no consideration. The supreme court accepted without discussion the lower courts' finding that a confidential relationship existed between defendant and his mother and applied the established rule that a presumption of invalidity attaches to gifts made to the dominant party by the other in a confidential relationship.[192] Noting that proof of fairness may suffice to rebut the presumption, the court stated that in certain cases only proof that the donor received independent advice respecting the consequences and advisability of the gift will suffice.[193] Disagreeing with the court of appeals, the supreme court held that proof of such advice was necessary under the facts of the case at bar: the donor was impoverished by the gift; she was feeble and dependent on defendant who lived with her; and she suddenly had changed her prior plan to divide her estate equally among her three children.[194] Finally, the court held that independent advice was not proven by evidence that defendant's attorney, in the presence of defendant and two of defendant's friends, had explained the deed to the grantor and had received an affirmative reply upon asking her whether she desired to transfer all her land to defendant.[195]

The claim that undue influence had been exerted by an adult child against her parent to obtain a deed of gift was raised again in *Kelly v. Allen*.[196] In this case the court made clear, as it had failed to do in *Richmond*, that "the normal relationship between a mentally competent parent and an adult child is not *per se* a confidential relationship and raises no presumption of the

190. 578 S.W.2d at 382 (citing Battle v. Claiborne, 133 Tenn. 286, 180 S.W. 584 (1915)).

191. 555 S.W.2d 105 (Tenn. 1977).

192. *Id.* at 107.

193. *Id.* at 107-08.

194. *Id.* at 108-09.

195. *Id.* at 109.

196. 558 S.W.2d 845 (Tenn. 1977).

invalidity of a gift from one to the other."[197] The court further stated:

> In order for such a presumption to arise there must be a showing . . . of dominion and control by the stronger . . . or . . . of senility or physical and mental deterioration of the donor or that fraud or duress was involved, or other conditions which would tend to establish that the free agency of the donor was destroyed and the will of the donee was substituted therefor.[198]

Since none of these things was shown in *Kelly*, the deed was held valid.

A mutual mistake of the parties to a deed on a material matter has been relied upon for reformation in many Tennessee cases.[199] Although ordinarily a unilateral mistake is not a basis for reformation, a recent case decided by the court of appeals established that a grantor's unilateral mistake—his failure to restrict expressly the use of the land granted to certain purposes—is a basis for reformation if the deed is a voluntary one for no consideration.[200] The court noted that all jurisdictions that have considered the question follow this rule.[201] Allowing reformation in favor of the grantor in such circumstances seems a reasonable exception to the usual rule that a mutual mistake is required, since the conveyance is, after all, gratuitous. An unfortunate consequence of the rule is that titles obtained gratuitously will be less certain, since the suit for reformation may be maintained by the grantor or by his heirs or devisees after his death.[202]

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197. *Id.* at 848. The court noted other Tennessee cases in which this rule is stated. *See* Robinson v. Robinson, 517 S.W.2d 202, 206 (Tenn. Ct. App.), *cert. denied, id.* (Tenn. 1974); Iacometti v. Frasinelli, 494 S.W.2d 496, 499 (Tenn. Ct. App.), *cert. denied, id.* (Tenn. 1973).

198. 558 S.W.2d at 848. Under these criteria, the facts in *Richmond* warranted a finding that a confidential relationship existed. *See* text accompanying notes 193-94 *supra*.

199. *See* Hazlett v. Bryant, 192 Tenn. 251, 241 S.W.2d 121 (1951); Alexander v. Shapard, 146 Tenn. 90, 240 S.W. 287 (1921).

200. Davidson v. Lane, 566 S.W.2d 891 (Tenn. Ct. App.), *cert. denied, id.* (Tenn. 1978).

201. *Id.* at 892.

202. *Id.* The suit in *Davidson* was in fact brought by the grantor's heirs.

### C. *The Recording System—Mechanics' and Materialmen's Liens*[203]

The Tennessee statutes providing for mechanics' and materialmen's liens,[204] which are effective from the "time of the visible commencement"[205] of the work and thus have priority even over interim recorded encumbrances, are strictly construed. Lien claimants must comply literally with statutory requirements in order to be protected.[206] That less than literal compliance will not suffice recently was illustrated in *In re Gasteiger*.[207] In that case the lien claimant took advantage of a recent enactment[208] by filing, on behalf of the landowner to whom he had furnished materials, a notice of completion, naming himself as the person to whom notice of unregistered lien claims were to be communicated by registered or certified mail within ten days or be forever barred. The materialman apparently sought to bar other claims and ensure the priority of his own claim by this procedure. He failed, however, to mail notice of his claim to the person listed in the notice of completion, that is, himself, within the ten day period. The court held that the materialman's lien was lost because of his failure to comply with a " 'material requirement' " of the statute.[209]

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203. The only case of interest involving the recording system during the period covered by this survey other than those dealing with mechanics' and materialmen's liens was Howard v. United States, 566 S.W.2d 521, 527 (Tenn. 1978), in which the supreme court held that a notice of a federal tax lien was legally registered under TENN. CODE ANN. § 64-2110 (1976) although it was neither acknowledged nor witnessed as required for other instruments in TENN. CODE ANN. § 64-2201 (1976). In a legislative development the Underground Utility Damage Prevention Act that became effective in 1978 requires utility operators to file notice of the location of underground facilities with the register of deeds and requires that such operators be notified by persons planning excavation or demolition in that location. TENN. CODE ANN. §§ 65-3201 to -3212 (Supp. 1980).

204. TENN. CODE ANN. §§ 64-1101 to -1158 (1976).

205. TENN. CODE ANN. § 64-1104 (Supp. 1980).

206. *See* Eatherly Constr. Co. v. DeBoer Constr., Inc., 543 S.W.2d 333 (Tenn. 1976) (per curiam), *discussed in* Sewell, *supra* note 1, at 199.

207. 471 F. Supp. 13 (E.D. Tenn. 1977).

208. Act of May 20, 1975, ch. 307, §§ 1-3, 1975 Tenn. Pub. Acts 688 (codified at TENN. CODE ANN. §§ 64-1145 to -1147 (1976)).

209. 471 F. Supp. at 15.

On the other hand, the courts are reluctant to impose requirements not found in the statutes concerning mechanics' and materialmen's liens.[210] The court of appeals recently determined that a lien claimant who has complied with all requirements of the mechanics' and materialmen's liens statutes need not also file *lis pendens* pursuant to Tennessee Code Annotated § 20-301[211] in order to be protected against bona fide purchasers for value without actual notice of the lien.[212] The court indicated that such purchasers would be protected if no liens were filed and no notice of any kind was given;[213] however, if the lien claimant has complied with the requirements of the statutes applicable to him, he will have given sufficient notice of his lien to subsequent purchasers.

To preserve the priority of his lien against subsequent purchasers or encumbrancers for value without notice, the mechanic or materialman must file a sworn statement for record within ninety days after the completion of construction or the occurrence of other events specified by statute.[214] In *Cooper v. Hunter*,[215] the court of appeals held that the ninety-day period began to run when the construction, by the lienor's own admission, was virtually completed. Noting that substantial completion is sufficient for lien purposes, the court stated that mere trivial imperfections requiring correction, especially those disclosed by a public inspector and of which the owner has no

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210. *See* General Elec. Supply Co. v. Arlen Realty & Dev. Corp., 546 S.W.2d 210, 213 (Tenn. 1977).

211. TENN. CODE ANN. § 20-301 (1955) (current version at TENN. CODE ANN. § 20-3-101 (1980)).

212. Moore-Handley, Inc. v. Associates Capital Corp., 576 S.W.2d 354 (Tenn. Ct. App.), *cert. denied, id.* (Tenn. 1978).

213. *Id.* at 356 (citing Land Developers, Inc. v. Maxwell, 537 S.W.2d 904 (Tenn. 1976); American Nat'l Bank & Trust Co. v. Wilds, 545 S.W.2d 749 (Tenn. Ct. App. 1976), *cert. denied, id.* (Tenn. 1977)).

214. TENN. CODE ANN. § 64-1112 (Supp. 1980) provides that the statement must be filed "within ninety (90) days after the building or structure or improvement is demolished, altered and/or completed, . . . or is abandoned and the work not completed, or the contract of the lienor expires or is terminated or he is discharged." Alternatively, the lienor may protect himself by recording the contract to supply materials or services.

215. 569 S.W.2d 852 (Tenn. Ct. App.), *cert. denied, id.* (Tenn. 1978).

knowledge, will not toll the running of the ninety-day period.[216] Subsequent purchasers and encumbrancers must be able to rely at some point on the public records, and a lien claimant should not be permitted to extend the period during which he must file by intentionally or unintentionally failing to correct all imperfections in construction.[217]

### *D. Adverse Possession*

The acts necessary to establish title by adverse possession were considered recently by the Tennessee Supreme Court in *Stoker v. Brown*,[218] an interesting case involving a private cemetery. The defendants, on whose farm the cemetery was located, claimed to have acquired an unfenced and unused portion of the cemetery tract by adverse possession. The defendants were deeded the farm some thirty years before suit was brought, but the cemetery tract was excluded expressly by the deed. Defendants used the disputed portion of the tract as a pasture until they began cultivating it some nine years before suit was brought. Rejecting defendants' claim, the court held that defendants' acts of possession did not constitute adverse possession: "Occasional grazing and cultivation are insufficient to establish adverse possession."[219] The court also stated another reason for the failure of defendants' claim of adverse possession: "[T]he express exclusion of this tract from every conveyance in the past eighty years conclusively demonstrates that the various owners of the surrounding farm, the defendants and their predecessors, were making no claim, adverse or otherwise, to this cemetery

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216. *Id.* at 855.

217. In other cases concerning the enforcement of mechanics' and materialmen's liens, it was held that a materialman must prove that the materials furnished, if readily usable in other buildings, were in fact used in the building against which the lien is sought, McCoy Lumber Indus., Inc. v. Parkview Towers, Inc., 567 S.W.2d 475 (Tenn. Ct. App.), *cert. denied, id.* (Tenn. 1978), and that mechanics' and materialmen's liens may not attach to a public housing project, even though owned by a private corporation, since the overall character of such property is public and public policy disallows the enforcement of such liens against public property, V.L. Nicholson Co. v. Transcon Inv. & Financial Ltd., 595 S.W.2d 474, 484-85 (Tenn. 1980).

218. 583 S.W.2d 765 (Tenn. 1979).

219. *Id.* at 767.

tract."[220] According to the court, defendants had made no hostile claim to the land until shortly before suit was brought, when plaintiffs drove across the disputed tract in order to reach the portion of the cemetery enclosed by a fence.[221] The court's suggestion that one cannot acquire land by adverse possession if one's deed expressly excludes the land adversely possessed is confusing, since color of title, or a document purporting to convey title to the adverse possessor, is not a requirement for common-law adverse possession.[222] Defendants in *Stoker* apparently sought to establish title by common-law adverse possession rather than by the shorter term statutory adverse possession, for which color of title is required.[223] But irrespective of whether one has color of title, title may not be obtained by adverse possession if possession is by permission of the true owner. The court was apparently concerned with this point since it noted the absence of a hostile claim. The implication that permissive possession may be inferred from the fact that the possessor's deed expressly excludes the property seems questionable, since the question whether one's possession is hostile or permissive should be determined primarily by reference to the possessor's conduct. Certainly the better ground for rejection of the claim of adverse possession in *Stoker* was the ground first stated by the court, namely the insufficiency of the acts of possession.

The acts of possession necessary to establish adverse possession were also considered in a recent court of appeals case. The plaintiff in *Hargis v. Collier*[224] claimed to have acquired by adverse possession a portion of a public road that he had closed off by fencing after it had fallen into disuse. The fence apparently served no purpose other than to prevent public use of the road. The court stated that such "casual fencing" actually weakened plaintiff's claim of adverse possession:

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220. *Id.* at 768.

221. *Id.*

222. Cannon v. Phillips, 34 Tenn. (2 Sneed) 210 (1854).

223. *See* TENN. CODE ANN. §§ 28-201, 28-205 (1955) (current version at TENN. CODE ANN. §§ 28-2-101, 28-2-105 (1980)).

224. 578 S.W.2d 953 (Tenn. Ct. App. 1978), *cert. denied, id.* (Tenn. 1979). For a discussion of the portion of this opinion dealing with abandonment of easements see text accompanying notes 80-84 *supra*.

> By casual fencing is meant the making of an inclosure by joining onto existing fences erected for purposes other and different from, and wholly foreign to, the purposes for which the inclosure thus made is to be used.
>
> . . . .
>
> Casual fencing is a weakening element in a limitation claimant's case, and where the fencing is not only casual but practically the whole of it constitutes a purpresture in the public way, and incloses a temporarily unused but substantial portion of the public streets, the claimant's asserted claim of right remains far from proved when nothing more than grazing within such fences is shown.[225]

Whether particular acts of ownership constitute adverse possession is determined by consideration of the ordinary uses of similar lands by their owners.[226] An average owner would act as a permanent owner, and casual fencing "bespeaks transiency."[227] Moreover, neither casual fencing nor the grazing of stock are so unmistakably referable to a claim of adverse possession as to give the true owner notice that an adverse claim is being made. Acts consistent with a "neighborly temporary purpose to use the land at the sufferance of the true owner"[228] will not constitute adverse possession.

## V. TRUSTS

### *A. Acceleration of Remainders*

When a surviving spouse renounces a life interest given him by the will of his deceased spouse in favor of an elective share of the decedent's estate,[229] the renunciation is treated as equivalent to the death of the surviving spouse.[230] In such situations, the

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225. 578 S.W.2d at 959 (quoting 3 AM. JUR. 2d *Adverse Possession* § 24 (1962) (footnotes omitted)). The court also found that plaintiffs' statement to one defendant permitting his continued use of the road "refuted any adverse claim" and that plaintiff had not adversely possessed for the required length of time. 578 S.W.2d at 959.

226. *See* 7 R. POWELL, *supra* note 6, § 1018.

227. Wynn v. Mendoza, 287 S.W.2d 217, 223 (TEX. Civ. App. 1956).

228. *Id.*

229. *See* TENN. CODE ANN. §§ 31-601 to -606 (Supp. 1980).

230. *See* Clark v. Board of Trustees, 596 S.W.2d 804, 806 (Tenn. 1980); Albright v. Albright, 192 Tenn. 326, 334, 241 S.W.2d 415, 418 (1951).

doctrine of acceleration of remainders normally applies. Under this doctrine the remaindermen whose possession was postponed by the terms of the will for the benefit of the preceding life estate will come into immediate enjoyment, unless the testator manifested a contrary intent.[231] Language in a 1951 Tennessee case that indicated the doctrine should never apply if the remainder is a contingent one[232] was reconsidered recently by the supreme court in *Clark v. Board of Trustees*.[233] Stating that the testator's intent, and not the characterization of the remainderman's interest as vested or contingent, is the "ultimate key" in determining whether the doctrine of acceleration of remainders applies,[234] the court held that the contingent remainder[235] created by the testamentary trust in *Clark* was accelerated when the life estate of the surviving spouse was terminated by her dissent from the will. The court gave the following reasons for this result: The remainderman was identified, there was no evidence that the testator intended to postpone the remainderman's enjoyment until the death of the surviving spouse in the event she dissented from the will, and the contingency upon which the remainder was limited, the birth of issue of the remainderman, had occurred.[236]

The court did not state whether all these factors must be present in order for a remainder to be accelerated. Furthermore, the court's apparent reliance on authority that states that a contingent remainder will be accelerated if "the contingencies are determined"[237] is troublesome. If, under the holding in *Clark*, it

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231. 192 Tenn. at 334-35, 241 S.W.2d at 418-19.

232. *Id.* at 331, 241 S.W.2d at 417.

233. 596 S.W.2d 804 (Tenn. 1980).

234. *Id.* at 807.

235. The court's characterization of the interest created as simply a contingent remainder seems erroneous since the trust terms provided that the corpus was to be paid to the remainderman if he had issue at the time of the life tenant's death *or* if he had issue subsequent to the death of the life tenant. Hence, both a contingent remainder and an executory interest were created. This point would appear to have been irrelevant, however, to the determination whether the future interest should have been accelerated in *Clark*, since the condition precedent upon which both future interests were limited had been satisfied.

236. 596 S.W.2d at 807.

237. *Id.* The court quoted 31 C.J.S. *Estates* § 82 (1964) (footnotes

is essential that the condition precedent upon which a contingent remainder is limited be met before the remainder can be accelerated, the court in fact applied the rule that only vested remainders can be accelerated, since a contingent remainder becomes a vested remainder if the condition precedent is met before the termination of the preceding estate.[238] On the other hand, *Clark* can be interpreted as ruling that satisfaction of the condition precedent is only one factor to be taken into account in determining the primary question whether the testator would have wished acceleration of the remainder in the event of the renunciation or premature termination of the preceding estate.[239] The case should be interpreted in this manner, for the alternative interpretation renders much of the language of the court meaningless.

### *B. Spendthrift Trusts*

The usual incidents of a spendthrift trust are provisions prohibiting the transfer of the beneficiary's future right to income or capital, either voluntarily or involuntarily.[240] A question of first impression recently before the Tennessee Supreme Court

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omitted):

> A remainder will not be accelerated if it is impossible to identify the remainderman, or if there is evidence of an intention to postpone the taking effect of the remainder; but where the contingencies are determined and donees ascertained, the doctrine of acceleration applies as well to a contingent as to a vested remainder.

*Id.*

238. This interpretation of *Clark* would be consistent with the doctrine of destructibility of contingent remainders, which is followed in Tennessee. *See generally* Jones & Heck, *Destructibility of Contingent Remainders in Tennessee*, 42 TENN. L. REV. 761 (1975). This doctrine should have no application to interests in personal property, such as those involved in *Clark*. *See* L. SIMES & A. SMITH, THE LAW OF FUTURE INTERESTS § 365 (2d ed. 1956).

239. This is the preferred view. *See* 5 A. SCOTT, THE LAW OF TRUSTS § 412.1 (3d ed. 1967); L. SIMES & A. SMITH, *supra* note 238, § 796.

240. *See generally* 2 A. SCOTT, *supra* note 239, § 151.

In Tennessee all trusts created by one other than the beneficiary by a recorded will or deed are spendthrift trusts to the extent that the trust assets are protected from the claims of all creditors except the state. *See* TENN. CODE ANN. § 26-601 (1955) (current version at TENN. CODE ANN. § 26-4-101 (1980)).

in *Howard v. United States*[241] was whether the income from such a spendthrift trust is subject to seizure in satisfaction of a federal tax lien for taxes owed by the income beneficiary. In answering affirmatively, the court recognized that, although under Tennessee law such property would be insulated from all creditors, including the Internal Revenue Service,[242] the supremacy clause[243] requires Tennessee law to yield to conflicting federal law.[244] The relevant federal law provides that the United States shall have a lien for unpaid taxes "upon all property and rights to property"[245] belonging to the debtor. The court concluded that although it is the state's province to determine the existence of "property and rights to property,"[246] once it is determined that the debtor in fact owns property or rights to property "federal law takes over for the purpose of determining whether a lien will attach."[247] The holding of the court is consistent with the result reached by several other courts[248] and the Restatement (Second) of Trusts.[249]

The general rule that a trust created by a settlor for his sole benefit cannot protect the settlor from his own folly or from his creditors was reaffirmed recently in a decision of the court of appeals. In *Waldron v. Commerce Union Bank*[250] two daughters of an alcoholic woman, who was settlor and sole beneficiary of a trust, caused their mother to sign a letter directing the trustee to allow no withdrawals from the corpus without approval of one of the two daughters. The mother subsequently communicated to the trustee " 'that she no longer wanted her daughters to have

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241. 566 S.W.2d 521 (Tenn. 1978).

242. *See* TENN. CODE ANN. § 26-601 (1955) (current version at TENN. CODE ANN. § 26-4-101 (1980).

243. U.S. CONST. art. VI, cl. 2.

244. 566 S.W.2d at 525.

245. 26 U.S.C. § 6321 (1976).

246. 566 S.W.2d at 525 (citing Aquilino v. United States, 363 U.S. 509 (1960)).

247. 566 S.W.2d at 525.

248. *See* Leuschner v. First Western Bank & Trust Co., 261 F.2d 705 (9th Cir. 1958); United States v. Dallas Nat'l Bank, 152 F.2d 582 (5th Cir. 1945).

249. RESTATEMENT (SECOND) OF TRUSTS § 157(d) (1959).

250. 577 S.W.2d 669 (Tenn. Ct. App. 1978), *cert. denied, id.* (Tenn. 1979).

anything to do with her affairs.' "[251] Thereafter, often in an intoxicated state, she made numerous and substantial withdrawals from the corpus without the consent or knowledge of either of her daughters.[252] The two daughters, appointed coconservators of their mother after these incidents had occurred, brought suit against the trustee. The daughters alleged that the above mentioned letter constituted an amendment to the trust that converted it from a revocable trust to a trust revocable only with the consent of a third party; that their mother's later communications to the trustee did not constitute a revocation of the amendment; and that the trustee was negligent. The court of appeals, citing the Restatement (Second) of Trusts,[253] stated that the daughters' first two allegations were without merit regardless of whether the letter had amended the trust: "[A] settlor who is the sole beneficiary of a trust and is not under a legal incapacity can revoke the trust even though the purposes for which he created it may have been to preclude him [from] wasting his own assets."[254] The court also found that the trustee could not be held liable for negligence, since it at all times acted at the direction of the settlor and sole beneficiary, who was not legally incapacitated.[255] *Waldron* clearly teaches that a settlor cannot protect himself against his own folly by any trust in which the settlor is sole beneficiary. If such a person creates a trust naming himself and another person as beneficiaries, however, the trust could not be terminated or modified without the consent of the other beneficiary.[256] If the other beneficiary witheld consent in order to prevent the settlor's receipt of large sums, much of the

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251. *Id.* at 672 (quoting chancellor's memorandum).

252. The mother spent over $100,000.00 in about 6 months " 'buying cars for her . . . friends, taking them to Las Vegas, and making unwise investments.' " *Id.* at 676 (quoting chancellor's memorandum).

253. 577 S.W.2d at 673 (citing RESTATEMENT (SECOND) OF TRUSTS § 339 (1959)).

254. 577 S.W.2d at 674. The court noted that at the time of the withdrawals the mother had not been judicially declared incompetent nor was her drunkenness "excessive so that she was deprived of the use of her reason and understanding." *Id.*

255. *Id.* at 675-76.

256. RESTATEMENT (SECOND) OF TRUSTS §§ 338, 340 (1959).

property could be protected.[257]

### C. Charitable Trusts

Under the doctrine of *cy pres*, a court of equity may permit a charitable trust to be performed in a manner that closely approximates the purposes of the settlor when circumstances unanticipated by him make literal performance impracticable.[258] Although this doctrine is not in effect in Tennessee,[259] "the same result appears to be attainable on other grounds when a court becomes convinced that justice demands it."[260] The Tennessee Supreme Court recently demonstrated its willingness to sanction performance of a charitable trust in conformity with the spirit, if not the letter, of the settlor's instructions.[261]

The trust in question was established in part for the benefit of the Junior League Home for Crippled Children in Nashville. The language of the trust provided that the gift would go to the settlor's son " '[i]f . . . the Junior League should discontinue the operation of a home . . . for crippled children.' "[262] The will creating the trust was written at a time when the Junior League operated such a home in its own facility, but when the time for distribution to the home arrived, the operation had been moved to the Vanderbilt Hospital Complex and had been expanded to provide care to children with noncrippling ailments as well as to those orthopedically crippled. The Junior League, through contract with Vanderbilt University and the Children's Regional Medical Center, provided operational and construction funds, volunteer workers, and membership on the Board of Directors. The court strictly construed the terms of the trust and found that the gift set forth in the trust should be carried out since the

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257. However, even when the settlor is not sole beneficiary, spendthrift restraints applicable to the settlor's interest would not prevent creditors from reaching it, and creditors can reach the settlor's interest even though the trust is one for support or a discretionary trust. RESTATEMENT (SECOND) OF TRUSTS § 156 (1959).

258. *See generally* RESTATEMENT (SECOND) OF TRUSTS § 399 (1959).

259. *See* Henshaw v. Flenniken, 183 Tenn. 232, 191 S.W.2d 541 (1946).

260. Sewell, *supra* note 1, at 185 (footnote omitted).

261. Third Nat'l Bank v. First American Nat'l Bank, 596 S.W.2d 824 (Tenn. 1980).

262. *Id.* at 826 (quoting will).

Junior League had not discontinued the operation of a home for crippled children.

> There is nothing in [the trust] which requires the Junior League to continue the Home on White Avenue, or to maintain the Home in a building owned by the Junior League, or to treat children for certain ailments only, or to perform the mechanics of administration in a certain fashion.[263]

Although the court did not discuss the doctrine of *cy pres*, under its holding the trust would have been enforceable regardless of the applicability of the doctrine since the court found that there existed "no deviation from or discontinuance of the 'home or hospital' perceived by the testator."[264] In the absence of that finding, which was neither supported nor contradicted by any evidence of the testator's intent other than the terms of the trust instruments, the trust would have failed absent application of the doctrine of *cy pres*. It seems evident that the court was reluctant to invalidate the charitable trust by finding that minor changes in circumstances required deviation from the express terms of the trust.

The favored position of charitable trusts was demonstrated in the recent decision of *Lewis v. Darnell*.[265] The court of appeals considered the validity of a trust established by the following terms: " 'If there is anything left, I want it put in the First Federal Bank for my church to use the interest each year for mission work. That lost souls may hear about and know my dear Savior.' "[266] Plaintiffs argued that this trust should fail for "vagueness and uncertainty of object."[267] The court rejected the contention, but did not make clear whether it was concerned

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263. *Id.* at 829.

264. *Id.*

265. 580 S.W.2d 572 (Tenn. Ct. App. 1978), *cert. denied, id.* (Tenn. 1979).

266. *Id.* at 573 (quoting will). The identity of "my church" was established by reference to other parts of the will and by extrinsic evidence.

267. *Id.* at 575. Plaintiffs also argued that the trusts were invalid because of the settlor's failure to designate a trustee. Referring to TENN. CODE ANN. § 35-120 (1977), by which a court is empowered to appoint a trustee of a charitable trust when none is named, the court concluded that the trusts would not fail for that reason. 580 S.W.2d at 575.

with the definiteness of the purpose of the trust or the definiteness of beneficiaries. Both meanings have been ascribed to the word "object" in past Tennessee cases.[268] Presumably, the court in *Lewis* was not concerned chiefly with definiteness of beneficiaries, since it relied on cases in which the word "object" was apparently used to mean purpose.[269] The court also stated that charitable trusts "will be upheld although the parties to be benefited may not be defined with that precision which would be requisite in trusts of an ordinary and private description."[270] Even though *Lewis* and other recent Tennessee decisions indicate that a charitable trust will not fail because of indefiniteness of beneficiaries, the requirement of a reasonably definite charitable purpose seems to persist.[271] Quantification of the requisite degree of definiteness of purpose is difficult, however, and was not attempted by the court in *Lewis*, which distinguished cases in which charitable trusts were held invalid for indefiniteness by simply stating that the settlor in *Lewis* "was substantially more definite and explicit."[272] When charitable trusts fail because of indefiniteness of purpose, the failure causes not only frustration of the settlor's intent but also causes defeat of the public interest in upholding charitable trusts.[273] Although one writer has concluded that, as a result of statutes[274] and case law, "Tennes-

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268. *See generally* Caffrey, *Charitable Bequests: Delegating Discretion to Choose the Objects of the Testator's Beneficence*, 44 TENN. L. REV. 307, 324-33 (1977).

269. Ratto v. Nashville Trust Co., 178 Tenn. 457, 159 S.W.2d 88 (1942); Dickson v. Montgomery, 31 Tenn. (1 Swan) 348, 362 (1851).

270. 580 S.W.2d at 575.

271. *See* Caffrey, *supra* note 268, at 332-33.

272. 580 S.W.2d at 575. This problem has resulted in similar summary dispositions of several other Tennessee cases. *See* Caffrey, *supra* note 268, at 332-33.

273. *See* Caffrey, *supra* note 268, at 307.

274. *See* TENN. CODE ANN. § 23-2802 (1955) (current version at TENN. CODE ANN. § 29-35-102 (1980)) (the state, through the attorney general, may compel "faithful performance" by the trustee of a charitable trust); TENN. CODE ANN. §§ 35-120 to -121 (1977) (charitable trusts will not fail for lack of trustee or because creating perpetuity); TENN. CODE ANN. § 35-1006(b)(3) (1977) (gifts for charitable uses "to be determined by the trustee" shall be made to organizations which qualify a gift for a charitable deduction under the Internal Revenue Code).

see has arrived at a point where bequests for charitable purposes generally . . . should be upheld,"[275] it remains for the supreme court to determine whether this is so.

## VI. Gifts of Personal Property

In the important 1976 decision of *Lowry v. Lowry*,[276] the Tennessee Supreme Court held that funds deposited by a person in a bank account, under contract with the bank providing for joint ownership of the accounts by the depositor and another with right of survivorship, pass to the other on the death of the depositor by virtue of the depositor's contract with the bank, regardless of the existence of the elements necessary for a valid *inter vivos* gift. By adopting the contract theory for the transfer of funds in joint accounts, the court followed the approach taken in several other jurisdictions designed to permit successful employment of such a "poor man's will" even though the essentials of a gift, particularly delivery, cannot be proved.[277] However, the court indicated that the contract of the parties would not be enforced if clear and convincing evidence showed that the contract did not reflect the intention of the parties.[278]

In a more recent case, the court of appeals held that a transaction in which one party confers a gratuitous benefit on another, whether analyzed in terms of the law of gifts or under the contract theory, is void if the recipient of the benefit exercised undue influence to obtain it.[279] The court specifically overruled the chancellor's holding that the presumption of invalidity, which attaches to gifts made to the dominant party by the

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275. Caffrey, *supra* note 268, at 333. In several other jurisdictions, definiteness of purpose is not requisite to the validity of charitable trusts. The leading case is Minot v. Baker, 147 Mass. 348, 17 N.E. 839 (1888). *See also* Restatement (Second) of Trusts §·396 (1959).

276. 541 S.W.2d 128 (Tenn. 1976), *discussed in* Sewell, *supra* note 1, at 164-65; 7 Mem. St. U.L. Rev. 332 (1977).

277. *See generally* R. Brown, The Law of Personal Property § 8.8 (3d ed. W. Raushenbush 1975).

278. 541 S.W.2d at 132-33.

279. Gordon v. Thornton, 584 S.W.2d 655 (Tenn. Ct. App.), *cert. denied, id.* (Tenn. 1979). The survivorship to jointly owned shares of stock was in issue.

other in a confidential relationship,[280] is inapplicable if the transaction is one of contract rather than a gift. The court stated:

> It would be highly inequitable to rule that the dominant party could avoid the presumption of invalidity by personally escorting the other party to a third person for the purpose of that party contracting with the third person in such manner as to pass the benefit to the dominant party.[281]

The court's refusal to allow application of the contract theory to insulate the transaction from invalidation for undue influence clearly is correct, since the transactions to which the contract theory is applicable are in fact gratuitous transfers, even though not labelled gifts. As indicated by dicta in *Lowry*, such transactions should be held void not only upon proof of undue influence but also upon proof of "fraud, misrepresentation, duress, . . . mutual mistake, and incapacity,"[282] since such proof establishes that the contract of the parties does not reflect their intent.

280. *See* text accompanying notes 192-93 *supra*.
281. 584 S.W.2d at 658.
282. 541 S.W.2d 128, 133 (Tenn. 1976).

# RECENT DEVELOPMENTS

## Constitutional Law—Citizenship—Evidentiary Standards for Expatriation Proceedings

*Vance v. Terrazas*, 444 U.S. 252 (1980).

Plaintiff, a citizen of both the United States and Mexico,[1] completed an application[2] for a certificate of Mexican nationality while he was a college student in Mexico. After a certificate was issued which stated that plaintiff had sworn allegiance to the United Mexican States and had renounced all rights and loyalty to any foreign government, plaintiff filed forms with the

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1. Terrazas was born in the United States, the son of a Mexican citizen; therefore, at birth he acquired dual citizenship. Vance v. Terrazas, 444 U.S. 252, 255 (1980).

The United States Constitution grants citizenship to all individuals born in the United States. "All persons born . . . in the United States . . . are citizens of the United States . . . ." U.S. CONST. amend. XIV, § 1. Under Mexican law, the child of a citizen becomes a citizen at birth regardless of where he is born. 444 U.S. at 252.

2. On the application the following statement was printed in Spanish:

> I therefore hereby expressly renounce _____ citizenship, as well as any submission, obedience, and loyalty to any foreign government, especially to that of _____, of which I might have been subject, all protection foreign to the laws and authorities of Mexico, all rights which treaties or international law grant to foreigners; and furthermore I swear adherence, obedience, and submission to the laws and authorities of the Mexican Republic.

444 U.S. at 252.

At some point, the blanks were filled in with the words "Estados Unidos" ("United States") and "Norteamericana" ("North America"), respectively. Plaintiff contended, however, that the blanks were not filled in when he signed the application and that he did not realize he was renouncing his United States citizenship by signing the application. *Id.*

Department of State to determine whether this certification resulted in loss of United States citizenship. The Department of State issued a certificate of loss of nationality that was affirmed by its Board of Appellate Review.[3] Plaintiff then brought suit in a United States District Court against the Secretary of State for a declaration of nationality.[4] The district court found that the Government had proved expatriation by a preponderance of the evidence.[5] The Seventh Circuit Court of Appeals reversed the district court's decision and held that the Constitution required proof not by a preponderance of the evidence[6] but by clear, convincing, and unequivocal evidence.[7] On appeal to the United States Supreme Court, *held*, reversed and remanded. The clear, convincing, and unequivocal standard of proof is not constitutionally required in expatriation cases and, the Government must prove both the expatriating act and the intent to relinquish citizenship by only a preponderance of the evidence. *Vance v. Terrazas*, 444 U.S. 252 (1980).

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3. *Id.* at 256.

4. Plaintiff brought his claim for declaration of nationality under 8 U.S.C. § 1503(a) (1976).

5. 444 U.S. at 257.

6. The preponderance of the evidence standard of proof is found in 8 U.S.C. § 1481, which provides:

> Whenever the loss of United States nationality is put in issue . . . the burden shall be upon the person or party claiming that such loss occurred, to establish such claim by a preponderance of the evidence. Except as otherwise provided in subsection (b) . . . any person who commits or performs, or who has committed or performed, any act of expatriation under the provisions of this chapter or any other Act shall be presumed to have done so voluntarily, but such presumption may be rebutted upon a showing, by a preponderance of the evidence, that the act or acts committed or performed were not done voluntarily.

8 U.S.C. § 1481(c) (1976).

7. 577 F.2d 7 (7th Cir. 1978). The court of appeals also discussed the requirement of specific intent to renounce citizenship in conjunction with its analysis of evidentiary standards. Although the Secretary did not question the intent requirement in the district court or the court of appeals and did not present the question separately in his jurisdictional statement to the Supreme Court, the Court found the issue to be of sufficient importance to be addressed. 444 U.S. at 258 n.5 (1980).

The Secretary brought the appeal under 28 U.S.C. § 1252 (1966).

In *Terrazas* the Supreme Court resolved the long-standing uncertainty concerning which standard of proof should apply in expatriation cases. Since the enactment of section 1481(c) in 1961,[8] the constitutionality of the preponderance of the evidence standard had not been questioned by any federal court. The courts had disagreed on the proper application of evidentiary standards in expatriation proceedings, but had not specifically addressed the statute. The *Terrazas* Court, in resolving the uncertainty, struck a balance between the rights of the individual in retaining citizenship and the legitimate concern of the government in divesting the citizenship of individuals who manifest an intent or desire to relinquish their citizenship.[9] The government has a legitimate interest in limiting citizenship status to individuals who will treat it with a minimal degree of seriousness and respect. Against the background of these competing interests, the Court addressed the specific question whether the legislative standard of proof that required the Government to prove by a preponderance of the evidence the occurrence of an expatriating act and an intent to renounce citizenship was constitutional.

The Nationality Act of 1940[10] was the basis of the federal

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8. Immigration and Nationality Amendment of 1961, Pub. L. No. 87-301, § 19, 75 Stat. 656 (codified at 8 U.S.C. § 1481(c) (1976)).

9. 444 U.S. at 270-71.

10. Ch. 876, 54 Stat. 1137 (1940) (repealed 1952). Section 401 of the 1940 Act originally listed eight definite courses of conduct that would result in loss of citizenship: (1) Obtaining foreign naturalization, (2) taking an oath of allegiance to a foreign state, (3) serving in a foreign armed service, (4) accepting office or employment under a foreign government for which only nationals are eligible, (5) voting in a foreign political election, (6) formally renouncing nationality before a diplomatic or consular officer of the United States in a foreign state, (7) deserting the armed forces in a time of war if followed by a court-martial, and (8) treason or attempting the overthrow of the government by force if followed by court-martial or conviction. *Id.* § 401, 54 Stat. at 1168-69. Two subsections were added in 1944 to broaden the scope of expatriating conduct. An individual could expatriate himself by making a formal written renunciation of nationality before an official designated by the Attorney General during a time of war. Act of July 1, 1944, ch. 368, § 1, 58 Stat. 677 (currently codified at 8 U.S.C. § 1481(a)(6) (Supp. III 1979)). A citizen could also expatriate himself by departing and remaining outside the United States during a time of war or national emergency for the purpose of draft evasion. Act of Sept. 27, 1944, ch. 418, § 1, 58 Stat. 746 (repealed 1952).

The successor of the 1940 Act was the Immigration and Nationality Act of

courts' first major struggle with the issue of evidentiary standards for expatriation proceedings.[11] This statute contained no

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1952, which for the most part continues to be in effect. Ch. 477, 66 Stat. 163 (1952) (currently codified in relevant part as amended at 8 U.S.C. §§ 1101-1503 (1976 & Supp. III 1979)). The prior categories of expatriating conduct were retained with only slight modifications in 8 U.S.C. § 1481(a). An amendment to this section provided for forfeiture of nationality upon conviction of advocating overthrow or conspiring to overthrow the government by force or violence or upon conviction of certain crimes relating to forceful opposition to the government. Expatriation Act of 1954, ch. 1256, § 2, 68 Stat. 1146 (currently codified at 8 U.S.C. § 1481(a)(9) (1976)). The subsections dealing with desertion and draft evasion have been repealed. Act of Sept. 14, 1976, Pub. L. No. 94-412, § 501(a)(2), 90 Stat. 1258 (repealing ch. 477, § 349(a)(10), 66 Stat. 163 (1952)) (draft evasion); Act of Oct. 10, 1978, Pub. L. No. 95-432, § 2, 92 Stat. 1046 (1978) (repealing ch. 477, § 349(a)(8), 66 Stat. 163 (1952)) (desertion). Although many of the changes made by the 1952 Act were merely changes in wording, some of the modifications were of greater significance. The Act retained the provision for loss of nationality by entry into the armed forces of a foreign state. 8 U.S.C. § 1481(a)(3) (1976). However, the Act deleted the old requirement that the individual also must have or acquire the nationality of the foreign state. *Id.* (amending Nationality Act of 1940, ch. 876, § 401(c), 54 Stat. 1137 (1940)). The 1940 Act made government employment in a foreign state an expatriating act if the position was open only to nationals. Ch. 876, § 401(d), 54 Stat. at 1169 (repealed 1952). The 1952 Act deleted the requirement that the position be restricted to nationals and added a requirement that the acceptance of such a position include naturalization or the taking of an oath of allegiance. 8 U.S.C. § 1481(a)(4) (1976). The 1952 Act also provided for restoration of citizenship after desertion if the individual was restored to active duty, was inducted, or was reenlisted. *Id.* § 1481(a)(8) (repealed 1978).

For a comprehensive history of expatriation legislation prior to 1950, see Roche, *The Loss of American Nationality—The Development of Statutory Expatriation*, 99 U. PA. L. REV. 25 (1951).

11. The first general expatriation statute was the Expatriation Act of 1907 which described two basic courses of conduct that would result in expatriation: (1) naturalization in a foreign state, and (2) taking an oath of allegiance to a foreign state. Ch. 2534, § 2, 34 Stat. 1228 (1907) (repealed 1940). Although the 1907 Act was the first expatriation statute that applied to United States citizens in general, two prior statutes dealing with expatriation in a limited context had been enacted. An 1865 statute provided for expatriation of soldiers who deserted for more than sixty days. Act of March 3, 1865, ch. 79, § 21, 13 Stat. 487 (repealed as amended 1978). Three years later, in the preamble to the Act of July 27, 1868, 15 Stat. 223, Congress officially recognized a right to expatriate when it stated that "the right of expatriation is a natural and inherent right of all people, indispensible to the enjoyment of the rights of life, liberty, and the pursuit of happiness." The statute, however, was entitled "An Act con-

evidentiary standards to govern expatriation proceedings. When required to interpret the Act, most courts agreed that citizenship held a preferred position in American society and should not be taken away from the individual without strong evidence of an expatriating act.[12] This policy resulted in an overwhelming preference for the clear, convincing, and unequivocal standard of proof.[13] This preference was reflected in the United States Su-

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cerning the Rights of American citizens in foreign States," and therefore apparently was for the protection of American citizens abroad rather than for Americans seeking to denationalize themselves. Nevertheless, the statute demonstrated the congressional intent and willingness to recognize the principle of universal voluntary expatriation.

12. The 1940 Act dealt with the specific types of conduct that would result in expatriation, but did not address the subjective state of mind that must accompany the act. Courts generally have held that the citizen must not only commit an expatriating act, but must do so voluntarily. *See, e.g.*, Trop v. Dulles, 356 U.S. 86 (1958) (implying that desertion from the armed forces during a time of war is not a voluntary abandonment or renunciation of citizenship); Savorgnan v. United States, 338 U.S. 491 (1950) (concluding that a native-born American citizen had voluntarily expatriated herself by naturalization as an Italian citizen and residence abroad); Mackenzie v. Hare, 239 U.S. 299 (1915) (equating the voluntary marriage of an American woman to a foreigner with the traditional concept of voluntary expatriation). In 1967 the Supreme Court narrowed the concept of voluntariness by stating not only that the citizen voluntarily must commit the specific acts, but also that the government could not take away citizenship without the consent or assent of the individual. Afroyim v. Rusk, 387 U.S. 253 (1967). Several commentators have interpreted the *Afroyim* consent requirement as being the same as subjective intent. *See* Note, *An Expatriation Enigma: Afroyim v. Rusk*, 48 B.U.L. REV. 295 (1968); Note, *Constitutional Law—Citizenship—Congress is Without the Power to Effect Voluntary Expatriation*, 3 TEX. INT'L L.F. 350 (1967). In 1972 the Ninth Circuit Court of Appeals assumed without deciding that a subjective intent to renounce citizenship was a required element of expatriation. King v. Rogers, 463 F.2d 1188, 1189 (9th Cir. 1972).

13. The standard of proof by which a case must be proved is often determinative of the outcome. The Supreme Court has categorized the standards of proof according to the relative importance attached to the ultimate decision: (1) the typical civil case, such as a monetary dispute between private parties, requires proof by only a preponderance of the evidence because of society's minimal concern with the outcome of such private suits; (2) criminal cases require a strict standard of proof to exclude the likelihood of erroneous judgment; therefore, to satisfy the due process clause, the prosecution must prove the defendant's guilt beyond a reasonable doubt; and (3) civil cases where the interests at stake are more substantial than mere loss of money require proof

preme Court expatriation case[14] of *Gonzales v. Landon*,[15] in which the Court clearly spoke out in favor of the clear, convincing, and unequivocal standard of proof. In *Gonzales*, an individual who was seeking a declaration of citizenship had been born in the United States, but had spent most of his life, prior to instituting suit, in Mexico. The United States sought to prove that petitioner had expatriated himself when he remained outside the country for the purpose of avoiding military service and training.[16] The Court declared that the standard of proof required in expatriation cases was the same as that required in denaturalization cases.[17] For the purpose of establishing the

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by clear, convincing, and unequivocal evidence. The intermediate standard is employed to protect particularly important individual interests in various civil situations. Addington v. Texas, 441 U.S. 418, 423-24 (1979).

14. An earlier Supreme Court decision had suggested that ambiguities in evidence be resolved in favor of citizenship, but did not mention specifically the standard of proof that should be applied. Perkins v. Elg, 307 U.S. 325 (1939).

15. 350 U.S. 920 (1955), *rev'g per curiam* 215 F.2d 955 (9th Cir. 1954).

16. Draft evasion is no longer considered an expatriating act. In 1976 Congress repealed the section under which Gonzales was charged. *See* note 10 *supra*.

17. 350 U.S. at 920. The Court referred to two denaturalization cases, Baumgartner v. United States, 322 U.S. 665 (1944) and Schneiderman v. United States, 320 U.S. 118 (1943), which held that the government must have clear, convincing, and unequivocal evidence before it could denaturalize a citizen.

Presumably, *Schneiderman* and *Baumgartner* were decided on the basis of deprivation of constitutional rights. Both of the opinions referred to the importance of citizenship and the rights that accompany it and the desire not to reduce the status of an individual from that of a citizen to that of an alien. 322 U.S. at 675; 320 U.S. at 122. Justice Murphy, speaking for the Court in *Schneiderman*, stated that the clear and convincing standard was necessary "because rights once conferred should not be lightly revoked." 320 U.S. at 125.

The clear, convincing, and unequivocal standard always has been and continues to be applied to the government's proof in denaturalization cases. *See, e.g.*, Knauer v. United States, 328 U.S. 654 (1946); United States v. Orrino, 120 F. Supp. 569 (E.D.N.Y. 1954).

The House Committee on the Judiciary recognized the difference between expatriation and denaturalization proceedings and stated that the statutory rules of evidence would apply only to expatriation actions. H.R. REP. No. 1086, 87th Cong., 1st Sess. 40, *reprinted in* [1961] U.S. CODE CONG. & AD. NEWS 2950, 2984.

standard of proof, the *Gonzales* Court drew an analogy between the two distinct concepts of expatriation and denaturalization. One concept refers to action on the part of the individual, while the other refers to action on the part of the government. Expatriation has been defined as the voluntary renunciation or abandonment of nationality and allegiance.[18] Denaturalization is the revocation of the citizenship of an individual who has been granted the privilege of citizenship as a result of congressional legislation.[19] By adopting the burden of proof requirement used in denaturalization cases, the Supreme Court in *Gonzales* enunciated a uniform evidentiary standard to govern expatriation cases and held that the Government must prove expatriation by clear, convincing, and unequivocal evidence.[20]

The Supreme Court again faced the issue of the evidentiary standard[21] in *Perez v. Brownell*.[22] The *Perez* Court treated the issue in a footnote that stated that the government must prove

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18. *See, e.g.*, Perkins v. Elg, 307 U.S. 325, 334 (1939); Kawakita v. United States, 190 F.2d 506, 511 (9th Cir. 1951), *aff'd*, 343 U.S. 717 (1952); Namba v. Dulles, 134 F. Supp. 633, 634 (N.D. Cal. 1955).

19. *See* Boyd v. Nebraska *ex rel.* Thayer, 143 U.S. 135, 162 (1892); *In re* Bishop, 26 F.2d 148 (W.D. Wash. 1927).

20. 350 U.S. at 920. The evidentiary standard set forth by the Supreme Court in *Gonzales* was not a new standard for expatriation proceedings. Several lower federal courts had held previously that the Government's proof of expatriation must be by clear, convincing, and unequivocal evidence. *E.g.*, Monaco v. Dulles, 210 F.2d 760 (2d Cir. 1954); Acheson v. Maenza, 202 F.2d 453 (D.C. Cir. 1953); Bauer v. Clark, 161 F.2d 397 (7th Cir.), *cert. denied*, 332 U.S. 839 (1947).

21. Since the decision in *Gonzales*, the lower federal courts had held consistently that proof of voluntarily committed expatriating acts must be by clear, convincing, and unequivocal evidence. *E.g.*, Bruni v. Dulles, 235 F.2d 855 (D.C. Cir. 1956); Stipa v. Dulles, 233 F.2d 551 (3d Cir. 1956); Kamada v. Dulles, 145 F. Supp. 457 (N.D. Cal. 1956).

22. 356 U.S. 44 (1958). Perez was a native-born American, but spent much of his life in Mexico. During World War II, he sought and was granted admission to the United States after stating that he was a native-born Mexican citizen. *Id.* at 46. He returned to Mexico and later sought readmission to the United States as a United States citizen. He admitted having voted in Mexican political elections. *Id.* In an action for a judgment declaring him to be a national of the United States, Perez was denied relief by the district court. This decision was affirmed by both the appellate court, 235 F.2d 364, 366 (9th Cir. 1956), and the United States Supreme Court, 356 U.S. at 62.

expatriation by clear, convincing, and unequivocal evidence.[23] The focus of Justice Frankfurter's opinion, however, was on the validity of the congressional power, based on the power of Congress to regulate foreign relations, to take away the citizenship of Americans who voted in foreign elections.[24] The implication of this opinion was that the fourteenth amendment was not a restriction on the ability of Congress to withdraw citizenship if that withdrawal was in exercise of an otherwise valid power;[25] therefore, an individual could lose his citizenship by voting in a foreign election.[26] Although the Court did not specifically state that the Government must prove by clear, convincing, and unequivocal evidence that a citizen voluntarily voted in a foreign election before the citizen could be divested of his citizenship, the stricter standard was acknowledged implicitly.

The Court decided another important expatriation case on the same day as *Perez*.[27] Chief Justice Warren, writing for the majority in *Nishikawa v. Dulles*,[28] found that evidence of the

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23. 356 U.S. at 47 n.2. The Court cited *Gonzales* in its brief discussion of the evidence issue.

24. The Court upheld section 401(e) of the Nationality Act of 1940, which dealt with loss of nationality by means of voting in a foreign political election. 356 U.S. at 62. The Court in *Perez* also discussed plaintiff's knowing failure to register for the draft, but found it unnecessary to rule on the constitutionality of section 401(j), which deals with expatriation as a result of avoidance of military service. *Id.*

25. *See* 356 U.S. at 58 n.3.

26. Ten years after the decision in *Perez*, the Court overruled its decision that loss of citizenship would result merely by voting in a foreign political election. Afroyim v. Rusk, 387 U.S. 253, 267 (1967).

27. Nishikawa v. Dulles, 356 U.S. 129 (1958). This case was decided on a different basis from either *Trop* or *Perez*. The Court in those cases addressed specific sections of the Nationality Act of 1940. The *Perez* Court upheld the congressional power to deal with voting by American citizens in foreign elections on the basis of congressional power to regulate foreign relations. 356 U.S. at 62. The Court in *Trop* invalidated the subsection that provided for loss of citizenship for desertion during a time of war. 356 U.S. at 97-104. In *Nishikawa* the Court did not consider the constitutionality of the section of the Act listing service in the armed forces of a foreign state as a cause for loss of nationality, but decided the case on the issue of the burden of proof and the voluntariness of the expatriating act. 356 U.S. at 130-31.

28. 356 U.S. 129 (1958). Nishikawa was both a native-born citizen of the United States and a citizen of Japan by virtue of his parents' citizenship. After

citizen's service in a foreign armed force was insufficient to establish loss of citizenship and stated that there must be clear, convincing, and unequivocal evidence of the voluntariness of the expatriating act.[29] Oddly, the parties were actually in agreement about the standard of proof required in expatriation cases. The opinion focused on the Government's burden of proving the voluntariness of the expatriating act, an issue on which the parties did not agree.[30] Basing its decision on *Gonzales*,[31] the Court concluded that all cases arising under the expatriation section of the 1940 Act should be governed by the clear, convincing, and unequivocal standard.[32] In addition, Chief Justice Warren recognized the lack of statutory guidance on the issue of the burden of proof in expatriation proceedings. Stating that "evidentiary ambiguities are not to be resolved against the citizen"[33] Chief Justice Warren reasoned that since citizenship was so valuable and the consequences of expatriation so drastic, the individual's right to retain his citizenship should be protected carefully.[34] *Nishikawa* provided a clarification of the concept[35] first enunciated in *Gonzales* that the Government's proof of a citizen's voluntary expatriation must be by clear, convincing, and unequivocal evidence.

Three years after *Perez* and *Nishikawa* were decided,[36]

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graduating from the University of California, he went to Japan to visit and study, intending to remain for only a few years. Pursuant to Japanese law, Nishikawa was drafted into the army shortly after the outbreak of World War II. *Id.* at 131. Upon applying for an American passport, he received a certificate of loss of nationality. *Id.* at 133. He brought suit in a district court seeking a declaration of citizenship. The court found his entrance and service in the Japanese army to have been a free and voluntary act. *Id.* The court of appeals affirmed this decision. 235 F.2d 135, 141 (9th Cir. 1956).

29. 356 U.S. at 135.

30. *Id.* at 133.

31. *Id.*

32. *Id.* The Court did not discuss whether such a holding was constitutionally required, but merely referred to prior cases in reaching its decision. *Id.* at 130-31. Presumably, the Court considered the standard constitutional.

33. *Id.* at 136.

34. *Id.* at 134.

35. *See* notes 15-20 *supra* and accompanying text.

36. During this period the lower federal courts continued to require the Government to meet the stricter burden of proof. *See* Guerrieri v. Herter, 186

Congress, after determining that the judicially established burden of proof was too rigid a standard, enacted legislation relaxing the burden of proof requirement. In 1961 the Immigration and Nationality Act of 1952 was amended[37] to provide that loss of citizenship be established by a preponderance of the evidence[38] and that any of the listed expatriating acts be presumed to have been committed voluntarily.[39] The stated purpose of the amendment was to limit the erosion of the statute designed to protect an individual's right of citizenship by placing on the Government the burden of proof to establish loss of citizenship by a preponderance of the evidence.[40] In addition, the House Committee on the Judiciary expressed the difficulty of subscribing to the evidentiary standard of *Gonzales*[41] and *Nishikawa*[42]

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F. Supp. 588 (D.D.C. 1960); Rosasco v. Brownell, 163 F. Supp. 45 (E.D.N.Y. 1958).

37. Act of Sept. 26, 1961, Pub. L. No. 87-301, 75 Stat. 650 (1961) (currently codified at 8 U.S.C. § 1481(c) (1976)).

38. *See* note 6 *supra*.

39. The power of Congress to legislate evidentiary standards is undisputed. Congress is vested with the power "[t]o constitute Tribunals inferior to the Supreme Court." U.S. CONST. art. I, § 8, cl. 9. The Supreme Court has stated that "Congress has power to prescribe what evidence is to be received in the courts of the United States." Tot v. United States, 319 U.S. 463, 467 (1943) (criminal case involving violations of Federal Firearms Act) (footnote omitted). *See* Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 31 (1976); Nishikawa v. Dulles, 356 U.S. 129, 139 (1958) (Black, J., concurring). Given the Supreme Court's approval of congressional authority to establish evidentiary standards for the federal courts, there is no apparent reason why Congress' power over these standards in expatriation proceedings should be any different. The power to legislate such standards, however, does not mean that the standards are nonreviewable. The Supreme Court has the power to review the legislative standards to determine their constitutionality. *See, e.g.*, Morrison v. California, 291 U.S. 82 (1934); Western & A.R.R. v. Henderson, 279 U.S. 639 (1929).

40. H.R. REP. No. 1086, 87th Cong., 1st Sess. 41, *reprinted in* [1961] U.S. CODE CONG. & AD. NEWS 2950, 2984. The House Report gave no concrete or definitive reasons for the enactment of the amendment; however, it did refer to the strictness of the *Nishikawa* standard, implying that a less strict standard would be adequate. The Committee's only other stated reason for imposing less strict standards was to effectuate the application of the statute designed to protect citizenship. *Id.* at 41, *reprinted in* [1961] U.S. CODE CONG. & AD. NEWS 2950, 2985.

41. *See* notes 15-20 *supra* and accompanying text.

42. *See* notes 28-35 *supra* and accompanying text.

that required proof of loss of citizenship by clear, convincing, and unequivocal evidence.[43] In approving the amendment, the Committee noted that prior administrative application of the stricter standard of proof had offended the intent and letter of the statute.[44] It also recognized that citizenship deserved specific statutory protection by means of a uniform evidentiary standard.[45]

Even after the enactment of the new section, which appeared to be a clear directive from Congress, the burden of proof issue continued to be debated in lower federal courts. Some courts, such as the Second Circuit in *United States v. Matheson*[46] and a New Jersey district court in *Cafiero v. Kennedy*,[47] chose to apply the clear, convincing, and unequivocal standard. In contrast, the Ninth Circuit Court of Appeals in *King v. Rogers*[48] applied section 1481(c) without any discussion of the

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43. *See* H.R. REP. No. 1086, 87th Cong., 1st Sess. 40, *reprinted in* [1961] U.S. CODE CONG. & AD. NEWS 2950, 2984.

44. The Committee cited several specific administrative hearings that had misapplied or misinterpreted the *Nishikawa* rule. *Id.* at 40-41, *reprinted in* [1961] U.S. CODE CONG. & AD. NEWS 2950, 2984.

45. *Id.* at 41, *reprinted in* [1961] U.S. CODE CONG. & AD. NEWS 2950, 2985. The Committee characterized citizenship as a priceless possession. *Id.* at 41, *reprinted in* [1961] U.S. CODE CONG. & AD. NEWS 2950, 2985.

Many cases also have noted the great worth and dignity of United States citizenship. *E.g.*, Mandoli v. Acheson, 344 U.S. 133, 139 (1952); Schneiderman v. United States, 320 U.S. 118, 122 (1943); Mackenzie v. Hare, 239 U.S. 299, 312 (1915).

46. 532 F.2d 809 (2d Cir.), *cert. denied*, 429 U.S. 823 (1976). The court discussed § 1481(c) in a footnote, but reasoned that the *Afroyim* intent requirement added a constitutional element to loss of citizenship that required a stronger standard of proof than the statute provided. *Id.* at 818 n.5. The court found the heavier burden of proof to be especially suitable in the case of an individual who believed himself to be a dual national, since he would not be likely to give up his citizenship if he could remain loyal to both the United States and another country. *Id.* at 815. The court cited Perkins v. Elg, 307 U.S. 325, 337 (1939), and Schneiderman v. United States, 320 U.S. 118, 122 (1943), for the proposition that citizenship should be protected whenever possible. 532 F.2d at 818.

47. 262 F. Supp. 140 (D.N.J. 1966). The court found that the Government had met the clear and convincing standard by presenting evidence of Cafiero's willingness to serve in the Italian armed forces despite his American citizenship. *Id.* at 147.

48. 463 F.2d 1188 (9th Cir. 1972).

standard of proof issue and stated that evidence of an expatriating act performed with subjective intent need only be proved by a preponderance of the evidence.[49]

The landmark expatriation case of the 1960s was *Afroyim v. Rusk*.[50] The relevancy of *Afroyim* to the standard of proof problem was what it failed to address rather than what it actually held.[51] The Supreme Court held that the section of the Nationality Act of 1940 that dealt with expatriation through voting in a foreign political election was unconstitutional[52] because such conduct was not necessarily indicative of a voluntary relinquishment of citizenship. The Court also found that citizens had a constitutional right to retain their citizenship unless some voluntariness[53] of expatriating action was manifested on their part or

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49. *Id.* at 1189. The court held that the Government had met its burden by presenting evidence that the citizen had taken an oath of allegiance to Queen Elizabeth and had notified his draft board that he had become a British subject. *Id.*

The court's rationale in applying the statutory standard was ambiguous. The *King* court may have presumed that the preponderance of the evidence standard was the only standard that could be used in expatriation proceedings and applied it accordingly. In the same year the United States District Court for the District of Columbia relied on the burden of proof requirement in denaturalization cases and applied the clear, convincing, and unequivocal evidence standard to defeat the Government's claim of expatriation. Peter v. Secretary of State, 347 F. Supp. 1035 (D.D.C. 1972).

50. 387 U.S. 253 (1967). Another Supreme Court case decided the same year as *Afroyim* recognized that the clear and convincing evidence standard should be applied whenever the Government denies or takes away citizenship. Berenyi v. District Dir., INS, 385 U.S. 630 (1967). *Berenyi*, however, was a naturalization case in which an alien was affirmatively seeking citizenship status; therefore, its direct application to expatriation was uncertain.

51. Afroyim was a Polish-American who was naturalized in 1926. He went to Israel in 1950 and voted there in 1951 for the legislative body. 387 U.S. at 254. When he sought renewal of his United States passport, the Department of State refused to grant it on the ground that he had expatriated himself by voting in the Israeli election. *Id.* Afroyim then brought a declaratory judgment action alleging that the section of the Nationality Act of 1940 that provided for loss of citizenship by voting in a foreign political election was unconstitutional. The district court rejected his argument, and the court of appeals affirmed. *Id.*

52. *Id.* at 267. This is the same subsection that the Court had upheld in *Perez* almost ten years earlier. 356 U.S. 44, 62 (1958). *See* text accompanying notes 24-26 *supra*.

53. 387 U.S. at 268.

unless they consented[54] or assented[55] to the deprivation of citizenship.[56] Since the Court did not discuss section 1481(c), it was unclear whether the *Afroyim* decision had any effect on the statutory burden of proof requirement.[57]

In *Vance v. Terrazas*[58] the Supreme Court resolved the existing controversy over the evidentiary standards by explicitly holding section 1481(c) constitutional. The Court found that the traditional power of Congress to legislate rules of evidence for the federal courts extended to proceedings to determine citizenship status. With congressional power in the area thus clearly established, the Court deferred to the legislative judgment on the issue.[59] The majority also concluded that the preponderance of the evidence standard of proof did not violate either the citizenship clause or the due process clause of the fifth amendment since the preponderance of the evidence standard adequately protected the individual's citizenship interest.[60] The Court expressly discussed[61] the validity of the presumption of voluntariness and emphasized that only voluntariness of the expatriating act is presumed and that specific intent[62] to terminate United

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54. *Id.* at 263.

55. *Id.* at 257.

56. The Court noted three policy considerations in support of the voluntariness-assent-consent requirement: (1) The importance of citizenship; (2) the desire not to impose statelessness on any individual; and (3) the nature of the United States government. It would be unfair and illogical to give temporary officials the power to deprive other citizens of their citizenship permanently. *Id.* at 267-68.

57. It is unlikely that the *Afroyim* Court intended to place the burden of proof requirement beyond the power of Congress absent an express holding or at least some mention of the subsection of the statute.

Attorney General Clark, in his 1969 interpretation of *Afroyim*, mentioned that the burden of proof is on the party asserting that expatriation has occurred. He suggested that the burden is not satisfied easily, but did not define the standard. 42 Op. Att'y Gen. 397, 400, 401 (1969).

58. 444 U.S. 252 (1980).

59. *Id.* at 265-66.

60. *Id.* at 266.

61. The Court pointed out that the court of appeals' opinion did not discuss the validity of the presumption since it found that the act must be proved to be voluntary by clear and convincing evidence. *Id.* at 267.

62. In the first section of the Court's opinion, the Court discussed the issue of intent to expatriate in great detail. It interpreted the *Afroyim* assent

States citizenship must be proved by the party claiming that expatriation had occurred.[63]

The Supreme Court fundamentally disagreed with the court of appeals' conclusion that section 1481(c) was unconstitutional and that the clear, convincing, and unequivocal standard was required.[64] The Court reasoned that *Nishikawa*[65] was not controlling because the case was neither constitutionally based nor decided in the shadow of a legislative enactment.[66] Although the Court dismissed *Nishikawa* as not controlling, it was unclear whether *Nishikawa* was based on constitutional principles or policy considerations. The *Nishikawa* Court did not specifically state that its decision was mandated by the Constitution, but spoke in terms of the value of citizenship and the drastic consequences of loss of citizenship.[67] The *Terrazas* Court's conclusion concerning *Nishikawa* satisfied the congressional desire, evidenced by section 1481(c),[68] to eliminate the results of cases[69] that followed the *Nishikawa* standard. Congressional intent, however, should not be controlling if application of the legislative enactment produces unconstitutional results. The Court does not owe deference to federal statutes when such deference results in violation of the constitutional rights of individuals.[70] Despite the possible unconstitutionality of the statutory standard, the Court in *Terrazas* placed great weight on the congressional judgment[71] and decided that the statute did provide an

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requirement as meaning "intent to terminate United States citizenship." *Id.* at 263.

63. *Id.* at 268.

64. *Id.* at 264.

65. *See* notes 28-35 *supra* and accompanying text.

66. 444 U.S. at 265.

67. 356 U.S. at 134.

68. *See* notes 40-44 *supra* and accompanying text.

69. *See* note 36 *supra*.

70. The Supreme Court has held federal legislation invalid in several expatriation cases where it found that the statutes were unconstitutional. Afroyim v. Rusk, 387 U.S. 253 (1967) (voting in a foreign political election); Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963) (draft evasion); Trop v. Dulles, 356 U.S. 86 (1958) (desertion in wartime).

71. The Court recognized the clear and convincing standard of *Nishikawa* and the deportation and denaturalization cases, but found them irrelevant since they did not involve a congressional judgment that the prepon-

adequate standard since, in its opinion, no constitutional deprivation was at stake in expatriation proceedings.[72]

Although the Court did not examine any cases other than *Nishikawa* that were decided prior to the 1961 amendment to section 1481(c), such inquiry became unnecessary since in dismissing the suggestion that *Nishikawa* was controlling, the Court effectively foreclosed the necessity of relying on any other cases.[73] The *Terrazas* Court, however, in no way diminished the importance of *Afroyim*. In recognizing that Congress lacked the power to impose expatriation on any citizen, the Court emphasized that Congress could control the procedures by which an individual's loss of citizenship was determined, but could not impose expatriation absent some subjective intent to relinquish citizenship. The Court specifically pointed out that its decision was not to be interpreted to suggest that Congress has no control over expatriation proceedings.[74] In his opinion for the Court Justice White recognized the power of Congress, rooted in its constitutional authority to create inferior federal courts, to legislate rules of evidence for the federal courts. He also stated that if Congress had the power to enforce the fourteenth amendment, it must also have the power to control the way in which citizenship may be lost.[75]

The holding in *Terrazas* serves to diminish the importance accorded citizenship[76] in past decisions.[77] According to the Court, since expatriation proceedings are "civil in nature and do

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derance standard provided sufficient protection for citizenship. 444 U.S. at 265-67.

72. *Id.* at 266-67.

73. Since one of the Court's reasons for finding *Nishikawa* inapposite was that it was decided before the enactment of section 1481(c), all other pre-1961 cases would be equally uncontrolling.

74. 444 U.S. at 265-66.

75. *Id.* The Court agreed with Justice Black's concurring opinion in *Nishikawa* that stated that Congress could prescribe rules of evidence for expatriation proceedings. 356 U.S. 129, 139 (1958) (Black, J., concurring).

76. The Supreme Court previously stated that in cases involving individual rights, whether criminal or civil, "[t]he standard of proof [at a minimum] reflects the value that society places on individual liberty." Addington v. Texas, 441 U.S. 418, 425 (1979) (quoting Tippett v. Maryland, 436 F.2d 1153, 1166 (4th Cir. 1971)) (brackets in original).

77. *See* note 45 *supra*.

not threaten a loss of liberty,"[78] such proceedings do not require a stricter standard of proof.[79] This almost casual dismissal of the loss of liberty argument is clearly inadequate. Indeed, the *Terrazas* rationale is arguably inconsistent with the recent decision of *Addington v. Texas*,[80] in which the Court reemphasized that civil commitment was a significant deprivation of liberty requiring due process protection.[81] In *Addington* the Court held that the liberty interest of an individual in commitment proceedings was of such weight and gravity that due process required a clear and convincing evidentiary standard as a constitutional minimum.[82] Although *Addington* and *Terrazas* could be distinguished because commitment is involuntary and expatriation is voluntary, the protections of a stricter evidentiary standard should apply to expatriation proceedings since such proceedings threaten the citizen with the loss of an important right.[83] The

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78. 444 U.S. at 266.

79. The Court apparently sought to avoid the imposition of an unduly heavy burden of proof on the Government, since the Government already had the burden of proving intent to renounce citizenship. As a result, the Court added expatriation proceedings to the least protected category, *see* note 9 *supra*, which includes other civil proceedings. This categorization suggests that a citizenship contest is in the same class as a monetary dispute between private parties.

80. 441 U.S. 418 (1979).

81. *Id.* at 425.

82. *Id.* at 425, 432-33. The Court pointed out that the "beyond a reasonable doubt" standard historically has been reserved for criminal cases and was not to be applied too broadly or casually in noncriminal cases. *Id.* at 425.

The majority opinion in *Afroyim* placed citizenship in a more protected position and stated that "[c]itizenship is no light trifle to be jeopardized any moment Congress decides to do so under the name of one of its general or implied grants of power." 387 U.S. 253, 267-68 (1967). The dissent in *Perez* stated that "[c]itizenship is man's basic right for it is nothing less than the right to have rights. . . . But the citizens themselves are sovereign, and their citizenship is not subject to the general powers of their government." 356 U.S. 44, 64-65 (1958) (Warren, C.J., Black & Douglas, JJ., dissenting) (footnotes omitted).

83. Citizenship is arguably a fundamental right, although no Supreme Court decision specifically has labeled it as such. Fundamental rights have been defined as those implicitly or explicitly guaranteed by the Constitution. *See* Livingston v. Ewing, 455 F. Supp. 825 (D.N.M. 1978) (fact that non-Indian vendors were excluded from selling their wares in a public museum did not violate their fundamental rights); Koelfgen v. Jackson, 355 F. Supp. 243 (D.

Court formerly has characterized citizenship as a "precious,"[84] "basic"[85] right from which many other important rights and privileges flow. Faithfulness to this conception of citizenship virtually mandates the stricter evidentiary standard.

Even though expatriation proceedings are civil in nature, the citizen's situation is analogous to that of the defendant in a criminal prosecution. Each individual has an important right dependent upon the outcome of the case. The criminal defendant stands to lose his liberty, or perhaps even his life. The citizen is threatened with loss of citizenship and all its accompanying rights. Although the Supreme Court previously stated that the beyond a reasonable doubt standard of proof was reserved for criminal cases,[86] the *Terrazas* Court should have given more

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Minn. 1972) (right to be fairly considered for public employment not fundamental). The fourteenth amendment guarantees citizenship to any individual born in the United States. *See* note 1 *supra*. Citizenship acquired by birth in the United States is, therefore, a fundamental right.

The United Nations has recognized citizenship as a basic right. The Universal Declaration of Human Rights states that everyone has the right to a nationality and that no one should be deprived of his nationality nor denied the right to change his nationality. Universal Declaration of Human Rights, G.A. Res. 217 (III), U.N. Doc. A/810, at 71-74 (1948), *reprinted in* L. SOHN, BASIC DOCUMENTS OF THE UNITED NATIONS § 9, at 132-35 (1956).

84. Schneiderman v. United States, 320 U.S. 118, 122 (1943).

85. Nishikawa v. Dulles, 356 U.S. 129, 137 (1958).

86. Addington v. Texas, 441 U.S. 418, 423-24 (1979). *See* note 13 *supra*.

The burden imposed in expatriation cases is different from that imposed in criminal cases. In expatriation proceedings, intent to renounce citizenship must be proved by a preponderance of the evidence. In criminal cases, due process requires that the prosecution prove beyond a reasonable doubt every fact necessary to constitute the crime charged. *See* Mullaney v. Wilbur, 421 U.S. 684 (1975); *In re* Winship, 397 U.S. 358 (1970). Intent to commit the criminal act, however, may be inferred because of the presumption that a sane individual intends the natural and probable consequences of his own acts. *See* United States v. Brown, 518 F.2d 821 (7th Cir.), *cert. denied*, 423 U.S. 917 (1975). The intent requirement in criminal and expatriation cases is distinguishable. In criminal cases, the issue is intent to cause the consequences of the criminal act. The requirement in expatriation cases is performance of an act with intent to renounce citizenship. It is not presumed that the individual performed the act with the intent to lose his citizenship. Both the presumption and the burden of proof are different in expatriation and criminal cases. Criminal defendants are disadvantaged by a presumption of intent, but get the benefit of the stricter burden of proof. In support of the stricter burden of proof in

consideration to the clear and convincing standard; at the very least the Court could have given a reasonable explanation why such a standard should not be adopted for expatriation proceedings. Expatriation is arguably one of the situations in which particularly important individual interests are deserving of the intermediate standard of proof.[87] The citizen is threatened with loss of the right to be a member of the political community. In addition to this potential deprivation, if the Government successfully proves its case, the citizen becomes an alien and must live in fear of possible expulsion.[88] The Supreme Court previously recognized the punitive nature of expatriation in several situations and in those cases invalidated the statutes imposing expatriation as unconstitutional under the eighth amendment prohibition against cruel and unusual punishment.[89] In *Terrazas*, however, the Court found that expatriation was not punishment since, under its reasoning, expatriation did not involve a loss of liberty.[90] Although criminal cases and expatriation proceedings are analogous in several respects, the *Terrazas* holding

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criminal cases, the criminal defendant arguably has more at stake than the expatriated citizen. A criminal conviction results in loss of liberty in the sense that the individual will be confined in an institution. A citizen who is divested of his citizenship loses a status but remains free to acquire citizenship in another country, or possibly to remain in the United States as an alien. On the other hand, loss of citizenship could be a greater deprivation than imprisonment when the imprisonment is only for a short period, because the criminal one day will be released, whereas expatriation generally is considered permanent.

87. *See* 441 U.S. at 424 and cases cited therein; note 13 *supra*.

88. The burden of proof in deportation proceedings is very different from that in expatriation proceedings. In deportation cases, the burden of proof is on the alien to show the time, place, and manner of entry into the United States and to show that he is not subject to exclusion under any provisions of the Immigration and Nationality Act of 1952. If he fails to sustain his burden of proof, he is presumed to be in the United States in violation of the law. 8 U.S.C. § 1361 (1976).

The expulsion of an alien does not implicate loss of liberty since the alien does not lose his status of citizenship. Aliens do not reside in the United States as of right, but only as a privilege granted by Congress. *See* Marcello v. Ahrens, 212 F.2d 830 (5th Cir.), *aff'd*, 349 U.S. 302 (1955).

89. Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963); Trop v. Dulles, 356 U.S. 86 (1958).

90. 444 U.S. at 266.

is not necessarily inconsistent with the standard of proof imposed in criminal cases, since the strictest standard has always been reserved for criminal cases[91] and expatriation is characterized as a civil proceeding.

Justices Stevens and Marshall, each concurring in part and dissenting in part,[92] disagreed with the majority's approval of the preponderance of the evidence standard.[93] Justice Stevens expressed the opinion that use of the liberal standard of proof would amount to the deprivation of liberty without due process of law.[94] Justice Marshall also held the view that the statutory standard interfered with a fundamental constitutional right of the individual to retain his citizenship and emphasized that expatriation proceedings should be subjected to the clear and convincing standard.[95] The opinions of these two dissenting justices are consistent with past judicial views of the importance of the citizenship right and the protection that should be given the individual threatened with loss of that right.[96] Both justices recognized that application of the statutory standard had serious constitutional implications, since citizenship is an important right deserving more protection than that afforded by the preponderance of the evidence standard.

The majority in *Terrazas* did not examine the practical implications that its holding will have on citizenship. Laurence Terrazas was a dual citizen; therefore, even though he lost his United States citizenship, he retained his Mexican citizenship. The *Terrazas* holding will be much more detrimental to the in-

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91. Addington v. Texas, 441 U.S. 418, 423 (1979).

92. Justice Marshall agreed that expatriating acts must be done with a specific intent to relinquish citizenship. 444 U.S. at 270 (Marshall, J., concurring and dissenting). Justice Stevens agreed that Congress could establish standards by which courts may determine when a renunciation has occurred, but did not agree that specific intent is necessary to prove expatriation. *Id.* at 272 (Stevens, J., concurring and dissenting).

93. Justice Brennan, in his dissent, concluded that Terrazas had not renounced his citizenship formally within the meaning of *Afroyim* and, therefore, that there was no need to pass on the constitutionality of § 1481(c). *Id.* at 274 n.4 (Brennan, J., dissenting).

94. *Id.* at 274 (Stevens, J., concurring and dissenting).

95. *Id.* at 272 (Marshall, J., concurring and dissenting).

96. *See* note 83 *supra*.

dividual with only a single citizenship.[97] If the Government proves expatriation of an individual with only one citizenship by a preponderance of the evidence, that individual becomes stateless.[98] Statelessness, as Justice Brennan pointed out in his dissent, is an unfavored condition in the international community.[99] The *Terrazas* Court, however, in allowing proof of expatriation by a less exacting standard, greatly increased the possibility of an increased number of stateless individuals.

The *Terrazas* decision will affect dual citizens differently than it will affect citizens with only United States citizenship. Although a dual citizen is less likely to become stateless, he may have a greater chance of losing his United States citizenship than the single citizenship individual. A dual citizen owes duties to two countries and these duties sometimes may conflict. If the dual citizen has the responsibility of performing duties for a country other than the United States, the Government may attempt to prove that the resulting conduct, if potentially expatriating, was done with intent to renounce United States citizenship. The judicially approved statutory standard makes the Government's contention easier to establish.

Since the enactment of section 1481(c), there had been a line of inconsistent expatriation cases concerning the evidentiary standards.[100] Since, however, all of these cases were lower federal

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97. The Supreme Court previously recognized the superior position of the dual national who loses his citizenship and implied that such a loss was not a serious deprivation since the individual retained citizenship of one country and was not stateless. Rogers v. Bellei, 401 U.S. 815 (1971).

98. "[L]oss of nationality amounts to the loss of all rights under contemporary international law." Note, *The Expatriation Act of 1954*, 64 YALE L.J. 1164, 1169 (1955). He who loses his citizenship "loses the right to engage in the professions . . . the right to vote and the right to hold public office." *Id.* at 1189.

99. "[T]he expatriate has lost the right to have rights. This punishment is offensive to cardinal principles for which the Constitution stands. It subjects the individual to a fate of ever-increasing fear and distress. . . . He may be subject to banishment, a fate universally decried by civilized people. He is stateless, a condition deplored in the international community of democracies."

444 U.S. at 271 (Marshall, J., concurring and dissenting) (quoting Trop v. Dulles, 356 U.S. 86, 102 (1958)).

100. *E.g.*, United States v. Matheson, 400 F. Supp. 1241 (S.D.N.Y. 1975),

court decisions, and therefore not controlling, the *Terrazas* Court was free to rule on the standard of proof without having to reconcile its decision with these cases. In deciding *Terrazas* the Court saw no reason to rely on cases decided prior to 1961 because they were decided without legislative guidance.[101] The Court, however, should have looked to its prior decisions for guidance had it found that application of the statutory standard resulted in loss of liberty or some other constitutional deprivation.[102] Instead, it validated the statutory mandate in an attempt to strengthen the uniform standard that would control expatriation cases in the future. Congressional endeavor to produce a uniformity had been ignored by the courts, and there was a judicial need for a Supreme Court interpretation of the statute.

The *Terrazas* decision produced a clear understanding of the nature and extent of the government's expatriation power. The Supreme Court has taken away the government's direct power to divest an individual of his citizenship by imposing the intent requirement, and, as a result, individual freedom and interest in retention of citizenship have been strengthened. The rights of the individual could have been strengthened even more, however, had the Court required proof of expatriation by clear and convincing evidence rather than by only a preponderance of the evidence. As Justice Frankfurter pointed out in his concurring opinion in *Nishikawa*, the Court should be careful not to impose on the Government a burden so onerous as to prevent effective enforcement of congressional enactments.[103] Citizenship, however, with all its appurtenant rights and privileges, is too precious a right to yield to the government's interest in what amounts to administrative ease. In weighing the vital rights of

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*aff'd*, 532 F.2d 809 (2d Cir.), *cert. denied*, 429 U.S. 823 (1976); Baker v. Rusk, 296 F. Supp. 1244 (C.D. Cal. 1969); Cafiero v. Kennedy, 262 F. Supp. 140 (D.N.J. 1966).

101. *See* text accompanying notes 65 & 66 *supra*.

102. Expatriation proceedings are arguably the types of situations in which personal liberty is at stake. *See* text accompanying notes 80-89 *supra*; notes 82, 83, 86 & 88 *supra*.

103. 356 U.S. at 141 (Frankfurter, J., concurring).

the individual against the convenience of the state, the Court should strike the balance in favor of the individual.

BARBARA J. KOLL

# Constitutional Law—First Amendment—Establishment Clause—Direct Public Aid to Secular Educational Function of Parochial Schools

*Committee for Public Education and Religious Liberty v. Regan*, 444 U.S. 646 (1980).

Plaintiffs, individual state taxpayers and an organization opposed to distribution of public funds to parochial schools, challenged a New York statute[1] authorizing the transfer of state

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1. The statute provides in relevant part:
Section 1. Legislative findings. . . . the state has the duty and authority to evaluate, through a system of uniform state testing and reporting procedures, the quality and effectiveness of instruction to assure that those who are attending instruction, as required by law, are being adequately educated within their individual capacities.

. . . .

More than seven hundred thousand pupils in the state comply with the compulsory education law by attending nonpublic schools. It is a matter of state duty and concern that such nonpublic schools be reimbursed for the actual costs which they incur in providing services to the state which they are required by law to render in connection with the state's responsibility for reporting, testing, and evaluating.

. . . .

Sec. 3. Apportionment. The commissioner shall annually apportion to each qualifying school, for school years beginning on and after July first, nineteen hundred seventy-four, an amount equal to the actual cost incurred by each such school during the preceding school year for providing services required by law to be rendered to the state in compliance with the requirements of the state's . . . examinations and reporting procedures.

. . . .

Sec. 7. Audit. No application for financial assistance under this act shall be approved except under audit of vouchers, or other documents by the commissioner as are necessary to insure that such payment is lawful and proper.

The state department of audit and control shall from time to time examine any and all necessary amounts and records of a qualifying school to which an apportionment has been made . . . for the pur-

funds to private elementary and secondary schools, most of which were church-affiliated. The schools received this aid as reimbursement for the costs of performing various state-mandated testing and record-keeping functions.[2] Plaintiffs maintained that this aid was unconstitutional under the establishment clause of the first amendment.[3] The United States District Court for the Southern District of New York found the statute unconstitutional.[4] This decision was appealed to the United States Supreme Court, which vacated the judgment of the district court and remanded the case[5] with instructions that the issues be considered in light of an intervening decision.[6] On remand, a three-judge district court found the statute constitutional.[7] On direct

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pose of determining the cost to such school for rendering the services referred to in section three of this act. If after such audit it is determined that any qualifying school has received funds in excess of the actual cost of providing the services enumerated in section three of this act, such school shall immediately reimburse the state in such excess amount.

1974 N.Y. Laws ch. 507, as amended by ch. 508.

2. The state-mandated tests were of three types: pupil evaluation program (PEP) tests, comprehensive achievement tests, and Regents Scholarship and College Qualifications Test (RSCQT). All tests involved secular academic subjects unrelated to religious precepts. The RSCQT examinations were scored by the state, the other tests by the schools. Record-keeping and reporting functions for which schools were reimbursed included annual attendance reports for each pupil and a report regarding the student body, faculty, physical facilities, and curriculum of each school. Committee for Pub. Educ. & Religious Liberty v. Regan, 444 U.S. 646, 655 (1980).

3. The first amendment provides that "Congress shall make no law respecting an establishment of religion." U.S. CONST. amend. I. The same amendment also contains a clause guaranteeing the free exercise of religion; free exercise problems are beyond the scope of this Note. The first amendment was made applicable to the states in Cantwell v. Connecticut, 310 U.S. 296 (1940).

4. Committee for Pub. Educ. & Religious Liberty v. Levitt, 414 F. Supp. 1174 (S.D.N.Y. 1976) (Levitt II). This case was brought to challenge an act, see note 1 *supra*, that was drafted to replace the one invalidated in Levitt v. Committee for Pub. Educ. & Religious Liberty, 413 U.S. 472 (1973) (Levitt I) (invalidating 1970 N.Y. Laws ch. 138 § 2).

5. 433 U.S. 902 (1977).

6. The high court suggested the issues be considered in light of Wolman v. Walter, 433 U.S. 229 (1977).

7. Committee for Pub. Educ. & Religious Liberty v. Levitt, 461 F. Supp.

appeal[8] to the United States Supreme Court, *held*, affirmed. The New York statute was upheld since it presented no substantial risk that the mandated testing and record-keeping functions could be used to promote religious purposes and since the statute contained adequate safeguards against improper or misdirected reimbursement. *Committee for Public Education and Religious Liberty v. Regan*, 444 U.S. 646 (1980).

In the last thirty-five years, several state legislatures have responded to persistent pressures from their constituents[9] by establishing programs aimed at channeling public funds to private schools, most of which are sectarian enterprises. The courts have had the responsibility of weighing these legislative measures against the demands of the first amendment. The United States Supreme Court has developed a tripartite test applicable to all aspects[10] of the establishment question. To withstand constitutional scrutiny, a challenged statute (1) must have a secular legislative purpose, (2) must have a primary effect that neither advances nor inhibits religion, and (3) must not result in excessive entanglement of the state with religion. In reviewing cases involving state aid to parochial schools, the Court closely examined[11] the particulars of each challenged program; this careful

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1123 (S.D.N.Y. 1978) (Levitt III).

8. The Court cited 28 U.S.C. § 1253 (1970) as the basis for its assumption of jurisdiction. 444 U.S. at 653.

9. For an excellent discussion of the growing assertiveness of various religious groups during the postwar era and of some of the controversies this assertiveness engendered, see R. MORGAN, THE SUPREME COURT AND RELIGION 81-90 (1972).

10. Establishment clause questions arise in contexts other than that of public funds for religious schools; however, the three-part test is applicable to all establishment litigation. *See* Walz v. Tax Comm'n, 397 U.S. 664 (1970) (property tax exemptions for churches); Epperson v. Arkansas, 393 U.S. 97 (1968) (prohibition of teaching evolutionary theory); Abington School Dist. v. Schempp, 374 U.S. 203 (1963) (Bible readings in public schools); Engel v. Vitale, 370 U.S. 421 (1962) (prayer at beginning of school day); Zorach v. Clauson, 343 U.S. 306 (1952) (released-time program for religious instruction off school premises); Bradfield v. Roberts, 175 U.S. 291 (1899) (congressional funding to church-affiliated hospital). A recent Tennessee case is Wiley v. Board of Educ., 468 F. Supp. 133 (E.D. Tenn. 1979) (Bible study in public schools), *noted in* 47 TENN. L. REV. 181 (1979).

11. 444 U.S. at 653, 661.

regard for the precise facts of each case was dictated by the broad terms of the applicable standard and by the factual variety and complexity of the challenged aid programs. Each previous case dealt with a different aid program and thus helped define what sorts of characteristics were constitutionally permissible. *Regan* had a dual significance: it clarified whether state aid could be directed toward the secular educational functions of parochial schools, and it addressed the question whether, with proper safeguards,[12] a system of direct reimbursement to sectarian elementary and secondary schools for the costs of performing secular testing and record-keeping functions could be permitted.

The line of cases addressing the issue of state aid to religious schools began with *Everson v. Board of Education*,[13] in which the United States Supreme Court upheld a New Jersey statute providing reimbursement to all parents of the costs of transporting their children to and from schools.[14] The Court, reasoning that the nondiscriminatory statute was a legitimate public safety measure analogous to fire or police protection,[15] saw no constitutional reason to preclude the extension of such a general welfare benefit to all citizens. The fact that parochial schools were benefited incidentally did not mean that the establishment clause had been violated; indirect and incidental benefits to religion were permissible since the first amendment "requires the state to be a neutral in its relations with groups of believers and non-believers; it does not require the state to be their adversary."[16] Presumably, to have withheld the general reimbursement benefit from the parents of sectarian school children would have rendered the state the adversary of religion.

Even though the reimbursement program was upheld, *Everson* was not an unqualified victory for those who favored state aid to religious schools. Justice Black, writing for the majority,

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12. The predecessor to the statute in the instant case was struck down in *Levitt I* due to a lack of safeguards to prevent improper or misdirected reimbursement. *See* note 4 *supra*.

13. 330 U.S. 1 (1947). *See* Boyer, *Public Transportation of Parochial School Pupils*, 1952 WIS. L. REV. 64; Pfeffer, *Religion, Education and the Constitution*, 8 LAW. GUILD REV. 387 (1947).

14. 330 U.S. at 18.

15. *Id.* at 17.

16. *Id.* at 18.

announced a strict, literal interpretation[17] of the establishment clause. The clause, said Justice Black, was intended to erect a "wall of separation between church and State,"[18] of which the Court could not approve even "the slightest breach."[19]

The first two prongs of the three-part test now applicable to all establishment clause litigation appeared in rudimentary form in *Everson*. The Court carefully explained the public safety rationale[20] that vindicated the statute, and thus anticipated the requirement that aid programs be based on a secular legislative purpose. The neutrality mandated by *Everson*[21] was subsequently restated in the tripartite test by the requirement that the primary effect of a challenged program neither advance nor inhibit religion.[22]

The state aid issue surfaced again in *Board of Education v. Allen*,[23] which sustained a New York statute authorizing the loan of secular textbooks to students in sectarian secondary schools.[24] The Court's analysis of the secular legislative purpose requirement was an extremely significant expansion of the *Everson* extension-of-benefits rationale. *Everson* had been predicated on a safety rationale far removed from the educational aspects of parochial schools. *Allen* greatly increased the scope of permissible aid by declaring that the state "has a proper interest in the way those [sectarian] schools perform their secular educational function."[25] Aid to students therefore was limited no longer to health and safety measures; the extension-of-benefits rationale

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17. *Id.* at 15-16.

18. *Id.* at 16.

19. *Id.* at 18. Some observers felt that Justice Black's strict language was irreconcilable with the disposition of the case. In dissent, Justice Jackson likened the apparent discordance between the Court's language and the Court's holding to Byron's Julia, who "whispering 'I will ne'er consent,'—consented." *Id.* at 19 (Jackson, J., dissenting).

20. *Id.* at 17-18. *See* text accompanying note 15 *supra*.

21. *See* text accompanying note 16 *supra*.

22. These two elements of the tripartite test were refined to their present verbal contours in Abington School Dist. v. Schempp, 374 U.S. 203 (1963), a school prayer case.

23. 392 U.S. 236 (1968). *See* Freund, *Public Aid to Parochial Schools*, 82 HARV. L. REV. 1680 (1969).

24. 392 U.S. at 238.

25. *Id.* at 247.

was broadened to include textbooks, so long as those books could not be "used by the parochial schools to teach religion."[26] The *Allen* majority indicated that the primary effect of the challenged program was merely to put books in the hands of children, a result that did not advance religion since "the financial benefit is to parents and children, not to schools."[27] The dissenters found the majority's primary effect analysis disingenuous; they felt that the true primary effect of the program was to advance religion by "actively and directly" assisting the "propagation of sectarian viewpoints."[28]

The third element of the establishment test was formulated in *Walz v. Tax Commission*,[29] a New York case involving property tax exemptions for religious organizations. According to *Walz*, a challenged program must satisfy the secular purpose and primary effect standards of *Allen* and, furthermore, must not result in excessive entanglement between government and religion.[30] In applying this third element of the test, the Court examined the administrative relationship created between church and state. The *Walz* Court upheld the challenged exemptions, since elimination of the exemptions would result in greater governmental entanglement with the churches by giving rise to such practices as tax valuation, liens, and foreclosures.[31]

The benefit realized by churches from the *Walz* tax exemption was justified as a permissible indirect benefit comparable to the reimbursement and loan benefits realized from the programs upheld in *Everson* and *Allen*. In discussing direct aid to religion, the Court stated that "obviously a direct money subsidy would be a relationship pregnant with involvement and . . . could encompass sustained and detailed administrative relationships for enforcement of statutory or administrative standards."[32] Direct subsidies thus were believed to result in an unacceptable degree of entanglement. The Court also intimated that if a government

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26. *Id.* at 248.
27. *Id.* at 244.
28. *Id.* at 253.
29. 397 U.S. 664 (1970). *See* Kauper, *The Walz Decision: More on the Religion Clauses of the First Amendment*, 69 MICH. L. REV. 179 (1970).
30. 397 U.S. at 674.
31. *Id.*
32. *Id.* at 675.

should "transfer part of its revenue to churches," an impermissible "sponsorship" or advancement of religion would result.[33] The excessive entanglement criterion was refined in *Lemon v. Kurtzman*,[34] a case striking down a Rhode Island statute providing direct salary supplements for teachers of secular subjects in private elementary and secondary schools.[35] Chief Justice Burger, writing for the majority, cited four factors relevant to the entanglement inquiry: (1) the character and purpose of the institutions benefited, (2) the nature of the aid provided, (3) the nature of the resulting relationship between the state and the church body,[36] and (4) the divisive political potential of the challenged programs.[37] The Court held that the salary supplements did foster excessive entanglement because extensive surveillance would be required to assure that religious and secular subject matter were not mingled[38] and because the potential for divisive political debate "inhered" in the program.[39]

While voiding the salary supplements on entanglement grounds, the Court again recognized[40] the part of the *Allen* rationale which stated that the government sometimes had a legitimate interest in furthering the secular educational function of sectarian schools.[41] Adopting the language of *Walz*, the *Lemon* Court discussed direct aid, again declaring it a defect.[42] *Everson* and *Allen* had sanctioned extensions of benefits to *citizens*, not to the schools directly. The Court reiterated its fear that direct aid would result in excessive entanglement due to the necessity of assuring that aid went only to further secular purposes.[43]

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33. *Id.*

34. 403 U.S. 602 (1971).

35. The case included a challenge of a Pennsylvania program authorizing reimbursement for private school teachers' salaries, textbooks, and instructional materials. *Id.* at 609.

36. *Id.* at 615.

37. *Id.* at 622.

38. *Id.* at 620.

39. *Id.* at 622.

40. *Id.* at 613.

41. *See* text accompanying note 25 *supra*.

42. 403 U.S. at 621. This discussion of direct aid is found not in the Court's treatment of the Rhode Island supplement program, but in its treatment of the Pennsylvania statute also at issue. *See* note 35 *supra*.

43. 403 U.S. at 621.

On the same day *Lemon* was decided the Court handed down *Tilton v. Richardson*,[44] in which the issue was the constitutionality of direct aid to sectarian colleges. The Higher Educational Facilities Act of 1963[45] provided construction grants for buildings used exclusively for secular educational purposes. The Court upheld the legislation on the grounds that no excessive entanglement would result.[46] According to the Court, the religious mission of sectarian colleges was not so pervasive and pronounced as that of sectarian primary and secondary schools. College students were also "less impressionable and less susceptible to religious indoctrination."[47] These factors made advancement of religion more difficult. Since the grants were given in a lump sum, they did not spawn an entangling administrative relationship between the colleges and the state. *Tilton* suggested that colleges could satisfy the tripartite test more easily than could lower-level schools.[48]

During its 1972 Term, the Court used the tripartite test to strike down three legislative efforts to aid religious schools. New York legislation reimbursing nonpublic schools for expenses related to state-mandated testing was declared unconstitutional in *Levitt v. Committee for Public Education and Religious Liberty (Levitt I)*.[49] The program was invalidated as an aid to religion due to the statute's failure to ensure that teacher-prepared tests, for which reimbursement was provided, were free of religious instruction.[50] Another defect of the system was its failure to estab-

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44. 403 U.S. 672 (1971). *See* Kauper, *Public Aid for Parochial Schools and Church Colleges: The Lemon, DiCenso, and Tilton Cases*, 13 ARIZ. L. REV. 567 (1971).

45. 77 Stat. 364 (current version at 20 U.S.C. §§ 711-721 (1976 & Supp. III 1978)).

46. 403 U.S. at 689. The *Tilton* Court, however, held invalid a provision of the Act permitting nonsecular use of the buildings after 20 years of solely secular use. *Id.* at 683-84.

47. *Id.* at 686 (citing Giannella, *Religious Liberty, Nonestablishment, and Doctrinal Development: The Nonestablishment Principle* (pt. II), 81 HARV. L. REV. 513, 574 (1968)).

48. This less exacting standard for state aid to church colleges reappeared in Hunt v. McNair, 413 U.S. 734, 746 (1973), and Roemer v. Board of Pub. Works, 426 U.S. 736, 750-51 (1976).

49. 413 U.S. 472 (1973).

50. *Id.* at 480.

lish an auditing procedure that would preclude improper or misdirected reimbursement.[51] In the second case, a Pennsylvania tuition grant program was found to advance religion in *Sloan v. Lemon*.[52] Impermissible advancement was also the flaw of a three-part New York aid scheme struck down in the third case, *Committee for Public Education and Religious Liberty v. Nyquist*.[53] One part of the scheme involved grants to religious schools for maintenance and repair. This program, by its failure to provide an adequate guarantee that no aid would go to further religious purposes, had a primary effect that "inevitably" advanced religion.[54] The New York system of tuition reimbursement grants was invalidated since the primary effect of the scheme was "to provide desired financial support for nonpublic, sectarian institutions."[55] Tax relief for parents of sectarian school children was struck down because it was not "sufficiently restricted to assure that it will not have the impermissible effect of advancing . . . sectarian activities."[56]

In *Meek v. Pittenger*[57] the Court reviewed a three-part aid scheme developed by the Pennsylvania legislature. One part of the scheme, a textbook loan program, was upheld on the authority of *Allen* and *Everson*.[58] The second part of the system directly supplied auxiliary services, defined as remedial and accelerated instruction, guidance counseling and testing, and speech and hearing therapy, to nonpublic schools at the request

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51. *Id.* at 477.

52. 413 U.S. 825 (1973).

53. 413 U.S. 756 (1973).

54. *Id.* at 779.

55. *Id.* at 783.

56. *Id.* at 794. The tax relief at issue in *Nyquist* was distinguished from the permissible tax exemptions in *Walz* on the grounds that the *Nyquist* benefits had the effect of aiding religion, while *Walz* assured a course of governmental neutrality toward religion. The *Nyquist* relief would have required more state involvement in the lives of its citizens, whereas the *Walz* system contemplated a greater detachment of church and state. *Id.* The Court also used an historical argument to bolster this distinction. *Id.* at 789-94.

57. 421 U.S. 349 (1975). *See* Kirby, *Everson to Meek and Roemer: From Separation to Détente in Church-State Relations*, 55 N.C.L. REV. 563 (1977) [hereinafter cited as Kirby].

58. 421 U.S. at 359-62. *See* text accompanying notes 13-28 *supra*.

of school officials.[59] In invalidating this program on entanglement grounds, the Court stated that excessive state surveillance was required to assure the separation of secular and religious instruction.[60]

The Court's invalidation of the third part of the Pennsylvania program, which involved the direct loan of "instructional materials and equipment" to private schools,[61] was very significant. The *Meek* plurality found the religious and editorial missions of parochial schools to be inextricably intertwined. In contrast, *Allen* had been predicated on the assumptions that these missions could be separated and that aid could flow to the secular without affecting the sectarian.[62] Since the religious and educational functions could not be separated, "substantial aid to the educational function of such schools . . . necessarily . . . resulted in aid to the sectarian school enterprise as a whole."[63] *Meek* thus cast doubt on the validity of the *Allen* Court's approval of aid to the educational function. Aid which "incidentally and indirectly" advanced the schools, however, was still permissible under the *Everson-Allen* extension of general benefits rationale,[64] but the aid supplied by the instructional materials was impermissible since it was "neither indirect nor incidental."[65]

Although the plurality opinion of *Meek* could have been construed as a ban on all aid to the educational function of sec-

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59. 421 U.S. at 367.

60. *Id.* at 370-71.

61. *Id.* at 354.

62. *See* text accompanying notes 23-26 *supra*.

63. 421 U.S. at 366. Perhaps this language of the Court indicated a desire to avoid the burden of closely examining each challenged state aid program, a desire to draw an easily recognizable line between the permissible and the impermissible. The extension of general safety and health benefits would be allowed, while the extension of other sorts of benefits would be denied.

64. *Id.* at 364-65. Such services as bus transportation, school lunches, and public health facilities still would be approved by the *Meek* plurality. *Id.* at 364.

65. *Id.* at 365. Other than supplying a mechanical reference to *Allen*, the *Meek* plurality failed to articulate the reasons that saved the approved textbook plan from the apparent ban on aid to the educational function. Presumably the loan was approved since the aid, although benefiting the educational function, was "indirect and incidental." *Id.* at 362.

tarian schools, the Court declined to adopt such an expansive reading in *Wolman v. Walter*.[66] Instead, in reviewing a six-part Ohio aid scheme, the Court reverted to its more traditional analysis by examining closely the details of each challenged program.[67] The Court, by classifying the program as an extension of a general welfare benefit like those approved in *Everson* and *Allen*,[68] approved the provision of speech and hearing diagnostic services. Ohio's remedial and therapeutic services were permissible because, unlike the system invalidated in *Meek*,[69] they were provided away from the pervasive religious atmosphere of parochial schools.[70] State funding of field trip transportation was overturned as an advancement of religion because the nonpublic school controlled the timing, frequency, and destinations of the trips, and thus made the schools the direct recipients of the aid.[71] The Court also discussed the possibility that the field trips could assume a religious character.[72]

The broad reading of *Meek* was rejected implicitly in *Wolman* by the Court's treatment of the provisions concerned with testing, scoring, and instructional materials. Under the testing and scoring provision, the state prepared and graded examinations in secular subjects, thereby involving itself in a process clearly related to the educational function of the schools.[73] This program withstood scrutiny because, unlike the program invalidated in *Levitt I*,[74] in which reimbursement was provided for tests prepared by parochial school teachers, the nonpublic school exercised no control over the contents or results of the tests.[75] The Court found, therefore, that surveillance and related entanglement problems were not present. In judging the instructional

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66. 433 U.S. 229 (1977).

67. *Id.* at 238.

68. *Id.* at 244. Similar diagnostic services in *Meek* were unconstitutional only because they were not severable from other auxiliary services found unconstitutional. *See* text accompanying notes 55 & 56 *supra*.

69. *See* text accompanying notes 59 & 60 *supra*.

70. 433 U.S. at 247.

71. *Id.* at 253.

72. *Id.* at 254.

73. *Id.* at 240.

74. *See* text accompanying notes 49-51 *supra*.

75. 433 U.S. at 240.

materials provision, the Court relied more heavily on *Nyquist* than on *Meek*.[76] Instead of invalidating the program because it advanced religion by aiding the educational function as *Meek* had done with a similar program, the Court struck down the program because the statute did not follow the *Nyquist* mandate that secular and religious functions be separated.[77] The judicial treatment accorded these two programs suggested that aid to a sectarian school's secular educational function was not per se unconstitutional.

In *Committee for Public Education and Religious Liberty v. Regan*[78] the Court held that the challenged New York aid program[79] satisfied all three elements of the establishment test. The secular legislative purpose element of the test was satisfied by the statute's stated intention of providing an adequate secular education to all the children of the state.[80] The primary effect element was satisfied since the schools were afforded no control over the contents of the tests[81] and since the required record-keeping could not be used to foster religion.[82] The fact that the schools received direct cash reimbursement for the costs of executing the programs did not convert the primarily secular effect into a primarily religious one.[83] The excessive entanglement element of the test was met, according to the Court, because the services for which reimbursement was provided were "discrete and clearly identifiable" and because the statute contained auditing safeguards against improper reimbursement.[84]

By acknowledging a clear secular purpose in the statute's stated objective,[85] the *Regan* Court recognized the state's legiti-

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76. *Id.* at 249-51.

77. *Id.* at 251. Justice Brennan, dissenting from those portions of the opinion upholding the constitutionality of the challenged programs, argued that the Court had ignored the "divisive political potential" aspect of the excessive entanglement criterion. *Id.* at 256 (Brennan, J., dissenting).

78. 444 U.S. 646 (1980).

79. *See* note 1 *supra*.

80. 444 U.S. at 654.

81. *Id.*

82. *Id.* at 656.

83. *Id.* at 657-58.

84. *Id.* at 660.

85. *See* note 1 *supra*.

mate interest in aiding the educational function of parochial schools, an interest first approved in *Allen*.[86] Confusion concerning aid to the educational function had arisen first from the condemnation of such aid by the *Meek* plurality,[87] and then from the approval of such aid in *Wolman*.[88] By relying on *Wolman* and by construing *Meek* narrowly, the Court signaled that aid to the educational function was indeed permissible and that *Allen* and its progeny remained good law. The Court did not overrule any part of *Meek* or disavow any of its language; it simply stated that *Meek* was never understood to support so broad a proposition as the plurality's language suggested.[89] State aid could be directed to the secular educational function so long as all elements of the tripartite test were satisfied.[90]

The excessive entanglement inquiry in *Regan* was limited to an approving description of the procedures designed to preclude improper payment.[91] The Court found that the administrative relationship established to ensure that no aid flowed to the propagation of religion was not entangling because the tests and records were secular in nature and because the services for which reimbursement was provided were discrete and clearly identifiable.[92] The reimbursement process was, according to the Court, "straightforward and susceptible to the routinization that characterizes most reimbursement schemes."[93] This finding was opposed by the dissenters, who argued that an entangling state surveillance would be necessary to guard against misuse of essay questions and to avoid paying teachers for time in which they mingled secular and religious duties.[94]

The Court's entanglement analysis ignored two factors

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86. *See* text accompanying note 25 *supra*.

87. *See* text accompanying notes 62 & 63 *supra*.

88. *See* text accompanying note 73 *supra*.

89. 444 U.S. at 661.

90. *Id.* at 661-62.

91. *Id.* at 659-60. *See* note 1 *supra*.

92. 444 U.S. at 660.

93. *Id.* at 660-61. The majority went on to say that the New York scheme suggested no entanglement on its face, and that the Court was unwilling to read into the plan the bad faith upon which any future excessive entanglement would be predicated. *Id.* at 661.

94. *Id.* at 670 (Blackmun, J., dissenting).

which, according to *Lemon*,[95] were relevant to the inquiry. Neither the character and purpose of the institutions benefited nor the statute's potential for divisive political impact was discussed.[96] The Court's cursory treatment of the entanglement standard was perhaps indicative of a lessening importance accorded that criterion. Cases other than *Regan* intimate that the entanglement inquiry has lost much of its vitality. For example, the entanglement analysis in *Roemer v. Board of Public Works*[97] seemed almost subsumed into the primary effect portion of the tripartite test. The Court there tied its finding of no entanglement to its earlier finding of an absence of pervasive sectarianism. The divisive political potential of entanglement was largely ignored in *Meek* and in *Wolman*.[98] Indeed, the entanglement requirement perhaps has become, like the easily satisfied secular purpose requirement, a largely perfunctory inquiry. If the application of these two prongs of the tripartite test has become merely ritualistic, then the primary effect criterion remains the only crucial inquiry in state-aid cases.

In light of the instructions given the district court on the remand of *Levitt v. Committee for Public Education and Religious Liberty (Levitt II)*,[99] it was unsurprising that the *Regan* majority found *Wolman* controlling on the question of primary effect. Although it conceded that the statutes at issue in *Regan* and *Wolman* were not identical, the Court declared that any differences in the statutes were not "of constitutional dimension."[100] One of these differences was the scoring procedures

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95. *See* text accompanying notes 36 & 37 *supra*.

96. 444 U.S. at 670 (Blackmun, J., dissenting).

97. 426 U.S. 736 (1976). *See* note 48 *supra*.

98. One observer of the lessening importance accorded the excessive entanglement criterion has gone so far as to declare that standard "excess baggage." *See* 44 TENN. L. REV. 377, 387 n.61 (1977). Reasons why the criterion has reached this lowly status are difficult to determine. Perhaps the excessive entanglement standard was created in *Walz* as a convenient way of upholding a popular measure that might have been difficult to vindicate using the other tests. Also, the reluctance of the Court to assess the divisive political potential of challenged programs may spring from the conviction that such assessment is a function that more properly lies with the legislative branch, and therefore indirectly with citizens themselves.

99. *See* text accompanying note 6 *supra*.

100. 444 U.S. at 654.

used in the two programs. Under the program approved in *Wolman*, all tests had been prepared by the state, administered by school personnel, then scored by the state. The program under review in *Regan* established a system in which three tests were prepared by the state and administered by school personnel;[101] two of the three tests, however, were scored not by the state but by school employees. This procedural difference did not warrant invalidation of the program because, according to the Court "the grading . . . by nonpublic school employees afforded no control to the school over the outcome of any of the tests."[102] The Court noted that the two tests consisted largely of objective, multiple-choice questions which gave the grader no latitude in evaluation.[103] In those sections of school-graded tests calling for essay responses, the Court found only a remote chance that religion could be advanced by the school's ability to ascertain a pupil's grasp of religious concepts.[104] This minimal chance was reduced further by procedures drafted to guard against inconsistent grading and misuse of essay questions.[105] Similarly, the Court saw no chance that the record-keeping and reporting functions, which were termed merely "ministerial" in nature, could be used to promote religion.[106]

The Court was justified in asserting that New York, by developing procedural safeguards and by objectifying the examinations, adequately guaranteed that the tests and records could not be used to inculcate religion. The state achieved the separation of religious and secular functions mandated by *Levitt I*, *Nyquist*, *Lemon*, and *Wolman*. It should be noted that these factors which helped satisfy the primary effect inquiry were also determinative of the entanglement inquiry. Perhaps this congruence of factors relevant to both inquiries is indicative of a subtle merger of the two tests, or of a subsumption of entanglement into primary effect. It is likely, however, that the Court will nominally retain a separate, distinct entanglement criterion,

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101. *See* note 2 *supra*.
102. 444 U.S. at 655.
103. *Id.*
104. *Id.* at 656.
105. *Id.*
106. *Id.*

since such a retention would allow the Court greater flexibility in future cases.[107]

Another aspect of the primary effect inquiry involved reimbursement, the second difference between the *Regan* and *Wolman* statutes. Under the system approved in *Wolman*, the state had provided no reimbursement to the schools.[108] The *Regan* program authorized direct reimbursement of the costs of performing the required acts.[109] The Court found this difference unimportant and stated that it would not draw a constitutional distinction between paying the school to do the grading and paying state employees to do the grading, since the grading function could in no way have the primary effect of advancing religion.[110]

The direct reimbursement provision constituted grounds on which *Wolman* should have been distinguished. A distinction should be drawn between the aspect of the program assuring the secular nature of the tests and records and the aspect of the program authorizing direct reimbursement for performance of the required functions. The fact that the tests and records in themselves could not be put to religious uses did not mean that reimbursement for the administration of those tests and records could not aid religion. Indeed, the reimbursement provision can be viewed as a direct subsidy to parochial schools in both their secular and religious missions. As Justice Blackmun pointed out in dissent, testing and record-keeping must be performed in order for the schools to maintain accreditation.[111] Thus it would not be unreasonable to view the costs of testing and record-keeping as part of the operating expenses of the parochial schools. Viewed in this light, the primary effect of the reimbursement program was to defray the costs of doing business, thereby advancing the sectarian school enterprise as a whole.

Furthermore, in upholding a system of direct aid, the Court departed from the long-established principle that such aid was impermissible. The programs upheld in *Everson* and *Allen*, for example, withstood constitutional scrutiny because they were

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107. *See* text accompanying notes 97 & 98 *supra*.
108. 433 U.S. at 229.
109. *See* note 1 *supra*.
110. 444 U.S. at 657-58.
111. *Id.* at 668 (Blackmun, J., dissenting).

viewed as extending benefits to citizens; the benefits accruing to religious schools were acceptable only because they were indirect and incidental.[112] *Walz* explicitly discussed the defect of direct aid while approving the indirect benefit of tax exemption.[113] *Lemon* struck down a statute authorizing a direct subsidy to nonpublic teachers.[114] *Tilton* approved direct aid, but that approval was predicated on the enormous differences between sectarian colleges and sectarian primary schools.[115] *Wolman*, the very case on which *Regan* relied, characterized the provision of field trip transportation to parochial schools as "impermissible direct aid."[116]

In several cases condemning direct aid, the Court reasoned that the "sustained and detailed administrative relationships" likely to result from such aid would lead to excessive entanglement.[117] The *Regan* Court, in the cursory discussion accorded the question, found this entanglement lacking. This finding, however, should not preclude a more thorough examination of the implications of direct aid. Some observors may find the dichotomy between direct and indirect aid somewhat artificial, and indeed programs that are very similar in effect may stand or fall depending on whether the aid is technically directed toward schools or citizens. Perhaps the Court should not place a premium on subtle nuances of legal form; however, the distinction did serve useful purposes. The distinction did recognize that, given the importance of both institutions in the lives of citizens, some interaction between church and state was inevitable, but that this interaction should be as minimal as possible. The direct-indirect distinction reminded legislators that the state, while having a legitimate interest in the welfare of its citizens, had no legitimate interest in subsidizing religion or advancing religious organizations. The emasculation or elimination of this distinction does much to undo the wall between church and

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112. *See* text accompanying notes 15 & 27 *supra*.

113. *See* text accompanying notes 31-33 *supra*.

114. *See* text accompanying notes 42 & 43 *supra*.

115. *See* text accompanying notes 47 & 48 *supra*.

116. 433 U.S. at 253. *See* text accompanying note 71 *supra*.

117. Cases condemning the administrative relationships resulting from direct aid include *Walz*, *Lemon*, *Nyquist*, and *Wolman*.

state and could result in even more blatant governmental sponsorship of religion.

In his separate dissent, Justice Stevens decried the ad hoc nature of state-aid decisions and suggested that the Court abandon "the entire enterprise of trying to justify various types of subsidies to nonpublic schools" by resurrecting the "high and impregnable" wall envisioned by the framers of the Constitution.[118] The malleable tripartite standard too easily adapts itself to results that flout the command of the establishment clause. Retention of the tripartite test can only prolong legal uncertainty and can only invite the internecine political strife[119] the Court has sought to avoid.[120]

How to resurrect the "high and impregnable" wall would of

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118. 444 U.S. at 671 (Stevens, J., dissenting).

119. In reviewing state-aid cases, the Court must assess the strong policy considerations which can be mustered on both sides of the issue. Accommodationists can argue forcefully that a basic sense of fairness requires that parents of children who attend private schools get some return on their tax contribution. State aid to religious schools undoubtedly helps keep viable an attractive educational alternative. Furthermore, the historical factors that gave birth to the establishment clause no longer exist, and there is little danger that modern Americans will find themselves under the yoke of a true established church. On the separationist side, it could be argued that in the present era of governmental retrenchment and budget-cutting, state aid to private schools dries up funds the public schools need desperately. Also, aid to private schools might in some instances encourage types of discrimination which American society has resolved to eradicate.

120. Professor Kirby, in his enlightening article, notes the lack of analytical consistency in cases dealing with state aid to parochial schools and deems this pattern indicative of a "strife-avoidance" desire on the part of the Court. *See* Kirby, *supra* note 57, at 568-69. Through this function of strife-avoidance, the Court attempts to balance and satisfy two strands of opinion having deep roots in American intellectual history. *Id.* at 566-68. One strand of opinion, traceable to Jefferson, would protect the *state* from abuse by the church by erecting a high and impregnable wall between the institutions. *Id.* at 566. The other strand, traceable to Roger Williams, is more concerned with preventing governmental incursions into the *church;* this strand of opinion would disallow only those forms of aid inconsistent with the exercise of religious freedom. *Id.* at 566-67. The Court, by assessing state-aid cases on an individual basis, and by setting seemingly different standards for elementary schools and for colleges, possibly can avoid divisive political debate by partially satisfying these two venerable currents of political thought. *Id.* at 574-75. *See* M. HOWE, THE GARDEN AND THE WILDERNESS 4-9 (1965).

course present the Court with a new problem. The line that the *Meek* plurality attempted to draw seems a reasonable one. Under the *Meek* test, aid directed toward the educational function of parochial schools would be impermissible. *Allen* and its progeny would need to be discredited or overruled. Types of proscribed aid would include the financing of buildings, field trips, instructional materials, textbooks, and educational tests. The extension of general welfare benefits, such as health measures or safety measures as in *Everson,* still could be allowed. Adoption of the *Meek* test would not resolve the problem automatically, for the Court still would be saddled with the burden of determining what benefits qualified as acceptable general welfare benefits. Still, however, adoption of the *Meek* test would constitute a judicial course preferable to the current one.

RONALD L. SCHLICHER

# Criminal Law and Procedure—Jury Separation—Burden of Proof of Prejudice to Defendant

*Gonzales v. State*, 593 S.W.2d 288 (Tenn. 1980).

Defendants, husband and wife, were tried for the aggravated assault[1] of their two daughters. After the evidence was presented and over the objections of both defense counsel,[2] the judge allowed the jury to disperse[3] after admonishing them against listening to any news concerning the trial. That night a

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1. The statute under which defendants were charged provides for a two- to ten-year sentence. TENN. CODE ANN. § 39-601(b) (Supp. 1979).

2. The objections by defense counsel took this case outside section 40-2528 of the Tennessee Code Annotated, which provides for a judge's discretionary separation of jurors in noncapital criminal cases when the jurors are not in actual trial or deliberation. *See* Cook, *Criminal Law in Tennessee in 1977-1978—A Critical Survey*, 46 TENN. L. REV. 473, 533 (1979).

3. The jury was sequestered for the first night of the trial; however, on the afternoon of the second day, the trial judge requested a meeting with counsel and expressed his intention to allow the jurors an overnight respite. The judge was responding to requests from seven jurors that they be allowed to vote in a constitutional referendum. The judge decided to allow the jury to disperse because he did not believe that the trial would be concluded in time for the jurors to get to the polls. Gonzales v. State, 593 S.W.2d 288, 289 (Tenn. 1980).

Defendants opposed the dispersal because of the sensitive nature of the charges and because of adverse publicity about the case. *Id.* Much of the publicity at this time was due to the extremely repugnant episode of child abuse culminating in the death of Melisha Gibson. This crime, committed in Tennessee, achieved national notoriety. *See, e.g.*, New Orleans Times-Picayune, May 29, 1977, at 5, col. 1; The Tennessean (Nashville), Oct. 17, 1976, § A, at 1, col. 1; *id.*, Oct. 16, 1976, at 1, col. 6; *id.*, Oct. 15, 1976, at 1, col. 1.

The public outrage ensuing from this crime prompted a change in the Tennessee law. Child abuse and willful or knowing failure to protect a child from abuse were expressly incorporated into the aggravated assault statute under which defendants were charged. TENN. CODE ANN. § 39-601 (Supp. 1979). *See* Cohen, *A Critical Survey of Developments in Tennessee Family Law in 1976-77*, 45 TENN. L. REV. 427, 493 (1978).

television movie vividly depicting child abuse was shown.[4] When the jury returned the following morning, defense counsel moved for a mistrial and claimed that the jury separation was prejudicial error, but the motion was overruled. The jurors were questioned generally by both the trial judge and defendant husband's counsel regarding exposure to prejudicial information; however, they were not questioned specifically about the television film.[5] All jury responses were negative, and both defendants subsequently were convicted.[6] In the hearing for a new trial, defense counsel asserted the jury separation as prejudicial error and requested a new trial.[7] Counsel also presented testimony on the inflammatory nature of the movie despite the fact that the jurors had not been asked if they had seen it. In upholding the convictions[8] the Tennessee Court of Criminal Appeals applied the harmless error statute[9] and held that although the jury separation was error, the burden of proving prejudice therefrom rested with defendants. On writ of certiorari from the Supreme

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4. "Sybil" was shown on the N.B.C. channel at 8 p.m., March 7, 1978. 593 S.W.2d at 290. The movie dramatized particularly offensive episodes of child abuse which resulted in the victim's developing multiple personalities.

5. *Id.* at 289-90. At the hearing for a new trial, defense counsel asserted that the broadcast of the film was unknown to him until after the trial was over. *Id.* at 290.

6. Defendant husband was convicted on two counts of aggravated assault for the abuse of his daughter and stepdaughter. *Id.* at 289. Defendant wife was convicted under the same statute for failing to take measures to protect one of her daughters from abuse. *Id.*

7. The State did not question the jury after the dispersal and did not present any evidence to counter allegations of prejudice at the hearing for a new trial. *Id.* at 290.

8. Gonzales v. State, Nos. 16093, 16094, & 16095 (Tenn. Crim. App. Nov. 29, 1978).

9. TENN. CODE ANN. § 27-117 (1975). The statute provides:

> No verdict or judgment shall be set aside or new trial granted by any appellate court, in any civil or criminal cause, on the ground of error in the charge of the judge to the jury, or on account of the improper admission or rejection of evidence, or for error in acting on any pleading, demurrer, or indictment, or for any error in any procedure in the cause, unless, in the opinion of the appellate court to which application is made, after an examination of the entire record in the cause, it shall affirmatively appear that the error complained of has affected the results of the trial.

Court of Tennessee, *held*, reversed and remanded. The burden is on the state to rebut the Tennessee common-law presumption of prejudice resulting from any jury separation that occurs without defendant's consent, and in the absence of a sufficient explanation a new trial must be granted. Although the harmless error statute may be relevant after the state has rebutted the common-law presumption, the statute cannot be invoked to shift the burden of proving prejudice to defendants. *Gonzales v. State*, 593 S.W.2d 288 (Tenn. 1980).

Prior to the Tennessee Supreme Court decision in *Gonzales*, state authority on the burden of proving prejudice was conflicting. The common law decreed that the state prove the absence of improper influence by a preponderance of the evidence, while the state harmless error statute allocated the burden of proof to the defendant. This confusion was complicated further by contradictory case law and by multiple constructions of the harmless error statute. The *Gonzales* court addressed two interrelated issues. The first issue was the characterization of defendant's right to an impartial trial, a right protected by jury sequestration. If an alleged trial error affected a right guaranteed by state law and did not affect a substantial interest of the accused, the Tennessee harmless error statute applied. If, however, the alleged error affected a right that was substantial but not guaranteed by the federal constitution, the error arguably was beyond the purview of the harmless error statute. Finally, if the alleged error involved a federal constitutional right, Tennessee courts were bound by federal standards in determining whether the error was harmless. The second issue in *Gonzales* was whether the state harmless error statute should be construed to contain implied exceptions for errors affecting either substantial rights or federal constitutional rights.

The Constitutions of both Tennessee[10] and the United States[11] provide for trial by an impartial jury[12] in criminal cases.

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10. "[I]n all criminal prosecutions, the accused hath the right to . . . a speedy public trial, by an impartial jury . . . ." TENN. CONST. art. 1, § 9.

11. "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ." U.S. CONST. amend. VI.

12. The impartial jury provided for by the United States Constitution is "one which is of impartial frame of mind at the beginning of trial, is influenced

Tennessee courts, following the English rule,[13] have interpreted these constitutional provisions to forbid jury separation.[14] Traditionally, any separation, whether accidental or intentional, automatically vitiated the verdict.[15] The Tennessee Supreme Court has stated that "[i]t is not necessary for the prisoner to prove that . . . [the jurors] were, during their absence, subjected to improper influence from others; it is sufficient if they might have been."[16] Similarly, juror exposure to trial publicity previously required automatic reversal.[17]

The strictness of the old rules requiring automatic reversal

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only by legal and competent evidence produced during trial, and bases its verdict upon evidence connecting defendant with the commission of the crime charged." The same interpretation was given the Tennessee Constitution in Durham v. State, 182 Tenn. 577, 584, 188 S.W.2d 555, 558 (1945) (quoting 20 WORDS AND PHRASES 294 (Perm. ed. 1959)).

13. In ancient times the jury was sequestered together "and without food, drink, fire, or light" until a verdict was agreed upon. 34 A.L.R. 1117 (1925) (quoting Bishop of N. v. Earl of Kent, 14 Hen. VII (Eng.) ch. 29). Under early Tennessee law the defendant was not permitted to consent to a jury separation. *See, e.g.*, Wiley v. State, 31 Tenn. (1 Swan) 256 (1851); Wesley v. State, 30 Tenn. (11 Hum.) 502 (1851). An early Tennessee statute that gave the trial judge discretion to permit dispersal in certain cases was declared unconstitutional in King v. State, 87 Tenn. 304, 10 S.W. 509 (1889) (invalidating Act of March 21, 1887, ch. 158, 1887 Tenn. Pub. Acts 269). Section 40-2528 of the current Tennessee Code Annotated serves a similar function. *See* note 2 *supra*.

14. Long v. State, 132 Tenn. 649, 651, 179 S.W. 315, 316 (1915); Williams v. State, 467 S.W.2d 816, 818 (Tenn. Crim. App. 1971)

15. McLain v. State, 18 Tenn. (10 Yer.) 240 (1837) (several jurors repeatedly absent for fifteen to twenty minutes).

16. *Id.* at 242.

17. Carter v. State, 77 Tenn. (9 Lea) 440 (1882). In *Carter*, because the jury read newspaper accounts of the case at trial and received information not admissible as evidence, the majority reversed the convictions, stating that "the verdict of the jury must be founded alone upon the evidence delivered in open court in the presence of the judge and the parties." *Id.* at 442. Judge McFarland asserted in his dissenting opinion that presumptions of prejudice from juror exposure to newspaper articles were inappropriate "if we assume [the jurors] possessed even a moderate degree of intelligence and honesty." *Id.* at 447. (McFarland, J., dissenting). Since the jurors are sworn and cautioned "to disregard all outside influences, . . . to suppose [the verdict was improperly influenced] . . . is to attribute to them a degree of weakness scarcely consistent with their fitness for their position." *Id.* at 448 (McFarland, J., dissenting).

was relaxed to the extent that separation merely created a presumption, rebuttable by the state, of prejudice to defendant.[18] In *Hines v. State*,[19] a juror suddenly was taken ill and separated himself from the other jurors for ten to fifteen minutes. The common-law rule concerning jury separation error was stated definitively in *Hines* as follows:

> 1st . . . [T]he fact of separation having been established . . . *prima facie* . . . [renders] the verdict . . . vicious; but, 2d, this separation may be explained by the prosecution, showing that . . . in fact, no impressions, other than those drawn from the testimony, were made upon . . . [the jurors' minds]. But, 3d, in the absence of such explanation, the mere fact of separation is sufficient ground for a new trial.[20]

Thus, Tennessee common law mandates that the state bear the initial burden of proof for jury separation errors.

For over 150 years, the Tennessee common-law presumption of prejudice from jury separation errors has coexisted with the concept of harmless error,[21] which places the burden of showing improper influence on the defendant. Only recently, however, have the courts begun to confront the dilemma of the conflicting burdens of proof. Many state rules,[22] as well as the Federal Rules of Civil[23] and Criminal[24] Procedure, have provisions al-

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18. *See, e.g.*, Etter v. State, 185 Tenn. 218, 205 S.W.2d 1 (1947); Hickerson v. State, 141 Tenn. 502, 213 S.W. 917 (1918); Odle v. State, 65 Tenn. (6 Baxt.) 159 (1873); Wesley v. State, 30 Tenn. (11 Hum.) 502 (1851); Riley v. State, 28 Tenn. (9 Hum.) 646 (1849); Hines v. State, 27 Tenn. (8 Hum.) 597 (1848); Stone v. State, 23 Tenn. (4 Hum.) 27 (1843).

19. 27 Tenn. (8 Hum.) 597 (1848).

20. *Id.* at 602.

21. Wilson v. State, 109 Tenn. 167, 179, 70 S.W. 57, 60 (1902). Isham v. State, 33 Tenn. (1 Sneed) 111, 115 (1853) ("The day is past for rescuing the guilty by mere technicalities."). *See also* Givens v. State, 103 Tenn. 647, 55 S.W. 1108 (1899); Glidewell v. State, 83 Tenn. (15 Lea) 133 (1885); Woods v. State, 82 Tenn. (14 Lea) 460 (1884); State v. Staley, 71 Tenn. (3 Lea) 565 (1879); Wallace v. State, 70 Tenn. (2 Lea) 30 (1878); Hale v. State, 41 Tenn. (1 Cold.) 167 (1860).

22. Chapman v. California, 386 U.S. 18, 22 (1967). *E.g.*, ALASKA R. CRIM. P. 47(a); ARIZ. REV. STAT. ANN. § 13-3987 (1975); ARK. R. CIV. P. 61; CAL. CONST. art. VI, § 4½.

23. FED. R. CIV. P. 61.

24. FED. R. CRIM. P. 52(a).

lowing for harmless error, but none of these rules expressly differentiates between constitutional errors and those affecting nonfundamental interests.[25] In Tennessee, statements of the harmless error rule commonly have, but not always, been qualified by declarations that the rule is inapplicable to errors affecting substantial rights of the accused.[26] Although the proviso has been rephrased over the years,[27] it was not couched exclusively in constitutional terms[28] until 1912 in *Hamblin v. State*.[29] Notwithstanding the fact that *Hamblin* included another, more conventional statement of the rule,[30] several courts fastened upon the constitutional language to establish a divergent line of case law and maintained that the harmless error statute had implied exceptions only for constitutional errors.

The tangential, more narrow construction of the implied exception to the harmless error rule derived from *Hamblin* was reflected in *Dykes v. State*[31] in which a burglary conviction was reversed because of an improper charge to the jury. The *Dykes* court asserted, "As far as we can find all cases that have been reported have held, where the question was raised, that when the constitutional right of the accused was violated then that the Harmless Error Statute did not save the case."[32] The opposite

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25. 386 U.S. at 22. Many states have adopted provisions substantially similar to the federal rules of procedure.

26. *E.g.*, Hamblin v. State, 126 Tenn. 394, 150 S.W. 89 (1912); Harness v. State, 126 Tenn. 365, 149 S.W. 911 (1912); Wilson v. State, 109 Tenn. 167, 70 S.W. 57 (1902).

27. *See* note 21 *supra*.

28. "We have said in numerous cases, both written and oral, that this statute must be given effect, unless it invades some constitutional right of the accused." 126 Tenn. at 400, 150 S.W. at 90.

29. 126 Tenn. 394, 150 S.W. 89 (1912).

30. The *Hamblin* court expressly approved the holding in Harness v. State, 126 Tenn. 365, 149 S.W. 911 (1912), by phrasing the exception to the harmless error statute as follows: "unless some substantial right of the accused guaranteed to him by the statutes or the constitution was violated." 126 Tenn. at 399, 150 S.W. at 90.

31. 201 Tenn. 65, 296 S.W.2d 861 (1956). *See, e.g.*, Briggs v. State, 207 Tenn. 253, 338 S.W.2d 625 (1960); Watson v. State, 166 Tenn. 400, 61 S.W.2d 476 (1933); Upchurch v. State, 153 Tenn. 198, 281 S.W. 462 (1926); Johnson v. State, 152 Tenn. 184, 274 S.W. 12 (1925); Munson v. State, 141 Tenn. 522, 213 S.W. 916 (1919); Vinson v. State, 140 Tenn. 70, 203 S.W. 338 (1918).

32. 201 Tenn. at 69, 296 S.W.2d at 863.

result was reached in *Sambolin v. State*[33] in which the Tennessee Supreme Court applied the harmless error statute to uphold a conviction that had been secured in part through a violation of defendant's constitutional right to be free from illegal search and seizure.[34] The inconsistency in applying the harmless error statute to substantial or constitutional rights as seen in *Dykes* and *Sambolin* reflected a dilemma that the courts ultimately would have to resolve.

In recent cases the Tennessee Court of Criminal Appeals consistently has applied the harmless error statute, which places the burden of proving prejudice on the defendant, to jury separation errors.[35] The trend began with *Wade v. State*[36] in which the court, after extensively reviewing the case law, held that "[i]n the absence of a showing of prejudice in the separation of the jury we hold that the separation, as brought out by the trial judge in his investigation, must be held to be harmless error, and we are bound by [the trial judge's] finding of fact in the matter."[37] In *Wade*, jurors had been separated while under a sequestration order. The court stated that "[t]here is no doubt that the [Tennessee] Supreme Court expressed the view that the separation of a jury may be considered as harmless error under some circumstances."[38] Furthermore, in 1959 the Tennessee Supreme

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33. 215 Tenn. 569, 387 S.W.2d 817 (1965). *See* McCravey v. State, 221 Tenn. 237, 426 S.W.2d 174 (1968); State v. Green, 129 Tenn. 619, 167 S.W. 867 (1914).

34. Although there were several constitutional violations in *Sambolin*, the court apparently used the harmless error statute to avoid reaching a federal constitutional question. 215 Tenn. at 574-75, 387 S.W.2d at 820.

35. *E.g.*, Rushing v. State, 565 S.W.2d 893 (Tenn. Crim. App. 1977); Wheeler v. State, 539 S.W.2d 812 (Tenn. Crim. App. 1976); Wade v. State, 524 S.W.2d 497 (Tenn. Crim. App. 1975).

36. 524 S.W.2d 497 (Tenn. Crim. App. 1975).

37. *Id.* at 502.

38. *Id.* at 501. One year after *Wade*, in Wheeler v. State, 539 S.W.2d 812 (Tenn. Crim. App. 1976), the court relied upon *Wade* to find another juror separation error harmless. The appellate court seemed to rely on the hearing conducted by the trial judge as negating any inference of prejudice and applied the harmless error statute to shift to the defendant the burden of proving prejudice. *Id.* at 815. The harmless error statute was again applied to a jury separation error in Rushing v. State, 565 S.W.2d 893 (Tenn. Crim. App. 1977). The court relied upon both *Wade* and *Wheeler* and accepted the inquiry con-

Court applied the harmless error rule to a case involving exposure of jurors to newspaper articles concerning the case being tried[39] and thus the court abandoned the previous position requiring automatic reversal.[40] The court's disposition of the case appeared to be an application of the harmless error rule to a right that the court had recognized as originating in the United States Constitution.[41]

Tennessee case law characterizes rights relating to jury sequestration as both federal and state constitutional rights.[42] The Tennessee Supreme Court in *Long v. State*[43] asserted that such rights were grounded in provisions of the Tennessee Constitution which are virtually identical to the sixth amendment of the United States Constitution.[44] Moreover, the court of criminal appeals[45] expressly has linked the right of jury sequestration to the fair trial[46] and due process provisions of the constitution.[47]

The United States Supreme Court examined the application of the rule of harmless error[48] to federal constitutional rights in *Chapman v. California*.[49] In *Chapman* the prosecuting attorney

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ducted by the trial judge as rebutting any inference of prejudice. *Id.* at 896.

39. Smith v. State, 205 Tenn. 502, 327 S.W.2d 308 (1959). The *Smith* court appeared to misunderstand the burden of proof conflict and stated, after applying the harmless error statute, that the reading of a prejudicial article, although presumptively prejudicial, may be deemed harmless. *Id.* at 530, 327 S.W.2d at 320-21.

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

41. *See* note 14 *supra* and notes 43-47 *infra* and accompanying text. *But see* Frazier v. State, 566 S.W.2d 545, 550 (Tenn. 1977) (exposure of jurors to newspaper publicity not error sufficient to overrule denial of change of venue); Swain v. State, 219 Tenn. 145, 407 S.W.2d 452 (1966) (*voir dire* sufficient to screen out jurors influenced by publicity).

42. *See* note 14 *supra.*

43. 132 Tenn. 649, 179 S.W. 315 (1915).

44. *Id.* at 651, 179 S.W. at 316.

45. Williams v. State, 467 S.W.2d 816 (Tenn. Crim. App. 1971).

46. *See* note 11 *supra.*

47. The United States Supreme Court in Sheppard v. Maxwell, 384 U.S. 333 (1966), stated that "[d]ue process requires that the accused receive a trial by an impartial jury free from outside influences." *Id.* at 362. *Sheppard* involved excessive juror exposure to trial publicity.

48. The Supreme Court was reviewing the California harmless error provision that appears in the state constitution. CAL. CONST. art. VI, § 4½.

49. 386 U.S. 18 (1967).

made repeated references to defendants' failure to testify in their own behalf and suggested that adverse inferences could be drawn therefrom.[50] The United States Supreme Court reversed the California Supreme Court's application of the California harmless error statute to this constitutional error.[51] The Court held that federal rather than state law was to be applied in determining whether the error was harmless[52] and that errors affecting federal constitutional rights in state criminal actions must be found to be harmless beyond a reasonable doubt.[53] Moreover, the *Chapman* Court held that the burden is on the state, as beneficiary of such errors, to prove lack of improper influence.[54] The Court asserted, "With faithfulness to the constitutional union of the States, we cannot leave to the States the formulation of the . . . laws . . . and remedies designed to protect people from infractions by the States of federally guaranteed rights."[55] While acknowledging that some constitutional errors might be harmless and not require automatic reversal,[56] the Court declared that certain constitutional rights are so essential to a fair trial that their violation could never be harmless error.[57]

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50. *Id.* at 19.

51. 63 Cal. 2d 178, 404 P.2d 209, 45 Cal. Rptr. 729 (1965). The United States Supreme Court held in Griffin v. California, 380 U.S. 609 (1965), while *Chapman* was still in the appellate stage, that comments regarding a defendant's failure to testify were unconstitutional under the fifth and fourteenth amendments.

52. 386 U.S. at 21.

53. *Id.* at 24.

54. *Id. See* R. ALDERMAN, T. CARTER, G. DAWSON, J. LAFEVOR, F. LETCHWORTH & T. TIGUE, TENNESSEE LAW OF CRIMINAL PROCEDURE 152 (1976).

55. 386 U.S. at 21.

56. *Id.* at 22.

57. *Id.* at 23. Justice Stewart, in his concurring opinion, expressed the view that comment to a jury by a prosecutor in a state criminal trial on the defendant's failure to testify should require automatic reversal and that the Court need not create a federal rule of harmless error. *Id.* at 45 (Stewart, J., concurring). In his dissent, Justice Harlan stated that the Court had exceeded its powers in exerting supervisory power over state courts. *Id.* at 56-57 (Harlan, J., dissenting). Justice Harlan suggested that the inquiry into the use of harmless error rules should focus on whether the rule was consistent with due process and was applied reasonably and fairly. *Id.* at 51 (Harlan, J., dissenting). Harlan advised that per se harmful errors are those "so devastating or inherently indeterminant that as a matter of law they cannot reasonably be found

Examples given by the Court of such per se harmful errors were admission to evidence of coerced confessions,[58] denial of right to counsel,[59] and trial by a biased judge.[60]

The Tennessee Supreme Court has applied the *Chapman* rule of federal harmless error to state violations of federal constitutional rights. In *McCravey v. State*[61] the rule was used to reverse convictions obtained through the use of involuntary confessions. Six years later in *McKeldin v. State*,[62] involving a denial of effective assistance of counsel at a preliminary hearing, the Tennessee Supreme Court again used *Chapman* to vacate a conviction. The most recent case decided by the supreme court in this area is *State v. Mitchell*[63] in which the federal rule of harmless error was applied to uphold convictions obtained in part through a denial of the sixth amendment right to confrontation.[64]

In *Gonzales v. State*[65] the court chose to adhere to the Tennessee common-law rule stated in *Hines*[66] that imposes a presumption of prejudice resulting from jury separation error and places the burden of proving lack of prejudice on the state. The court justified its decision by the absence of a Tennessee Su-

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harmless," and that errors involving "certain types of official misbehavior require reversal simply because society cannot tolerate giving final effect to a judgment tainted with such intentional misconduct." *Id.* at 52 n.7 (Harlan, J., dissenting).

Arguably, the majority in Harrington v. California, 395 U.S. 250 (1969), shifted the inquiry in *Chapman* from "whether the constitutional error contributed to the conviction to whether the untainted evidence provided 'overwhelming' support for the conviction." *Id.* at 255 (Brennan, J., dissenting).

58. Payne v. Arkansas, 356 U.S. 560 (1958) (use of coerced confession found to violate fourteenth amendment).

59. Gideon v. Wainwright, 372 U.S. 335 (1963) (sixth amendment found to guarantee counsel at government expense in the case of indigents).

60. Tumey v. Ohio, 273 U.S. 510 (1927) (trial by biased judge found to violate the fourteenth amendment).

61. 221 Tenn. 237, 426 S.W.2d 174 (1968).

62. 516 S.W.2d 82 (Tenn. 1974).

63. 593 S.W.2d 280 (Tenn. 1980). *See also* State v. Elliot, 524 S.W.2d 473 (Tenn. 1975).

64. In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." U. S. CONST. AMEND. VI.

65. 593 S.W.2d 288 (Tenn. 1980).

66. *See* text accompanying note 20 *supra*.

preme Court decision expressly holding that the harmless error statute abrogated the common-law presumption relating to jury separation. The court took a narrow view of the issue and examined only its own decisions involving jury separation error,[67] all of which were decided prior to the United States Supreme Court's decision in *Chapman*.[68] The court failed to consider *Chapman* or to note its effect on Tennessee law in closely related areas.[69] The court reasoned that "[w]here the State responds to the defendant's showing that jury separation has occurred . . . as mandated by the *Hines* rules, the harmless error statute may be appropriately considered."[70] Thus, the court appeared to apply the common-law presumption first, and then to apply the harmless error statute. The harmless error statute does not on its face lend itself to the interpretation that it is to be applied subsequent to common-law allocations of burdens of proof.[71] Perhaps the court did not intend to consider the harmless error statute as such, but merely attempted to convey the idea that the state had the affirmative burden of explaining the separation, thereby proving its harmlessness. This approach

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67. The court examined the following cases, among others: Steadman v. State, 199 Tenn. 66, 282 S.W.2d 777 (1955) (male and female jurors separated, both groups under custody, no reversal because presumption that officers did their duty outweighed presumption of prejudice); Cole v. State, 187 Tenn. 459, 215 S.W.2d 824 (1948) (presumption of prejudice rebutted by testimony of officer and jurors); Etter v. State, 185 Tenn. 218, 205 S.W.2d 1 (1947) (convictions reversed due to wholly unexplained separation of one juror at lunch); Hickerson v. State, 141 Tenn. 502, 213 S.W. 917 (1918) (convictions reversed because juror spoke to people attending his child's funeral out of officer's hearing); Sherman v. State, 125 Tenn. 19, 140 S.W. 209 (1911) (although court officers could be fined for allowing separation of jurors in the custody of different officers, where the separation was explained, it was not grounds for reversal); Cartwright v. State, 80 Tenn. (12 Lea) 620 (1883) (where it physically was impossible for a juror to communicate with anyone, even though out of the officer's sight, no presumption of prejudice was warranted); Wesley v. State, 30 Tenn. (11 Hum.) 502 (1851) (an unexplained jury dispersal with defendant's consent resulted in reversal).

68. The most recent case relied upon was Smith v. State, 205 Tenn. 502, 327 S.W.2d 308 (1959).

69. *See* notes 61-63 *supra* and accompanying text.

70. 593 S.W.2d at 293.

71. *See* note 9 *supra*.

would be consistent with the common-law rule.[72]

In retracing previous uses of the harmless error rule in jury sequestration cases, the Tennessee Supreme Court summarily dismissed the *Wade* line of case law in which the harmless error statute was applied to jury separation errors to shift the burden of proving prejudice to the defendant.[73] Such consistent and serious deviation from the supreme court rule, namely application of the harmless error rule to jury separation mistakes, appeared to merit a more articulate disposition. Moreover, the *Gonzales* court stated, "The harmless error statute . . . has never been invoked to relieve the State of the burden of affirmatively showing that no prejudice occurred during the separation, or to alter in any way the application of the *Hines* rules."[74] Unless the court intended to convey the fact that the rule had never been invoked successfully in the supreme court for jury separation errors, the statement is incorrect because the harmless error statute was used for that purpose by the court of criminal appeals in *Wade*.[75]

In order to make a coherent analysis of the problem facing the *Gonzales* court, two preliminary determinations must be made. First, jury separation error must be characterized as affecting insubstantial state rights, substantial state rights, or federal constitutional rights. Rights relating to jury sequestration appear to originate in the federal constitution,[76] since the right to an impartial trial by jury is guaranteed by the sixth amendment.[77] States, however, certainly have an interest in regulating the procedural aspects of such matters so long as the procedural regulation does not interfere with the substantial rights of the accused.[78] Second, if the harmless error statute is found to have

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72. *See* text accompanying note 20 *supra*.

73. *See* Gonzales v. State, 593 S.W.2d 288, 290 (Tenn. 1980). The *Wade* line of cases is arguably distinguishable from *Gonzales* because no prejudicial event comparable to the airing of "Sybil" occurred; however, the supreme court did not enunciate this distinction.

74. *Id.* at 292.

75. 524 S.W.2d 497 (Tenn. Crim. App. 1975).

76. *See* notes 42-47 *supra* and accompanying text.

77. *See* notes 11 & 42-46 *supra* and accompanying text.

78. For example, the Tennessee statute allows jury separation in noncapital felonies. TENN. CODE ANN. § 40-2528 (1975).

any implied exceptions, these exceptions must be clearly defined. Compelling arguments can be made for interpreting the statute to have implied exceptions for errors affecting substantial or constitutional rights, since the harmless error rule could "work very unfair and mischievous results"[79] unless scrupulously applied. The Supreme Court has mandated that the rule be interpreted to have some implied exceptions, at least for the *Chapman* per se harmful federal constitutional errors.[80] Conversely, it would be equally unjust and burdensome to the state to permit the guilty to misuse appellate review "in a game for sowing reversible error in the record."[81] Thus, automatic reversal for any substantial or constitutional error also would be extreme.

After jury separation error has been found and the harmless error statute has been construed, the problem presented in *Gonzales* may be examined in the context of the four modes of treatment of error applied in Tennessee case law.[82] First, if jury separation errors are found to touch insubstantial state rights, the state harmless error statute governs.[83] Jury separation, however, would appear to be an important right, if not a federal constitutional, right. Second, if an error affects substantial state rights or federal constitutional rights, the Tennessee Supreme Court decisions have yielded contradictory results.[84] The older cases, *Hamblin* and the *Dykes* line of cases, recognize an implied exception to the harmless error statute for substantial or constitutional rights.[85] The third line of authority, exemplified by

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79. Chapman v. California, 386 U.S. 18, 22, 50 (1967). *See also* Harrington v. California, 395 U.S. 250 (1969), in which the dissent said:

> There should be no need to remind this Court that the appellate role in applying standards of sufficiency or substantiality of evidence is extremely limited. To apply such standards as threshold requirements to the raising of constitutional challenges to criminal convictions is to shield from attack errors of a most fundamental nature and thus to deprive many defendants of basic constitutional rights.

*Id.* at 257 (Brennan, J., dissenting).

80. *See* notes 58-60 *supra* and accompanying text.

81. Chapman v. California, 386 U.S. 18, 49 (1967).

82. *See* notes 83 & 85-87 *infra* and accompanying text. *Compare* text accompanying notes 18, 26, 32 & 34 *supra*.

83. 28 OKLA. L. REV. 370, 372 n.12 (1975). *See* note 9 *supra*.

84. *See* notes 31 & 33 *supra* and accompanying text.

85. *See* notes 26, 27, 29, 31, & 32 *supra* and accompanying text.

*Sambolin*, recognizes no such exceptions and would apply the harmless error statute.[86] Finally, if rights relating to jury sequestration originate in the fair trial provision of the Constitution,[87] questions relating to such rights are federal questions and are, therefore, controlled by federal law.[88] This result is mandated by *Chapman* and already has been recognized by the Tennessee Supreme Court in at least three related areas.[89] In one such decision, *Mitchell*, handed down only seven days before *Gonzales*,[90] the supreme court applied the *Chapman* rule to a violation of sixth amendment rights.[91] The natural inference from the result in *Gonzales* is that the court found jury separation to concern a substantial, but not federal constitutional right of the accused; consequently, the court followed the line of authority that holds the harmless error statute to have an implied exception for substantial errors[92] in deciding that the common-law rule controlled.

In *Gonzales* the court was presented with an opportunity to clarify and modernize the Tennessee law dealing with jury dispersal occurring without defendant's consent and to harmonize its case law with federal decisions. The court, in failing to indicate an understanding of the intricacies of the problem, did little more than exhibit a rather mechanical "cash register"[93] ap-

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86. *See* note 33 *supra* and accompanying text.

87. *See* note 11 *supra*.

88. Chapman v. California, 386 U.S. 18, 22 (1967).

89. *See* notes 61-63 *supra* and accompanying text.

90. *Mitchell* was decided on January 14, 1980, and *Gonzales* was decided on January 20, 1980.

91. *See* notes 63 & 64 *supra* and accompanying text.

92. This line of case law is best illustrated by Harness v. State, 126 Tenn. 365, 149 S.W. 911 (1912).

93. Courts treat error like the "operations of an automatic cash-register." 1 J. WIGMORE, EVIDENCE § 21 at 371 (3d ed. 1940). Gonzales represents a unique variation of the task of preventing improper juror influence. Traditionally, jurors were insulated from publicity or public hostility relating to the case being tried. *See* notes 17 & 47 *supra* and accompanying text. In *Gonzales*, defendants asserted prejudice resulting from the airing of a television movie concerning child abuse. *See* note 4 *supra*. The relationship between the various laws and policies regulating jury separation and the showing of a television drama is at best an attenuated one. Such an indirect source of prejudice might be beyond the scope of normal jury sequestration since jurors are admonished

proach to the problem. The court failed to confront squarely this use of the harmless error doctrine—a use that potentially creates a loophole in the traditional, beyond a reasonable doubt standard of proof in criminal trials. The better reasoned approach to jury separation error is to characterize the right to a sequestered jury as a federal constitutional right, to apply the federal rule of harmless error, and thereby to accommodate the heightened proof requirements characteristic of criminal proceedings. Although reversal has been effected in this particular case due to confusion as to the applicable rule, the state in the future, as beneficiary of this type of constitutional error, may prevail by proving harmlessness by a mere preponderance of the evidence.

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only against viewing television programs concerning the case at trial and are allowed to watch television generally. *See* Smith v. State, 205 Tenn. 502, 527, 327 S.W.2d 308, 322 (1959); Steadman v. State, 199 Tenn. 66, 69, 282 S.W.2d 777, 778 (1955). The influence would not affect a determination of guilt or innocence and therefore might not be prejudicial under a bifurcated trial system. In Tennessee, however, where the trial jury is involved in sentencing, TENN. CODE ANN. § 40-2707 (1975), the influence could adversely affect the defendant. The court did not advance such a distinction.

# Securities Regulation—Insider Trading—Duty of Non-Insider to Disclose Material Nonpublic Information

*Chiarella v. United States*, 445 U.S. 222 (1980).

Defendant, the employee[1] of a financial printing company, was responsible for layouts of announcements involving prospective tender offers[2] and mergers. In setting the layouts for these takeover bids, defendant discovered the identities of five target corporations.[3] Prior to public announcement of each bid, defendant bought stock in the respective target corporation. When the planned transactions were announced and the price of the target corporation's stock increased, defendant sold the shares.[4] As a result of this activity, defendant was indicted on seventeen counts of violating section 10(b) of the Securities Exchange Act of 1934[5] and SEC

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1. Defendant was a "markup man" for Pandick Press, a financial printer. In his employment, defendant selected type fonts and page layouts and then sent the copy on to be set into type. United States v. Chiarella, 588 F.2d 1358, 1363 (2d Cir. 1978).

2. A tender offer is an offer made by one company to purchase shares directly to the shareholders of another company, communicated by newspaper advertisements and mailed circulars, with a view toward acquiring control of the second company. *See* S-G Securities, Inc. v. Fuqua Inv. Co., 466 F. Supp. 1114, 1127 (D. Mass. 1978); Cattlemen's Inv. Co. v. Tears, 343 F. Supp. 1248, 1252 (W.D. Okla. 1972).

3. Because of his knowledge of the stock market, defendant was able to deduce the identities of the corporations involved, even though their names had been either deleted or written in code to preserve confidentiality. United States v. Chiarella, 588 F.2d 1358, 1363 (2d Cir. 1978).

4. Over a fourteen month period, defendant realized a gain of over $30,000 by trading in this fashion in the stock of the five target corporations. Chiarella v. United States, 445 U.S. 222 (1980).

5. 15 U.S.C. § 78j(b) (1976). 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 national securities exchange —
>
> . . . (b) To use or employ, in connection with the purchase or sale of

Rule 10b-5[6] for failing to disclose the market information. In the district court defendant was convicted by a jury for violating those provisions.[7] The United States Court of Appeals for the Second Circuit affirmed defendant's conviction.[8] On certiorari to the Supreme Court of the United States, *held*, reversed. Mere possession of nonpublic market information, absent a fiduciary relationship or some other relationship of trust and confidence, does not give rise to a duty either to disclose such information or to abstain from trading under section 10(b) and Rule 10b-5. *Chiarella v. United States*, 445 U.S. 222 (1980).[9]

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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.

*Id.*

6. 17 C.F.R. § 240.10b-5 (1979). Rule 10b-5 provides:

It shall be unlawful for any person, directly, or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,

(a) To employ any device, scheme, or artifice to defraud,

(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

7. United States v. Chiarella, 450 F. Supp. 95 (S.D.N.Y. 1978). The court found that defendant's conduct fell within the range of activities that Congress intended to prohibit when it enacted § 10(b). *Id.* at 97. Sanctions of up to $10,000 and five years imprisonment for violations of the 1934 Act are provided in § 32(a). 15 U.S.C. § 78ff(a) (1976). Although defendant agreed to return his profits to those from whom he bought the securities, he was nonetheless convicted for criminal violations of the previously noted provisions. 588 F.2d 1358, 1364 (2d Cir. 1978). The Supreme Court noted that this was the first instance in which criminal sanctions had been imposed for nondisclosure. 445 U.S. at 235 n.20.

8. United States v. Chiarella, 588 F.2d 1358 (2d Cir. 1978).

9. At least two other problems, both having to do with jury instructions, were present in this case. The United States argued that even if defendant was not liable under § 10(b) for his failure to disclose his information to those with whom he traded, he was nonetheless liable for breach of his duty, owed to the corporations making the bids, as an employee of the printing company em-

The Securities Exchange Act of 1934 was passed in an attempt to protect investors against fraud and imprudent investments and to give integrity to the securities industry.[10] This purpose was reflected in the Act by section 10(b)'s broad prohibition against manipulative or deceptive devices in connection with the purchase or sale of securities.[11] The intent of Congress was to protect the investing public not only from common-law fraud, but from any manipulative practices that amounted to market unfairness.[12] In 1942, the SEC promulgated Rule 10b-

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ployed by those corporations. 445 U.S. at 235. In overcoming this argument, the Court reasoned that the essence of the trial judge's instructions was that the jury could convict defendant if it found that he had failed to disclose material information to the sellers. The only duty mentioned in the instructions was one owed to the sellers, not to the corporations making the takeover bids. The Court therefore dismissed this argument on the basis that it could not affirm a criminal conviction based on a theory not presented to the jury. *Id.* at 236-37 (citing Dunn v. United States, 442 U.S. 100, 106-07 (1979); Rewis v. United States, 401 U.S. 808, 814 (1971)).

The other problem with jury instructions was discussed by Justice Brennan in his concurring opinion. Justice Brennan agreed with the substance of the dissent by Chief Justice Burger, in which it was argued that anyone who converted or otherwise improperly obtained nonpublic information and used it for his own benefit was guilty of a § 10(b) violation. 445 U.S. at 240 (Burger, C. J., dissenting). Chief Justice Burger argued that the jury instructions, fairly read as a whole and in the context of the trial, required a finding that defendant had misappropriated the information involved. *Id.* at 243 (Burger, C.J., dissenting). Justice Brennan, however, was not satisfied and refused to find the defendant liable absent proper jury instructions. *Id.* at 238 (Brennan, J., concurring).

10. 78 CONG. REC. 7861 (1934) (remarks of Rep. Lea). The 1934 Act was one in a series of acts designed to eliminate problems in the securities industry that Congress believed had contributed to the stock market crash of 1929 and the subsequent depression of the 1930s. SEC v. Capital Gains Res. Bureau, Inc. 375 U.S. 180, 186 (1963).

11. 15 U.S.C. § 78j(b) (1976). The effect of this broad prohibition was to substitute the philosophy of full disclosure for the philosophy of caveat emptor. 375 U.S. at 186. By this prohibition, Congress intended to protect investors from practices detrimental to their interests. *See* S. REP. No. 792, 73d Cong., 2d Sess. 9 (1934); H.R. REP. No. 1838, 73d Cong., 2d Sess. 33 (1934). The Supreme Court limited the extent of this protection by interpreting § 10(b) and Rule 10b-5 to require scienter, not mere negligence. Ernst & Ernst v. Hochfelder, 425 U.S. 185 (1976).

12. H.R. REP. No. 1383, 73d Cong., 2d Sess. 10 (1934). "To insure to the multitude of investors the maintenance of fair and honest markets, manipula-

5 as a provision for the enforcement of the section 10(b) objectives. The rule prohibited any practice or act that operated as a fraud or deceit in the purchase or sale of securities;[13] by its terms, Rule 10b-5 applied to more than just fraud.[14] In *Chiarel-*

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tive practices of all kinds on national exchanges are banned." *Id.* As Chief Justice Burger stated in his dissent in *Chiarella*:

> I would read § 10(b) and Rule 10b-5 to encompass and build on this principle: that a person who has misappropriated nonpublic information has an absolute duty to disclose that information or to refrain from trading.
>
> . . . By their terms, these provisions reach *any* person engaged in *any* fraudulent scheme. This broad language negates the suggestion that congressional concern was limited to trading by "corporate insiders" or to deceptive practices relating to "corporate information."

445 U.S. at 240 (Burger C.J., dissenting).

Prior to the promulgation of Rule 10b-5 by the Securities and Exchange Commission, omissions of material information in securities transactions were actionable as fraud under the common law only when a fiduciary relationship or some other relationship of trust and confidence existed between the parties to the transaction. RESTATEMENT (SECOND) OF TORTS § 551(2)(a), at 119 (1977). Only corporate insiders ordinarily were deemed to have this duty either to disclose the information or abstain from trading. The concept of corporate insiders under § 16 of the 1934 Act includes officers and directors of a corporation and those shareholders who were beneficial owners of more than 10% of any class of securities in a corporation. 15 U.S.C. § 78p (1976). The insider concept is even broader under Rule 10b-5. *See* SEC v. Texas Gulf Sulphur Co., 401 F.2d 833, 848 (2d Cir. 1968), *cert. denied*, 404 U.S. 1005 (1971); Ross v. Licht, 263 F. Supp. 395, 409 (S.D.N.Y. 1967).

Remarks by the committees involved in developing the 1934 Act indicated that unfair practices by corporate insiders specifically were intended to be covered by another section of the Act. 15 U.S.C. § 78p (1976). *See* S. REP. No. 792, 73d Cong., 2d Sess. (1934); H.R. REP. No. 1383, 73d Cong., 2d Sess. (1934); COMMMITTEE ON STOCK EXCHANGE REGULATION, REPORT TO SECRETARY OF COMMERCE RELATIVE TO STOCK EXCHANGE REGULATION 16 (1934) (reference to separate rules for regulation of specialists).

13. 17 C.F.R. § 240.10b-5 (1978).

14. *See* note 6 *supra* (fraud or deceit). In a case involving the Investment Advisers Act of 1940, 15 U.S.C. § 80b-6 (1976), which included the same provision as that found in Rule 10b-5(c), the Supreme Court declared that if Congress in fact intended to codify the common law of fraud, it intended to do so remedially, not technically. SEC v. Capital Gains Res. Bureau, Inc., 375 U.S. 180, 195 (1963). The Court stated that "[f]raud, indeed, in the sense of a court of equity properly includes all acts, omissions and concealments which involve a breach of legal or equitable duty, trust, or confidence, justly reposed, and are injurious to another, *or by which an undue and unconscientious advantage is*

*la*, the issue was whether the scope of the rule would be extended to impose a duty either to disclose or abstain from trading upon a possessor of nonpublic market information who had no fiduciary relationship or other relationship of trust and confi-

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*taken of another." Id.* at 194 (quoting Moore v. Crawford, 130 U.S. 122, 128 (1889)) (emphasis added). *See* J. STORY, EQUITY JURISPRUDENCE § 187 (13th ed. 1886).

At common law, one who failed to disclose to another a fact that he knew justifiably might induce the other party to a business transaction to act or refrain from acting was liable for fraud. RESTATEMENT (SECOND) OF TORTS § 551(1), at 119 (1977). This liability was premised on a duty to disclose the information. *Id.* Unless some positive statement was made in addition to the omission, such a duty to disclose generally was premised on a fiduciary relationship or some other relationship of trust. *Id.* § 551(2), at 119. This fiduciary duty ordinarily was owed only to the corporation itself, not to the individual shareholders. Thus, the reach of common-law fraud actions in the corporate securities context was narrow.

In interpreting the prohibition in § 10(b) and in Rule 10b-5, courts have extended the duty to disclose or abstain beyond the traditional reach of common-law fraud actions. Only a few years after the enactment of Rule 10b-5 a federal district court ruled that this duty was owed by a corporate insider to the individual shareholders. Speed v. Transamerica Corp., 99 F. Supp. 808 (D. Del. 1951). The SEC expanded the range of persons owing a duty to disclose or abstain to include a broker-dealer who had obtained inside information from an insider in the corporation whose securities were being traded. *In re* Cady, Roberts & Co., 1961 FED. SEC. L. REP. 81013 (1961). Tippees, persons who received material, nonpublic information from the insiders of the corporation in whose securities they were trading, also were held to have a duty to disclose or abstain. SEC v. Texas Gulf Sulphur Co., 401 F.2d 833 (2d Cir. 1968), *cert. denied*, 404 U.S. 1005 (1971). *See* Ross v. Licht, 263 F. Supp. 395, 410 (S.D.N.Y. 1967) (defining tippees as persons given information by insiders in breach of trust); Shapiro v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 495 F.2d 228, 237 (2d Cir. 1974) (discussion of tippers versus tippees). The SEC even extended that duty to remote tippees. *In re* Investors Mgmt. Co., 44 S.E.C. 633 (1971). A remote tippee obtains his information from another tippee, rather than directly from a corporate source. Liability is based on the principle that the remote tippee either knows or has reason to know of the nature of the information and its source. *Id.* at 645. A common factor among all the defendants who fell within Rule 10b-5 was the relationship they had with the corporations whose securities were traded. Although the defendants were not corporate insiders, they obtained their information from corporate insiders, and the courts and the SEC found that they therefore owed duties to those with whom they traded. *See* SEC v. Texas Gulf Sulphur Co., 401 F.2d 833 (2d Cir. 1968), *cert. denied*, 404 U.S. 1005 (1971); *In re* Investors Mgmt. Co., 44 S.E.C. 633 (1971).

dence with either the corporation whose shares he traded or the shareholders with whom he dealt.

Despite the signals from both Congress and the Court that section 10(b) and Rule 10b-5 were remedial measures that should be construed broadly, the initial application of those measures to cases of nondisclosure was confined. At common law, corporate insiders ordinarily owed fiduciary duties only to the corporation itself, not to the individual shareholders.[15] This rule was applied unless special facts existed to create on the part of the insider a duty to disclose inside information to shareholders with whom he traded.[16] Only in a minority of jurisdictions were corporate insiders liable for failing to disclose inside information to those with whom they traded.[17] In *Speed v. Transamerica Corp.*,[18] although the court restricted the class of defendants liable under section 10(b) and Rule 10b-5 to traditional fraud limits, it expanded common-law notions by finding that the corporate insider was liable to the minority shareholders as well as to the corporation.[19]

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15. Carpenter v. Danforth, 52 Barb. 581, 584-86 (N.Y. App. Div. 1868).

16. Strong v. Repide, 213 U.S. 41 (1909).

17. Oliver v. Oliver, 118 Ga. 362, 371, 45 S.E. 232, 235 (1903). As a common-law basis of liability for nondisclosure of inside information by an insider, the New York Court of Appeals ruled that shareholders who had suffered due to an insider's trading on undisclosed information could maintain a shareholder's derivative suit on behalf of the corporation against the insider. Diamond v. Oreamuno, 24 N.Y.2d 494, 248 N.E.2d 910, 310 N.Y.S.2d 78 (1969).

18. 99 F. Supp. 808 (D. Del. 1951).

19. The complaint alleged that defendant caused an annual report for the Axton-Fisher Corporation, in which defendant was a majority shareholder, to be mailed to plaintiffs. *Id.* at 812. This report allegedly showed the value of Axton-Fisher's inventory to be worth almost $10,000,000 less than its actual value and reported a decline in net income when the corporation's earnings were in fact improving. *Id.* It was alleged that defendant withheld the true information in order to make substantial purchases of Axton-Fisher stock at below market value and affect a merger. Plaintiffs contended that they would not have sold their stock had they known the true state of affairs of the corporation. *Id.*

Plaintiffs alleged that the information withheld was material and brought an action against the corporation for common-law fraud and deceit and for violation of Rule 10b-5. *Id.* A matter is material under the following circumstances:

> (a) [A] reasonable man would attach importance to its existence

The SEC extended liability under Rule 10b-5 beyond the generally accepted bounds of the corporate insider concept with its decision in *In re Cady, Roberts & Co.*[20] The question for the SEC was whether a broker-dealer who received inside information from his partner, a corporate director, had a duty to disclose that information to purchasers to whom he sold that corporation's securities.[21] In ruling that the broker-dealer did have such a duty, the Commission justified its extension of liability

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or nonexistence in determining his choice of action in the transaction in question; or

(b) the maker of the representation knows or has reason to know that its recipient regards or is likely to regard the matter as important in determining his choice of action, although a reasonable man would not so regard it.

RESTATEMENT (SECOND) OF TORTS § 538(2), at 80 (1977).

*See* Lewelling v. First California Co., 564 F.2d 1277, 1279 (9th Cir. 1977); Northwest Paper Co. v. Thompson, 421 F.2d 137, 138 (9th Cir. 1969); Myzel v. Fields, 386 F.2d 718, 734-35 (8th Cir. 1967), *cert. denied*, 390 U.S. 951 (1968); List v. Fashion Park, Inc., 340 F.2d 457, 462 (2d Cir. 1965); Kohler v. Kohler Co., 319 F.2d 634, 642 (7th Cir. 1963).

The court determined that it was unlawful under Rule 10b-5 for a corporate insider to purchase stock from minority shareholders on the basis of undisclosed material information. 99 F. Supp. at 828. In the court's opinion, Congress intended to eliminate all deceptive devices in the sale of securities. *Id.* at 832. Nonetheless, the decision was based on a duty of disclosure derived from the policy of preventing corporate insiders from taking unfair advantage of minority shareholders. *Id. Accord*, Kohler v. Kohler Co., 319 F.2d 634, 642 (7th Cir. 1963). *Cf.* Myzel v. Fields, 386 F.2d 718, 740 (8th Cir. 1967), *cert. denied*, 390 U.S. 915 (1968) (status of person immaterial; duty to disclose arises because of Rule 10b-5).

20. 1961 FED. SEC. L. REP. 81013 (1961). At a board of directors meeting, the Curtiss-Wright Corporation, whose stock had continued to rise in market price, decided to initiate a substantial dividend reduction, from $.625 per share to $.375 per share. *Id.* at 81015. Before this information was transferred to the New York Stock Exchange, a Curtiss-Wright director called defendant to inform him of the change. The director and defendant were partners in a broker-dealer firm. *Id.* at 81015 n.4. Defendant promptly issued two sell orders in order to gain the high market value of the shares before the news was announced publicly. The sell orders involved approximately 7000 shares. *Id.* at 81015. On the basis of these transactions, defendant was sued under § 10(b) and Rule 10b-5 and received a punishment of suspension from the securities exchange for 20 days. *Id.* at 81013, 81015.

21. *Id.* at 81014. The defrauded persons in this case were those who purchased the shares from defendant. *Id.* at 81018.

under Rule 10b-5 by finding that a major purpose of the securities acts in general was the prevention of fraud, manipulation, and deception in securities transactions.[22] The Commission reasoned that section 10(b) and Rule 10b-5 were broad remedial provisions aimed at reaching deceptive practices, whether or not such practices would be sufficient to sustain an action for fraud at common law.[23] Although it did not define the limits within which the securities acts could be used, the Commission clearly indicated that the acts generated a body of federal law encompassing much more than traditional common-law fraud.[24]

The Commission determined that the obligation to disclose material, nonpublic information before trading was dependent on two factors.[25] The first was the existence of a relationship giving access to information intended to be used only for a corporate purpose.[26] The second factor was the inherent unfairness of allowing a person possessing such information to use it while knowing it was unavailable to the other party to the transaction.[27] In other words, the defendant's access to inside corporate information resulted in a situation of unfairness when he traded with those who did not have access to that information.

Although the Commission appeared to be moving toward application of Rule 10b-5 to situations of market unfairness in this second factor of the test, the emphasis on the special relationship giving access to information indicated that the Commission was not totally willing to part with common-law notions of fraud. As the Commission stated, "Thus our task here is to identify those persons who are in a special relationship *with a company* and privy to its internal affairs, and thereby suffer correlative duties in trading in its securities."[28] The Commission thereby based its ruling on defendant's partnership with the insider of the corporation that issued the securities involved, a relationship that gave him access to the inside information regard-

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22. *Id.* at 81015.
23. *Id.*
24. *Id.* at 81016 n.10.
25. *Id.* at 81017.
26. *Id.*
27. *Id.*
28. *Id.* (emphasis added). It is clear from the quotation that the relationship must be with the corporation whose stocks are being traded.

ing the dividend reduction. As a partner with the corporate insider in the broker-dealer firm, defendant occupied a fiduciary relationship toward his customers. Among the duties he thereby owed to his customers, according to the Commission, were a duty not to take a position adverse to their position, a duty not to take secret profits at their expense, a duty not to make factual misrepresentations in his dealings with them, and a general duty not to place his own interests above their interests.[29] Thus defendant, as well as his partner, had a fiduciary duty to disclose his information or abstain from trading; the necessary ingredient for the existence of this duty was the relationship that gave defendant access to the information from an inside corporate source.[30]

The Court of Appeals for the Second Circuit extended the scope of Rule 10b-5 liability in *SEC v. Texas Gulf Sulphur*[31] to include tippees,[32] persons who had received material, nonpublic information from the insiders of the corporation.[33] The court stated that Rule 10b-5 was applicable to a person who, though not an insider within the meaning of section 16(b) of the 1934 Act, possessed inside information.[34] Access to such information

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29. *Id.* at 81020 n.31.

30. *Id.* at 81017. *See* 52 IOWA L. REV. 777, 782 (1967). *But see* Fleischer, *Securities Trading and Corporate Information Practices: The Implications of the Texas Gulf Sulphur Proceedings*, 51 VA. L. REV. 1271 (1965). Three possible readings have been suggested for liability in the *Cady, Roberts & Co.* decision. The first is that special obligations are imposed upon brokerage firms. The second involves the identity of interest between partners in brokerage firms. Finally, the decision has suggested that broad liability exists for anyone who receives from a director confidential information that he knows to be secret and trades upon that information. *Id.* at 1281-82.

31. 401 F.2d 833 (2d Cir. 1968), *cert. denied*, 404 U.S. 1005 (1971).

32. *See* note 14 *supra*.

33. Certain corporate officials and employees learned of a mineral deposit discovery and bought stock in the corporation before the discovery was announced. These tippees were not insiders in the traditional sense, in that they were not all directors, officers, nor even substantial stockholders in the corporation. SEC v. Texas Gulf Sulphur Co., 401 F.2d 833 (2d Cir. 1968), *cert. denied*, 404 U.S. 1005 (1971).

34. 401 F.2d at 848. Insiders include those shareholders with more than 10% beneficial interest in any class of a corporation's securities, and the officers and directors of a corporation. 15 U.S.C. § 78p(a)-(b) (1976). *See* note 12 *supra*.

still was viewed as the essence of Rule 10b-5,[35] but the emphasis of the Second Circuit's opinion was upon the fact of possession of such information, rather than upon the relationship giving access to the information.[36] As in *Cady, Roberts & Co.*, a relationship giving access to inside information was present in *Texas Gulf Sulphur*. The employees who were held liable[37] under Rule 10b-5 obtained the inside information through their relationship with the corporation whose securities they traded. In emphasizing possession as the important factor to be considered, however, the court subordinated this relationship to what it considered to be the policy behind Rule 10b-5, namely, a justifiable expectation that all investors in the securities market should have equal access to material information.[38]

As the Second Circuit struggled with the issue of Rule 10b-5 liability for nondisclosure,[39] the SEC extended the range of Rule

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35. 401 F.2d at 848.

36. *Id. See also* 13 GA. L. REV. 636, 643 (1979).

37. In addition to corporate officers, the employees involved included two geologists and an engineer. 401 F.2d at 843.

38. *Id.* at 848. *See* Cary, *Insider Trading in Stocks*, 21 BUS. LAW 1009, 1010 (1966) (a discussion of the necessity of giving a broad, somewhat undefined, interpretation to the securities acts in order to effect their purpose, namely to give investment confidence to the small investor); Fleischer, *Securities Trading and Corporate Information Practices: The Implication of the Texas Gulf Sulphur Proceedings*, 51 VA. L. REV. 1271, 1278-80 (1965) (discussing the importance of investor protection and market place expectations in deciding to apply Rule 10b-5).

39. In a case decided shortly after the *Texas Gulf Sulphur* case, the Court of Appeals for the Second Circuit refused to extend the Rule 10b-5 duty to disclose or abstain to a defendant who had no relationship which gave access to inside corporate information. SEC v. Great Am. Indus., Inc., 407 F.2d 452 (2d Cir. 1968), *cert. denied*, 395 U.S. 920 (1969). Defendant issued shares of stock in exchange for certain property. In subsequent press releases and reports defendant failed to disclose that a large portion of the stock issued was used to pay finder's fees. Thus, the actual value of the land was significantly less than that which defendant's releases indicated. The SEC sought a temporary injunction with respect to this alleged violation of § 10(b) and Rule 10b-5. The majority held that defendant had a duty of full disclosure to prevent information already disclosed from misleading the investing public. *Id.* at 460-61. The court stated that evidence showing that defendant's conduct went considerably beyond nondisclosure eliminated the need for consideration of imposing a duty of disclosure upon persons not occupying a special relationship to a buyer or seller of securities. *Id.* Thus, the court found defendant liable under

10b-5 defendants to include remote tippees[40] in *Investors Management Co., Inc.*[41] Of decisive importance in the Commission's finding that defendant was liable was defendant's knowledge that the undisclosed information emanated from a corporate source.[42] In a concurring opinion, Commissioner Smith was careful to point out that the relationship giving access to information and the defendant's knowledge of that relationship were essential to the Commission's holding.[43]

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the narrow concept of common-law fraud, which clearly falls within the terms of Rule 10b-5. *See* RESTATEMENT (SECOND) OF TORTS § 551(2)(b), at 119 (1977).

In separate concurring opinions, however, three judges expressed a willingness to extend liability beyond the traditional limits. Most notably, Judge Kaufman expressed a reluctance to retain the common-law distinction between partial disclosure and nondisclosure in cases involving securities laws. 407 F.2d at 461-62 (Kaufman, J., concurring). Significantly, Kaufman wrote the majority opinion for the *Chiarella* case at the appellate level. As stated in the conclusion to this concurrence, "[I]n sum, any claim that material facts were withheld in a transaction in connection with the sale or purchase of securities must be scrutinized with care, whether or not there would have been liability at common law for such a deed." *Id.* at 463 (Kaufman, J., concurring).

40. *See* note 14 *supra.*

41. 44 S.E.C. 633 (1971). This case primarily involved the Douglas Aircraft Corporation and its prospective underwriter, Merrill Lynch, Pierce, Fenner & Smith, Inc. Prior to this dispute, Douglas' outlook had been very favorable. However, in June 1966, Douglas informed a vice-president of Merrill Lynch that the revised forecast was bleak. The vice-president relayed this news to Merrill Lynch's aerospace analyst, who in turn relayed it to two Merrill Lynch salesmen in New York. These salesmen passed the information on to three other employees. These five employees imparted the information to representatives of the named defendant, among others. On the basis of this information, these defendants sold their Douglas shares, in advance of public announcement of the poor prospects. *Id.* at 635-36.

42. *Id.* at 644. Although the SEC did not specify that the corporate source must be within the corporation whose securities are sold, it was so in this case. The SEC language indicates a narrow holding to that effect. *Id.*

43. *Id.* at 649 (Smith, Comm'r, concurring). As Commissioner Smith stated:

> The company source is what makes the information "inside" and the special relationship (as director, employee, consultant, prospective underwriter, etc.) is what creates the duty. Elaboration of the duty of tippees viewed as part of the evolution of federal regulation of securities fraud, should not dispense with the requirement that the tippees have this knowledge.

*Id.* at 649-50 (Smith, Comm'r, concurring).

After the *Investors Management Co., Inc.* decision, the Supreme Court decided the case of *Affiliated Ute Citizens v. United States.*[44] In that case a bank had entered into an agreement to act as transfer agent for the securities of the Ute Corporation. Two employees of the bank planned a scheme wherein they failed to disclose to the Indians the disparity in price between two different markets for the securities, one Indian and one non-Indian.[45] Because liability of the defendants as insiders was not an issue, the access test of *Cady, Roberts & Co.*[46] was not involved. The Court found the relationship of trust created by virtue of the transfer agency agreement between the plaintiff and defendants to be decisive in holding defendants liable for Rule 10b-5 violations.[47] Although defendants argued that no positive statement had accompanied the omission of material facts, the Court found that a duty to disclose or abstain nevertheless existed.[48] As market makers,[49] the defendants had an affirmative duty to disclose their activities or abstain from trading in the securities.[50]

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44. 406 U.S. 128 (1972).

45. These employees bought shares for themselves and for others in the Indian market at a price below fair market value. The Indian organization claimed this nondisclosure was a violation of Rule 10b-5. *Id.*

46. 1961 FED. SEC. L. REP. 81013 (1961).

47. *See, e.g.*, SEC v. Texas Gulf Sulphur Co., 401 F.2d 833 (2d Cir. 1968), *cert. denied*, 404 U.S. 1005 (1971); *In re* Investors Mgmt. Co., 44 S.E.C. 633 (1971).

48. 406 U.S. at 153. The corporation's directors knew about the two markets. The Court did not consider, however, the question whether defendants acquired their knowledge from the directors to be important. The defendants already knew about the two markets. Had they acted as mere transfer agents, they would not have been held liable. Yet, by their activities and their relationship with the corporation, they incurred a duty to disclose or abstain. By encouraging the market for non-Indians, defendants effectively created the inside information themselves. *Id.* at 152.

49. A market maker is a dealer who, with respect to a particular security, holds himself out, by entering indications of interest in purchasing and selling in an interdealer quotations system or otherwise, as being willing to buy and sell for his own account on a continuous basis other than on a national securities exchange. 17 C.F.R. § 240.17a-9(f)(1) (1979).

50. 406 U.S. at 153. The market-making activity was viewed as a material fact that defendants had a duty to disclose. *Accord*, Chasins v. Smith, Barney & Co., 438 F.2d 1167 (2d Cir. 1970).

*Affiliated Ute* appeared to be consistent with the other major decisions in the area of section 10(b) and Rule 10b-5 liability insofar as the Court found a narrow ground, market making, for its holding while at the same time discussing with approval the need to interpret the provisions flexibly.[51] The Court reasoned that the statutory provisions, by the repeated use of the word "any," were meant to be broad and inclusive.[52] The Court also noted that Congress must have intended the provisions to be read flexibly in order to effectuate their remedial purposes.[53]

In the instant case, *Chiarella v. United States*,[54] the United States Supreme Court determined that a financial printer who did not fit within the traditional definition of a corporate insider[55] was not liable for nondisclosure of material information[56] under Rule 10b-5. The Court reasoned that failure either to disclose information or abstain from trading in a securities transac-

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51. In 1971, Justice Douglas, speaking for a unanimous Court, stated that "[s]ection 10(b) must be read flexibly, not technically and restrictively. Since there was a 'sale' of a security and since fraud was used 'in connection with' it, there is redress under § 10(b), whatever might be available as a remedy under state law." Superintendent of Ins. v. Bankers Life & Cas. Co., 404 U.S. 6, 12 (1971).

52. 406 U.S. at 151.

53. *Id.* In order to achieve a fair and equitable securities marketplace, Congress intended that the securities laws be interpreted flexibly. The Court has noted this congressional intent in several recent cases. *See, e.g.*, Touche Ross & Co. v. Redington, 442 U.S. 560 (1979) (violation of § 17(a) of the 1934 Act.) "The ultimate question is one of congressional intent, not one of whether this Court thinks that it can improve the statutory scheme that Congress enacted into law." *Id.* at 578; United States v. Naftalin, 441 U.S. 768 (1979) (violation of § 17(a)(1) of the 1933 Securities Act); Sante Fe Indus. Inc. v. Green, 430 U.S. 462 (1977) (Rule 10b-5 and § 10(b) misrepresentation case). *See also* notes 10-14 *supra* and accompanying text.

54. 445 U.S. 222 (1980).

55. According to § 16 of the 1934 Act, corporate insiders include beneficial owners of more than 10% of a class of a security and directors or officers of the issuer of a security. 15 U.S.C. § 78p (1976). Defendants here had no relationship with the issuers of the securities involved, nor did they obtain their information from someone with such a relationship to the issuer as is included in § 16.

56. The information concerning the impending takeover bids was stipulated to be material. United States v. Chiarella, 588 F.2d 1358, 1364 n.5 (2d Cir. 1978). *See* note 19 *supra* (definition of materiality).

tion amounted to fraud only when a duty of disclosure existed.[57] In its assessment of the *Cady*[58] ruling, the Court found that the duty to disclose or abstain was based on the relationship of trust between the corporate insider and the shareholders.[59] The Court noted that access to inside information was, along with unfairness, a determinative factor in the *Cady* test.[60] The Court interpreted access to be important in that case insofar as it gave the broker-dealer, whose partner was a corporate insider, a duty to disclose that was derived from the fiduciary duty owed by his partner.[61] Thus, consistently with *Affiliated Ute,* the Court actually seemed to view the relationship of trust, rather than access to information, as the determinative factor.[62] Since *Affiliated Ute* was not an insider case, the Court in that case properly ignored any question of access to inside information and found a common-law duty to disclose or abstain imposed by a relationship of trust.[63] By viewing the *Cady* access test as imputing a derivative fiduciary liability when no other relationship of trust existed, the emphasis on the relationship itself in *Affiliated Ute,*[64] as that case was read by the majority in *Chiarella,*[65] appeared proper.[66] Under this approach, in which the relationship

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57. 445 U.S. at 228. At common law the duty to disclose or abstain, absent some partial disclosure, was based on the existence of a fiduciary relationship or a similar relationship of trust and confidence. RESTATEMENT (SECOND) OF TORTS § 551(2)(a), at 119 (1977).

58. 1961 FED. SEC. L. REP. 81013 (1961).

59. The Court based this determination upon an examination of common-law fraud and stated that such a duty was not "a novel twist of the law." 445 U.S. at 227.

60. *Id.*

61. *Id. See* 445 U.S. at 227 n.8.

62. *Compare* Affiliated Ute Citizens v. United States, 406 U.S. 128 (1972), *with In re* Cady, Roberts & Co., 1961 FED. SEC. L. REP. 81013 (1961).

63. *See* 406 U.S. at 152. *See also* note 48 *supra.*

64. *See* notes 47-50 *supra* and accompanying text.

65. 445 U.S. at 229.

66. The duty to disclose material, non-public information has not been imposed on every person possessing this type of information. Traditionally, this obligation has been limited to persons with a special relationship to the company affected by the information. Restrictions on the securities trading of this class of persons reflect notions of fiduciary responsibility developed under state and federal law. *Cady, Roberts,* one of the landmark cases on insider trading, spells out this

of trust was emphasized as the relevant factor, defendant in *Chiarella* did not have any duty either to disclose the information to the shareholders from whom he purchased stock or to abstain from trading in the stock. He was not in any sort of relationship of trust or confidence with the sellers.

In cases prior to *Affiliated Ute*, access to information was provided through a relationship with the corporations whose securities were being traded.[67] The *Chiarella* Court could have reached the same result under the access test by construing that test as imposing a duty only where a relationship existed by which information was received from the corporation whose securities were being traded.[68] Defendant in *Chiarella* had no relationship of trust with the corporations in whose securities he traded. He obtained his information by using his knowledge of the marketplace to interpret information supplied by the corporations whose takeover bids he printed.[69] The only duty that possibly could arise out of such a situation, if this narrow construction of the access test was accepted, would be a duty owed by defendant to the acquiring corporations.[70] Such a duty reasonably could be imputed to the printing company and its employees due to the company's position of trust vis-à-vis the

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approach.

Fleischer, Mundheim & Murphy, *An Initial Inquiry Into the Responsibility to Disclose Market Information*, 121 U. PA. L. REV. 798, 804 (1973) (footnote omitted).

67. *See, e.g.*, SEC v. Texas Gulf Sulphur Co., 401 F.2d 833 (2d Cir. 1968), *cert. denied*, 404 U.S. 1005 (1971) (tippees obtained information from insiders of corporation whose securities were traded); *In re* Investors Mgmt. Co., 44 S.E.C. 633 (1971) (remote tippees received information from tippees, who received it from insiders of the corporation whose securities were traded); *In re* Cady, Roberts & Co., 1961 FED. SEC. L. REP. 81013 (1961) (broker-dealer obtained information from director of corporation whose stocks were traded).

68. *See* notes 55-67 *supra*.

69. Chiarella v. United States, 445 U.S. 222, 231-32 (1980). The United States offered to the Supreme Court an alternative theory of liability, namely, that defendant violated § 10(b) by perpetrating a fraud upon the acquiring corporation. This fraud was said to exist between the acquiring corporations and the printing company, because of the employer-employee relationship from which a duty toward those corporations arose. The Court did not consider the merit of this alternative theory because it was not presented to the jury. *Id.* at 235-36.

70. *See* note 9 *supra*.

corporations.[71]

Under a literal reading of the two-part *Cady* test, however, the *Chiarella* Court should have found defendant liable under Rule 10b-5. The first element of the test required a "relationship giving [the defendant] access, directly or indirectly, to information intended to be available only for a corporate purpose."[72] Undoubtedly the information that defendant relied upon in his transactions was intended to be available only for a corporate purpose. Defendant's occupation provided him the necessary relationship to gain access to that information.[73] The Court found that defendant had no duty to disclose because, unlike the situation in *Cady*, no relationship of trust was present between defendant and the shareholders whose shares he purchased.[74] Chief Justice Burger, with whom Justice Brennan agreed in principle, stated in his dissent, however, that the natural interpretation of section 10(b) and Rule 10b-5 which follows from the *Cady* test is that any person who has misappropriated nonpublic information has an absolute duty to disclose or abstain.[75] Furthermore, as Justice Blackmun, joined by Justice Marshall, argued in his dissent when assessing the impact of the *Cady* test, the SEC's action in regarding the insider relationship in terms of access was in keeping with the principle that the broad provisions of the securities act should not be limited by the narrow distinctions prevailing at common law.[76] The second element of the test in *Cady*, an element largely ignored by the courts in subsequent holdings,[77] concerned "the inherent unfairness involved where a

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71. *See* note 69 *supra*.

72. *In re* Cady, Roberts & Co., 1961 FED. SEC. L. REP. 81013, 81017 (1961). *See* note 35 *supra*.

73. The actual test in *Cady* does not require the relationship to be between the defendant and the corporation whose shares are being traded. *See* note 102 *infra* and accompanying text. Thus, under a literal reading of the test, the defendant could be liable for failure either to disclose any information intended for a corporate purpose or to abstain from trading in the securities affected by that information.

74. Chiarella v. United States, 445 U.S. 222, 232-33 (1980).

75. *Id.* at 241 (Burger, C.J., dissenting). *See also id.* at 239 (Brennan, J., dissenting).

76. *Id.* at 249 (Blackmun, J., dissenting).

77. *See, e.g.*, SEC v. Texas Gulf Sulphur Co., 401 F.2d 833 (2d Cir. 1968), *cert. denied*, 404 U.S. 1005 (1971); *In re* Investors Mgmt. Co., 44 S.E.C. 633

party takes advantage of such information knowing it is unavailable to those with whom he is dealing."[78] The Court in *Chiarella* noted that not every instance of financial unfairness constitutes fraudulent activity under section 10(b) and Rule 10b-5.[79] Chief Justice Burger indicated that trading based upon misappropriated nonpublic information was the very type of unfairness that Congress intended to eliminate.[80] "The duty to abstain or disclose [in *Cady*] arose, not merely as an incident of fiduciary responsibility, but as a result of the 'inherent unfairness' of turning secret information to account for personal profit."[81] A broad reading of the *Cady* test for liability under Rule 10b-5 has been avoided by courts that were able to reach the same results on narrower grounds.[82] By exercising that same restraint, the Court in *Chiarella* reached a different result.[83] Thus, defendant was found not to have violated Rule 10b-5.

Although consistent with the holdings of prior decisions, the Court's holding in *Chiarella* was inconsistent with the policy considerations that led to those holdings.[84] During congressional

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(1971).

78. *In re* Cady, Roberts & Co., 1961 FED. SEC. L. REP. 81013, 81017 (1961). This element of unfairness follows from the materiality of the information involved. Thus, the critical element to be proved is access to the information. 2 A. BROMBERG, SECURITIES LAW: FRAUD § 7.4(6)(5), at 180 (1979). The Second Circuit has indicated that anything short of equal access to material information might amount to unfairness. *See* SEC v. Texas Gulf Sulphur Co., 401 F.2d 833, 848 (2d Cir. 1968), *cert. denied*, 404 U.S. 1005 (1971).

79. Chiarella v. United States, 445 U.S. 222, 232 (1980).

80. *Id.* at 241 (Burger, C.J., dissenting).

81. *Id.* at 249 (Blackmun, J., dissenting).

82. *See, e.g.*, Affiliated Ute Citizens v. United States, 406 U.S. 128 (1972) (duty derived from relationship of trust); SEC v. Great Am. Indus., Inc., 407 F.2d 452 (2d Cir. 1968), *cert. denied*, 395 U.S. 920 (1969) (partial disclosure occurred); SEC v. Texas Gulf Sulphur Co., 401 F.2d 833 (2d Cir. 1968), *cert. denied*, 404 U.S. 1005 (1971) (duty derived from access).

83. One member of the majority, in a concurring opinion, pointed out that the Court in fact did not approve of defendant's actions. Chiarella v. United States, 445 U.S. 222, 238 (1980) (Stevens, J., concurring).

84. In a dissenting opinion, Chief Justice Burger suggested a misappropriation theory of liability under § 10(b) and Rule 10b-5. Recognizing the very broad language of the provisions, he proposed that an absolute duty either to disclose or abstain should be imposed on anyone who misappropriates nonpublic information. *Id.* at 240 (Burger, C.J., dissenting).

consideration of the 1934 Act, a congressman stated that "[t]he real purpose of this regulatory measure is to protect the investors of the United States against fraud and imprudent investments, and to give integrity to the securities by the sale of which American business must be financed."[85] Rule 10b-5 was intended to be invoked whenever any person, insider or outsider, engaged in fraudulent practices in connection with securities transactions;[86] the rule, however, was also designed to encompass an infinite variety of schemes and devices by which one party might take undue advantage of others in the securities marketplace.[87]

In *Cady*[88] and *Investors Management Co.*,[89] the SEC indicated that parity of access to material information might be required between parties to a securities transaction.[90] The Court of Appeals for the Second Circuit also recognized the importance of this policy of equal access to information in several of its decisions.[91] The Supreme Court itself recently appeared

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85. 78 CONG. REC. 7861 (1934) (remarks of Rep. Lea).

> The purpose of the act is indentical with that of every honest broker, dealer, and corporate executive in the country, viz., to purge the securities exchanges of those practices which have prevented them from fulfilling their primary function of furnishing open markets for securities where supply and demand may freely meet at prices uninfluenced by manipulation or control. The act strikes deeply not only at defects in the machinery of the exchanges but at causes of disastrous speculation in the past. It seeks to eradicate fundamental and far-reaching abuses which contain within themselves the virus for destroying the securities exchanges.

S. REP. No. 1455, 73d Cong., 2d Sess. 81 (1934). *See* Comment, *Expanded Criminal Liability Under 10b-5*—United States v. Charnay, 1977 UTAH L. REV. 103, 104 (1934 Act was enacted to protect investors from many types of abuses, including market manipulation).

86. L. LOSS, SECURITIES REGULATION 823 (1951). *See* note 19 *supra* and accompanying text.

87. 52 IOWA L. REV. 777, 780 (quoting *In re* Cady, Roberts & Co., 1961 FED. SEC. L. REP. 81013, 81016 (1961)).

88. 1961 FED. SEC. L. REP. 81013, 81018 (1961).

89. 44 S.E.C. 633, 644 (1971).

90. *See* Fleischer, Mundheim & Murphy, *An Initial Inquiry Into the Responsibility to Disclose Market Information*, 121 U. PA. L. REV. 798, 806 (1973).

91. *See, e.g.*, United States v. Chiarella, 588 F.2d 1358 (2d Cir. 1978);

ready to base a broad reading of section 10(b) on the policy behind it.[92] Discussing three other Supreme Court cases,[93] the Court stated, "Those cases forcefully reflect the principle that '[section] 10(b) must be read flexibly, not technically and restrictively' and that the statute provides a cause of action for any plaintiff who 'suffer[s] an injury as a result of deceptive practices touching the sale [or purchase] of securities . . . .' "[94] Also, in a pair of cases involving violations of other securities provisions, the Court noted that a key purpose of the securities laws was the achievement of high ethical standards in the securities industry,[95] and that the ultimate question for the Court in securities law violations was one of congressional intent.[96] In *Chiarella* the Court departed from these policy considerations and relied instead on a narrow interpretation of the relationship test in *Affiliated Ute* and the access test in *Cady*. Although Justice Stevens noted in his concurring opinion that the Court did not necessarily approve of defendant's actions,[97] the majority based its finding for the defendant on the fact that no relationship of trust, such as was required at common law before a duty to disclose or to abstain would be imposed, existed between defendant and the shareholders from whom he bought securities. The Court thereby failed to give due regard to the legislative intent and policy that the courts and the SEC previously had

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SEC v. Great Amer. Indus., Inc., 407 F.2d 453 (2d Cir. 1968), *cert. denied*, 395 U.S. 920 (1969); SEC v. Texas Gulf Sulphur Co., 401 F.2d 833 (2d Cir. 1968), *cert. denied*, 404 U.S. 1005 (1971).

92. *See* Affiliated Ute Citizens v. United States, 406 U.S. 128 (1972); Superintendent of Ins. v. Bankers Life & Cas. Co., 404 U.S. 6 (1971); SEC v. Capital Gains Res. Bureau, 375 U.S. 180 (1963).

93. *See* note 86 *supra*.

94. Sante Fe Indus., Inc. v. Green, 430 U.S. 462, 475-76 (1977) (quoting Superintendent of Ins. v. Bankers Life & Cas. Co., 404 U.S. 6, 12-13 (1977)).

95. United States v. Naftalin, 441 U.S. 768, 775 (1979).

96. Touche Ross & Co. v. Redington, 442 U.S. 560, 578 (1979). Although the Court held that no private cause of action existed under § 17(a) and stated that the provision should not be read more broadly than its language and statutory scheme reasonably permitted, it also said that "[*t*]*he ultimate question is one of congressional intent*, not one of whether this court thinks that it can improve upon the statutory scheme that Congress enacted into law." *Id.* (emphasis added).

97. *See* note 77 *supra*.

considered so important.[98]

Congress clearly intended that section 10(b) of the 1934 Act and Rule 10b-5 provide broad protections for investors in the securities marketplace.[99] The enactments were worded to encompass a broad range of unfair practices.[100] Until *Chiarella*, the range of defendants included in the SEC prohibition against unfair trading had expanded;[101] in *Chiarella*, however, the Court declared a type of activity that Congress intended to deter to be beyond the reach of the applicable provisions.[102] This narrowly grounded decision was ultimately inconsistent with the relevant legislative intent and policy concerns.[103] The Court in *Chiarella* thus effectively narrowed statutory liability for nondisclosure to little more than that imposed by traditional common-law concepts; this restrictive view of the issue is undeniably at odds with the broad, remedial intent expressed by Congress and the SEC in their acts and rules. This refusal to give effect to the

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98. Chiarella v. United States, 445 U.S. 222, 249-50 (1980) (Blackmun & Marshall, JJ., dissenting).

99. *See* note 79 *supra* and accompanying text.

100. *See* notes 5 & 6 *supra*.

101. The dissenting justices noted that the Court has, in recent years, cut back on § 10(b) and Rule 10b-5. 445 U.S. at 248-49 (Blackmun & Marshall, J.J., dissenting). However, the issues in the two cases cited for that proposition are distinguishable from the question in the present case. In *Ernst & Ernst v. Hochfelder*, the Court determined that scienter was required for an act or omission to violate Rule 10b-5. 425 U.S. 185 (1976). This requirement involves the state of mind of the defendant, not his identity or his position in the market. In *Blue Chip Stamps v. Manor Drug Stores*, the Court ruled that a plaintiff in a Rule 10b-5 cause of action must be either a purchaser or seller of the securities involved. 421 U.S. 723 (1975). This requirement deals with the identity of the plaintiff, not the defendant. In neither case did the Court limit the range of possible defendants under Rule 10b-5.

102. *See* 445 U.S. at 238 (Stevens, J., concurring); *id.* at 240 (Burger, C.J., dissenting).

103. *See* List v. Fashion Park, Inc., 340 F.2d 457, 462 (2d Cir. 1965). In prior cases and rulings, the deciding bodies reached conclusions consistent with the broad legislative intent and policy behind the provisions involved. *See, e.g.*, Affiliated Ute Citizens v. United States, 406 U.S. 128 (1972); SEC v. Great Am. Indus., Inc., 407 F.2d 453 (2d Cir. 1968), *cert. denied*, 395 U.S. 920 (1969); SEC v. Texas Gulf Sulphur Co., 401 F.2d 833 (2d Cir. 1968), *cert. denied*, 404 U.S. 1005 (1971); *In re* Investors Mgmt. Co., 44 S.E.C. 633 (1971); *In re* Cady, Roberts & Co., 1961 FED. SEC. L. REP. 81013 (1961).

clearly expressed intent of Congress means that the legislative process,[104] already overburdened, will be forced to apply its limited time and resources to a question that could have been resolved easily. In all likelihood, Congress explicitly will expand liability for nondisclosure; meanwhile, the investing public may suffer from the clearly unfair market practices approved in *Chiarella*.

RICHARD L. COLBERT

104. Congress, by being more susceptible to outside pressure, is certain to take more time to decide the matter in controversy. Furthermore, the Court has the power to affect this defendant as well as future defendants, whereas a congressional amendment of the relevant provisions would allow defendant and any others who engage in similar activities prior to passage of the amendment to profit from those activities without sanction.

# Trademark Infringement—Lanham Act § 43(a)—Source Confusion

*Dallas Cowboys Cheerleaders, Inc. v. Pussycat Cinema, Ltd.*, 604 F.2d 200 (2d Cir. 1979).

Defendant, Pussycat Cinema, Ltd.,[1] produced a pornographic motion picture in which the leading actress performed in plaintiff's well-known cheerleading uniform.[2] Contending that the uniform was its trademark,[3] plaintiff, Dallas Cowboys Cheer-

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1. Zaffarano as the principal of Pussycat Cinema, Ltd. and the producer and distributor of the motion picture was also named as a defendant. Dallas Cowboys Cheerleaders, Inc. v. Pussycat Cinema, Ltd., 467 F. Supp. 366, 369, 372 (S.D.N.Y.), *aff'd*, 604 F.2d 200 (2d Cir. 1979).

2. Plaintiff's uniform "consists of a blue bolero blouse, white vest decorated with three blue five-pointed stars on each side of the front of the vest and white fringe at the bottom of the vest, tight white shorts with a belt decorated with blue stars, and white boots." *Id.* at 370. The same uniform has been used for seven years and has come to identify plaintiff's cheerleaders. *Id.*

3. Three issues were present in this case: (1) Whether the uniform was a trademark; (2) whether defendant's use of the uniform infringed the trademark and violated section 43(a) of the Lanham Act; and (3) whether defendant should be allowed to use the trademark because of the fair use doctrine or general first amendment freedoms. The second issue is the topic of this Note. See note 40 *infra* for a discussion of the first amendment issue.

Because plaintiff's uniform was not registered as a trademark, the issue was whether it could be a common-law trademark. The court explained that a purely functional item may not be a trademark. A cheerleading uniform is functional because it is "clothing designed and fitted to allow free movement while performing cheerleading routines." Dallas Cowboys Cheerleaders, Inc. v. Pussycat Cinema, Ltd., 604 F.2d 200, 203 (2d Cir. 1979). Nevertheless, the design of the uniform in this case was not purely functional. That is, the particular Western flavor of the uniform was not necessary to perform cheers. *Id.* at 203 n.4. The court further explained the nonfunctional requirement of trademarks by citing cases in which functionality of design was considered. *Compare In re* Honeywell, Inc., 532 F.2d 180 (C.C.P.A. 1976) (denial of trademark for thermostat cover that was "essentially functional in character" was proper) *with In re* Penthouse Int'l Ltd., 565 F.2d 679 (C.C.P.A. 1977) (registration of a trademark that also performed the function of a jewelry item was proper).

Although the item itself may be functional, its design may become a trademark if the design is nonfunctional and has acquired "secondary meaning."

leaders, Inc.,[4] sought a preliminary injunction[5] against defendant's distribution and advertising of the movie. The United States District Court for the Southern District of New York granted the injunction.[6] On appeal to the United States Court of

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The court defined secondary meaning in terms of symbolism and found that plaintiff's uniform had acquired secondary meaning because it was "universally recognized as the symbol of the Dallas Cowboys Cheerleaders." 604 F.2d at 203 n.5. The Trademark Act does not specifically require a showing of secondary meaning, but it does recognize a mark when it "has become distinctive of the applicant's goods in commerce." 15 U.S.C. § 1052(f) (1976). Distinctiveness may be proved by showing a substantially exclusive and continuous use of a mark in commerce for five years. *Id.* The Dallas Cowboys Cheerleaders used their uniform for six years before the defendant's movie premiered. Consequently, the court held that the uniform design was a valid trademark. 604 F.2d at 204.

The term "trademark" will be used in this Note to discuss trademarks and service marks. The Trademark Act defines a trademark as "any word, name, symbol, or device or any combination thereof adopted and used by a manufacturer or merchant to identify his goods and distinguish them from those manufactured or sold by others." 15 U.S.C. § 1127 (1976). A service mark is "a mark used in the sale or advertising of services to identify the services of one person and distinguish them from the services of others." *Id.* "The same rules that apply to a trademark apply to a service mark, which is merely a trademark that has been applied to services rather than products." Fotomat Corp. v. Cochran, 437 F. Supp. 1231, 1241 (D. Kan. 1977) (the mark was the building used for drive-through photographic services). *See* Boston Professional Hockey Ass'n v. Dallas Cap & Emblem Mfg., Inc., 510 F.2d 1004, 1009 (5th Cir.), *cert. denied*, 423 U.S. 868 (1975); E. VANDENBURGH, TRADEMARK LAW AND PROCEDURE § 1.10, at 1-2 (1st ed. 1959) [hereinafter cited as E. VANDENBURGH].

4. Plaintiff, a subsidiary of the Dallas Cowboys Football Club, Inc., employs the cheerleaders, manages their commercial appearances, and licenses others to manufacture and distribute posters, calendars, and other items depicting the cheerleaders in their uniforms. 604 F.2d at 202.

5. In order to obtain a preliminary injunction, plaintiff was required to establish "possible irreparable harm and either (1) probable success on the merits or (2) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly in the movant's favor." *Id.* at 206, 207 (quoting Selchow & Righter Co. v. McGraw-Hill Book Co., 580 F.2d 25, 27 (2d Cir. 1978)). This standard for issuing a preliminary injunction is more lenient than that previously used by the Second Circuit. *See* Girl Scouts of the United States v. Personality Posters Mfg. Co., 304 F. Supp. 1228, 1230 (S.D.N.Y. 1969). *See generally* Mulligan, *Preliminary Injunction in the Second Circuit*, 43 BROOKLYN L. REV. 831 (1977).

6. 467 F. Supp. 366 (S.D.N.Y. 1979).

Appeals for the Second Circuit, *held*, affirmed.[7] When an unauthorized use of a trademark tends to create a false association with the trademark's owner, the use violates section 43(a) of the Lanham Trademark Act.[8] *Dallas Cowboys Cheerleaders, Inc. v. Pussycat Cinema, Ltd.*, 604 F.2d 200 (2d Cir. 1979).

Courts traditionally have found infringement when the defendant's use of a trademark resulted in "source confusion." Source confusion in its classic sense occurs when an " 'ordinarily prudent *purchaser* [would] be liable to purchase . . . one [product] believing that he was purchasing the other.' "[9] This purchaser-confusion test for infringement has been expanded to include confusion among the general public.[10] The test has also

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7. 604 F.2d 200 (2d Cir. 1979). The court of appeals granted defendants' motion to stay the injunction and ordered an expedited appeal. Following argument before the court of appeals the stay was dissolved, and the preliminary injunction was reinstated. *Id.*

8. Section 43(a) of the Lanham Trademark Act provides:

> Any person who shall affix, apply, or annex, or use in connection with any goods or services, or any container or containers for goods, a false designation of origin, or any false description or representation, including words or other symbols tending falsely to describe or represent the same, and shall cause such goods or services to enter into commerce, and any person who shall with knowledge of the falsity of such designation of origin or description or representation cause or procure the same to be transported or used in commerce or deliver the same to any carrier to be transported or used, shall be liable to a civil action by any person doing business in the locality falsely indicated as that of origin or in the region in which said locality is situated, or by any person who believes that he is or is likely to be damaged by the use of any such false description or representation.

15 U.S.C. § 1125(a) (1976).

9. United Drug Co. v. Obear-Nester Glass Co., 111 F.2d 997, 999 (8th Cir. 1940) (quoting S.S. Kresge Co. v. Winget Kickernick Co., 96 F.2d 978, 987 (8th Cir. 1938)). *See* 3 R. CALLMANN, THE LAW OF UNFAIR COMPETITION TRADEMARKS AND MONOPOLIES § 80.1, at 541 (3d ed. 1969) [hereinafter cited as R. CALLMANN].

10. The 1946 Trademark Act had defined infringement as the use of a mark that was "likely to cause confusion or mistake or to deceive *purchasers* as to the source of origin of such goods." Trademark Act of 1946, ch. 540, § 32, 60 Stat. 437 (current version at 15 U.S.C. § 1114 (1976)) (emphasis added). In the 1962 amendment to this Act the reference to purchasers was omitted. Therefore, it can be implied that Congress intended a broader application, possibly to consumers in general. Act of Oct. 9, 1962, Pub. L. No. 87-772, § 17, 76

been expanded to apply in cases in which sponsorship, rather than the confusion of two products, is involved.[11] Although its application has varied, the test has consistently been one for confusion. In determining that the requisite degree of confusion is present, however, courts have recently extended the definition of confusion far beyond its literal meaning. In *Pussycat Cinema* the Second Circuit was faced with an unauthorized use of a trademark that did not meet the traditional standard of likelihood of confusion.

Source confusion has played an important role in establishing trademark infringement. For example, failure to prove source confusion defeated plaintiff's infringement action in the New York district court case of *Girl Scouts of the United States v. Personality Posters Manufacturing Co.*[12] Defendant manufactured a poster portraying "a smiling girl dressed in the well-known green uniform of the Junior Girl Scouts, with her hands clasped above her protruding, clearly pregnant abdomen. The caveat 'BE PREPARED' appear[ed] next to her hands."[13] Plaintiff, the Girl Scouts organization, sought to enjoin defendant from printing, distributing, and selling the poster.[14] Plaintiff contended that defendant's use of the uniform, the trademark of the Girl Scouts, would lead viewers of the poster to believe that

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Stat. 769 (currently codified at 15 U.S.C. § 1114 (1976)).

11. Confusion as to sponsorship is a misleading "impression generated by the use of a similar mark that the defendant's goods come from the plaintiff, or that the defendant's business is related to, or otherwise connected with, the plaintiff's." 3 R. CALLMANN, *supra* note 9, § 80.2, at 543 (citations omitted).

12. 304 F. Supp. 1228 (S.D.N.Y. 1969).

13. *Id.* at 1230.

14. The motion for a preliminary injunction was similar to that made in *Pussycat Cinema* because it requested among other things that the defendant be enjoined

> (c) from using in connection with the manufacturing, advertising or selling of any merchandise not plaintiff's . . . any one or more of the official GIRL SCOUT uniforms . . . ;
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> . . . .
>
> (e) from committing any other . . . acts which induce or are calculated to induce the belief that any merchandise not of plaintiff's manufacture is of plaintiff's manufacture or is sponsored or approved by plaintiff.

*Id.* at 1230 n.1.

the poster, like cookies, was marketed by the Girl Scouts themselves.[15] The court required plaintiff to establish actual evidence of the likelihood of confusion in order to show that infringement of the registered or common-law trademarks was probable.[16] Since plaintiff could present no such evidence,[17] the court found that no one would think that the poster was a product of the wholesome Girl Scouts.[18]

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15. *Id.* at 1231.

16. The court tested for infringement of the registered and common-law trademarks by using the source-confusion standard. *Id.* at 1231, 1233. Use of this standard was not uncommon. *See* Maternally Yours, Inc. v. Your Maternity Shop, Inc., 234 F.2d 538 (2d Cir. 1956). In *Maternally Yours* the court applied the source-confusion test, as codified in the Lanham Trademark Act, *see* note 10 *supra*, to affirm a finding of infringement of the registered trademark. *Id.* at 542-43. The court also applied the considerations that underlie this statutory test to affirm a finding of infringement of the common-law trademark. *Id.* at 544. The *Girl Scouts* court also used the source-confusion test to determine that section 43(a) had not been violated. 304 F. Supp. at 1233.

Plaintiff also sought relief on other causes of action, including a violation of the New York antidilution statute. The statute expressly provides for a determination of trademark infringement, "notwithstanding . . . the absence . . . of confusion as to the source of goods or services." N.Y. GEN. BUS. LAW § 368-d (McKinney 1968). The court admitted that this statute seemed to confer trademark protection even when source confusion did not exist but refused to grant relief based on a literal construction of the statute. The court also noted that other courts had denied relief in the absence of confusion. 304 F. Supp. at 1233. *But see* note 22 *infra*.

17. Apparently the court believed that if source confusion had occurred, then there would have been evidence that "contributions to the organization [had] fallen off, that members [had] resigned, that recruits [had] failed to join, that sales either of plaintiff's posters or other items [had] decreased, or that voluntary workers [had] dissociated themselves or declined to support the honorable work of the organization." 304 F. Supp. at 1235. Although plaintiff presented evidence of telephone calls received from members of the public expressing their indignation concerning defendant's poster, the court would not equate indignation with confusion. *Id.* at 1231.

18. Even if we hypothesize that some viewers might at first blush believe that the subject of the poster is actually a pregnant Girl Scout, it is highly doubtful that any such impression would be more than momentary or that any viewer would conclude that the Girl Scouts had printed or distributed the poster. But it is the role of the court to rule on evidence, not on hypothesis; and of evidence not a scintilla has been presented supporting the allegation of confusion or its likelihood.

*Id.*

Three years later, in a similar case, another New York district court did enjoin a poster manufacturer from distributing a poster using plaintiff's trademark. In *Coca-Cola Co. v. Gemini Rising, Inc.*[19] plaintiff introduced actual evidence of consumer confusion. Defendant used plaintiff's world-famous red and white "Enjoy Coca-Cola" trademark but changed it to read "Enjoy Cocaine."[20] Plaintiff submitted affidavits from consumers who had attributed the poster to plaintiff and who had threatened a group boycott of Coca-Cola.[21] The court held, therefore, that consumers were likely to be confused into believing that the "Enjoy Cocaine" poster was an advertising gimmick sponsored by Coca-Cola.[22]

While the *Girl Scouts* and *Coca-Cola* courts were sensitive to the purpose of the trademark laws, which is to protect the public against source confusion, more recent decisions have lost sight of that purpose. A notable distortion of the source-confusion test occurred in the Fifth Circuit in *Boston Professional Hockey Association v. Dallas Cap & Emblem Manufacturing, Inc.*[23] In *Dallas Cap* plaintiff brought an action to enjoin defendant from manufacturing and selling embroidered patches depicting the teams' trademarks.[24] The *Dallas Cap* court explained

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19. 346 F. Supp. 1183 (E.D.N.Y. 1972).

20. *Id.* at 1186.

21. *Id.* at 1189 n.9.

22. *Id.* at 1190. The court not only found source confusion more easily than did the *Girl Scouts* court, it also accepted the idea of applying the New York antidilution statute to protect trademarks when source confusion was lacking. *Id. But see* note 16 *supra*. The court mentioned that the antidilution statute extends relief without requiring confusion and that "there are numerous New York cases granting injunctive relief to protect one's trade name or mark from another's imitation 'in the absence of a threat of confusion as to the source or sponsorship of the goods or services.' " 346 F. Supp. at 1192 (quoting Sullivan v. Ed Sullivan Radio & T.V., Inc., 1 A.D.2d 609, 611, 152 N.Y.S.2d 227, 229 (1956)). The *Coca-Cola* court cited Tiffany & Co. v. L'Argene Prods. Co., 67 Misc. 2d 384, 324 N.Y.S.2d 326 (Sup. Ct. 1971), in support of this statement, but the *Tiffany* court did not actually grant trademark protection in the absence of confusion. In *Tiffany* the court inferred a likelihood of confusion because the defendant's "only conceivable purpose" for using the plaintiff's trademark was to trade on his reputation. *Id.* at 388, 324 N.Y.S.2d at 330.

23. 510 F.2d 1004, 1012 (5th Cir.), *cert. denied*, 423 U.S. 868 (1975).

24. *Id.* at 1008.

that "[t]he difficulty with this case stems from the fact that a reproduction of the trademark itself is being sold, unattached to any other goods or services."[25] Consumers were buying replicas of the plaintiff's mark itself and were not relying on the trademark to identify the source of the products. In other words, the buyers were not purchasing the product because of a belief that the trademark identified the trademark owner's goods or that the trademark owner sponsored the product; instead, they chose the product simply because they wanted the trademark. The buying public was not confused about anything, but knew that the patches portrayed the teams' trademarks. Therefore, if evidence of traditional source confusion had been required, no infringement would have been found.

In expanding the traditional confusion test, the *Dallas Cap* court equated using a mark as "the triggering mechanism" for a sale with "causing confusion."[26] How the court reasoned that the test for confusion was met simply because defendant had exploited the mark as a selling device is best understood in light of the court's admission that the

> decision here may slightly tilt the trademark laws from the purpose of protecting the public [from confusion] to the protection of the business interests of plaintiffs, [but] . . . when viewed against the backdrop of the common law of unfair competition . . . both the public and plaintiffs are better served by granting the relief sought by plaintiffs.[27]

The court's allusion to the "backdrop of the common law of unfair competition" is apparently an appeal to the purpose of the law of unfair competition, namely the protection of business, of which trademark law is a derivative.[28] Instead of emphasizing the confusing effect of defendants' use of the mark on the purchaser or the consuming public, the *Dallas Cap* court stressed the trademark owner's business interest in his mark. Thus, while the court maintained that the confusion requirement had been

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25. *Id.* at 1010.

26. *Id.* at 1012.

27. *Id.* at 1011.

28. The law of trademarks is part of the larger field of unfair competition. *See id.* at 1010; Safeway Stores, Inc. v. Safeway Properties, Inc., 307 F.2d 495, 497 n.1 (2d Cir. 1962); E. VANDENBURGH, *supra* note 3, § 1.70, at 40.

met merely because the mark was duplicated and sold, the *Dallas Cap* court was actually protecting the plaintiff's business interests by "afford[ing] judicial relief from a competitor who [sought] to 'reap where he [had] not sown.' "[29] In reality, then, the court abandoned the confusion test in favor of a test for misappropriation.[30]

Similarly, the Seventh Circuit in *James Burrough Ltd. v. Sign of the Beefeater, Inc.*[31] inappropriately used the confusion test to find infringement when actually it was protecting the business interest of the plaintiff. Although it recited the traditional statutory proposition that "infringement is found when the evidence indicates a likelihood of confusion, deception or mistake on the part of the consuming public,"[32] the court added that "the test is not whether the public would confuse the marks, but whether the viewer of an accused mark would be likely to associate the product or service with which it is connected with the source of products or services with which an ear-

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29. Callmann, *He Who Reaps Where He Has Not Sown: Unjust Enrichment in the Law of Unfair Competition*, 55 HARV. L. REV. 595, 612 (1942).

Supporters of this view often quote Justice Frankfurter's opinion in Mishawaka Rubber & Woolen Mfg. Co. v. S.S. Kresge, 316 U.S. 203 (1942), in which he explained that "the trademark owner has something of value. If another poaches upon the commercial magnetism of the symbol he has created, the owner can obtain legal redress." *Id.* at 205.

Today, however, unfair competition is much broader, and not only protects a plaintiff's good will in a product, but also prevents a competitor from obtaining an undue advantage from another's efforts. 1 R. CALLMANN, *supra* note 9, § 4.1, at 109, 111. "[O]ne man has not a right to use a name, or other mark, for the purpose of attracting to himself the trade or custom that would have flowed to the person who first used, or was alone in the habit of using, that particular name or mark." W. BROWNE, A TREATISE ON THE LAW OF TRADE-MARKS 384 (2d ed. 1898). *See also* S. OPPENHEIM & J. WESTON, UNFAIR TRADE PRACTICES AND CONSUMER PROTECTION 41 n.14 (3d ed. 1974).

30. The misappropriation doctrine is a form of common-law unfair competition. It was established by the United States Supreme Court in International News Serv. v. Associated Press, 248 U.S. 215 (1918). The *INS* Court defined misappropriation as "an unauthorized interference with the normal operation of complainant's legitimate business precisely at the point where the profit is to be reaped, in order to divert a material portion of the profit from those who have earned it to those who have not." *Id.* at 240.

31. 540 F.2d 266 (7th Cir. 1976).

32. *Id.* at 274.

lier mark is connected."[33] Thus, the *Beefeater* court defined the test for infringement as the likelihood that consumers, upon seeing only the defendant's use of the mark, would believe that it was "in some way related to, or connected or affiliated with, or sponsored by, [the plaintiff]."[34] By looking only for a relationship, connection, or affiliation between two marks, the *Beefeater* court expanded the traditional test for whether there is confusion between marks.

In *Dallas Cowboys Cheerleaders, Inc. v. Pussycat Cinema, Ltd.*[35] the Second Circuit applied the *Beefeater* court's infringement test with an even more unconventional definition of confusion. The court explained that the necessary confusion requirement was met if the use of the mark led the public to believe its use had been "sponsored" or "approved" by the mark's owner.[36] The court found that because defendant's use of the trademark might have brought to mind the Dallas Cowboys Cheerleaders, the public may have been confused into believing that plaintiff sponsored the movie.[37]

The court in *Pussycat Cinema* implied that any unauthorized use of a mark that results in the public's associating the mark with its true owner presents a likelihood of confusion per se. The court unnecessarily abandoned the traditional confusion test and looked at the policy behind the test in order to expand trademark protection. Acknowledging that "[t]he trademark laws are designed not only to prevent consumer confusion but also to protect 'the synonymous right of a trademark owner to control his product's reputation,' "[38] the court prevented defendant from reaping the benefits of plaintiff's reputation in the cheerleader uniform.

The court's decision was unprecedented because a violation of the doctrines of misappropriation or unjust enrichment is not automatically trademark infringement. Trademark law does not

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33. *Id.* at 275.

34. *Id.* at 274.

35. 604 F.2d 200 (2d Cir. 1979).

36. *Id.* at 205.

37. *Id.*

38. *Id.* (quoting James Burrough Ltd. v. Sign of the Beefeater, Inc., 540 F.2d 266, 274 (7th Cir. 1976)).

give the trademark owner an absolute monopoly in his mark but allows its owner only limited exclusive rights. Before a plaintiff can enjoin a defendant from misappropriating his trademark or from obtaining unjust enrichment from the use of his mark, he should be required to prove that his trademark rights have been infringed according to the source-confusion test of traditional trademark law. The court in *Pussycat Cinema* granted plaintiff a preliminary injunction because defendant's use of plaintiff's trademark was likely to cause consumers to associate the trademark with its owner.[39] The court, however, overstated the protections provided by trademark law. Of course people were likely to associate the trademark with its owner; otherwise, the trademark would be useless.

The *Pussycat Cinema* court extended plaintiff's rights by allowing him to exclude a use of his trademark that could harm his business reputation. Recognition of the trademark owner's right to control his product's reputation exhibits a modern trend toward protecting trademarks as if they were a property right.[40]

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39. *Id.*

40. The law of trademark has traditionally "been limited exclusively to protection of the identifying function of marks and names and . . . [has] recognized in them no property rights as such apart from that identifying function." Pattishall, *The Dilution Rationale for Trademark-Trade Identity Protection, Its Progress and Prospects*, 71 NW. U.L. REV. 618, 629 (1976) [hereinafter cited as Pattishall]. Protecting trademarks as if they were property, however, is similar to the protections afforded by antidilution statutes. The dilution concept has been explained as

> a theory of trade identity protection fundamentally different from the likelihood of confusion basis . . . . [It is the] property right in trademarks which should be protected against the tort of "gradual whittling away or dispersion of the identity and hold upon the public mind of the mark or name by its use upon noncompeting goods."

*Id.* at 618 (quoting Schecter, *The Rational Basis of Trademark Protection*, 40 HARV. L. REV. 813, 825 (1927)) (citation omitted).

Because the court recognized a property right in plaintiff's trademark, the injunction was found not to violate defendant's first amendment protections. 604 F.2d at 206. Defendant asserted that the first amendment protected his infringement of plaintiff's trademark. The court explained that "[p]laintiff's trademark is in the nature of a property right, . . . and as such it need not 'yield to the exercise of First Amendment rights under circumstances where adequate alternative avenues of communication exist.'" *Id.* (quoting Lloyd Corp. v. Tanner, 407 U.S. 551, 567 (1972)) (citations omitted). But see Justice

The 1977 Annual Review Committee of the United States Trademark Association has noted that the cases for that year exhibited

> a continuous development of recent trends in the law favoring plaintiffs and granting more effective protection from methods of competition which strike the conscience as unfair or morally wrong. The pendulum continues to swing away from the application of broad sweeping rules intended to foster competition and toward the application of individually fashioned equitable remedies designed to stop conduct which smacks of reaping where one has not sown.[41]

The *Pussycat Cinema* court prevented defendant from engaging in conduct that the court viewed as commercially immoral or unfair. Even though the result was commendable, the court

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Marshall's dissent in Lloyd Corp. v. Tanner, 407 U.S. 551 (1972) (5-4 decision in which the majority upheld the right of the owner of a shopping center to bar the distribution of handbills on the premises). In response to the majority's holding that some property rights are not required to "yield to the exercise of First Amendment rights," *id.* at 567, Justice Marshall wrote,

> We must remember that it is a balance that we are striking—a balance between the freedom to speak, a freedom that is given a preferred place in our hierarchy of values, and the freedom of a private property owner to control his property. When the competing interests are fairly weighed, the balance can only be struck in favor of speech.

*Id.* at 580 (Marshall, J., dissenting). The balancing of free speech and property rights should weigh even more heavily toward free speech when the property right encompasses a trademark. The law of trademarks has traditionally "been limited exclusively to protection of the identifying function of marks and names and [has] recognized in them no property right as such apart from that identifying function." Pattishall, *supra*, at 629.

The defendant contended that the first amendment doctrine of fair use as applied to copyrights should also be applied to trademarks. 604 F.2d at 205. The court rejected this argument and stated that the fair-use doctrine probably was not applicable to trademarks. *Id.* at 206 & n.9. Arguably, however, trademarks have a built-in fair-use exception because trademark infringement, unlike copyright infringement, is not found whenever there is a copying. If the confusion test for infringement is expanded to allow exclusive use by the trademark owner against all others, a subtle but unwarranted abridgement of first amendment freedoms will result.

41. Annual Review Committee of the United States Trademark Association, *The Thirtieth Year of Administration of the Lanham Trademark Act of 1946*, 67 TRADEMARK REP. 471, 534 (1977).

should not have used trademark law to reach its result. Plaintiff's right to exclude others from using the trademark should be triggered only when the second use leads to confusion. That is the extent of trademark protection. Although allowing a trademark owner to make his own reputation is not a new concept in trademark law,[42] extending trademark protection to its commercial drawing power is a violation of the public policy favoring a free, competitive market.[43] Trademark law itself is a limit on pure competition; therefore, to broaden trademark protection is to further restrict competition.

In addition, the court invoked section 43(a) of the Lanham Trademark Act as the basis for trademark infringement. Congress, however, enacted section 43(a) to protect the public against false representations concerning *unmarked* goods in commerce.[44] Section 43(a) outlaws any "false designation of origin, or any false description or representation, including words or other symbols" applied to goods in commerce.[45] Section 43(a) does not expressly deal with trademarks, but protects against unfair competition by false advertising and misrepresentations. Defendant billed the movie as "Starring Ex Dallas Cowgirl Cheerleader Bambi Woods," although the star of the movie had

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42. For example, over forty years ago, a panel of the Second Circuit, which included Judge Learned Hand, stated that

> [s]imilarity of make-up usually signifies the same source; . . . if so, the plaintiff may insist that its reputation shall be of its own making alone . . . . It is probably too soon to learn whether any actual confusion will result, certainly the plaintiff has not so proved that it has yet done so; but the similarity could scarcely have been accidental in origin . . . .

Time, Inc. v. Ultem Publications, Inc., 96 F.2d 164, 165 (2d Cir. 1938) (citations omitted).

43. See Smith v. Chanel, Inc., 402 F.2d 562 (9th Cir. 1968), in which the court discussed this policy at considerable length.

44. The rights protected by the Lanham Act are not limited to those of registered trademarks. The definitional section of the Act provides:

> The intent of this chapter is to regulate commerce within the control of Congress by making actionable the deceptive and misleading use of marks in such commerce; to protect registered marks used in such commerce from interference by State, or territorial legislation; to protect persons engaged in such commerce against unfair competition.

15 U.S.C. § 1127 (1976).

45. *Id.* § 1125(a).

never been a Dallas Cowgirl.[46] This misrepresentation and other aspects of the challenged advertising may have made section 43(a) a proper conduit for the injunction, but the advertising was not trademark infringement.

The New York antidilution statute[47] might have been the proper means of rendering a decision favorable to plaintiff. In fact, in a footnote to the opinion the court mentioned the antidilution statute as an alternative basis for relief.[48] The court referred to the movie as "a gross and revolting sex film" and questioned whether it even had a plot.[49] Defendant's pornographic use of plaintiff's trademark, therefore, may have diluted plaintiff's business reputation.

Moreover, in similar cases courts have recognized a "right of publicity" derived from the right of privacy.[50] The publicity value of one's name or likeness serves as the basis for preventing misappropriation.[51] The right of publicity is an alternative theory of recovery the court could have relied upon without bending the trademark laws.[52]

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46. 604 F.2d at 203 n.2.

47. N.Y. GEN. BUS. LAW § 368-d (McKinney 1968). *See* notes 16, 22 & 39 *supra*.

48. 604 F.2d at 205 n.8.

49. *Id.* at 202.

50. The Second Circuit recently referred to Dean Prosser's explanation that the right of privacy includes " 'four distinct kinds of invasion of four different interests of the plaintiff.' " Factors Etc., Inc. v. Pro Arts, Inc., 579 F.2d 215, 220 (2d Cir. 1978) (quoting W. PROSSER, HANDBOOK OF THE LAW OF TORTS 804 (4th ed. 1971)). "The fourth type, appropriation of plaintiff's name or likeness for defendant's benefit, has in recent years acquired the label 'right of publicity.' The distinguishing feature of this branch of the tort is that it involves the use of plaintiff's protected right for defendant's direct commercial advantage." 579 F.2d at 220.

51. One intellectual property lawyer has even commented that "the Dallas Cowboy cheerleaders were allowed to protect their right to publicity by enjoining the porno flick 'Debbie Does Dallas' on the basis that the uniform in the movie brought to mind the real cheerleaders." Alter, *Crazylegs Hirsch Runs Away with the Rights to His Name*, Nat'l L.J., March 24, 1980, at 27, col. 1.

52. It is, however, an open question whether a business or corporation can possess publicity rights. To date, the doctrine has been applied only to individuals. *See, e.g.*, Memphis Dev. Foundation v. Factors Etc., Inc., 616 F.2d 956 (6th Cir. 1980) (Elvis Presley); Price v. Hal Roach Studios, Inc., 400 F.

The *Pussycat Cinema* court properly enjoined defendant from capitalizing on plaintiff's trademarks, reputation, and publicity rights. Through his own labors plaintiff had something of value that defendant was exploiting commercially. Defendant's actions may or may not have harmed plaintiff, but they did ring of injustice. Defendant, however, did not infringe plaintiff's trademark. The test for infringement is the likelihood of source confusion. The *Pussycat Cinema* court had other means of disposing of this case without distorting the confusion test beyond recognition.

DESIRÉE K. PARK

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Supp. 836 (S.D.N.Y. 1975) (Laurel & Hardy); Guglielmi v. Spelling-Goldberg Prods., 140 Cal. Rptr. 775 (Ct. App. 1977), *aff'd*, 25 Cal. 3d 860, 603 P.2d 454, 160 Cal. Rptr. 352 (1979) (Rudolph Valentino). *See also* 47 TENN. L. REV. 886 (1980).

# Workers' Compensation—Choice of Physician—Post-Judgment Right of Control

*Goodman v. Oliver Springs Mining Co.*,
595 S.W.2d 805 (Tenn. 1980).

Plaintiff-employee was diagnosed by his personal physician as having pneumoconiosis,[1] a compensable disease[2] under the Tennessee Workers' Compensation Law,[3] for which the trial court awarded him permanent disability benefits and past medical expenses incident to the treatment of the disease.[4] After final judgment, employer's insurance carrier tendered plaintiff a list of three physicians and advised plaintiff that recovery for future medical treatment was contingent upon choosing one of the designated physicians.[5] Plaintiff initially declined to consult any of the proffered doctors and remained under the care of his personal physician. Subsequently, however, he attempted to contact the doctors listed and found two of them to be unavailable.[6] Upon plaintiff's motion to enforce judgment, the trial court ordered the defendants, plaintiff's employer and its insurance carrier, to reimburse the plaintiff for medical expenses incurred since trial and, additionally, for future treatment by plaintiff's

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1. Pneumoconiosis, a respiratory condition, is commonly known as black lung. W. MALONE, M. PLANT & J. LITTLE, THE EMPLOYMENT RELATION 300 (1974).

2. TENN. CODE ANN. § 50-1101 (Supp. 1980).

3. *Id.* §§ 50-901 to -1211 (1977 & Supp. 1980). In 1980 the Tennessee legislature changed the Workmen's Compensation title to Workers' Compensation. Act of March 11, 1980, ch. 534, 1980 Tenn. Pub. Acts 121 (codified as TENN. CODE ANN. § 50-902 (Supp. 1980)).

4. Goodman v. Oliver Springs Mining Co., 595 S.W.2d 805, 806 (Tenn. 1980). Plaintiff was under his physician's care for approximately ten months before the judgment was rendered. *See id.* at 806-07.

5. *Id.* at 806.

6. One of the physicians refused to examine the employee; the other died soon after his name was tendered. No attempt was made to contact the third doctor. *Id.* at 807.

chosen doctor.[7] Defendants appealed, contending that they retained the right to designate a panel of physicians as provided by section 50-1004 of the Tennessee Code Annotated[8] and that plaintiff was not entitled to reimbursement for post-trial medical treatment rendered by a physician not chosen from the panel designated by defendants. On appeal to the Tennessee Supreme Court, *held*, affirmed. An employer who does not tender a list of three physicians able and willing to treat the employee violates the employee's standard right of choice of physician, and, furthermore, once an employee has justifiably engaged his own doctor, the employer cannot, absent a change of circumstances, require that the self-procured treatment be discontinued and replaced with services provided by a physician named by the employer; therefore, the employee may continue to be treated by his personal doctor and is entitled to past and future necessary medical expenses for such treatment. *Goodman v. Oliver Springs Mining Co.*, 595 S.W.2d 805 (Tenn. 1980).

Under the Tennessee Workers' Compensation Law,

> [t]he injured employee shall accept the medical benefits afforded hereunder; provided, that the employer shall designate a group of three (3) or more reputable physicians or surgeons not associated together in practice if available in that community from which the injured employee shall have the privilege of selecting the operating surgeon or the attending physician; and, provided further, that the liability of the employer for such services rendered the employee shall be limited to such charges as prevail for similar treatment in the community where the injured employee resides.[9]

An employer,[10] upon notice[11] of an occupational injury or dis-

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7. *Id.* at 806.

8. *See* text accompanying note 9 *infra*.

9. TENN. CODE ANN. § 50-1004 (Supp. 1980).

10. The employer has a statutory duty to provide medical benefits to his employees. The Workers' Compensation Law provides, in part:

> The employer or his agent shall furnish free of charge to the employee such medical and surgical treatment, medicine, medical and surgical supplies, crutches, artificial members, and other apparatus, such nursing services as ordered by the attending physician and hospitalization, including such dental work made reasonably necessary by accident as herein defined, as may be reasonably required . . . .

ease, is to designate a panel of three physicians qualified to provide the employee with medical care. The employee must choose his treating physician from this panel.[12] The approach used in Tennessee represents a compromise between total employer-carrier control and employee free choice.[13] These alternate methods of choosing the employee's treating physician reflect opposing public policies.[14] The personal interest of the employee in choosing his doctor[15] and the value of the doctor-patient relationship[16] is sought to be protected by employee free choice.[17] Employer choice of medical treatment,[18] conversely, is said to

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TENN. CODE ANN. § 50-1004 (Supp. 1980). The same benefits apply to employees afflicted with an occupational disease. *Id.* § 50-1105.

11. Before an employee may recover under the Workers' Compensation Law, the employer must have had timely notice of the injury or disease. Aetna Cas. & Sur. Co. v. Long, 569 S.W.2d 444, 449 (Tenn. 1978); TENN. CODE ANN. § 50-1001 (1977) (notice of injury); *id.* § 50-1107 (notice of disease) (pneumoconiosis exempt).

12. TENN. CODE ANN. § 50-1004 (Supp. 1980). *See* text accompanying note 9 *supra*.

13. *See* 2 A. LARSON, THE LAW OF WORKMEN'S COMPENSATION § 61.12, at 10-446 (1976) [hereinafter cited as A. LARSON]. A congressionally commissioned study recommended either the free choice or panel approach. NATIONAL COMMISSION ON STATE WORKMEN'S COMPENSATION LAWS, THE REPORT OF THE NATIONAL COMMISSION ON STATE WORKMEN'S COMPENSATION LAWS 78 (1972). These recommendations have been embodied in a model act, COUNCIL OF STATE GOVERNMENTS, WORKMEN'S COMPENSATION & REHABILITATION LAW § 12(b) (alternatives 1 & 2) (1974).

14. *See generally* 2 A. LARSON, *supra* note 13, § 61.12, at 10-445 to -446; Bowers, *Free Choice of Physicians Under the Workmen's Compensation Law*, 25 INS. COUNSEL J. 333 (1958) [hereinafter cited as Bowers].

15. Dahl, *The Inter-Relationship Between Law and Medicine in Workmen's Compensation: A Comparative Guide for Practitioners*, 12 CAL. WEST L. REV. 25, 49-50 (1975) [hereinafter cited as Dahl]. "Each of us regards his body as a divine temple which no uninvited practitioner should punch or needle." *Id.* at 49.

16. Bowers, *supra* note 14, at 334; Dahl, *supra* note 15, at 49. "The faith of the patient in his attending physician is not an unimportant part of treatment . . . ." *Id.* at 49.

17. *See, e.g.*, Perron v. ITT Wire & Cable Div., 103 R.I. 336, 343, 237 A.2d 555, 559 (1968) (dictum); R.I. GEN. LAWS § 28-33-8 (Supp. 1980); TEX. REV. CIV. STAT. ANN. art. 8306, § 7 (Vernon Supp. 1980).

18. *See* Condry v. Jones Farm Equip. Co., 358 So. 2d 1030, 1031-32 (Ala. Civ. App. 1978) (construing earlier version of ALA. CODE § 25-5-77(a) (1975)).

induce lower cost[19] and better quality of medical care.[20] An additional concern is that the employer, as the party bearing the cost of physicians' services under the Workers' Compensation Law, should have some control over the selection of the treating physician.[21]

Tennessee courts have dealt extensively with the issue of the employee's right to reimbursement of medical fees charged by a physician chosen independently of the employer-designated list. The *Oliver Springs* court responded to the question whether an employee, having obtained judgment for reimbursement for past independent medical care and for future medical care, is entitled to future expenses if he has retained his own physician rather than accepted a physician from the statutory physician list tendered by the employer after judgment.

The issue whether an employee is justified in independently engaging a physician has arisen in several contexts. For example, it is well settled that an employer is liable for the costs of diagnosis of an occupational disease by an employee's personal physician if, before diagnosis, the employee was not aware that he had an occupational disease.[22] Also, if the employer consents to an independently obtained physician, the employer is liable for such services.[23] Finally, if the employer fails[24]

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19. 10 W. SCHNEIDER, SCHNEIDER'S WORKMEN'S COMPENSATION § 2001, at 13 (1953) [hereinafter cited as W. SCHNEIDER]; Bowers, *supra* note 14, at 334.

20. *See* 2 A. LARSON, *supra* note 13, § 61.12, at 10-445; 10 W. SCHNEIDER, *supra* note 19, § 2001, at 13-14; Bowers, *supra* note 14, at 334.

21. *See* note 45 *infra* and accompanying text; text accompanying note 53 *infra*.

22. Bishop v. United States Steel Corp., 593 S.W.2d 920, 922 (Tenn. 1980); Consolidation Coal Co. v. Brown, 225 Tenn. 572, 581-82, 474 S.W.2d 416, 420 (1971). *Accord*, Wormsley v. Consolidation Coal Co., 408 F.2d 79, 83-84 (6th Cir. 1969) (applying Tennessee law).

23. The consent may be express or implied. National Zinc Co. v. Van Gunda, 402 P.2d 264, 267 (Okla. 1965) (implied consent followed by express consent); State Auto. Mut. Ins. Co. v. Cupples, 567 S.W.2d 164, 165 (Tenn. 1978) (express consent); Smith v. Norris, 218 Tenn. 329, 334-35, 403 S.W.2d 307, 309 (1966) (implied consent). *Cf.* Worley Bros. Granite Co. v. Hall, 109 Ga. App. 720, 721, 137 S.E.2d 312, 312 (1964) (consent in the first instance not continuing in nature so as to permit employee to change physicians at his discretion). *See generally* 10 W. SCHNEIDER, *supra* note 19, § 2006.

24. Whitson v. Liberty Mut. Ins. Co., 556 S.W.2d 756, 757-58 (Tenn.

or refuses[25] to provide needed medical care, the employee is justified in seeking treatment for which he must be compensated by the employer.

On the other hand, the choice of physician is particularly troublesome when the employer, although not technically complying with the panel requirement,[26] provides medical treatment and the employee subsequently changes to his personal physician. In *Atlas Powder Co. v. Grimes*[27] the employee was not given a choice of doctors but was sent to the company doctor.[28] After his discharge by the company physician and while still experiencing back pains, the employee engaged a physician who operated on the employee for kidney stones and a herniated disc.[29] The court found that the company doctor was not qualified to conduct the necessary diagnostic tests or to operate for

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1977); Cleveland-Tenn. Enamel Co. v. Eaton, 517 S.W.2d 10, 12 (Tenn. 1974); Floyd v. Tennessee Dickel Distilling Co., 225 Tenn. 65, 70, 463 S.W.2d 684, 687 (Tenn. 1971).

25. St. Paul Ins. Co. v. Waller, 524 S.W.2d 478, 483 (Tenn. 1975).

26. The original language of the Tennessee Workers' Compensation Law gave the employer the right to select the physician who was to treat his employee. Act of Apr. 12, 1919, ch. 123, § 25, 1919 Tenn. Pub. Acts 369. The Act provided that "the employer shall furnish free of charge to the injured employe such medical and surgical treatment . . . as may be reasonably required, and the injured employe shall accept the same." *Id.*, 1919 Tenn. Pub. Acts at 378. In an important case decided under this provision, Irwin v. Fulton Sylphon Co., 179 Tenn. 346, 166 S.W.2d 610 (1942), the employer properly tendered the services of a physician, but the employee chose to have the necessary operation performed by his private doctor. *Id.* at 348, 166 S.W.2d at 610. In denying the employee reimbursement for his personal surgeon's fees, the court stated that "the employer in the first instance has the right to select the physician." *Id.* at 349, 166 S.W.2d at 611. Therefore, the employee could not expect to recover for his surgeon's expenses " 'while declining without good reason the services so tendered.' " *Id.*, 166 S.W.2d at 611 (quoting 77 C.J. *Workmen's Compensation Acts* § 496, at 779 (1935)). The court noted, however, that the operation and hospitalization were separate aspects of the medical treatment required to be furnished by the employer, and the employee, having accepted these services, could collect for such charges. *Id.* at 350, 166 S.W.2d at 611. The current statutory language was enacted in 1943. Act of Feb. 10, 1943, ch. 117 § 1, 1943 Tenn. Pub. Acts 333. *See* text accompanying note 9 *supra*.

27. 200 Tenn. 206, 292 S.W.2d 13 (1956).

28. *Id.* at 209, 292 S.W.2d at 14.

29. *Id.* at 210-11, 292 S.W.2d at 14-15.

the condition[30] and awarded reimbursement to the employee.[31] The court reasoned that "when the employer fails to provide three doctors from whom the employee shall select and then selects a doctor who was not competent . . . [t]he employee in selecting a doctor then of his own has a perfect right to do so and the employer would be liable."[32] Thus, the court did not base its decision solely on the employer's failure to name the panel, but also relied on the company physician's lack of qualification to treat the condition. The *Grimes* court did not discuss the employee's duty to consult with his employer before engaging other medical care.

Following *Grimes*, the Tennessee Supreme Court identified factors, in addition to the provision of a physician list, that are relevant to the determination of which party will bear the cost

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30. *Id.* at 216, 292 S.W.2d at 17.

31. *Id.* at 218, 292 S.W.2d at 18. Relying on a portion of § 50-1004 of the Tennessee Code, the employer in *Grimes* claimed that its liability was limited to one hundred dollars. *Id.* at 217, 292 S.W.2d at 17-18. The section relied on provides: "If an emergency, or on account of the employer's failure or refusal to provide the medical care and services required by this law, the injured employee or his dependents may provide the same, and the cost thereof, *not exceeding one hundred dollars ($100)*, shall be borne by the employer . . . ." TENN. CODE ANN. § 50-1004 (Supp. 1980) (emphasis added). The court rejected the employer's contention with the statement, "This paragraph in the section does not relate to the question here involved." 200 Tenn. at 217, 292 S.W.2d at 18. To hold otherwise would obviate the general recovery limit on the employer's liability since the employer could simply refuse to provide treatment and thereby force the employee to seek medical services himself at little cost to the employer. *Id* at 218, 292 S.W.2d at 18. This position was affirmed without discussion in Holston Valley Community Hosp. v. Dykes, 205 Tenn. 336, 343, 326 S.W.2d 486, 489 (1959). Thus, the question arises whether the court has voided de facto this portion of § 50-1004. The employer's general liability for medical services was limited to one hundred dollars in the original act. Act of Apr. 12, 1919, ch. 123 § 25, 1919 Tenn. Pub. Acts 369, but was gradually raised and presently is unlimited except for the proviso that the employer's liability reflect "such charges as prevail for similar treatment in the community where the injured employee resides." TENN. CODE ANN. § 50-1004 (Supp. 1980). The remaining one hundred dollar limitation is thus a very curious animal indeed, and if not extinct, is at least on the endangered species list.

32. 200 Tenn. 206, 216, 292 S.W.2d 13, 17 (1956). "[T]he employer . . . has the affirmative and continuing duty to supply medical treatment that is prompt, *in compliance with the statutory prescription on choice of doctors, and adequate.*" A. LARSON, *supra* note 13, § 61.12 at 10-450 (emphasis added).

of independently procured treatment. In *Atlas Powder Co. v. Grant*[33] the employee was treated by several company doctors over a three-to-four month period for injuries resulting from a fall. The employee, dissatisfied with the treatment and experiencing a great deal of pain, changed physicians and had an operation.[34] One company doctor testified that the employee's problem was not the need for an operation but "a sense of self-pity."[35] In affirming the trial court's determination that the employee had the right to engage his personal physician,[36] the majority[37] noted that the employee had "differences" with the company doctor[38] and "had good grounds to believe that he was not cured."[39] The court noted that the employee had undergone treatment for several months[40] and stressed that he had cooperated with the company and its physicians; moreover, he independently sought another physician only upon discovering that he was not cured.[41] The company's objection to not being noti-

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33. 200 Tenn. 617, 293 S.W.2d 180 (1956), *noted in* 24 TENN. L. REV. 1225 (1957).

34. 200 Tenn. at 619, 293 S.W.2d at 180.

35. *Id.* at 618, 293 S.W.2d at 180.

36. *Id.*, 293 S.W.2d at 181.

37. In his dissent, Chief Justice Neil, joined by Justice Tomlinson, emphasized that the employee "without reason employed his own doctor without notice to the employer that he desired additional medical services." *Id.* at 623, 293 S.W.2d at 183 (Neil, C.J., dissenting). The Chief Justice was of the opinion that the employee's own physician could recommend additional services but that the employer is then entitled to name the physician panel, and "[o]f course, he could not arbitrarily refuse any request made by the employee." *Id.* at 625, 293 S.W.2d at 183 (Neil, C.J., dissenting). However, neither could the employee "arbitrarily and without reason abandon the services tendered him and proceed to pile up an enormous medical bill incurred by himself with other doctors." *Id.* at 625-26, 293 S.W.2d at 184 (Neil, C.J., dissenting).

38. *Id.* at 622, 293 S.W.2d at 182.

39. *Id.*, 293 S.W.2d at 182.

40. *Id.*, 293 S.W.2d at 182. The court said, " '[I]f the treatment . . . furnished by the employer . . . does not within a reasonable time effect a cure . . . , then it cannot be said that the employer has furnished such medical and surgical treatment as was reasonably and seasonably required.' " *Id.* at 621, 293 S.W.2d at 182 (quoting Union Iron Works v. Industrial Acc. Comm'n, 190 Cal. 33, 40, 210 P. 410, 413 (1922)).

41. 200 Tenn. at 623, 293 S.W.2d at 182.

fied of the employment of another physician[42] was thus implicitly rejected. The court's opinion did not address the effect of the employer's failure to name the physician panel.

A second group of choice-of-physician cases consists of decisions favorable to the employer. This result was reached in *Proctor & Gamble Defense Corp. v. West*,[43] the first of a number of cases that emphasized the employer's right to be notified of a change of physician rather than the employee's right to a physician panel. In *West*, several months after the company's physicians had completed treatment of the employee's back injury, the employee engaged a physician without notifying the employer.[44] In denying the employee reimbursement for the independently obtained services, the court did not discuss the employer's initial failure to provide the employee with a physician panel; rather, the court focused on the employee's duty to notify the employer if further medical expenses were to be incurred. Referring to a reciprocal duty of the employer to furnish and the employee to accept medical treatment, the *West* court interpreted the statute as requiring the employee to consult with the employer "before incurring the expenses . . . if the employee expects the employer to pay."[45] The court distinguished *Grant*, noting the absence of "personal differences"[46] between the doctors and patient. The court also emphasized that although months had passed since the doctors' services had ended, the employee "without consulting his employer in any manner incurred these additional expenses."[47]

The *West* standard of employee liability for self-procured medical treatment was elaborated in *Rice Bottling Co. v. Hum-*

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42. *Id.* at 619, 293 S.W.2d at 181.

43. 203 Tenn. 138, 310 S.W.2d 175 (1958).

44. *Id.* at 145, 310 S.W.2d at 178.

45. *Id.*, 310 S.W.2d at 178. The court stated, "The opposite would seem to be against public policy." *Id.*, 310 S.W.2d at 178. As previously suggested, the court's language suggests that the employer, as the party having to pay for medical treatment under the Workers' Compensation Law, should have some degree of control over the physicians and the treatment rendered. *See* text accompanying note 21 *supra*.

46. 203 Tenn. at 145, 310 S.W.2d at 178.

47. *Id.*, 310 S.W.2d at 178.

*phreys*.[48] In that case the employee injured his back and was referred by the company doctor to an orthopedic surgeon[49] but apparently was not given a list of three physicians. The employee, during several subsequent visits to this doctor, was told to return to work since no injury could be found.[50] The employee engaged the services of a chiropractor[51] and initially was awarded reimbursement for chiropractic services.[52] In reversing the chancellor's award for chiropractic expenses, the court said, "We need to keep in mind the question is not whether employee needed further medical services, but whether employee was justified in obtaining further medical services, without consulting employer, yet expecting employer to pay for same."[53] The *Humphreys* court did not discuss either the employer's failure to name a physician panel or the *Grimes* and *Grant* cases that seemed more factually similar[54] to *Humphreys* than did *West*. Although the company doctor's belief that nothing was wrong with the employee "would carry the obvious inference [that] there was no need for employee to return to [the company] doctor,"[55] the court found no "reasonable excuse"[56]

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48. 213 Tenn. 8, 372 S.W.2d 170 (1963).

49. *Id.* at 10, 372 S.W.2d at 171.

50. *Id.*, 372 S.W.2d at 171.

51. *Id.*, 372 S.W.2d at 171. Recovery for a chiropractor's services was denied by an unusual opinion in Manley v. Municipality of Jefferson City, 207 Tenn. 648, 343 S.W.2d 358 (1960). The employee visited a chiropractor one month after sustaining a neck injury, which the employer did not believe to be serious enough to require treatment. The employer's insurance carrier informed the employee that it did not recognize chiropractors' bills and subsequently referred the employee to a doctor. The employee consulted the doctor but continued to visit the chiropractor. *Id.* at 649, 343 S.W.2d at 358. The court noted that treatment was furnished the employee and accepted by him. *Id.* at 650, 343 S.W.2d at 358. However, the court mentioned neither Tennessee case law nor statutory requirements; instead, the court cited a Delaware case, General Motors Corp. v. Socorso, 48 Del. 418, 105 A.2d 641 (1953), for the proposition that the employee "was not entitled to recover for a chiropractor's bill of his own choice when he was receiving treatment from a physician which was being paid for by the defendant company." 207 Tenn. at 650, 343 S.W.2d at 358.

52. 213 Tenn. at 11-12, 372 S.W.2d at 172.

53. *Id.* at 13, 372 S.W.2d at 173.

54. *See* text accompanying notes 29 & 35 *supra*.

55. 213 Tenn. at 13, 372 S.W.2d at 173. Indeed, this was a factor which

for the employee's obtaining independent medical services without first consulting his employer.

The *West* and *Humphreys* decisions were followed in *Tom Still Transfer Co. v. Way*[57] and *Emerson Electric Co. v. Forrest*.[58] Since the hospital to which the employee had been taken and the clinic he later visited independently were in the same town, the *Way* court concluded that no hardship precluded the employee from continuing treatment at the hospital.[59] Additionally, the employee easily could have consulted with his employer since he lived and worked in the same town. No evidence of disagreement between the doctors and the patient existed, and the employee had not voiced to the employer any displeasure with his treatment.[60] In *Forrest*, although the employee had "been constantly plagued by severe swelling in his right arm"[61] for more than a year following his work-related accident, the court emphasized that he had never "expressed dissatisfaction with the medical treatment furnished."[62] In both *Way* and *Forrest* the employer was not held liable for expenses incurred when the employee independently sought a doctor without first notifying

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led the court in the later decision of Forest Prods. v. Collins, 534 S.W.2d 306 (Tenn. 1976), *see* note 76 *infra*, to find the employee *justified* in obtaining her outside physician.

56. 213 Tenn. at 13, 372 S.W.2d at 173. The court noted that since the employee lived near his place of work, he easily could have notified his employer. *Id.* at 14, 372 S.W.2d at 173. *See also* Tom Still Transfer Co. v. Way, 482 S.W.2d 775, 777 (Tenn. 1972); text accompanying note 60 *infra*.

57. 482 S.W.2d 775 (Tenn. 1972). The *Way* court found the employee "not justified in obtaining further medical care without first consulting his employer." 482 S.W.2d at 777. The court made no mention of *Grant*, which reached the opposite result, even though the facts of the case presented some of the same circumstances found in *Grant*. *See* text accompanying notes 40 & 41 *supra*; note 40 *supra*.

58. 536 S.W.2d 343 (Tenn. 1976). In *Forrest*, the court stated, "Further, the record is silent as to the reason why appellee [employee] did not consult with appellant [employer]. Absent such a showing, the chancellor erred in ordering appellant to pay the controverted medical expenses." *Id.* at 346. In neither case did the absence of tender of a physician panel enter into the court's analysis.

59. 482 S.W.2d at 777.

60. *Id.*

61. 536 S.W.2d at 344.

62. *Id.* at 346.

the employer.

*West* and *Humphreys* were also relied on for the decision in *Harris v. Kroger Co.*[63] that denied reimbursement to an employee who had not expressed dissatisfaction with the employer-provided physician before obtaining the services of her private doctor.[64] Although the employer had not provided a panel, the court noted that it had "refused to hold that in every instance the failure of the employer to furnish a panel of doctors renders the employer liable for expenses for doctors chosen by the employee."[65] The employee's desire for objective treatment, coupled with feelings of confusion, helplessness, and despondency, was not a "reasonable excuse" for failure to notify her employer of her change of physician.[66]

A third group of cases may reconcile the *Grimes* finding of employer liability, based at least in part on the failure to tender the employee a list of physicians, with the burden shouldered by the employee in *West* for failure to consult the employer before obtaining an outside physician. In *Holston Valley Community Hospital v. Dykes*[67] the employee janitor, after straining his back, was sent to a doctor designated by the employer; the panel requirement was not met. The employee was treated by this doctor for three weeks and complained that he was getting worse and that the company doctor was trying to get him back to work.[68] The employee thereafter sought a private doctor, who was considerably more experienced than the company physician.[69] The court viewed the case as falling "somewhere between" *Grimes* and *West*.[70] The court refused to adopt a per se rule of employer liability for an employee's self-procured services in cases of the employer's noncompliance with the statute.[71]

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63. 567 S.W.2d 161 (Tenn. 1978).
64. *Id.* at 163.
65. *Id.*
66. *Id.* at 164.
67. 205 Tenn. 336, 326 S.W.2d 486 (1959).
68. *Id.* at 341, 326 S.W.2d at 488.
69. *Id.* at 342, 326 S.W.2d at 489.
70. *Id.*, 326 S.W.2d at 489.
71. The court said,

> We are not agreeable to placing the decision of this question solely on the fact that the employer did not comply with this provision of the

Rather, the court said that the circumstances surrounding the unauthorized change of physician were important in the determination.[72] Ruling in favor of the employee, the court stated, "When we consider the fact that this employee was a menial workman . . . and of very little education . . . we must realize that under the circumstances it never occurred to him that he might have obviated this law suit if he had . . . requested that he be given another doctor."[73] Although the employee had failed to consult with his employer, "the employer was first at fault in not . . . offering the employee a choice."[74]

The *Dykes* approach was further developed by *Employers Insurance v. Carter*,[75] in which the employee, after receiving unsatisfactory treatment from the company doctor, was denied his request for another doctor. In holding that the employee was justified in obtaining private medical care, the court said that while the employer may not be liable for every failure to furnish a panel, "certainly an employer who thus fails to follow that statute runs that risk. Referring the employee to a single physician does not comply with the statute; it is an usurpation of the privilege of the employee to choose the ultimate treating physician."[76] The court further observed that the "employee must

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law and thus to leave it open to any employee to act on his own initiative under all circumstances in quitting the doctor assigned him by the employer and then switching over without notice to the employer to another doctor.

*Id.* at 343, 326 S.W.2d at 489. *Accord*, Burlington Indus., Inc. v. Clark, 571 S.W.2d 816, 818 (Tenn. 1978).

72. 205 Tenn. at 323, 326 S.W.2d at 489.

73. *Id.* at 342, 326 S.W.2d at 489. *See* Burlington Indus., Inc. v. Clark, 571 S.W.2d 816, 818 (Tenn. 1978) (circumstances similar to *Dykes* were important to the court's decision); note 78 *infra*.

74. 205 Tenn. at 342-43, 326 S.W.2d at 489.

75. 522 S.W.2d 174 (Tenn. 1975).

76. *Id.* at 176. In Forest Prods. v. Collins, 534 S.W.2d 306 (Tenn. 1976), the court found that

the employee acted reasonably in seeking medical treatment of her own choice since the employer failed to tender her a panel of three physicians from which to choose one, but, instead, referred her to a single 'company doctor' who, after examination, dismissed her and directed her to return to work.

*Id.* at 308. The *Collins* court relied upon the decisions in *Grimes*, *Grant*, *Dykes*, and *Carter*. The case is difficult to reconcile with the opposite result

comply with this statute if he is to be entitled to receive its benefits,"[77] and found that the employee had complied with the statute.[78]

As demonstrated by the strong language in *Carter*,[79] the employer's failure to name a physician panel is a violation of the statute. The court in *Dykes*, however, had made the effect of this violation uncertain by refusing to adopt a blanket rule of employer liability for such a breach; instead, the *Dykes* court found the circumstances of each case to be determinative.[80] A review of the cases demonstrates that the court will not justify the employee's independent engagement of a physician when there appears to be no reason or need for doing so.[81]

Thus, *Grimes*, *Grant*, *Dykes*, and *Carter* identify factors that have influenced the court in finding that the employee was justified in obtaining his personal physician after having received treatment from a physician designated by the employer.[82] These considerations include (1) lack of qualification of employer-supplied physician to treat the condition involved[83] or

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reached in the earlier and factually similar case of Rice Bottling Co. v. Humphreys, 213 Tenn. 8, 372 S.W.2d 170 (Tenn. 1963), *see* text accompanying notes 46-56 *supra*, unless the court has some aversion to chiropractic services, for which compensation was denied in *Humphreys*.

77. 522 S.W.2d at 176.

78. *Id.* In Burlington Indus., Inc. v. Clark, 571 S.W.2d 816 (Tenn. 1978), the court was heavily influenced by *Dykes* and *Carter*. In *Clark* an employee was discharged by the company doctor because the doctor had " 'done all he could,' " even though the employee was still suffering severe back pains. *Id.* at 817. The employee had not been given a choice of physicians, and the court noted that neither the company nor its insurance carrier had informed the employee that she should consult her employer before seeking outside medical care. *Id.* at 818. Further, the court asked, "What would be the natural reaction of an employee, who has only a ninth grade education, under these circumstances?" *Id.* The employee "was justified in seeking medical care of her own choosing for which the non-complying employer is liable." *Id.* at 819.

79. *See* text accompanying note 76 *supra*.

80. *See* note 71 *supra*.

81. *See* text accompanying notes 53 & 56 *supra*.

82. The *Collins* and *Clark* decisions are also included in this category. *See* notes 76 & 78 *supra*.

83. Atlas Powder Co. v. Grimes, 200 Tenn. at 206, 216, 292 S.W.2d 13, 17 (1956); text accompanying note 32 *supra*.

unsatisfactory treatment afforded employee,[84] (2) personal differences with employer-supplied doctor,[85] (3) treatment for extended period by company doctor without improvement,[86] (4) low work status and education of employee,[87] (5) dismissal from company doctor's care,[88] (6) direction for employee to return to work before cured,[89] (7) lack of instructions from employer or insurance carrier regarding selection of a physician,[90] (8) consultation with employer or employer-supplied doctor before obtaining independent physician.[91]

In *West, Humphreys, Way, Forrest,* and *Kroger Co.,* the court has stressed other factors in finding that the employee was not justified in choosing his personal physician after receiving treatment by an employer-provided physician. Among these factors are (1) lack of personal differences or disagreement between doctor and employee,[92] (2) extended period between end of employer-provided treatment and employee's engagement of doc-

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84. Employers Insurance v. Carter, 522 S.W.2d 174, 176 (Tenn. 1975); text accompanying note 75 *supra. See also* note 32 *supra.*

85. 200 Tenn. at 622, 293 S.W.2d at 182; text accompanying note 38 *supra.*

86. 200 Tenn. at 622, 293 S.W.2d at 182; text accompanying notes 40 & 41 *supra. But see* Emerson Elec. Co. v. Forrest, 536 S.W.2d 343, 344 (Tenn. 1976) (employee's condition had persisted more than a year after initial treatment); text accompanying note 61 *supra.*

87. Holston Valley Community Hosp. v. Dykes, 205 Tenn. 336, 342, 326 S.W.2d 486, 489 (1959); text accompanying note 73 *supra.* See Burlington Indus., Inc. v. Clark, 571 S.W.2d 816 (Tenn. 1978); note 78 *supra.*

88. *See* Burlington Indus., Inc. v. Clark, 571 S.W.2d 816, 817 (Tenn. 1978); note 78 *supra*; Forest Prods. v. Collins, 534 S.W.2d 306, 308 (Tenn. 1976); note 76 *supra. But see* Rice Bottling Co. v. Humphreys, 213 Tenn. 8, 13, 372 S.W.2d 170, 173 (1963); text accompanying notes 55 & 56 *supra.*

89. Holston Valley Community Hosp. v. Dykes, 205 Tenn. 336, 341, 326 S.W.2d 486, 488 (1959); text accompanying note 68 *supra*; Forest Prods. v. Collins, 534 S.W.2d 306, 308 (Tenn. 1976); note 75 *supra.*

90. Burlington Indus., Inc. v. Clark, 571 S.W.2d 816, 818 (Tenn. 1978); note 78 *supra.*

91. Employers Insurance v. Carter, 522 S.W.2d 174, 176 (Tenn. 1975).

92. Tom Still Transfer Co. v. Way, 482 S.W.2d 775, 777 (Tenn. 1972); text accompanying note 60 *supra.* Proctor & Gamble Defense Corp. v. West, 203 Tenn. 138, 145, 310 S.W.2d 175, 178 (1958); text accompanying note 46 *supra.*

tor,[93] (3) close proximity of employee's home and place of employment, thus facilitating ability to consult with employer,[94] (4) close proximity of employer-provided treatment and employee-chosen physician, thus evidencing no hardship on employee to visit the former,[95] and (5) failure of employee to voice displeasure with his treatment to employer.[96]

Different complications exist when the employee fails or refuses to submit to treatment initially offered by his employer in compliance with the Act. In *Consolidation Coal Co. v. Pride*,[97] the employee, suffering from shortness of breath, consulted a physician who diagnosed his condition as nodular silicosis and emphysema.[98] The employer, upon notice, submitted a list of three physicians. Although the employee submitted to an examination by one of the listed doctors, all other treatment was rendered by his original physician.[99] The employee, having declined a doctor from the employer's list, was liable for the self-procured services.[100] The court stated:

> It is our view that petitioner had a duty to consult with one of the designated physicians, at least for the initial examination. If thereafter unsatisfied with that physician's findings, petitioner may, generally speaking, (1) move the court to appoint a neutral physician, whose expense would be borne equally by the parties, (2) consult with his employer and make other arrangements suitable to both parties, or (3) go to a physician of his own choice, without consulting with the employer, and thus be liable for such services.[101]

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93. 203 Tenn. 138, 145, 310 S.W.2d at 178; text accompanying note 47 *supra*.

94. Tom Still Transfer Co. v. Way, 482 S.W.2d 775, 777 (Tenn. 1976); text following note 59 *supra*; Rice Bottling Co. v. Humphreys, 213 Tenn. 8, 14, 372 S.W.2d 170, 173; note 56 *supra*.

95. 482 S.W.2d at 777; text accompanying note 59 *supra*.

96. Harris v. Kroger Co., 567 S.W.2d 161, 163 (Tenn. 1978); text accompanying note 64 *supra*; Emerson Elec. Co. v. Forrest, 536 S.W.2d 343, 346 (Tenn. 1976); text accompanying note 62 *supra*; Tom Still Transfer Co. v. Way, 482 S.W.2d 775, 777 (Tenn. 1976); text accompanying note 60 *supra*.

97. 224 Tenn. 188, 452 S.W.2d 349 (1970).

98. *Id.* 193, 452 S.W.2d at 352.

99. *Id.* at 197, 452 S.W.2d at 353.

100. *Id.* at 199, 452 S.W.2d at 354.

101. *Id.*, 452 S.W.2d at 354.

*Pride* provides an example of perhaps the clearest case of the employee's lack of justification and attendant liability for his independent choice of physician: when the employer, upon notice, tenders a panel and the employee refuses to choose a physician from the list.

*Goodman v. Oliver Springs Mining Co.*[102] is a case of first impression in Tennessee. The *Oliver Springs* court, relying on *Grimes*, recognized that the employer initially has the right to designate a three physician panel.[103] Citing *Pride*,[104] the court also made clear that the employee ordinarily must consult one of the designated physicians, or petition the court to appoint a neutral physician, or consult with the employer before engaging a personal physician.[105] If the employee obtains a private physician without prior consultation, the employer may be absolved of responsibility for the payment of those services.[106] The court, however, relying on *Humphreys* and *Kroger Co.*, noted that circumstances do exist under which an employee will not be penalized for obtaining independent medical treatment.[107] Although *Oliver Springs* and *Pride* both involved the failure of the employee to undergo treatment by a doctor who was listed on the physician panel tendered, the court distinguished the two cases on two grounds. First, the employer in *Oliver Springs* had not tendered a valid list; two of the three doctors were either unwilling or unable to treat the employee.[108] Thus, the employer violated the statute and, as in *Carter*, "attempted to usurp the employee's privilege to choose the ultimate treating physician."[109] Second, the court, finding the employee to have justifiably engaged his own physician, adopted the rule that his right to continue with this doctor could not be extinguished by the employer's subsequent tender of medical care.[110]

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102. 595 S.W.2d 805 (Tenn. 1980).
103. *Id.* at 807.
104. *Id.* at 808. *See* text accompanying notes 97-101 *supra*.
105. 595 S.W.2d at 808.
106. *Id.*
107. *Id.* at 807.
108. *Id.*
109. *Id.* at 808.
110. *Id.* Whether an employee, having engaged his personal physician because of the employer's initial default, should have his right to compensation

The Tennessee Supreme Court's refusal to hold the employer liable in every case for failure to follow the panel requirement reflects a clash of opposing policies.[111] Thus, the *Oliver Springs* court reiterated the employer's right to a measure of control over the choice of physician by the naming of a physician panel, while at the same time relying on *Kroger Co.* and *Humphreys* in recognizing that the employee may, in some circumstances, choose his personal physician.[112]

When the employer has violated the statute by not naming a panel, but has provided the employee with medical services, the court seems to balance implicitly the competing policies and to base its decisions on factors such as the quality and effectiveness of the employer-provided medical care and the employee's indication of satisfaction with the treatment rendered.[113] However, in *Oliver Springs* the employer neither satisfied the panel requirement nor provided the employee with medical services;[114]

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terminated by refusing the employer's subsequent offer of medical services has been addressed by several jurisdictions. *See* Balsamo v. Fisher Body Div.-Gen. Motors Corp., 481 S.W.2d 536, 537 (Mo. Ct. App. 1972); Nury v. Consumers Mining Co., 159 Pa. Super. Ct. 373, 377, 48 A.2d 87, 89 (1946).

In a leading case, Zeeb v. Workmen's Comp. App. Bd., 67 Cal. 2d 496, 432 P.2d 361, 62 Cal. Rptr. 753 (1967), the employee suffered a flare-up from a prior industrial injury and was refused treatment except on a private basis by the company doctor. The company alleged that the flare-up was not caused by the prior industrial injury. Unsatisfied, the employee sought medical treatment on his own. *Id.* at 498, 432 P.2d at 362, 62 Cal. Rptr. at 754. When the employer subsequently authorized treatment by a company doctor, the employee refused these services and continued to be treated by his personal physician. Rejecting the view that the employer's subsequent offer shifted the burden to the employee to accept the services, the court ruled, "Where . . . the employer has refused treatment causing the employee to procure his own medical treatment, . . . treatment should continue with the same doctor in the absence of a change of condition or evidence that the treatment is defective or additional treatment is necessary." *Id.* at 502, 432 P.2d at 365, 62 Cal. Rptr. at 757. By its initial refusal to treat the employee, the employer had "lost control to compel the acceptance of its doctor." *Id.* at 500, 432 P.2d at 364, 62 Cal. Rptr. at 756. See Voss v. Workmen's Comp. App. Bd., 10 Cal. 3d 583, 516 P.2d 1377, 111 Cal. Rptr. 241 (1974) where the *Zeeb* doctrine was applied and amplified.

111. *See* text accompanying notes 13-21 *supra*.

112. 595 S.W.2d at 807.

113. *See* notes 82-96 *supra* and accompanying text.

114. *See* note 120 *infra* and accompanying text.

treatment was received from the employee's personal physician prior to the naming of the panel. Under these circumstances, the court did not find it necessary to balance countervailing factors in order to find the employee entitled to reimbursement for past medical expenses.

Another factor, and one central to the court's decision in *Oliver Springs*, was the employer's very failure to name the physician panel.[115] *Oliver Springs* makes clear that providing a list of three physicians, two of whom are either unable or unwilling to treat the employee, is the equivalent of providing a single doctor[116] and, under *Carter*, an "usurpation"[117] of the employee's rights. When the employer tenders a defective list and the employee does not accept services from the company but receives treatment from an outside source, both the statutory provisions and public policy favor the employee. The supreme court's award of medical expenses[118] incurred since judgment in the lower court is thus supported by its finding that the employer and insurance carrier had "fallen far short of their statutory right and concomitant obligation to designate a list of three physicians from which the plaintiff is entitled to choose."[119]

At the time of the employer's post-judgment tender of the panel in *Oliver Springs*, the employee was still under the care of his diagnosing physician, apparently as a result of the employer's failure to provide treatment for the pneumoconiosis.[120] Though the employer's tender of a panel had been defective, the

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115. 595 S.W.2d at 808.

116. *Id.*

117. Employers Ins. v. Carter, 522 S.W.2d 174, 176; *see* text accompanying note 76 *supra*.

118. 595 S.W.2d at 808.

119. *Id.*

120. The court excerpted a portion of a letter from the employee's attorney to the insurance carrier: "Your client refused to furnish Mr. Goodman any medical attention for more than a year [time between notice to the employer of the disease and tender of the list following judgment]." 595 S.W.2d at 807. The employee at trial testified that the company had offered no treatment or hospitalization for his condition. Defendant's Bill of Exceptions at 1 (on file in the Tennessee Supreme Court Building, Knoxville, Tenn.). The *Oliver Springs* court did not discuss the question of the applicability of the last paragraph of section 50-1004 of the Tennessee Code Annotated, *see* note 31 *supra*, to this situation.

argument could be made that a future valid tender would terminate the employee's right to compensation for the services provided by his own doctor. This eventuality was foreclosed by the court's adoption of the following rule as articulated by Professor Larson: "[I]f the employee has once justifiably engaged a doctor on his own initiative, a belated attempt by the employer to offer a doctor chosen by the employer will not cut off the right of the employee to continue with the employee's doctor."[121]

The trial court's award in *Oliver Springs* established the employee's right to reimbursement for services of his self-obtained doctor to the time of trial.[122] As the Tennessee Supreme Court found, "Since the judgment was never appealed and be-

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121. 595 S.W.2d at 808 (quoting 2 A. LARSON, *supra* note 13, § 16.12, at 10-454 to -455). Tennessee thus joined the California Supreme Court decision of Zeeb v. Workmen's Comp. App. Bd., 67 Cal. 3d 496, 432 P.2d 361, 62 Cal. Rptr. 753 (1967), upon which the principle is based, to prohibit the employer from resuming control over treatment once the employee has validly procured his own physician. *See* note 110 *supra*. The California court reasoned that when the employee has been forced by the employer's default to engage his own medical treatment,

> medical considerations and adherence to the purposes of [the medical benefits] section [(effective treatment that will return the employee to work quickly and minimize the cost of treatment)] would dictate that a doctor-patient relationship which will inspire confidence in the patient is an ingredient aiding in the success of the treatment [and should not be interrupted] . . . .

*Id.* at 502, 432 P.2d at 365, 62 Cal. Rptr. at 757.

The court in *Oliver Springs* further elaborates that " 'in the absence of a change in condition or evidence that the treatment was defective or additional treatment is needed, the claimant [is] entitled to continue the use of his own doctor.' " 595 S.W.2d at 808 (quoting 2 A. LARSON, *supra* note 13, § 61.12, at 10-455.). In Voss v. Workmen's Comp. App. Bd., 10 Cal. 3d 583, 516 P.2d 1377, 111 Cal. Rptr. 241 (1974), the California Supreme Court construed "change of condition" to mean a change in the employee's physical condition and not a change in "circumstances concerning the cost of treatment." *Id.* at 590, 516 P.2d at 1381, 111 Cal. Rptr. at 245. The court said, "[I]f the employee's physical condition changes so that the condition which prompted the carrier [employer] to deny further treatment is not the employee's existing condition, it would seem proper for the carrier [employer] to resume control of the treatment of the condition as changed." *Id.*, 516 P.2d at 1381, 111 Cal. Rptr. at 245. *See also* McCoy v. Industrial Acc. Comm'n, 64 Cal. 2d 82, 410 P.2d 362, 48 Cal. Rptr. 850 (1966).

122. 595 S.W.2d at 806.

came final the plaintiff has 'justifiably engaged' Dr. Swann as a matter of law."[123] As an alternative basis for finding the Larson rule satisfied, the court noted that the employee, not being aware of the presence of an occupational disease until it was diagnosed, had justifiably engaged his doctor from the time of his initial visit.[124]

Courts should take cognizance of an employer's neglect or refusal to comply with his statutory duty to provide medical treatment to employees[125] and, in effect, estop an employer from regaining control of the choice of physician against the wishes of the employee. In finding that the employee justifiably engaged his own doctor as a matter of law because of the employer's failure to appeal the lower court's judgment,[126] the Tennessee Supreme Court wisely has adopted a similar position.

Unless the court's alternative basis[127] for finding the physician to have been justifiably engaged is considered dictum, the *Oliver Springs* court seems to have carried the Larson rule further than did the cases upon which it was based.[128] The court indicated that, assuming an employee has no prior knowledge of an occupational disease, he may continue with his diagnosing physician even after notice has been given the employer, and the employee's right to compensation for continued services by this physician will not be terminated by the employer's subsequent tender of a panel.[129] Arguably the employer has not breached his

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123. *Id.* at 808.

124. *Id.*

125. *See* note 10 *supra.*

126. 595 S.W.2d at 808.

127. *See* text accompanying note 124 *supra.*

128. The *Zeeb* court expressly found the denial of the employer's right to regain control to be predicated on his refusal to provide treatment. 67 Cal. 2d at 502, 432 P.2d at 365, 62 Cal. Rptr. at 757; *see* note 110 *supra. See also* Voss v. Workmen's Comp. App. Bd., 10 Cal. 3d at 589, 516 P.2d at 1380-81, 111 Cal. Rptr. at 244-45. One commentator has suggested that *Zeeb* be liberalized to allow employees to retain the initial physician in the analogous situation where emergency treatment has been required. 8 S.F.L. REV. 149, 161 (1973).

129. The question arises whether the following passage from a case decided a mere two weeks before *Oliver Springs* has been overruled by *Oliver Springs*:

> Once the employee learns that he is afflicted with an occupational disease, he is "under a duty to consult with his employer . . . before in-

statutory duty and should not be penalized, but public policy supports the supreme court's application of the Larson rule in instances where the employee has justifiably engaged a physician prior to his awareness that he has an occupational disease or injury. Requiring the employee to change doctors would result in duplicative, time-consuming, and, in some instances, dangerous tests. Such a practice would produce a waste of medical resources, inconvenience and hazards for the employee, and increased costs to the employer of providing medical care to his employees.[130] Moreover, since employees would not be aware at the time of engaging their own physicians that they were suffering from work-related conditions, the likelihood of physician shopping for claims purposes is not a problem under the court's rule.

In *Oliver Springs*[131] the Tennessee Supreme Court has taken a positive step for employees covered by workers' compensation. Workers' compensation litigation in Tennessee has produced confusing results on the issue of choice of physician. Against this background of confused judicial decisions, it is unrealistic to expect the average worker, especially when faced with injury or illness, to understand the rights and duties involved in the procurement of medical services. The court's adoption of the Larson rule will simplify the rules of employer-em-

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curring additional medical expenses," and in most instances cannot thereafter recover expenses incurred for treatment of the occupational disease by a physician not designated by the employer.

Bishop v. United States Steel Corp., 593 S.W.2d 920, 922 (Tenn. 1980) (citing Consolidation Coal Co. v. Pride, 452 S.W.2d 349 (Tenn. 1970)); *see* note 22 *supra* and accompanying text.

130. As the *Oliver Springs* court stated, "[A] change in physicians would only cause the defendants to suffer unnecessary expense and cause the plaintiff to suffer additional hardship." 595 S.W.2d at 808-09. The employee's attorney had recognized this hardship in a letter to the insurance carrier: "[The employee] would be required to undergo additional x-ray exposure and the very unpleasant ordeal of additional pulmonary function studies, bronchoscopies, etc. It appears that this would be an unnecessary expense to your client also." *Id.* at 807.

131. 595 S.W.2d at 805 (Tenn. 1980).

ployee liability for medical services and result in benefits to the employer and employee alike.

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# BOOK REVIEW

PRODUCT SAFETY AND LIABILITY—A DESK REFERENCE. By John Kolb and Steven S. Ross. New York: McGraw-Hill Book Co. 1980. Pp. 661. $29.50.

Both authors have long been closely associated with the work of product design engineers, and this book is written with the problems and concerns of these designers uppermost in mind. The principal purpose of the book is to sensitize product manufacturers to the importance of designing and manufacturing their products with product safety as a dominant consideration; the authors provide detailed check lists, data compilations, and guidelines for achieving this safety objective. The book is useful to lawyers because it familiarizes them with engineering and production perspectives that are valuable in assessing product claims.

The second half of the book consists of appendices of information intended to be used as a ready reference, rather than as a body of knowledge to be read and absorbed as a whole. There are, for example, check lists for designers and installers,[1] a hazardous substance table with applicable Department of Transportation regulations,[2] the American National Standards for Safety and Health,[3] an index of Consumer Product Safety Commission standards,[4] federal record-retention requirements,[5] a description of standard-setting and safety-information organizations,[6] and a list of information sources related to products liability.[7] A number of these appendices will be modified or superseded within a

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1. J. KOLB & S. ROSS, PRODUCTS SAFETY AND LIABILITY—A DESK REFERENCE app. A at 329-77 (1980) [hereinafter cited as KOLB & ROSS].
2. *Id.* app. C at 401-97.
3. *Id.* app. D at 499-523.
4. *Id.* app. E at 525-45.
5. *Id.* app. F at 547-84.
6. *Id.* app. G at 585-630.
7. *Id.* app. H at 623-30.

few years; they, therefore, will require updating to remain useful.

The authors emphasize throughout the book the importance of designing and manufacturing with the product-use environment constantly in mind. The term that has grown up in the industry to describe such concerns is "human factors engineering." The human factors engineer has expertise both in engineering and in human psychology. The authors also stress the importance of having design personnel "get out into the field and investigate for themselves the real-life situations and conditions for which they are expected to devise a product."[8] They note the importance of having customer complaints "fed back to corporate headquarters in a form that can be analyzed for patterns which betray safety-related problems."[9]

The authors emphasize that for corporate management to "ignore or pay only lip service to safety — especially on the grounds that consumers are hopelessly inept and the courts hopelessly anticorporation — is professionally irresponsible and can jeopardize corporate survival."[10] One of the biggest barriers to correcting corporate action in safety design, they conclude, "is the 'rational' opinion of management that the product was grievously abused and misused before it caused injury."[11] Moreover, designers "tend to be above average in attainments. They may easily forget that a good many users will be below median performance in any ability . . . . [O]ne must design for the 95th percentile (or as some say, the 5th percentile) in the intended user population, rather than for the 'median' user."[12]

Kolb and Ross repeatedly point out that warnings and instructions should not be relied on as a substitute for a feasibly safe design. "In fact, extensive training may prove counterproductive by encouraging a false sense of confidence in one's ability to control a dangerous product."[13] Warnings will be ig-

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8. *Id.* at 83.
9. *Id.* at 196.
10. *Id.* at xiii.
11. *Id.* at 275.
12. *Id.* at 148-49.
13. *Id.* at 39.

nored if they counsel against efficient use of the product.[14] In addition, the written word often may be a slim reed of protection since the consumer "may not even be able to read — as much as a quarter of all Americans are functionally illiterate, some educators say, not counting the preschool, the blind, and people for whom English is not the native tongue."[15] In view of these considerations, it is ironic that "plaintiffs' attorneys favor a 'failure to warn' argument above all others," owing to the frequent difficulty of proving defective design or installation.[16]

The authors quote the sound advice of a products defense attorney:

> I have found that when it appears that the engineer has tried to make a product as safe and dependable as he could, it pays to have him describe the alternative ways he might have designed the product, and then explain why he made the choices he did — complete with results of any tests he made. Judge and jury are more likely to believe the designer did his best.[17]

They also note that a

> good record-keeping policy also helps establish that a company is taking reasonable precautions to market safe products. The existence of a questioning memo from a designer concerned with safety aspects of a new product, combined with evidence that the designer's point of view was adequately considered, is probably better in most situations than a "blank record" suggesting that safety-related areas were never considered at all, or that the records have been sanitized to prevent embarrassment in court.[18]

In light of these observations, it is disquieting to read that

> [a]s one products liability lawyer put it, "the engineer's responsibility to implement his safety recommendations often exposes him to virtually limitless explanation, rationalization, and, in certain instances, management harassment." At one memora-

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14. *Id.* at 221.
15. *Id.* at 50.
16. *Id.* at 14.
17. *Id.* at 278-79.
18. *Id.* at 91.

> ble product safety panel in Washington, D.C. in 1971, not one of the speakers still worked for the companies or government agencies at which they had raised objections to management safety practices.[19]

The book is not always accurate in its statements about products liability law. For example, the authors refer to Justice Traynor's famous concurrence in *Escola v. Coca-Cola Bottling Company* [20] as the majority opinion in that case, and describe it as an "opinion remarkable for its forthright subjectivity."[21] The *Campo v. Scofield*[22] patent-danger doctrine is described[23] without any explanation that the doctrine was overruled in 1976 in the jurisdiction of its origin[24] and that it is widely discredited elsewhere.[25] The term "innocent bystander" is incorrectly defined as a product lessee, borrower, or other user.[26] The authors state that as of 1976 only Connecticut had an outer cutoff products liability statute of limitations,[27] but they fail to point out that prior to the date of publication of this book a number of states had enacted such statutes.[28] In the case of the drug DES, the authors were apparently unaware[29] of the 1980 California decision[30] permitting victims to sue the drug manufacturers as a

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19. *Id.* at 83.

20. 24 Cal. 2d 453, 150 P.2d 436 (1944).

21. KOLB & ROSS, *supra* note 1, at 10.

22. Campo v. Scofield, 301 N.Y. 468, 95 N.E.2d 802 (1950).

23. KOLB & ROSS, *supra* note 1, at 20.

24. Micallef v. Miehle Co., 39 N.Y.2d 376, 348 N.E.2d 571, 384 N.Y.S.2d 115 (1976).

25. *See* Auburn Mach. Works Co. v. Jones, 366 So. 2d 1167, 1169 (Fla. 1979).

26. KOLB & ROSS, *supra* note 1, at 22. *Compare* Elmore v. American Motors Corp., 70 Cal.2d 578, 451 P.2d 84, 75 Cal. Rptr. 652 (1969) (bystander in even greater need of protection than consumer or user when injury to bystanders from the product's defect is reasonably foreseeable).

27. KOLB & ROSS, *supra* note 1, at 298.

28. *See* Comment, *Statutes of Repose in Products Liability: The Assault Upon the Citadel of Strict Liablity*, 23 S.D.L. REV. 149 (1978); note, *Date-Of-Sale Statutes of Limitation: An Effective Means of Implementing Change in Products Liability Law?*, 30 CASE W.L. REV. 123 (1979).

29. KOLB & ROSS, *supra* note 1, at 298.

30. Sindell v. Abbott Labs., 26 Cal. 3d 588, 607 P.2d 924, 163 Cal. Rptr. 132 (1980).

group. These last two instances indicate the fluidity of products law and the importance of periodically updating a book of this sort.

In the description of the effective use of the engineering expert in products litigation, the authors do an outstanding job. They recognize the difficulty of communicating technical engineering information to a lay factfinder,[31] and they emphasize the importance of apparent objectivity[32] and understandability.[33] They make the important observation that sometimes the practical mechanic may be as effective as the Ph.D. — and much less expensive. " 'I've seen a lift-truck mechanic testify as effectively as an expert', says one attorney, but he warns that all concerned should try not to exaggerate such a person's qualifications."[34]

The chapter on chemical products is especially illuminating. The authors recognize the "staggering" potential for injury and liability in this area.[35] They make the somber observation that chemical spills "are a common occurrence in the American transportation system. . . . In New Jersey alone, there were 2,000 spills in 1977."[36] This is an area in which strict liability for abnormally dangerous products could be imposed, without requiring proof of either negligence or defect.[37] In many chemical products cases, however, negligence may be easy enough to prove;[38] many plaintiffs' products attorneys believe that psychologically it is very important to show negligence whenever possible in order to increase the likelihood of recovery.[39]

In the final chapter on products liability insurance, the authors explore the controversial issue of employer cotortfeasor immunity in the context of workers' compensation liability for work-related product injuries. They question the *Dole v. Dow Chemical Company*[40] solution of tort liability apportionment be-

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31. KOLB & ROSS, *supra* note 1, at 280.
32. *Id.* at 279.
33. *Id.* at 286.
34. *Id.* at 283.
35. *Id.* at 226.
36. *Id.* at 263.
37. *See* Siegler v. Kuhlman, 81 Wash. 2d 448, 502 P.2d 1181 (1973).
38. KOLB & ROSS, *supra* note 1, at 225.
39. *Id.* at 14.
40. 30 N.Y.2d 143, 282 N.E.2d 288, 331 N.Y.S.2d 382 (1972).

tween employer and manufacturer for product-related workplace injuries, indicating that this solution is too cumbersome.[41] Contribution between or among cotortfeasors on the basis of relative responsibility is the clear trend in tort law today, including products liability law.[42] Moreover, it is difficult to justify tort immunity for the employer but not for the product manufacturer when their roles in an enterprise liability context are in many respects very similar.

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41. KOLB & ROSS, *supra* note 1, at 324.

42. *See* Safeway Store, Inc. v. Nest-Kart, 21 Cal. 3d 322, 579 P.2d 441, 146 Cal. Rptr. 550 (1978).

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# DISTINGUISHED ALUMNI LECTURE— OTHER PEOPLE'S MORALS: THE LAWYER'S CONSCIENCE

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The best statement of the thesis I want to explore was made some years ago by a Boston lawyer, Charles Curtis, in his book *It's Your Law.*[1] Curtis put it this way:

> [A]cting for others is in a different category of behavior than acting for yourself and I think its ethics are different. . . .
>
> The person for whom you are acting very reasonably expects you to treat him better than you do other people. . . . A lawyer, therefore, insensibly finds himself treating his client better than others; and therefore others worse than his client.[2]

Since Curtis' discussion of the problem of vicarious responsibility in legal ethics, there have been others, notably Monroe Freedman, Charles Fried, and William Simon, who have tackled the subject.[3] But I do not know anyone who has put the matter

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1. C. CURTIS, IT'S YOUR LAW (1951).

2. *Id.* at 7-8.

3. *See* Freedman, *Personal Responsibility in a Professional System*, 27 CATH. U.L. REV. 191 (1978); Fried, *The Lawyer As Friend: The Moral Foundations of the Lawyer Client Relation*, 85 YALE L.J. 1060 (1976); Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 WIS. L. REV. 29.

more plainly than Curtis, or any other moralist who has faced as squarely as he did what, in fact, is a pervasive problem in morals: the question whether one has a different set of ethics when acting for someone else. I do not agree, however, with the conclusion that Curtis states as to vicarious responsibility: "I think its ethics are different."[4] My answer is different on three levels: a professional level, a philosophical level, and finally, a theological level.

On the professional level, I must confess that I do have the inclination that Curtis makes central and that I would suppose every lawyer experiences when acting for a client. You do want to treat a client at least better than you treat yourself. A lawyer does like to say, "My client needs this," or "I am claiming this because I have to for my client." It is a very attractive and, I suppose, almost inescapable formula. Lawyers would not feel quite the same if they did not have that ability to refer to their clients. At its noblest, certainly, this approach may lead a lawyer to act more commendably for a client than for himself. For me the paradigm is Francis Scott Key, the author of the *Star Spangled Banner* and a very capable Washington lawyer. In the case of *The Antelope*,[5] Key acted for 281 kidnaped Africans who were cast friendless on American shores. Every material interest and the predominant political power were arrayed in favor of their enslavement in America. Key, although he did not succeed in freeing all of the kidnaped Africans, did succeed in freeing about half of them through a selfless devotion to their cause. Although his work did not have a completely satisfactory conclusion, it was, nonetheless, a remarkable achievement on behalf of helpless aliens—an achievement made possible because Key put their cause above his own concerns.[6]

One can see in that kind of devotion to others a meaning in Curtis' formula which is its justification. In dismissing the possibility of inherent dangers in Curtis' formula, it is easy to say that the law provides a built-in limit. If an attorney stays within the limits of the law in acting for a client and treats the client better than other people, no problem arises because that is what

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4. C. CURTIS, *supra* note 1, at 7.
5. 23 U.S. 337, 10 Wheat. 66 (1825).
6. *See* J. NOONAN, THE ANTELOPE (1977).

the adversary system assumes. I will give an example in which the legal limit was disregarded and then consider whether the existence of a legal limit is enough. This example, from the early 1930s, concerns the receivership of the Williamsport Wire Rope Company, a modest manufacturer in Pennsylvania whose main supplier was Bethlehem Steel. Bethlehem Steel had a large interest in Williamsport because of the credit it had extended and because of a desire to preserve and perhaps even to integrate the company into the Bethlehem system. The steel company was the principal client of Hoyt Moore of Cravath, Swaine, and Moore. The Williamsport receivership was heard in the court of Albert Johnson, federal judge for the Middle District of Pennsylvania, and soon Mr. Moore began to receive emissaries from the middle district of Pennsylvania who indicated that if they were treated right, the case would proceed very favorably in Judge Johnson's court. The court decree foreclosed Bethlehem's mortgage which squeezed out all the small stockholders and gave Bethlehem one hundred cents on the dollar on its unsecured accounts. The other creditors received only forty-nine cents on the dollar. Thus, Bethlehem acquired a bargain and a plant integrated into its system. It turned out that Hoyt Moore, as Bethlehem's lawyer, had agreed to the payment of fees to various nominees of Judge Johnson amounting to about six hundred thousand dollars.[7] This example represents a service to a client that overstepped the bounds of the law. In plain English, it was a case of bribing a federal judge. Moore was indicted for the crime, but was acquitted because the statute of limitations had run; he thus remained a pillar of his firm and of the New York bar.[8] I mention the response of his firm and of the bar because while the law clearly had been violated, the rationalization of the firm and the bar appears to have been that Moore had done it for his client. This story does not appear in Robert Swaine's instructive history of the Cravath firm, which is remarkably candid until about 1915. Swaine does, however, include a short biography of Hoyt Moore along with that of the other partners. His final statement about Moore is that "[n]o lawyer ever unreservedly gave more of himself to a client than Hoyt Moore has given to

7. H.R. REP. No. 1639, 79th Cong., 2d Sess. 26-38 (1945).
8. *See* J. BORKIN, THE CORRUPT JUDGE 185 (1962).

Bethlehem."[9]

That statement is the key. Why would Hoyt Moore, a highly respectable New York lawyer, a rather righteous Yankee from Maine, get involved in the shabby business of bribing a federal judge? It was not to make money for Hoyt Moore; he had plenty of money. It was not that this was such an important matter for Bethlehem Steel; they benefited substantially but they certainly would have continued in business even if they had not acquired Williamsport Wire. Why did an excellent lawyer, a man with a fine background who did not need desperately to win the case and whose client really did not need to win either, become involved in this? In probing the available data, the only conclusion I can reach is that Moore did it because his client wanted it and because he felt bound to fulfill all his client's wishes. In a sense there was no division between Moore's morals and his client's morals—his client's morals had become his, and if they had to "play ball" with a corrupt federal judge, Moore was willing to arrange it. The point should be clear: It is easy to overstep the legal bounds, once you embark on the course of saying, "I'm acting for my client."

Curtis recognized the real danger and summed it up this way: "You devote yourself to the interests of another at the peril of yourself. Vicarious action tempts a man away from himself."[10] Even though his conclusion is different from mine, Curtis admitted the risk. While I understand the attractiveness and even the inescapability of the catch phrase, "I'm doing it for my client," I also see the phrase functioning as a kind of carapace. The phrase functions as a defense against various moral claims, a defense against empathy with someone else's feelings, a defense against responsibility. If a lawyer can utter this incantation and can take it seriously enough, responsibility and the feelings accompanying it are shifted to the client.

An example from a different profession will serve to illustrate the effect of this reassuring shield which I term the carapace effect. I refer to a chronic problem among bureaucrats. This problem is evident any day of the week in most post offices, although the problem is not confined to the public sector. It is

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9. R. SWAINE, 2 THE CRAVATH FIRM AND ITS PREDECESSORS 144 (1948).
10. C. CURTIS, *supra* note 1, at 8.

the kind of mentality seen in bank clerks who successfully convey the impression that they are not involved in the business being transacted between the customer and their bank. They have transferred responsibility for their own actions to the system for which they are acting, and therefore, the system, not the clerk, is responsible for whatever is done at their window. I used to think that an adequate distinction between a bureaucrat and a lawyer was this: A bureaucrat does not know the purposes of the system, while a lawyer, of course, does. I still think it is a useful distinction since a lawyer does have a sense of the purposes of the system he serves. Yet when it comes to abdicating responsibility, I wonder whether there is enough difference between Hoyt Moore serving his client by taking extraordinary responsibility for achieving his client's wishes and the ordinary clerk in a bureaucracy who apparently is taking no responsibility for anything. One would say they are a world apart. Yet in another way they are closer than one would like to think, because in each situation the individual has surrendered his or her own conscience to the system or to the client being represented. This reassuring, even necessary excuse, "I'm doing it for someone else," operates as an anodyne to relieve their consciences. For many people, no doubt, such relief is a blessing. Blessed are they who do not think and judge on their own account, so those people say. But if they are lawyers, they have transformed a profession of responsible people helping other people into a commerce where the professionals' brains are bought, and they themselves, as persons, are stultified.

The problem of vicarious action or vicarious responsibility does not face lawyers alone; it is a pervasive problem affecting great numbers of people in public office—not just the clerks and the bureaucracy, but also major political figures holding high office. It is a recurrent phenomenon that such individuals do things that they would be ashamed to do on their own account by reasoning that they are acting on behalf of the public. Again, a single example may serve as an illustration. Martin Gilbert's great biography of Winston Churchill tells how in private encounters and even in political encounters with individuals, Churchill was remarkably charitable and showed an exceptional

willingness to forgive affronts.[11] Although kind and sympathetic with individuals, Churchill was responsible for the decision to bomb Dresden on St. Valentine's Eve, at a time when it was crowded with refugees and when over 60,000 human beings would be incinerated as a result of his decision.[12] Looking at the kind Churchill and the vindictive Churchill, I cannot help believing that there is something terribly wrong with an approach which says, "I was doing it for the country, and although I would never have done it for myself, it was right to do it for the country." The destruction of Dresden is a drastic example of the sort of action that is much more common and less spectacular in the offices of mayors or school boards, for example. It even happens, I would suggest, in the home. One often encounters parents who do things because of their children that they would be ashamed to do for themselves. The rationalization of vicarious actions—that they are necessary for the welfare of those for whom we are acting—is as available for the average parent as for the average public office holder.

The problem of vicarious actions also exists outside our own society. It is present on a wide scale in the Soviet Union, where relations with one's immediate family and close friends are warmer than our own, but where in the public sphere there is a vast empty space occupied by the notion of doing it for others and in particular of doing it for the Soviet state. The result is that this vast empty space is an utter wilderness. Yet, looking at this wilderness, I am inclined to ask, "Are we any better, or is our bureaucracy going in the same direction?"

These observations are a preamble to some reflections based on common sense because common sense made cogent is my notion of what philosophy is. Consider, for example, two kinds of activities. Put in one column activities such as eating, sleeping, sleeping with, knowing, and loving. Put in the other column buying and selling, litigating, and fighting. What is the difference between the activities in the two columns? It is not that those in the first set are more spiritual than the others, although loving and knowing are spiritual activities. It is not, as you can see from the inclusion of buying and selling, that those in the sec-

11. M. GILBERT, 5 WINSTON S. CHURCHILL 1115 (1976).
12. R. LEWIN, CHURCHILL AS WARLORD 113 (1973).

ond column simply represent conflict, although some adversary element does exist in each of the three situations. What, then, is the fundamental difference? The first is a list of acts which nobody could do for you, and the second is a list of acts which someone very often will do for you. One list includes personal actions while the other includes actions that can be vicarious. It is not that one list is good and the other list is bad. I cannot imagine a world in which there is not a tremendous amount of buying and selling by others on behalf of their principals. This may appear to be a limitation brought about by living in a capitalistic society, but I think that it is a universal limitation. Agency existed in the Roman world and in the feudal world, and it exists today in the Soviet world. Agents are necessary for a great number of activities involving the distribution of goods. I doubt that we could ever reach a state in which agency would be eliminated from buying, selling, and distributing. One can also argue that the depersonalization which results from the substitution of one person for another is often helpful in reducing tension. That certainly is a rationale for the use of lawyers in litigation—that the substitution of the lawyer for his client, and the consequent depersonalization of the conflict, reduce antagonism.

Yet I hesitate to accept that argument totally. I hesitate partly because it seems to me that the depersonalization that is possible in fighting is really one of the main reasons why there is war. If people could not get others to fight their wars, they would have to fight for themselves. The depersonalization which has reduced the tension is actually a way of increasing the possibility of conflict. Another flaw in the argument, I submit, is that in the case of other activities in which there are ambiguities, people intuitively favor the resolution of the ambiguities by increasing personal involvement rather than by decreasing it. Consider, for example, being host to a guest. It seems to me clear from experience that it is a rare hotel where guests come close to experiencing the personal welcome extended by a host in his own home. Someone acting for himself is a better host than someone acting through a receptionist, bell captain, assistant manager, cook, or chambermaid. The example may be extended. I used to believe that store-bought cakes were as good as, if not better than, cakes baked at home. But I have been persuaded by my wife that it is not the same; unless she bakes the cake or pie

herself, something is lacking in the personal welcome extended to a guest. Her intuition, I am sure, is correct. The feeling is not the same when you have used someone else to welcome your guest. In the setting of a private home, people prefer to welcome their guests in person and to be welcomed themselves in person rather than by proxy. Similarly, in the case of medical treatment, at least where the illness is serious, we all want to see the doctor himself, not somebody down the line or some surrogate who is not the principal healer. We do not believe the agent is the same as the physician in person.

Consider what often happens in the field of higher education. In many universities, including my own, a number of course offerings are made in the name of a certain professor, but the teaching is actually done in sections by assistants. When the student's main contact is with the assistants, and the assistants are responsible for major course decisions and for grading, it is not the same as if the teacher, in whose name the course is being offered, had actually taught the course. The depersonalization effected is a tangible loss.

While the depersonalization brought about by the use of lawyers may reduce tension, it also may have side effects. Consider the *Warren v. Warren* case,[13] which became a major issue in the confirmation hearings of Louis Brandeis as an Associate Justice of the Supreme Court. In a nutshell, old Mr. Warren, the father of Brandeis' partner, died and left a very prosperous unincorporated paper business. Mr. Warren wanted his widow and five children to have the benefit of the business. Brandeis set up a trust in such a way that Sam Warren, the oldest son, was one of the trustees and also manager and lessee of the plant. The arrangement was that the lessee would give a share of the trust profits to Sam and to the other four Warren children and the widow. Everything in this complicated plan hinged on the family's confidence in Sam—a confidence that existed when the

13. Warren v. Warren, No. 14630 (Mass., filed Dec. 13, 1909). The case went through some 27 days of trial. 1 Nomination of Louis D. Brandeis: Hearings Before the Subcomm. of the Comm. on the Judiciary, U.S. Senate, 64th Cong., 1st Sess. 856 (1916) (testimony of Edward F. McClennen). The case was eventually dismissed by consent pursuant to a settlement. *Id.* at 138-42 (testimony of Hollis Russell Bailey).

trust was created. The family thought Sam was the most capable member of the family and happily turned the business over to him. Then, as sometimes happens in families, with the passage of time there was a falling out between Sam and his brother Ned. Ned was regarded as something of a dilettante, living in England and spending his share of the income on antiques. Ned resented Sam's patronizing him, and finally he began to suspect Sam of bad faith in engineering the entire arrangement.[14]

Brandeis' part in the structure became an issue in the hearings on his nomination for Supreme Court Justice. It is not my purpose to focus on Brandeis here, except to say that he in fact had acted on behalf of the whole family, the way most family lawyers would do, and had tried to treat the Warren family fairly as a group.[15] My focus is on Ned and his lawyers. One lawyer filed a complaint in equity charging Sam with breach of trust. At the same time Ned wrote Sam a letter in which he stated: "The phrases are such as in a legal document I have felt obliged to sign, but are very far from representing my feelings toward you. . . . Let us try to agree; it would be much pleasanter. Your affectionate brother, E.P. Warren."[16] In this simple letter two stages of thought are established. Ned wants to be an affectionate brother, but he also has a sense of compulsion to use harsh legal formulas. Because he is caught in the legal process, he feels he must sign the hostile document with its terrible charges. The letter shows how Ned shifted responsibility for the document to his lawyer, while his lawyer had shifted the responsibility to Ned. The upshot was both dramatic and sad. Sam was offended deeply by being accused of breach of trust when he knew he had acted in an honorable fashion. He refused to settle, and the case went to trial. Ned's first lawyer, who had given the trouble between the brothers its formal shape, engaged a formidable trial lawyer, Sherman Whipple, to conduct the trial. Sam was put on the witness stand, and of course Ned's lawyer began to dig away. After days of Whipple's keen cross-

14. *Id.* at 139-49, 153-55 (testimony of Hollis Russell Bailey).

15. *Id.* at 880 (testimony of Edward F. McClennen).

16. *Id.* at 860 (testimony of Edward F. McClennen). Letter from Ned Warren to Sam Warren, Dec. 13, 1909 (testimony of Edward F. McClennen).

examination, Sam died.[17] This was the tragic outcome of a client's ceasing to be a loyal brother and of a lawyer's view of himself as a depersonalized instrument of aggression. It may seem to be a strong example, like that of the bombing of Dresden, but the process of depersonalization can, and often does, lead to shocking consequences.

The motion picture *Being There*, starring the late Peter Sellers, offers the same philosophy in a lighter vein. The ending of the film contains a message that may appropriately be used at this juncture. The gardener, Chance (played by Sellers), comments wisely: "You've got to be there in person."

Before discussing the theological aspects of my thesis, I turn to a figure who provides a link between my professional and philosophical observations—a figure who has always served as a model for lawyers, that is, the judge. Our beliefs and experiences with regard to judges should confirm the validity of the foregoing comments on vicarious action. First of all, consider the cases that say, "The person who decides must hear the evidence."[18] The message is that in order to judge, one must be there in person. The same point was made recently in Congress when the Ethics Committee was about to decide a case involving a California congressman without giving all of the congressmen a chance to hear the evidence. One congressman insisted that he could not act as a judge without having heard the evidence.[19]

Equally elementary is the thought that it is the judge who must decide, not some delegate of the judge. No judge can turn a case over to his or her law clerk and say, "You decide this one." The judge would be abdicating his or her function. There is a related area in which some ambiguity exists and in which I think experience and intuition confirm what was said earlier about teaching; I refer to the writing of opinions. As most of us know, a number of Supreme Court Justices do not write their own opinions. Most of them at least review the drafts. The best—and by the best I mean Holmes and Brandeis and Cardozo—always

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17. *Id.* at 856 (testimony of Edward F. McClennen).

18. Morgan v. United States, 298 U.S. 468, 481 (1936).

19. H.R. REP. No. 96-930, 96th Cong., 2d Sess. 221 (1980) (statement of Representative Robert L. Livingston of Louisiana).

wrote their own opinions.[20] There is a distinct move in judicial circles toward a bureaucracy in which law clerks compose the first draft and much of the final draft. The reason for objecting to this trend is linked to my observations on teaching. Teaching is a personal act. When a judge writes an opinion, he is teaching lawyers and, in particular, law students. If he is going to turn the teaching over to someone else, he is no better than the professor who has his name on a course but turns it over to his assistants. One might say, "Suppose the clerk is smarter than the judge?" This gambit is not a winning one. When one writes in another's name, the act is depersonalized. The depersonalization dilutes responsibility and quality.[21]

Intuition and experience in the fields of teaching and writing will lead most people to agree with the foregoing discussion. But in a third area where the question of vicarious responsibility arises, there has always been much debate. Consider the case of a judge whose personal knowledge conflicts with what is before him in the record. This hypothetical was a favorite of the medieval canonists and theologians, who pictured a situation—easier to grasp in those days when there were many small principalities—in which the judge in a certain community is the prince. There is only one prince and only one judge; he judges what is judged. He knows from personal observation that the defendant charged with a capital crime is innocent, but the prosecution has put in evidence indicating that the man is guilty. The prince cannot disqualify himself; he is the one who must judge. Is he going to judge on the basis of his personal, off-the-record knowledge that the man is innocent, or is he going to judge on the record? Some eminent theologians said, "He must judge on the record. That is all he can go by."[22] Other teachers disagreed and

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20. *See* Baier, *The Law Clerks: Profile of an Institution*, 26 VAND. L. REV. 1125, 1165 (1973) (for a discussion of Holmes) [hereinafter cited as Baier, *The Law Clerks*]; Newland, *Personal Assistants to Supreme Court Justices: The Law Clerks*, 40 OR. L. REV. 299, 314 (1961) (for a discussion of Brandeis). For the statement concerning Cardozo's opinions, the author relies on the inimitable distinctiveness of his style. See, for example, Palsgraf v. Long Island R.R. Co., 248 N.Y. 339, 162 N.E. 99 (1928).

21. *See* Baier, *The Law Clerks*, *supra* note 20, at 1165-69.

22. This language paraphrases 2 T. AQUINAS, SUMMA THEOLOGICA Question 87, art. 2, obj. 4, *reprinted in* 20 GREAT BOOKS OF THE WESTERN WORLD

said, "You are condoning murder. If you put an innocent man to death, you are committing murder."[23] The dispute was a live one, although possibly the case was never real.

Although I had been familiar with that hypothetical for some time, I found it much more moving when I came across a description of an analogous actual situation. A story from Ignazio Silone's autobiographical piece in *The God That Failed*[24] describes an incident occurring one Sunday after church in Silone's little village in the Abruzzi. A local nobleman came out of the church with his dog. For some reason, he had a grudge against a seamstress in the village; he turned the dog on her and she was mauled badly. Almost the entire village saw the gross physical assault after church that Sunday morning. The poor seamstress announced that she was going to sue the nobleman. Everybody told her it would be a terrible mistake, but she was stubborn and she sued. The local judge, reputed to be an honest judge, tried the case. Although he had not been present, he had heard about the assault from everybody in the village. Not a single person was willing to appear as a witness for the seamstress. The nobleman, who was defended by the town's leading liberal lawyer, bribed a couple of witnesses who testified that the seamstress had provoked the dog. The judge found for the nobleman and awarded costs against the seamstress. Later, when the judge was visiting the Silone household, he told Silone's parents, "[E]ven if I had been present at the disgusting incident . . . still as a judge I had to go by the evidence of the case, and unfortunately it was in favor of the dog." Silone's mother said to young Ignazio, "[I]t's a horrible profession. . . . [B]e whatever you like, but not a judge."[25] It *is* a horrible profession if there must be such a split between personal knowledge and conscience and what someone is constrained to do as a judge.

I am reminded of another real incident involving a man who

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(R. Hutchins ed. 1952).

23. *See generally* K. NORR, ZUR STELLUNG DES RICHTERS IM GELEHRTEN PROZESS DER FRÜHZERT: IUDEX SECUNDUM ILLEGATA NON SECUNDUM CONSCIENTIUM JUDICAT (1967).

24. Silone, untitled essay, in THE GOD THAT FAILED 76 (R. Crossman ed. 1949).

25. *Id.* at 83.

was both a judge and a lawyer and who was one of the few lawyers to be canonized: Sir Thomas More. More describes it in a letter to his daughter Margaret sent from the Tower of London,[26] where he had been imprisoned for refusing to take the Oath of Supremacy acknowledging Henry VIII as the supreme ruler of the Church of England.[27] More tells Margaret how he was admitted to the Tower Garden and approached by various divines, including the Archbishop of Canterbury, who argued with him that it was acceptable to admit that the King was the ruler of the Church in England.[28] More confessed to being in a state of perplexity and doubt, whereupon the Archbishop of Canterbury said, "Well, in that case, if you are in doubt, the King is telling you to do it. And if you are in doubt it is safe for you to follow the King's order."[29] More tells Margaret that he was very much tempted by that course of reasoning. But then he thought, "Well, I will have very few moral problems if I can always resolve doubts by letting the King's order decide them."[30] He refused to adopt an attractive application of the theory of vicarious responsibility, which would have avoided all perplexities. More decided that although he could not answer and although he was in doubt, he would not accept another man, even the King, as spokesman for his conscience.[31]

More's decision was that of a man who was a judge, a lawyer, and a saint, and it brings me to a theological coda. I believe that on one level of human experience the intuitive response I

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26. Letter from Sir Thomas More to Margaret Roper (Apr. 17, 1534), *reprinted in* THE CORRESPONDENCE OF SIR THOMAS MORE 501 (E.F. Rogers ed. 1947).

27. *Id.*

28. *Id.* at 502-04.

29. Paraphrased from *id.* at 505. The Archbishop of Canterbury said:

> [Y]ou knewe for a certenty and a thinge without doubt, that you be bownden to obey your soverain lorde your Kyng. And therfore are ye bounden to leave of the doute of your vnsure conscience in refusing the othe, and take the sure way in obeying your prince, and swere it.

*Id.*

30. Paraphrased from *id.* at 506. More thought, "And of trouth if that reason may conclude, than have we a redy way to avoyde all perplexities. For in what so ever matters the doctours stande in great doubt, the Kynges commaundement giuen vpon whither side he list, soyleth all the doutes." *Id.*

31. *Id.* at 506-07.

have been suggesting may be enough; yet for myself and, I think, for a number of other people, common experience is not enough; we need a theological perspective. We need the reinforcement of revelation. By saying that, I do not intend to suggest that people in the Christian Church have not often been guilty of the kind of masking of conscience that I have pointed to in Churchill, in other politicians, and even in parents. All the great crimes in Christian history—the Inquisition, the Crusades, the Wars of Religion—may be seen as exercises of vicarious responsibility by people who for the most part were admirable personally but who, when they were acting for others or for the Church, felt that the most savage methods were acceptable. Appealing to a biblical foundation, I do not exclude the Church from its judgment.

Various texts in the Scriptures lend themselves to a quasi-agency interpretation—for example, "He who hears you, hears me"[32] and "Whatever you do to the least of these, you do unto me."[33] You might ask, "Aren't these examples in which you find one person substituted for another in the Scriptures?" I would answer that the substitution there is a different kind, a kind that actually has its roots not in the Gospels, but in Genesis in the familiar text that God made man in his own image. What is being encountered in that ancient Jewish tradition and then again in the Gospels is the response to other human beings as the images of God. That response has its most sublime statement in the Gospel of John, where it is said, "He who sees me sees also the Father."[34]

We are all, if we follow this theological perspective, in some sense embodiments of the divine. When we ask for the personal, when we value it, when we demand it, we are responding to the divine that is embodied in other persons. According to that perspective our morals are certainly not other people's and they are not our own: they are God's.

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32. *Matthew* 18: 18.
33. *Matthew* 25: 40.
34. *John* 14: 19.

# EXPANSIVE JUDICIAL REVIEW OF ECONOMIC REGULATION UNDER STATE CONSTITUTIONS: THE CASE FOR REALISM

JAMES C. KIRBY, JR.*



## I. INTRODUCTION

Very few challenges to state economic regulations currently are made under the federal constitution and carried to the United States Supreme Court. In fact, judicial review at the federal level has become virtually a dead letter in this area. In only one case[1] since 1937 has the Supreme Court invalidated a state economic regulation, and that case has since been expressly overruled.[2] If the Supreme Court indeed has abandoned the economic field, state courts interpreting state constitutions are the last and only protection against unreasonable and arbitrary

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1. Morey v. Doud, 354 U.S. 457 (1957).

2. City of New Orleans v. Dukes, 427 U.S. 297 (1976). *See* text accompanying notes 35-38 *infra*.

legislation.[3]

The increasing importance of state courts and state constitutions may be dramatized by examining recent cases in which both state and federal constitutional challenges were available, but apparently not raised. Every state has provisions parallel to the due process and equal protection clauses of the United States Constitution.[4] Thus, constitutional challenges to eco-

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3. This judicial activism under state constitutions may be of vital importance to a small business confronted by legislation favoring a competitor or to persons barred from entering professions and occupations by restrictive measures designed to create or preserve monopolies and to prevent competition.

4. *See, e.g.*, ALA. CONST. art. I, § 6 (criminal due process) & art. I, § 1 (equal protection); ALASKA CONST. art. I, § 7 (due process) & art. I, §§ 1,3 (equal protection); ARIZ. CONST. art. II, § 4 (due process) & art. II, § 13 (equal protection); ARK. CONST. art. 2, § 8 (due process) & art. 2, § 3 (equal protection); CAL. CONST. art. I, § 7 (due process and equal protection); COLO. CONST. art. II, § 25 (due process) & art. II, § 6 (equal protection); CONN. CONST. art. 1, § 10 (due process) & art. 1, § 20 (equal protection); DEL. CONST. art. I, § 7 (due process) & art. I, § (equal protection); FLA. CONST. art. I, § 9 (due process) & art. I, § 2 (equal protection); GA. CONST. art. I, § 2-101 (due process) & art. I, § 2-203 (equal protection); HAWAII CONST. art. I, § 4 (due process and equal protection); IDAHO CONST. art. I, § 13 (due process) & art. I, § 1 (equal protection); ILL. CONST. art. I, § 2 (due process and equal protection); IND. CONST. art. 1, § 12 (due process) & art. 1, § 23 (equal protection); IOWA CONST. art. I, § 9 (due process) & art. I, § 1 (equal protection); KAN. CONST. BILL OF RIGHTS § 18 (due process) & § 1 (equal protection); KY. CONST. BILL OF RIGHTS § 14 (due process) & §§ 1-3 (equal protection); LA. CONST. art. I, § 2 (due process) & art. I, § 3 (equal protection); ME. CONST. art. I, § 6-A (due process and equal protection); MD. CONST. DECL. OF RIGHTS art. 24 (due process) & art. 46 (equal protection); MASS. CONST. pt. 1, art. XI (due process) & pt. 1, art. I & amend. art. CVI (equal protection); MICH. CONST. art. 1, § 17 (due process) & art. 1, § 2 (equal protection); MINN. CONST. art. I, § 7 (due process) & art. I, § 2 (equal protection); MISS. CONST. art. 3, § 14 (due process); MO. CONST. art. I, § 10 (due process) & art. I, § 2 (equal protection); MONT. CONST. art. II, § 17 (due process) & art. II, § 4 (equal protection); NEB. CONST. art. I, § 1 (due process) & art. I, § 3 (equal protection); NEV. CONST. art. 1, § 8 (due process) & art. 1, § 1 (equal protection); N.H. CONST. pt. 1, art. 15 (criminal due process) & pt. 1, art. 1 (equal protection); N.J. CONST. art. I, ¶ 5 (due process) & art. I, ¶¶ 1, 5 (equal protection); N.M. CONST. art. II, § 18 (due process and equal protection); N.Y. CONST. art. I, § 6 (criminal due process) & art. I, § 11 (equal protection); N.C. CONST. art. I, §§ 18, 19 (due process) & art. I, § 19 (equal protection); N.D. CONST. art. I, § 13 (due process) & art. I, § 20 (equal protection); OHIO CONST. art. I, § 16 (due process) & art. I, § 2 (equal protection); OKLA. CONST. art. II, § 7 (due process) & art. II, §§ 2, 6

nomic regulations can be, and usually are, made on both state and federal constitutional grounds.[5] There continues to be, however, a surprising number of reported state cases in which counsel rely solely on federal grounds. This strategy unnecessarily invites ultimate reversal by the United States Supreme Court[6] and fails to take advantage of a limitation on Supreme Court review. The Supreme Court may not act in cases in which state appellate courts have upheld a constitutional challenge on both federal grounds and adequate, independent state grounds.[7] Some state courts have become quite adept at insulating their decisions from Supreme Court review by reasoning at length on federal constitutional grounds and then summarily indicating that

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(equal protection); OR. CONST. art. I, § 10 (due process) & art. I, § 20 (equal protection); PA. CONST. art. I, § 11 (due process) & art. I, §§ 1, 26 (equal protection); R.I. CONST. art. 1, § 10 (due process); S.C. CONST. art. I, § 3 (due process and equal protection); S.D. CONST. art. VI, § 2 (due process) & art. VI, §§ 1, 18 (equal protection); TENN. CONST. art. I, §§ 8, 17 (due process) & art. XI, § 8 (equal protection); TEX. CONST. art. I, § 19 (due process) & art. I, § 3 (equal protection); UTAH CONST. art. I, § 11 (due process) & art. I, § 2 (equal protection); VT. CONST. ch. I, art. 4 (due process) & ch. I, art. 1 (equal protection); VA. CONST. art. I, § 11 (due process) & art. I, §§ 1, 11 (equal protection); WASH. CONST. art. I, § 3 (due process) & art. I, § 12 (equal protection); W. VA. CONST. art. III, § 10 (due process) & art. III, § 1 (equal protection); WIS. CONST. art. I, § 9 (due process) & art. I, § 1 (equal protection); WYO. CONST. art. 1, § 6 (due process) & art. 1, §§ 2, 3 (equal protection).

5. *E.g.*, Serrano v. Priest, 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971); Cleere v. Bullock, 146 Colo. 284, 361 P.2d 616 (1961); Miles Labs. v. Eckerd, 73 So. 2d 680 (Fla. 1954).

6. Until 1914, the Supreme Court had no statutory jurisdiction to review state court decisions that sustained federal constitutional challenges to state action. Statutory jurisdiction then became a basis for discretionary review by certiorari but rarely was used until the advent of the Burger Court. Between 1960 and 1969 certiorari was granted in only eight such cases. During the next nine years the Court reviewed at least twenty-five such cases and reversed state courts in twenty-four of them. This puzzling trend of the Burger Court is examined critically in Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1242-64 (1978) [hereinafter cited as Sager].

7. Jankovich v. Indiana Toll Rd. Comm'n, 379 U.S. 487, 491-92 (1965); Fox Film Corp. v. Muller, 296 U.S. 207, 210-11 (1935). *See generally* C. WRIGHT, A. MILLER, E. COOPER & E. GUSSMAN, 16 FEDERAL PRACTICE AND PROCEDURE §§ 4019-4032 (1977) [hereinafter cited as C. WRIGHT & A. MILLER]; L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 3-33 (1978).

invalidation of the state action also is required under the state constitution.[8] In this situation, any correction by the Supreme Court for erroneous state court reasoning on the federal issue would be merely advisory because state courts remain the ultimate arbiters of state law.[9]

One example of how counsel may have overlooked state law grounds[10] is *Gadsden Times Publishing Corp. v. Dean*,[11] a case involving an Alabama law[12] requiring that employees be compensated while on jury duty. An Alabama intermediate appellate court invalidated the law under the United States Constitution on substantive due process grounds.[13] The appellate court cited as authority an obsolete, discredited Supreme Court decision[14] from pre-New Deal years when the Court freely substituted its laissez-faire value judgments for the contrary judgments of state legislatures. After a denial of review by the Supreme Court of Alabama,[15] the United States Supreme Court granted certiorari and reversed. The Court reaffirmed its modern position that the Constitution leaves to legislatures the resolution of debatable

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8. *See* Serrano v. Priest, 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971) (requiring equal financing of public schools). By contrast, when the Supreme Court of California decided its famous *Bakke* case, also an equal protection case, the court was careful to rest its opinion invalidating racial discrimination in state medical school admissions solely on the fourteenth amendment, apparently to make review by the United States Supreme Court possible. Bakke v. Regents of the University of California, 18 Cal. 3d 34, 553 P.2d 1152, 132 Cal. Rptr. 680 (1976), *aff'd in part, rev'd in part*, 438 U.S. 265 (1978).

9. For a thorough discussion of the rationale which supports the independent and adequate state ground doctrine, see C. WRIGHT & A. MILLER, *supra* note 7, at § 4021.

10. Of the 24 reversals cited by Sager, it is believed that adequate state grounds were available in most cases and that these state judgments would have been saved by reliance on such grounds. Sager, *supra* note 6.

11. 49 Ala. App. 45, 268 So. 2d 829 (1972), *rev'd per curiam*, 412 U.S. 543 (1973).

12. ALA. CODE tit. 30, § 7(1) (1940) (current version at ALA. CODE § 12-16-7 (1975)).

13. Gadsden Times Publishing Corp. v. Dean, 49 Ala. App. 45, 268 So. 2d 829 (1972), *rev'd per curiam*, 412 U.S. 543 (1973).

14. Coppage v. Kansas, 236 U.S. 1 (1915).

15. Gadsden Times Publishing Corp. v. Dean, 289 Ala. 743, 268 So. 2d 834 (1972).

issues concerning "business, economic, and social affairs."[16] Consequently, Alabama's law for compulsory pay for jury duty remained in effect, partly because of the failure by counsel and the court to sense the importance of state constitutions and the existence of the adequate and independent state ground doctrine.

The Alabama case is one of several in recent years in which the Burger Court gratuitously has reversed state courts that have over-enforced the federal constitution.[17] An increasing number of state courts, however, have relied on both state and federal grounds to make their judgments final and conclusive.[18] The question then arises: why rely on the federal ground at all in such cases? The reasoning of the state court on the federal issue is mere dictum—as would be the Supreme Court's reasoning on the state law issue—since the disposition of the latter question compels the ultimate result. It would be better judicial craftsmanship and would spotlight more accurately the role of state constitutions in our federal system if the state courts merely would note the federal claims and the absence of any need for their resolution.

An increase in the number of constitutional decisions resting solely on state grounds would go far to elevate state constitu-

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16. 412 U.S. 543, 545 (quoting Day-Brite Lighting, Inc. v. Missouri, 342 U.S. 421, 424-25 (1952)). By contrast, a similar law was invalidated by the Hawaii high court on both state and federal constitutional grounds and thus was insulated from review by the United State Supreme Court. Hasegawa v. Maui Pineapple Co., 52 Hawaii 327, 475 P.2d 679 (1970). *See* text accompanying notes 109-11 *infra*.

17. *See* Sager, *supra* note 6, at 1244-45 & nn.104 & 105. *See, e.g.*, Idaho Dep't of Employment v. Smith, 434 U.S. 100 (1977) (reversing Idaho Supreme Court, holding that Idaho statute which denied unemployment benefits to otherwise qualified persons attending day classes, while permitting qualified night students to receive benefits, was rational and not violative of due process); Hortonville Joint School Dist. No. 1 v. Hortonville Educ. Ass'n, 426 U.S. 482 (1976) (reversing Wisconsin Supreme Court, holding that due process clause does not require a de novo hearing in county court of school board decision to fire striking teachers); North Dakota State Bd. of Pharmacy v. Snyder's Drug Stores, Inc., 414 U.S. 156 (1973) (reversing North Dakota Supreme Court, holding that a state statute which required majority ownership of pharmacies by registered pharmacists did not violate due process).

18. *E.g.*, Cleere v. Bullock, 146 Colo. 284, 361 P.2d 616 (1961); Maryland Bd. of Pharmacy v. Sav-A-Lot, Inc., 270 Md. 103, 311 A.2d 242 (1973); Grocers Dairy Co. v. McIntyre, 377 Mich. 71, 138 N.W.2d 767 (1966).

tional law to its proper status in both decisional law and constitutional scholarship. Law schools also can help, and they must share the blame for the failure by counsel and the courts to do justice to state constitutions. The typical course in constitutional law now virtually ignores the existence of state constitutions. The typical casebook reprints no state appellate court decisions and, at the most, makes brief footnote reference to the fact that results under state constitutions might be different from those studied at length under the United States Constitution. As a result, the student usually is left with the misleading impression that the Supreme Court's deference to state legislative judgments in the economic area gives such legislatures unreviewable power. The fundamental inaccuracy of this vision of state legislative power is one theme of this Article.

A significant number of state courts have refused to follow the example of our highest court and instead stand ready to grant relief to victims of legislatively imposed burdens and disadvantages for which no reasonable basis actually can be demonstrated. Recent examples from several states will be considered along with a strong line of Tennessee cases in which the courts have intervened against unreasonable and discriminatory legislation. A somewhat conflicting line of Tennessee cases in which the reasoning may appear to preclude meaningful review also will be noted. In the process, an approach to judicial review that focuses upon actualities rather than conjecture will be identified and supported.

## II. THE DECLINE OF FEDERAL SUBSTANTIVE DUE PROCESS[19]

Many of the Supreme Court decisions of the pre-New Deal

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19. The term "due process" as a limit on federal action in the fifth amendment and as a limit on state action in the fourteenth amendment generally is given the same meaning in both provisions. It dates from 1355 and is found in chapter 3 of the statute of 28 Edward III. The corresponding term in some state constitutions, "law of the land," is derived from chapter 29 of the Magna Carta of 1225. "Substantive due process" as used in this Article involves the use of such a provision to review the substantive terms of legislation for reasonableness. The term also has a very different meaning: the judicial recognition of substantive fundamental rights beyond those specifically recognized in the Constitution or inferrable from its text, as in the contraception, abortion, and family relations cases. For various views of the latter meaning of

period were made under the doctrine of substantive due process, which to many is a code word for judicial activism in the so-called "*Lochner* era."[20] The Court now frequently refers to the era of substantive due process as if it is a closed chapter, a thoroughly discredited period. Many of the Court's statements and all of its recent actions compel the conclusion that the Court has abdicated totally any real power in this field and will not invalidate state action even for the most extreme irrationality or arbitrariness.

Some observers attribute the demise of substantive due process to a recognition of judicial incompetence that calls for deference to legislative judgments in complex economic matters,[21] a view which would call for similar deference by state courts. Others deny the incompetence of the Court in such cases and instead attribute its abdication to an institutional need for judicial economy in preserving the Court's scarce resources for matters of greater federal concern.[22] Along similar lines, one writer

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substantive due process, see Moore v. City of East Cleveland, 431 U.S. 494 (1977). Analysis might be served better if the term were limited to this second meaning, which is more consistent with the literal phrase. The term "economic due process" is sometimes used in the present context even though deferential judicial review of legislation for minimal reasonableness is not limited to economic interests. Review for reasonableness is beginning to be recognized as an underlying element of both due process and equal protection with little difference in the analytical problems of the two. *See* Bennett, *"Mere" Rationality in Constitutional Law: Judicial Review and Democratic Theory*, 67 CALIF. L. REV. 1049 (1979) [hereinafter cited as Bennett].

20. The *Lochner* era is the period of judicial activism in economic matters typified by the case of Lochner v. New York, 198 U.S. 45 (1905) (Court invalidated a measure limiting the number of hours of employment in bakeries).

21. Professor Tribe attributes the Supreme Court's abdication to its adoption of

> an institutional argument that, even if the public good or social justice could be defined . . . , and even if particular legislative restraints on liberty were profoundly unjust according to some cognizable standard or principle, legislative choices among conflicting values were beyond judicial competence to criticize and hence beyond judicial authority to strike down . . . .

L. TRIBE, *supra* note 7, at 452.

22. McCloskey, *Economic Due Process and the Supreme Court: An Exhumation and Reburial*, 1962 SUP. CT. REV. 34 [hereinafter cited as

applauds the development as a recognition that no overriding national interest supports federal judicial intervention against state legislatures in local economic matters.[23]

If substantive due process no longer has any vitality at the Supreme Court level, some would argue that the Court finally has reverted to constitutional fundamentals after a long period of aberration. Although this position was not embraced even by the dissenters in the *Lochner* era, a strong historical case can be made that due process should have no substantive component and should be limited solely to procedural guarantees.[24] If this revisionist theory, which would upset more than a century of constitutional case law,[25] were to prevail at the federal level, there is no logical reason why it also should not, in time, bring about a similar total demise of substantive due process at the state level. Chances for such a development, however, appear to be extremely remote in view of the acceptance and vitality the doctrine enjoys in many states.

The failure of the Court to articulate the actual reasons for its abdication indicates that it may have proceeded intuitively on unsure premises. Suffice it to say that the revisionist doctrine is now dead as a practical matter. As a matter of formal constitutional principles, however, the Court has nursed along enough life to enable a future neo-activist Court to revive the doctrine for future intervention should state legislatures act unreasona-

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McCloskey].

23. Hetherington, *State Economic Regulation and Substantive Due Process of Law* (pt. 1), 53 NW. U.L. REV. 13, 31 (1958) [hereinafter cited as Hetherington].

24. R. BERGER, GOVERNMENT BY JUDICIARY 193-220, 249-69 (1977); 2 L. BOUDIN, GOVERNMENT BY JUDICIARY 374-96 (1932); Berger, *A Comment on "Due Process of Law,"* 31 S.C. L. REV. 661 (1980); Mendelson, *Raoul Berger's Fourteenth Amendment—Abuse by Contraction vs. Abuse by Expansion*, 6 HASTINGS CONST. L.Q. 437, 453-54 (1979). The Supreme Court did not expand due process beyond its procedural guarantees until Scott v. Sandford, 60 U.S. (19 How.) 393 (1857), wherein it invalidated the Missouri Compromise as violating property law rights of owners of slaves. Judicial use of state due process clauses as a substantive limit on legislation also dates from the mid-nineteenth century. Corwin, *The Doctrine of Due Process of Law Before the Civil War* (pts. 1 & 2), 24 HARV. L. REV. 366 & 460 (1911).

25. McCloskey describes economic due process as "one of the cardinal doctrines of American constitutional history." McCloskey, *supra* note 22, at 40.

bly. In its most recent consideration of the subject, the Court purported to apply the test of substantive due process announced in 1934 in *Nebbia v. New York*:[26] "If the laws passed are seen to have a reasonable relation to a proper legislative purpose, and are neither arbitrary nor discriminatory, the requirements of due process are satisfied . . . ."[27]

The *Nebbia* test has been restated many times by state courts,[28] and in the hands of less deferential judges it is still an effective tool for meaningful review. The test is essentially a two-pronged one requiring both a proper legislative purpose or *end* and reasonable legislation as a *means* to that end. There are continuing examples of state courts applying both prongs of this means-end test to strike down state laws.[29] In the Supreme Court, however, critical review of the propriety of state legislative ends simply ceased to happen, largely without explanation; review of the reasonableness of means thus became a mere formality. In a much-quoted statement, Chief Justice Stone announced that the only inquiry in such cases is whether the legislative judgment is supported by "any state of facts either known or which could reasonably be assumed."[30] This conceivable rational basis test was to play a key role in the practical demise of substantive due process at the federal level. The test placed on challengers of statutes the impossible burden of negating all hypothetical and speculative rational bases and, as one observer put it, made "the presumption of statutory validity . . . , in practice, conclusive."[31] State courts that have applied the same test also have doomed their due process clauses as tests of reasonableness, but most of them have avoided this result by refusing to settle for conjecture and by testing instead for actual reasonableness.[32]

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26. 291 U.S. 502, 537 (1934).

27. *Id. See also* PruneYard Shopping Center v. Robins, 447 U.S. 74, 84-85 (1980).

28. *E.g.*, Union Carbide & Carbon Corp. v. White River Distrib., Inc., 224 Ark. 558, 275 S.W.2d 455 (1955); Cleere v. Bullock, 146 Colo. 284, 361 P.2d 616 (1961); Remington Arms Co. v. Skaggs, 55 Wash. 2d 1, 345 P.2d 1085 (1959).

29. *See* note 28 *supra*.

30. United States v. Carolene Prods. Co., 304 U.S. 144, 154 (1938).

31. Hetherington, *supra* note 23, at 28.

32. Howard, *State Courts and Constitutional Rights in the Day of the*

## III. The Decline of Federal Equal Protection

The only case in more than half a century in which the United States Supreme Court invalidated a state economic regulation on equal protection grounds was *Morey v. Doud*,[33] which involved an Illinois regulation[34] of currency exchanges that exempted the American Express Company by name. For nearly twenty years this case stood as the sole exception to the Court's hands-off policy in the economic area and served only to provoke law school classes to stimulating Socratic discussions of possible principled bases for its holding. Finally, in *City of New Orleans v. Dukes*[35] the Court conceded that *Morey* was an aberration and expressly overruled it.

In *Dukes* the Court considered a 1972 New Orleans measure[36] that prohibited pushcart vendors in the French Quarter except those who had been in business for eight years or more. Two corporate vendors were allowed to continue business under the challenged ordinance. The grandfather clause was challenged under the equal protection clause by a vendor who had been in business for only two years. In upholding the clause the Supreme Court recognized as a legitimate legislative purpose the preservation of the French Quarter's traditional "appearance and custom" and upheld as a rational means to that end the classification eliminating vendors of recent vintage.[37] The favored vendors reasonably could have been viewed by the city as more likely to have built up substantial reliance interests in continued operation; also, because of their prolonged presence the vendors might have become part of the French Quarter's distinctive character and charm.[38]

Although the *Dukes* opinion purports to test for rationality, the resort to speculative assumptions without an actual factual

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*Burger Court*, 62 Va. L. Rev. 873, 887-88 (1976) [hereinafter cited as Howard].

33. 354 U.S. 457 (1957).

34. Ill. Rev. Stat. ch. 16½, § 30-56.3 (1955) (entitled Illinois Community Currency Exchange Act).

35. 427 U.S. 297 (1976).

36. New Orleans, La., Code ch. 46, §§ 1, 1.1 (as amended Aug. 31, 1972).

37. 427 U.S. at 304 (citing Dukes v. City of New Orleans, 501 F.2d 706, 709 (5th Cir. 1974)).

38. *Id.* at 305.

basis in the record amounts to employing the same conceivable rational basis approach that had been fatal to substantive due process. In other equal protection cases the Supreme Court more candidly has conceded the application of deferential review and minimal scrutiny.[39]

In one of the Sunday closing law cases Chief Justice Warren stated:

> Although no precise formula has been developed, the Court has held that the Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.[40]

This much-quoted statement of the conceivable rational basis test is a more accurate articulation of the *Dukes* reasoning than is the *Dukes* language that purports to test for actual reasonableness. In any event, it is certain that an equal protection claim frequently adds little or nothing to a due process claim in federal courts. The same deferential review which satisfies the means-end test for reasonableness under due process also will cause legislative classifications to be upheld. This situation, however, does not prevail under many state constitutions.

## IV. EXPANSIVE JUDICIAL REVIEW OUTSIDE TENNESSEE

The term "expansive" is intended to connote only the judicial application of state due process and equal protection clauses to restrain government and to afford more protection to the individual than now is required by United States Supreme Court decisions under the federal constitution. This expansiveness in

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39. This degree of deference is opposed to the strict scrutiny applied in the racial area and to the intermediate levels of scrutiny applied to classifications based on sex, alienage, and illegitimacy. Government employment and benefits are other areas that receive minimal scrutiny.

40. McGowan v. Maryland, 366 U.S. 420, 425-26 (1961).

state judicial review is not necessarily to be applauded. Some decisions will be seen as appropriate for other states to follow; some will be criticized as judicial excess.

### A. *Substantive Due Process*

The doctrine of substantive due process is very much alive in the state courts. A 1953 study found that the highest courts in only three states had followed the lead of the United States Supreme Court and left their state legislatures as the final judges of the reasonableness of economic regulations.[41] At least one of those three is known to have since revived due process as a substantive curb in the economic area.[42] No single study has purported to collect all the state cases in this area, but it appears that the overwhelming majority of states have viable precedents for judicial intervention against legislation on grounds of unreasonableness.[43] Of the decisions surveyed, many invalidations of economic measures on due process grounds could have been based solely upon a determination of illegitimacy of legislative purpose; that is, the end prong of the *Nebbia* test has not been satisfied. Of these cases, nearly all rest upon a judicial determination that the legislation in question has the impermissible purpose of unreasonably preventing competition in the economic market place.

The most active subject for state judicial intervention against anticompetitive measures has been in the area of fair trade laws, which were upheld by the United States Supreme Court in 1936.[44] In 1956 only four of twenty-one state courts

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41. The three states were Colorado, Kansas, and Minnesota. 53 COLUM. L. REV. 827 (1953). For an argument that all states should have followed the Supreme Court's lead, see Paulsen, *The Persistence of Substantive Due Process in the States*, 34 MINN. L. REV. 91 (1950).

42. Cleere v. Bullock, 146 Colo. 284, 361 P.2d 616 (1961) (invalidating a requirement that funeral directors be trained as embalmers).

43. See cases collected and discussed in 53 COLUM. L. REV. 827, 834-42 (1953).

44. Old Dearborn Distrib. Co. v. Seagram-Distillers Corp., 299 U.S. 183 (1936). Such laws permit a manufacturer and a retailer to contract that the retailer will resell at a minimum price and also will enforce the price maintenance provisions against nonsignatory retailers.

that had considered such laws had invalidated them,[45] but by 1976 a majority had stricken them;[46] some courts reversed their own precedents in the process.[47] The cause of this remarkable turnabout was largely the fact that accumulated experience under such fair trade laws had revealed their true purpose; as more than one court stated, it was "a matter of common knowledge that [the fair trade statutes were] price-fixing statute[s], designed primarily to destroy competition at the retail level."[48] The statutes were then condemned as having no public purpose.[49]

These decisions, in candidly recognizing the actual purposes of fair trade laws, are to be commended. More questionable is the *Lochner*-like substitution of judicial judgments for legislative judgments on the issue of what constitutes a legitimate public purpose. In a carefully reasoned opinion, the Supreme Judicial Court of Massachusetts chose not to invalidate its fair trade law on due process grounds and found as grounds for honest debate whether the law served the public welfare despite its anticompetitive purpose.[50]

A host of other anticompetitive measures have fallen under similar judicial determinations that they serve no legitimate public purpose. These measures have included legislative regulation of prices charged for haircuts,[51] dry cleaning,[52] cigarettes,[53]

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45. Howard, *supra* note 32, at 883.

46. *Id.* at n.48 (citing 2 TRADE REG. REP. (CCH) ¶ 6,041 (Mar. 15, 1976)).

47. In North Carolina such a law was upheld in 1939 and invalidated in 1974. Bulova Watch Co. v. Brand Distrib., Inc., 285 N.C. 467, 206 S.E.2d 141 (1974).

48. Remington Arms Co. v. Skaggs, 55 Wash. 2d 1, 7, 345 P.2d 1085, 1088 (1959) (quoting Skaggs Drug Center v. General Electric Co., 63 N.M. 215, 226, 315 P.2d 967, 974 (1957)).

49. *E.g.*, Union Carbide & Carbon Corp. v. White River Distrib., Inc., 224 Ark. 558, 275 S.W.2d 455 (1955); Miles Labs., Inc. v. Eckerd, 73 So. 2d 680 (Fla. 1954); Union Carbide & Carbon Corp. v. Bargain Fair, Inc., 167 Ohio St. 182, 147 N.E.2d 481 (1958); Shakespeare Co. v. Lippman's Tool Shop Sporting Goods Co., 334 Mich. 109, 54 N.W.2d 268 (1952). For criticism of such decisions, see 15 STAN. L. REV. 309, 320-26 (1963).

50. Corning Glass Works v. Ann & Hope, Inc., 363 Mass. 409, 294 N.E.2d 354 (1973) (invalidating on grounds of delegation of legislative powers).

51. Noble v. Davis, 204 Ark. 156, 161 S.W.2d 189 (1942).

52. State Bd. of Dry Cleaners v. Thrift-D-Lux Cleaners, Inc., 40 Cal. 2d

business franchises,[54] and milk.[55] A Birmingham, Alabama, city ordinance against ticket scalping was condemned on similar grounds.[56] Before the advent of the Supreme Court's commercial speech doctrine the highest courts of Pennsylvania,[57] Maryland,[58] and Florida[59] struck down bans on advertising the prices of prescription drugs.

State measures designed to favor one business competitor over another sometimes take the guise of prohibitions of particular business practices. A notable example is *Defiance Milk Products Co. v. Du Mond*,[60] in which the New York Court of Appeals considered a statute[61] that prohibited the sale of evaporated skimmed milk except in containers holding a minimum of ten pounds, a quantity so large as to preclude retail purchases. In defense of the statute, it was shown only that some shopkeepers had tried to substitute evaporated skimmed milk when customers had asked for evaporated milk.[62] The plaintiff's containers were marked plainly as evaporated skimmed milk, as required by other provisions of the law. The court viewed the limit on the size of containers as effectively banning all retail sales of a wholesome food product and as unrelated to the claimed evil of customer deception. The regulation bore no reasonable relationship to any valid legislative purpose. In a comparable case, the Supreme Court of Michigan invalidated a prohibition on the sale of milk in containers larger than one-half gallon but less than

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436, 254 P.2d 29 (1953).

53. Williams v. Hirsch, 211 Ga. 534, 87 S.E.2d 70 (1955).

54. Hand v. H & R Block, Inc., 258 Ark. 774, 528 S.W.2d 916 (1975) (based on the fourteenth amendment).

55. Ward v. Big Apple Super Markets, 223 Ga. 756, 158 S.E.2d 396 (1967); Gillette Dairy, Inc. v. Nebraska Dairy Prod. Bd., 192 Neb. 89, 219 N.W.2d 214 (1974).

56. Estell v. City of Birmingham, 291 Ala. 680, 286 So. 2d 872 (1973).

57. Pennsylvania State Bd. of Pharmacy v. Pastor, 441 Pa. 186, 272 A.2d 487 (1971).

58. Maryland Bd. of Pharmacy v. Sav-A-Lot, Inc., 270 Md. 103, 311 A.2d 242 (1973).

59. Stadnik v. Shell's City, Inc., 140 So. 2d 871 (Fla. 1962).

60. 309 N.Y. 537, 132 N.E.2d 829 (1956).

61. N.Y. AGRIC. & MKTS. LAW § 64(2) (1954) (repealed 1965).

62. 309 N.Y. at 542, 132 N.E.2d at 831.

three gallons.[63] A number of cases have stricken laws prohibiting street vending of food.[64] In a Nevada case[65] decided on both equal protection and due process grounds, an ordinance[66] that prohibited delivery of gasoline from trucks having capacity in excess of 2000 gallons was invalidated; the Nevada court noted cases from other jurisdictions that had reached the same result.[67]

Not all of the decisions involving business practices identify an anticompetitive purpose in the condemned measures; the courts sometimes simply dismiss the measures as serving no legitimate purpose. A notable early case that involved a candid recognition by its defenders of an anticompetitive purpose is the Wisconsin decision invalidating a law[68] that totally prohibited the manufacture and sale of oleomargarine.[69] After dismissing other claimed legislative purposes, the court considered the proposition that the measure might be valid as protecting the Wisconsin dairy industry and concluded:

> [T]he legislature has no more power to prohibit the manufacture and sale of oleomargarine in aid of the dairy industry than it would have to prohibit the raising of sheep in aid of the beef-cattle industry, or to prohibit the manufacture and sale of cement for the benefit of the lumber industry.[70]

The measures described might better be condemned as denials of equal protection, but a substantial number of state courts choose instead to treat free enterprise as a constitutionally protected substantive right. A remarkable example of such thinking is a 1977 Georgia case[71] invalidating an act[72] protecting

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63. Grocers Dairy Co. v. McIntyre, 377 Mich. 71, 138 N.W.2d 767 (1966).

64. Trio Distrib. Corp. v. City of Albany, 2 N.Y.2d 690, 143 N.E.2d 329, 163 N.Y.S.2d 585 (1957) (citing cases from Massachusetts, New Jersey, and Ohio).

65. *In re* Martin, 88 Nev. 666, 504 P.2d 14 (1972) (citing cases from Colorado, South Carolina, Texas, and Wisconsin).

66. Wells, Nev., Emergency Ordinances 62 (Sept. 10, 1963) & 81 (Mar. 24, 1970).

67. 88 Nev. at 669, 504 P.2d at 16.

68. 1925 Wis. Laws ch. 279.

69. John F. Jelke Co. v. Emery, 193 Wis. 311, 214 N.W. 369 (1927).

70. *Id.* at 323, 214 N.W. at 373.

71. General GMC Trucks, Inc. v. General Motors Corp., 239 Ga. 373, 237

automobile dealers from competition by new franchises set up in their areas by their manufacturers. In the course of an opinion resting expressly on dubious interstate commerce grounds, but containing heavy due process overtones, the court noted proudly that "[t]he courts of Georgia . . . have traditionally limited the power of the state to regulate private business"[73] and expressly ruled out protection from competition as a legitimate legislative purpose.[74]

Another striking example of state court activism in aid of free competition is the decision of the North Carolina Supreme Court in *In re Aston Park Hospital, Inc.*,[75] which held unconstitutional a statute[76] requiring a certificate of need from the state's medical care commission before the construction and operation of a new private hospital. Such measures had been enacted in several states and represented a national trend toward comprehensive planning of hospital services to promote orderly development of medical facilities and to hold down the rising costs of hospital care. The court treated the case as akin to those in which it had stricken licensing requirements for common occupations and held that due process does not permit the state to forbid persons to enter the private hospital business solely because the ability of other established hospitals to maintain full occupancy thereby might be endangered.[77] The *Aston Park* decision has been criticized on both constitutional grounds[78] and grounds of hospital development policy;[79] it can only be viewed as Lochnerism at work. The act of balancing the competing economic interests of patients, existing hospital operators, and prospective operators takes judges into complex and debatable economic issues on which most courts would defer to the legislative branch. Also, the state's financial stake in medical costs under

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S.E.2d 194, *cert. denied*, 434 U.S. 966 (1977).

72. GA. CODE ANN. §§ 84-6604(a) to -6610(f)(10) (Supp. 1976).

73. 239 Ga. at 376, 237 S.E.2d at 196.

74. *Id.* at 377, 237 S.E.2d at 197.

75. 282 N.C. 542, 193 S.E.2d 729 (1973).

76. N.C. GEN. STAT. § 90-291 (1971) (repealed 1975).

77. 282 N.C. at 549, 193 S.E.2d at 734.

78. Howard, *supra* note 32, at 885-86.

79. Comment, *Hospital Regulation After Aston Park: Substantive Due Process in North Carolina*, 52 N.C. L. REV. 763 (1974).

state medicaid programs now may have become a compelling interest.

In some such cases the courts are making economic judgments that are more appropriate for legislative determination and essentially are formulating antitrust policy which might be appropriate in the absence of legislation but hardly is appropriate in opposition to it. Also, by constitutionalizing rules favoring economic competition, the courts leave constitutional amendment or congressional action as the only redress. As Congress continues to assume increasing powers over the economy, however, the net loss may be slight in major economic areas.

Despite the criticism of particular applications of judicial review of the legitimacy of the legislative purpose, it must be remembered that John Marshall's great statement included "Let the end be legitimate"[80] and that legitimacy of purpose is a specific element of the *Nebbia* due process test. More fundamentally, some substantive containment of legislatures is basic to our concept of limited government. As Professor Robert Bennett has stated recently, "[C]oncern with legitimacy of legislative purposes is virtually inevitable in any system that resembles our constitutional law. . . . Widely shared concepts of legitimacy in legislative activity will not tolerate legislation that does no more than favor one interest at the expense of another . . . ."[81]

Once a legitimate legislative purpose is identified, as occurs readily in the great majority of cases, the due process inquiry then turns to the second prong of *Nebbia*, the reasonableness of the legislative measure as a means to that end. Again it should be recalled that John Marshall's statement also required that the means be "appropriate" and "plainly adapted" to the legitimate end.[82]

Review for reasonableness in the economic area is no more manageable or no less open to subjectivity than is the use of this imprecise standard in other areas. Although there is respectable scholarly authority that would abandon all such review[83] for rea-

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80. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 415, 430 (1819).

81. Bennett, *supra* note 19, at 1086, 1083.

82. 17 U.S. (4 Wheat.) 415, 430 (1819).

83. *See generally* J. ELY, DEMOCRACY AND DISTRUST (1980); Linde, *Due Process of Lawmaking*, 55 NEB. L. REV. 197 (1976). Both writers would end

sons other than the historical meaning of due process, such review is a fixture of American state constitutional law. Review for reasonableness also continues at the federal level when congressional legislation is concerned, although standards of minimal scrutiny have caused review to be an easy hurdle for congressional enactments concerning economic matters.[84]

*Hale v. Morgan*[85] is an illustration of this aspect of substantive due process functioning at its best in the states. A California statute[86] called for the assessment in favor of a tenant against a landlord of a civil penalty of $100 per day if the landlord willfully deprived the tenant of utility services for the purpose of evicting him. The statute's validity was challenged in a case in which its literal application would have required payment of $17,300 by an individual landlord to a tenant. The purpose of the statute—discouraging landlords from resorting to such self-help—was unquestionably a legitimate one, but the sanction of a mandatory, cumulative penalty in such substantial amounts, without regard to circumstances or to varying degrees of culpability, was held to be unreasonable and a denial of due process.[87] A narrowing construction which permitted assessments of varying and considerably lesser penalties was adopted. Both state and federal due process clauses were described as "the most basic substantive checks on government's power to act unfairly or oppressively."[88] Even those with little sympathy for such landlords should applaud this classic application of substantive due process to relieve citizens of unfair and oppressive governmental action.

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review of the substantive content of legislation for reasonableness, but would expand requirements of participation in lawmaking procedures. See Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063 (1980), for a persuasive critique of constitutional theories which elevate process above substance.

84. A recent illustration is Andrus v. Allard, 444 U.S. 51 (1979), upholding provisions of the Eagle Protection Act and Migratory Bird Treaty Act which prohibit commercial transactions in parts of protected birds even though the birds were lawfully taken before effective dates of the acts.

85. 22 Cal. 3d 388, 584 P.2d 512, 149 Cal. Rptr. 375 (1978).

86. CAL. CIV. CODE § 789.3 (West 1971).

87. 22 Cal. 3d at 404, 584 P.2d at 522, 149 Cal. Rptr. at 385.

88. *Id.* at 398, 584 P.2d at 518, 149 Cal. Rptr. at 381.

Another group of cases that have found legislation to be an unreasonable means to a legitimate end may be characterized as burden-shifting cases. In 1952, the Supreme Court in *Day-Brite Lighting, Inc. v. Missouri*[89] held that due process is not denied under the federal constitution by a law[90] requiring that employees be paid for up to four hours for time off for voting. Four years later the Supreme Court of Illinois declined to follow *Day-Brite* and invalidated a similar provision under its state constitution.[91] Compulsory pay for jury duty, which raises similar problems, has arisen in Alabama and Hawaii.[92] More recently, the Alabama Supreme Court has considered a statute[93] that required an employer to continue wage payments to an employee for up to twenty-one days while on active duty with the National Guard or a reserve unit. Acting this time solely under the Alabama Constitution, the court struck down the law on due process and contract impairment grounds.[94]

In each of the burden-shifting cases the legislature had attempted to promote unquestionably valid public purposes: the promotion of voting,[95] jury service,[96] and civilian military service.[97] In each instance the legislature sought to shift the economic burden of such service to employers who neither bore a special responsibility for the public need nor received any special benefit from the meeting of that need. Shifting the economic burden to particular employers was no more reasonable than shifting it to any other person or business holding an economic relationship to the persons performing the public services.[98]

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89. 342 U.S. 421 (1952).

90. Mo. Rev. Stat. § 129.060 (1949).

91. Heimgaertner v. Benjamin Elec. Mfg. Co., 6 Ill. 2d 152, 128 N.E.2d 691 (1955) (holding section of Illinois Election Code described as "pay-while-voting" legislation unconstitutional).

92. *See* text accompanying notes 11-16 *supra* & note 16 *supra*.

93. Ala. Code § 31-2-13 (1975).

94. White v. Associated Indus. of Alabama, Inc., 373 So. 2d 616 (Ala. 1979).

95. *See* notes 89 & 90 *supra* and accompanying text.

96. *See* note 92 *supra* and accompanying text.

97. *See* notes 93 & 94 *supra* and accompanying text.

98. *See* Day-Brite Lighting, Inc. v. Missouri, 342 U.S. 421 (1952); White v. Associated Indus. of Alabama, Inc., 373 So. 2d 616 (Ala. 1979); Heimgaertner v. Benjamin Elec. Mfg. Co., 6 Ill. 2d 152, 128 N.E.2d 691 (1955).

The two final examples of review for reasonableness may appear to be at opposite poles in importance. In one, the Supreme Court of Wisconsin invalidated its full-crew law[99] insofar as it required three employees in a single railway engine operating outside railroad yards.[100] The provision could not be justified as a safety measure; possible justification as protection for railway jobs was not considered and indeed was treated implicitly as an illegitimate purpose.[101]

A reasonableness case of lesser importance involved the invalidation of a Shreveport, Louisiana ordinance[102] prohibiting frog-gigging on a particular lake for eleven months of the year.[103] One Louisiana scholar attributes the decision both to the great weight placed by the Louisiana court on the individual interest in frog-gigging and to Louisiana traditions of individual liberty and laissez-faire which approach the philosophy of John Stuart Mill.[104]

Despite the numerous instances indicated above, due process as a doctrinal restraint on the substance of legislation should not be viewed as a major weapon in our constitutional arsenal. The proconsumer results in the fair trade cases ultimately were achieved nationally by congressional enactment.[105] The drug price advertising cases now can be better rationalized on free speech grounds.[106] Some of the cases were decided on both due process and equal protection grounds, and other cases could have been so decided. Other cases are sufficiently argu-

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99. WIS. STAT. ANN. § 192.25(4) (1957) (repealed 1971).

100. Chicago & N.W. Ry. Co. v. La Follette, 43 Wis. 2d 631, 169 N.W.2d 441 (1969). The opinion recognized that other state courts considering full-crew laws have upheld them in their entirety. *Id.* at 657, 169 N.W.2d at 453.

101. *Id.* at 652, 169 N.W.2d at 451.

102. SHREVEPORT, LA., CODE § 14-19 (1964) (originally enacted as Shreveport, La., Ordinance 40, § 6(D)(4) (1964)).

103. City of Shreveport v. Curry, 357 So. 2d 1078 (La. 1978).

104. Hargrave, *Louisiana Constitutional Law*, 39 LA. L. REV. 807, 816 (1979).

105. In passing the Consumer Goods Pricing Act of 1975, Congress withdrew its consent to state fair trade laws as exceptions to federal antitrust law. Consumer Goods Pricing Act of 1975, Pub. L. No. 94-145, 89 Stat. 801 (amending 15 U.S.C. § 1).

106. Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976).

able, or even aberrant, that it cannot be said with confidence that their being decided oppositely would have been a great constitutional loss. The California landlord-tenant case[107] may be the major instance of substantive due process as the only available basis for achieving an important and desirable result. Perhaps the scarcity of such cases is wholesome evidence that legislatures seldom act in totally irrational ways. Nonetheless, judicial review for some minimum of reasonableness is a worthwhile safeguard for those rare instances when they do.

### *B. Equal Protection*

A claim of inequality before the law is very different and is more deserving of sympathetic judicial consideration than is a claim of legislative irrationality. Concurring in a leading decision in the Supreme Court's retreat from the area, Justice Jackson once noted the fundamentally differing thrusts of substantive due process and equal protection:

> The burden should rest heavily upon one who would persuade us to use the due process clause to strike down a substantive law or ordinance. . . . Invalidation of a statute or an ordinance on due process grounds leaves ungoverned and ungovernable conduct which many people find objectionable.
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> Invocation of the equal protection clause, on the other hand, does not disable any governmental body from dealing with the subject at hand. It merely means that the prohibition or regulation must have a broader impact. I regard it as a salutary doctrine that cities, states and the Federal Government must exercise their powers so as not to discriminate between their inhabitants except upon some reasonable differentiation fairly related to the object of regulation. This equality is not merely abstract justice. The framers of the Constitution knew, and we should not forget today, that there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few

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107. Hale v. Morgan, 22 Cal. 3d 388, 584 P.2d 512, 149 Cal. Rptr. 375 (1978). *See* notes 85-88 *supra* and accompanying text.

> to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected. Courts can take no better measure to assure that laws will be just than to require that laws be equal in operation.[108]

Although Justice Jackson stated an equal protection concern that did not prevail at the federal level, he identified a fundamental purpose of the clause that now should give pause to any state court considering its duty. As the last bastion of equal protection in economic matters, state judges have a special and greater responsibility than did their federal brethren to heed Jackson's admonition against allowing arbitrary and unreasonable discrimination to go unremedied.

The jury-duty pay case from Hawaii is illustrative. In *Hasegawa v. Maui Pineapple Co.*[109] employers of fewer than twenty-five employees were exempt from the general statutory requirement[110] that employees be paid the difference between their regular pay and their jurors' fees. If the Hawaii legislature had been willing to risk the ire of small businessmen and apply its burden-shifting to all employers, the court's task would have been more difficult. Instead, legislators yielded to the temptation to "pick and choose,"[111] as Jackson put it, and gave the court an equal protection basis, in addition to its due process reasoning, for invalidating the statute.

Should courts pretend to be ignorant of that which is common knowledge? State regulatory measures are inevitably the products of a legislative process that is subject to the democratic necessities variously called lobbying, special influence, or redress of grievances. Courts seldom mention that they are even aware of the facts of life of the legislative process, much less go as far as did the Nebraska Supreme Court when it accepted a judicial duty to guard against "pressure groups which seek and frequently secure the enactment of statutes advantageous to a particular industry and detrimental to another under the guise of

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108. Railway Express Agency v. New York, 336 U.S. 106, 112-13 (1949) (Jackson, J., concurring).

109. 52 Hawaii 327, 475 P.2d 679 (1970).

110. HAWAII REV. STAT. § 388-32 (1968) (repealed 1972).

111. 336 U.S. at 112. *See* text accompanying note 108 *supra*.

police power regulations."[112] It is believed that many judges share the Nebraska court's concern, often because of personal knowledge of their state's legislature, and that many are consciously or unconsciously moved by this knowledge to more expansive judicial review. Judges, like others, also know that their state's legislative process frequently does not provide a deliberative judgment based upon full factual investigation. This fact may help to account for a sharp trend away from deferential review.

Again, California is in the lead. In 1973, in *Brown v. Merlo*,[113] the California Supreme Court declared that the state's guest statute[114] was unconstitutional and thus ended three decades of singling out automobile guests from other guests in their rights against negligent hosts. In the course of holding that automobile guests, like guests upon a landowner's property, now may recover for injury caused by a host's negligence, the court rejected the conceivable rational basis test and stated:

> Although by straining our imagination we could possibly derive a theoretically "conceivable," but totally unrealistic, state purpose that might support this classification scheme, we do not believe our constitutional adjudicatory function should be governed by such a highly fictional approach to statutory purpose. We recognize that in past years several federal equal protection cases have embraced such an excessively artificial analysis in applying the traditional "rational basis" equal protection test.[115]

Under its realistic approach the California court had little difficulty in rejecting the two grounds traditionally advanced to justify guest statutes: the promotion of hospitality and the prevention of collusive suits.[116] An October 1978 survey found that since the California decision guest statutes have also fallen in Idaho, Kansas, Michigan, Nevada, New Mexico, North Dakota,

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112. Lincoln Dairy Co. v. Finigan, 170 Neb. 777, 788, 104 N.W.2d 227, 234 (1960).

113. 8 Cal. 3d 855, 506 P.2d 212, 106 Cal. Rptr. 388 (1973).

114. CAL. VEH. CODE § 17158 (1971).

115. 8 Cal. 3d. at 865 n.7, 506 P.2d at 219 n.7, 106 Cal. Rptr. at 395 n.7.

116. *Id.* at 864, 506 P.2d at 218, 106 Cal. Rptr. at 394.

Ohio, and Wyoming.[117]

One of the states in which a guest statute has been upheld since the *Brown* decision is Delaware.[118] The deferential review of that state's highest court stands in sharp contrast to that employed in California. At one point the Delaware Supreme Court stated that "[t]he General Assembly has access to relevant information bearing upon these matters more significant than any afforded this Court, bound as it is by the limitations of the record of this judicial proceeding."[119] Such unpremised conclusions that legislatures have access to relevant facts unavailable to courts and that such facts support the classification at hand cause classifications to be effectively unreviewable. For a court to dismiss an equal protection claim by asserting simply that the legislature may know something that the judges do not is more of an abdication than the position of the United States Supreme Court. Such abdication strips state equal protection clauses of any application whatsoever in a huge class of cases, a result which should be totally indefensible to a constitutionalist. Without necessarily agreeing with its application, it must be agreed that the California court's approach is the more desirable one *if* equal protection is to be *any* restraint on state economic regulations.

In choosing to exercise realistic review the California court relied in part on a 1972 law review article[120] that has received much attention in legal journals, but too little attention in the courts. Professor Gerald Gunther proposed a "newer equal protection" that causes judicial review to be exercised with more of a "bite" under an intermediate standard of review between strict scrutiny and review for minimal rationality.[121] The key provision of Gunther's model is that those defending a classification in a

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117. [1978] 22 PERSONAL INJURY NEWSLETTER 116. During the same period guest statutes were upheld in Alabama, Colorado, Delaware, Indiana, Nebraska, South Dakota, and Utah. The constitutional issues are discussed in McAdams, *Automotive Guest Statutes—A Constitutional Analysis*, 41 INS. COUNSEL J. 408 (1974).

118. Justice v. Gatchell, 325 A.2d 97 (Del. 1974).

119. *Id.* at 102.

120. Gunther, *Foreword to The Supreme Court, 1971 Term*, 86 HARV. L. REV. 1 (1972) [hereinafter cited as Gunther].

121. *Id.* at 20.

statute have the burdens of articulating the legislative purpose and factually demonstrating a relation between the classification as a means and the legislative purpose as an end.[122] There would be no judicial deference based on imaginable supporting facts and conceivable legislative purposes that may be totally unrealistic.

Gunther's model also has been adopted by the Alaska Supreme Court. In *Isakson v. Rickey*[123] the court considered a legislative "limited entry" program[124] that sought to reduce the number of commercial fishers in its waters. Newly issued entry permits were required for commercial fishing after January 1, 1974. A commission was established to determine who would receive the limited number of entry permits; economic hardship was to be the principal determinant. Another provision mandated that the commission accept applications for permits only from those holding gear licenses issued prior to January 1, 1973. The act was held to be an unconstitutional denial of equal protection to those holding gear licenses issued after this date. The statute's classification based on date of receiving gear licenses was found to bear "no fair and substantial relationship" to the purpose of relieving hardship.[125]

The fair and substantial relation test employed by the Alaska court or some other formulation of an intermediate standard of review requiring an act's defenders to demonstrate reasonableness has been applied in a number of recent cases. In Michigan[126] and North Dakota,[127] exclusion of agricultural workers from workers' compensation coverage was held unconstitutional. The North Dakota opinion is particularly notable. Although the court characterized its test as one of intermediate

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122. *Id.* at 21.

123. 550 P.2d 359 (Alaska 1976).

124. ALASKA STAT. § 16.43.010 to .080 (1973).

125. 550 P.2d at 365. The requirement that applicants be holders of gear licenses was later upheld as a valid grandfather clause; however, no preference for early issuance dates was allowed. Commercial Fisheries Entry Comm'n v. Apokedak, 606 P.2d 1255 (Alaska 1980).

126. Gallegos v. Glaser Crandell Co., 388 Mich. 654, 202 N.W.2d 786 (1972).

127. Benson v. North Dakota Workmen's Comp. Bureau, 283 N.W.2d 96 (N.D. 1979).

scrutiny,[128] it required a "close correspondence"[129] between classifications and legislative goals and relied on aspects of overinclusiveness and underinclusiveness usually associated with strict scrutiny.[130] One case relied on by the North Dakota court is a New Mexico decision[131] invalidating a minimum wage act[132] that required variety store employees to be paid seventy-five cents per hour but that permitted drug store employees to be paid only fifty cents per hour.[133]

Equal protection is gaining vitality in areas of tort law other than guest statutes. Limits on total recovery in medical malpractice actions have fallen in at least three states.[134] Statutes of limitations providing for shorter periods for malpractice actions against architects and engineers than for actions against others in the construction industry have been invalidated in at least five states.[135] In Pennsylvania a statutory exception of libel and slander actions from the general rule that causes of action survive the death of the plaintiff or of the defendant was held unconstitutional.[136] None of these holdings could have occurred under deferential standards of review. Such expansive review under equal protection in the torts area has been supported persuasively in a recent law review article which develops at length a strong agrument against provisions in most comparative negli-

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128. *Id.* at 99.

129. *Id.*

130. *Id.* at 106-07.

131. Burch v. Foy, 62 N.M. 219, 308 P.2d 199 (1957). The soundness of decisions like this and the agricultural employee exclusion cases will be considered at notes 190-93 *infra* and accompanying text.

132. 1955 N.M. Laws ch. 200, § 2(c)(1).

133. 62 N.M. at 225, 308 P.2d at 203.

134. These states include Illinois, Ohio, and North Dakota. Such provisions have been upheld in Arizona, Florida, Kansas, Nebraska, and Wisconsin. Cases are collected in Arneson v. Olson, 270 N.W.2d 125 (N.D. 1978).

135. *See* Muzar v. Metro Town Houses, Inc., 82 Mich. App. 368, 266 N.W.2d 850 (1978) (citing cases in accord from Hawaii, Illinois, Michigan, and Wisconsin and cases holding to the contrary from Arkansas, New Jersey, and Washington). Comparable legislation since has been upheld in Tennessee in Harrison v. Schrader, 569 S.W.2d 822 (Tenn. 1978). For a discussion of *Harrison*, see text accompanying notes 217-20 *supra*.

136. Moyer v. Phillips, 462 Pa. 395, 341 A.2d 441 (1975) (invalidating a statutory exception enacted in 1917).

gence statutes that totally deny recovery to a negligent plaintiff whose fault is greater than that of a defendant.[137]

Finally, in both Colorado[138] and Nebraska[139] Sunday closing laws were declared unconstitutional because their exceptions failed to satisfy tests of reasonableness. In the Nebraska decision the court noted that the real purposes of such laws "are to enlist the power of the state to protect business interests."[140] In Maine the exaction of higher license fees for junkyards within 100 feet of highways was condemned.[141] The denial of licenses to practice medicine to osteopaths while admitting persons with allopathic training was stricken in California in a well-reasoned opinion based upon extensive factual analysis.[142] Requirements that funeral directors be trained in embalming have been stricken as unreasonable occupational barriers in several states.[143] Also invalidated was a Maryland measure that prohibited cosmetologists from cutting and shampooing men's hair, while permitting them to perform such services for women.[144]

In summary, the highest courts of at least thirty-two states[145] have refused to follow the lead of the United States Su-

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137. Sowle & Conkle, *Comparative Negligence Versus the Constitutional Guarantee of Equal Protection: A Hypothetical Judicial Decision*, 1979 DUKE L.J. 1083.

138. Dunbar v. Hoffman, 171 Colo. 481, 468 P.2d 742 (1970).

139. Skag-Way Dep't Stores, Inc. v. City of Omaha, 179 Neb. 707, 140 N.W.2d 28 (1966).

140. *Id.* at 712, 140 N.W.2d at 32.

141. Ace Tire Co., Inc. v. Municipal Officers, 302 A.2d 90 (Me. 1973).

142. D'Amico v. Board of Medical Examiners, 11 Cal. 3d 1, 520 P.2d 10, 112 Cal. Rptr. 786 (1974).

143. *See* Cleere v. Bullock, 146 Colo. 284, 361 P.2d 616 (1961). Other cases invalidating such laws are cited from Illinois, Massachusetts, New York, and Wisconsin. *Accord* Gholson v. Engle, 9 Ill. 2d 454, 138 N.E.2d 508 (1956); Wyeth v. Board of Health, 200 Mass. 474, 86 N.E. 925 (1909); People v. Ringe, 197 N.Y. 143, 90 N.E. 451 (1910); State *ex rel.* Kempinger v. Whyte, 177 Wis. 541, 188 N.W. 607 (1922). *Contra* State Bd. of Funeral Directors v. Cooksey, 147 Fla. 337, 3 So. 2d 502 (1941); Walton v. Commonwealth, 187 Va. 275, 46 S.E.2d 373 (1948).

144. Maryland State Bd. of Barber Examiners v. Kuhn, 270 Md. 496, 312 A.2d 216 (1973) (decided on both due process and equal protection grounds).

145. Instances of expansive judicial review are cited in this Article from the following states: Alabama, Alaska, Arkansas, California, Colorado, Florida, Georgia, Hawaii, Idaho, Illinois, Kansas, Kentucky, Louisiana, Maine, Mary-

preme Court. In these states there is at least one modern precedent, and often a sizeable number, that supports expansive judicial review in the economic area. Systematic research in the other states undoubtedly would reveal many other such precedents. No state court is known to have limited itself expressly to the deferential review now in effect at the federal level. Consequently, as a national matter, it can be said that state legislatures have not been left as the final judges of the reasonableness of their enactments.

While substantive due process nominally is still alive, it is much less important than equal protection as a restraint on unreasonable economic regulation. The most significant development is the trend under equal protection toward an intermediate standard of review that causes statutory classifications to be reviewed on the basis of actual instead of imagined and hypothetical factual bases; this is a healthy trend toward realism in the protection of constitutional rights.

## V. Expansive Judicial Review in Tennessee[146]

Tennessee's counterpart to the due process clauses of the fifth and fourteenth amendments to the United States Constitution is the "law of the land" provision in article I, section 8 of the Tennessee Constitution. Its counterpart to the equal protection clause is article XI, section 8, which requires in its caption that only "general laws" are to be passed and then in more specific terms forbids laws granting privileges or suspending general laws for the benefit of individuals. It is most commonly referred to as a restriction on class legislation. As with the federal provisions, there is considerable overlap in the coverage of the two provisions,[147] and many cases have considered challenges under

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land, Massachusetts, Michigan, Nebraska, Nevada, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Pennsylvania, South Carolina, Tennessee, Texas, Washington, Wisconsin, and Wyoming.

146. While an attempt has been made to identify all relevant Tennessee cases decided since 1956, the difficulty of researching state constitutions, leaves the possibility that some decisions may not have been discovered.

147. Although legislative classifications now generally are challenged in Tennessee under article XI, section 8, there are also cases in which the validity of classifications has been considered under the law of the land provision of

both provisions.[148] In at least eight decisions since 1956, the Tennessee appellate courts have engaged in expansive judicial review to invalidate state economic regulations that now would be upheld by the United States Supreme Court against challenges under the federal constitution.

### *A. Substantive Due Process*

In 1956, in *State v. White*,[149] the Tennessee Supreme Court considered a prosecution under a statute[150] prohibiting the giving of premiums or other benefits with the sale of gasoline. In invalidating the statute, the court viewed it as having an illegitimate anticompetitive purpose, much like those condemned in cases involving business practices cited earlier from other states.[151] The court, never considering that the legislature might have viewed such practices as possibly deceiving motorists about the price actually being paid for gasoline, condemned the provision with the following conclusions:

> [W]hen the statute . . . prohibits as a trade stimulant the giving of a premium or gratuity, . . . the statute is unconstitutional.

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article I, section 8. The two clauses once were viewed as prohibiting two different kinds of classifications. Article I, section 8 was applied to legislative classifications which subjected a class to burdens not imposed upon the community at large, while article XI, section 8 dealt with the conferring of special rights, privileges, or immunities not enjoyed by the general population. Dibrell v. Morris' Heirs, 89 Tenn. 497, 15 S.W. 87 (1891). This distinction largely has disappeared from modern Tennessee cases, but in dealing with classifications the courts occasionally cite old decisions which arise under the law of the land clause and which set forth a more stringent standard of review than now is stated, usually such as that classifications must "rest upon some natural or reasonable basis, having some substantial relation to the public welfare." Daugherty v. State, 216 Tenn. 666, 675, 393 S.W.2d 739, 743 (1965), *cert. denied*, 384 U.S. 435 (1966).

148. *See, e.g.*, Jones v. Haynes, 221 Tenn. 50, 424 S.W.2d 197 (1968); Livesay v. Tennessee Bd. of Examiners in Watchmaking, 204 Tenn. 500, 322 S.W.2d 209 (1959); State v. White, 199 Tenn. 544, 288 S.W.2d 428 (1956); State v. Bookkeepers Business Serv. Co., 53 Tenn. App. 350, 382 S.W.2d 559, *cert. denied, id.* (1964).

149. 199 Tenn. 544, 288 S.W.2d 428 (1956).

150. TENN. CODE ANN. § 6770.33 (Supp. 1950).

151. 199 Tenn. at 548, 288 S.W.2d at 429-30.

> We think such . . . provision is outside of the scope of the police power and does not relate to the general welfare. So long as the operator's business does not offend the public morals and work an injustice on the public, his constitutional right to pursue it on equal terms to that allowed to others in like business is beyond question, even though his methods may have a tendency to draw trade to him to the detriment of competitors.[152]

In *Livesay v. Tennessee Board of Examiners in Watchmaking*[153] the court invalidated a licensing system that prescribed character and educational qualifications for watch and clock repairing. The court viewed the regulated activity as a common occupation that had no relation to the public welfare.[154] In answer to the contention that protecting the public from incompetence in watchmakers was a justifiable purpose, the court took the position that incompetent performance of such services affects only the private parties involved, not the public; the court ignored the possibility of viewing the public as an aggregate of clock and watch owners.[155] In answer to the claim that the statute was justified as preventing possible fraud, the court stated: "And, if the opportunity for a dishonest person in pursuit of a private occupation to defraud his customer is to become a justification for the regulation under the police power rule of an otherwise private occupation, then the Legislature may well regulate every conceivable business."[156]

In a comparable case,[157] the application of state qualifications and licensing procedures to those offering bookkeeping services to the public was held unconstitutional. The public was deemed to have no interest in the regulation of bookkeeping, as distinguished from public accountancy, because of the greater responsibilities assumed by the latter in auditing and certifying financial statements.[158] Thus, a difference in degree in terms of

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152. *Id.*, 288 S.W.2d at 429-30.

153. 204 Tenn. 500, 322 S.W.2d 209 (1959).

154. *Id.* at 505, 322 S.W.2d at 212.

155. *Id.* at 509, 322 S.W.2d at 213.

156. *Id.*, 322 S.W.2d at 213.

157. State v. Bookkeepers Business Serv. Co., 53 Tenn. App. 350, 382 S.W.2d 559, *cert. denied, id.* (Tenn. 1964).

158. *Id.* at 360, 382 S.W.2d at 564.

potential for public harm if services are performed by unqualified persons was constitutionally determinative.

Although the Tennessee decisions have precedent in other states, they must be viewed as implicitly rejecting even the deferential conceivable rational basis test by refusing to speculate on the possible evils which might have moved the legislature to act. They amount to substitution of judicial judgments for legislative judgments on debatable issues of legitimacy of public purposes. They may be viewed as part of Tennessee's contribution to the survival of Lochnerism in the states. They also must be viewed, however, as evidence of the widely shared concern that legitimacy of legislative purpose should continue to be a matter of constitutional concern and judicial review.

The final expansive holding under substantive due process is *Merchants Bank v. Tennessee, Wildlife Resources Agency*,[159] in which the application to plaintiff of a provision of the wildlife conservation laws was held unconstitutional.[160] The plaintiff bank held a security interest in a vehicle that was seized as contraband because it had been used to transport a deer that had been killed unlawfully. The bank itself had violated no law and had no knowledge that the vehicle was being used unlawfully. The terms of the statute clearly contemplated that innocent lienholders would forfeit security interests in contraband and provided for a hearing solely on the issue of the unlawful use of the vehicle.[161] A recent United States Supreme Court decision had upheld a similar Puerto Rican measure.[162]

Without addressing the United States Supreme Court's reasoning or considering the rationality of the underlying substantive rule involved, the Tennessee Court of Appeals held that the bank was entitled to a hearing as a matter of procedural due process and, as a matter of substantive property law, was entitled to preserve its interest in the seized property upon estab-

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159. 567 S.W.2d 476 (Tenn. Ct. App.), *cert. denied, id.* (Tenn. 1978).

160. TENN. CODE ANN. § 51-709 (1977).

161. *Id.*

162. Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974). The court found abundant precedent at common law and in federal decisions of long standing for the rule that the innocence of the owner of property subject to forfeiture is no defense in forfeiture proceedings.

lishing its innocence.[163] The right to a hearing follows easily once the constitutional nature of the innocent lienholder's substantive property rights is identified. The much more difficult substantive issue was never expressly recognized or analyzed. Moreover, the Tennessee Supreme Court's denial of certiorari is puzzling.

The *Merchants Bank* case turned not on the legitimacy of legislative purpose but on the reasonableness of a means to that purpose as an end. The legitimacy of the public purpose—enhanced enforcement of the game laws—is clear. The second prong of the *Nebbia* test was in issue, and the court simply rejected forfeiture of innocent lienholders' interests as a reasonable means.[164] This question is at least debatable and could have gone the other way. The *Merchants Bank* case is significant evidence that substantive due process survives as a restraint upon unreasonable economic regulation in Tennessee.

### *B. Equal Protection*

An area in which the courts of Tennessee consistently have exercised expansive judicial review and have required an affirmative showing of factual reasonableness of legislative classifications is in geographic discrimination,[165] better known as "local legislation." The great majority of modern cases considering such measures have involved laws affecting local governments in their governmental or proprietary capacities and are, therefore, outside the scope of this Article.[166]

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163. 567 S.W.2d at 481.

164. *Id.*

165. Geographic discrimination within a state has never been a federal constitutional problem under the fourteenth amendment. "The Equal Protection Clause relates to equality between persons as such rather than between areas. . . . Territorial uniformity is not a constitutional requisite." Salsburg v. Maryland, 346 U.S. 545, 551-52 (1954). For an argument that a showing of reasonableness should be required, see Horowitz & Neitring, *Equal Protection Aspects of Inequalities in Public Education and Public Assistance Programs From Place to Place Within a State,* 15 U.C.L.A. L. REV. 787 (1968).

166. The Home Rule provisions of article XI, section 9 are involved in such cases; the ramifications of these provisions, however, are beyond the scope of this Article. In a recent decision involving such a law the Tennessee Supreme Court divided sharply and, according to the two-member dissent, de-

Two instances of such review are within this topic. The first concerned a private act,[167] applicable by its caption only to Fentress County, that prohibited the sale and use of pyrotechnics in that county throughout the entire year. A general state law[168] prohibited such activity except during the periods from June 20 to July 5 and from December 10 to January 2. The private act was made subject to the Home Rule procedures and was to become effective upon approval by a two-thirds vote of the Fentress County Court. In *Jones v. Haynes*[169] the Tennessee Supreme Court held first that the Home Rule Amendment did not apply to such a regulation because, like all criminal legislation, it could not be made contingent upon local approval. Then, viewing the act as special legislation, it was held to be subject to a requirement of reasonableness under article I, section 8 and under article II, section 8.[170] Since there was nothing before the court to show any differing circumstances distinguishing Fentress County from the rest of the state with respect to fireworks, the act was held unconstitutional.[171]

An earlier decision to the contrary involving Davidson County[172] was distinguished in the *Jones* case on two grounds: (1) Davidson County was viewed as confronting circumstances and problems unique to it,[173] although no facts relevant to the fireworks problems were discussed, and (2) the Davidson County private act[174] was enacted before the passage of the general state fireworks law and therefore no suspension of a general law was involved.[175]

The Davidson County case was again a problem for the su-

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parted from prior cases uniformly requiring showings of reasonableness for all local laws suspending general laws, including those laws affecting particular counties in their governmental capacities. Leech v. Wayne County, 588 S.W.2d 270 (Tenn. 1979).

167. Act of Apr. 20, 1967 ch. 97, 1967 Tenn. Priv. Acts 365.
168. TENN. CODE ANN. §§ 53-3001 to -3016 (1966).
169. 221 Tenn. 50, 424 S.W.2d 197 (1968).
170. *Id.* at 54, 424 S.W.2d at 198-99.
171. *Id.*, 424 S.W.2d at 199.
172. Elliott v. Fuqua, 185 Tenn. 200, 204 S.W.2d 1016 (1947).
173. 221 Tenn. at 54, 424 S.W.2d at 199.
174. Act of Jan. 24, 1947, ch. 58, 1947 Tenn. Priv. Acts 178.
175. 221 Tenn. at 55, 424 S.W.2d at 199.

preme court in *Canale v. Steveson*,[176] which considered an act outlawing fortunetelling in Shelby County only.[177] In a delightfully amusing opinion extolling at length the therapeutic values of fortunetelling, the supreme court, speaking through Special Justice Erby Jenkins, held the act unconstitutional. No conceivable rational basis could be found for a finding that fortunetelling might present special evils in Shelby County. Indeed, if there were a possible relationship between population and such problems, Special Justice Jenkins viewed it as cutting the other way; residents of smaller, rural counties should be more gullible and susceptible to the preying of fortunetellers than the supposedly more sophisticated residents of the most populous counties. One suspects that Justice Jenkins' tongue was in his cheek as he wrote much of this opinion, but the holding was serious and the complainant-appellee, one Ruby Steveson, gained the right to cheer Shelby Countians for a fee.[178]

Municipal ordinances, like local laws, seem to have a special potential for invoking expansive judicial review of economic regulations in Tennessee. In *Consumers Gasoline Stations v. City of Pulaski*[179] the court held unconstitutional an ordinance[180] prohibiting the installation of any new gasoline storage tanks within the city limits. The ordinance was viewed as unreasonably creating a monopoly in favor of stations in existence at the time of its enactment.[181] The court recognized that the ordinance's purpose might have been achieved through a zoning

176. 224 Tenn. 578, 458 S.W.2d 797 (1970).

177. The act applied to counties of greater population than 400,000 under the 1950 census or any subsequent federal census. The most significant recent local legislation varying economic regulation for larger counties is the Uniform Residential Landlord and Tenant Act, TENN. CODE ANN. §§ 64-2801 to -2864 (1976), which applies only in the four counties with a population of more than 200,000. In the only reported case involving this classification it was enforced with its constitutionality going unquestioned. Schratter v. Development Enterprises, Inc., 584 S.W.2d 459 (Tenn. Ct. App.), *cert. denied, id.* (Tenn. 1979).

178. 224 Tenn. at 586, 458 S.W.2d at 801.

179. 200 Tenn. 480, 292 S.W.2d 735 (1956). The holding was based on article I, section 8 because article XI, section 8 does not apply to municipal ordinances.

180. PULASKI, TENN., CODE tit. 2, § 9-0205 (1949).

181. 200 Tenn. at 486, 292 S.W.2d at 737.

measure that allowed preexisting uses,[182] a possibility which considerably dilutes the case as a constraining precedent on governmental power. The rather blatant anticompetitive purpose of the ordinance undoubtedly influenced the court.

*Shatz v. Phillips*[183] reviewed a zoning ordinance[184] of Union City for reasonableness of its classifications and held the measure unconstitutional. Applying a general rule that a zoning ordinance must have a rational connection with the public welfare, the court could find no such basis for a restriction that would have eliminated a particular scrap metal business conducted inside an attractive building and found to have no obnoxious qualities.[185] The fatal discrimination was between scrap metal processing and other heavy industry in the businesses permitted in a particular district. The case is a commendable instance of expansive review under an intermediate standard of the type shown earlier to be gaining acceptance in other states.

Local variation of a statewide regulation was also involved in *Dilworth v. State*,[186] although this element again played no part in the court's expressed reasoning. Held unconstitutional was a law[187] that permitted local governments to discriminate against private carriers in setting maximum truck weights for certain local roadways. Common carriers were totally exempt from a state legislative delegation to local governments of a power to lower otherwise applicable statewide limits. No reasonable basis could be found for the classification as a means to the end of protecting roadways from damage from excessive weights.[188] The argument that common carriers might be favored as highway users because of their service to the general public was rejected in favor of a diametrically opposite view that private users for private purposes are to be preferred over "hirelings" in access to public highways.[189] This part of the reasoning

182. *Id.*, 292 S.W.2d at 737.

183. 225 Tenn. 519, 471 S.W.2d 944 (1971).

184. UNION CITY, TENN., CODE § 11-2003(b).

185. 225 Tenn. at 527, 471 S.W.2d at 947.

186. 204 Tenn. 522, 322 S.W.2d 219 (1959). The author was counsel for the defendant-appellee.

187. TENN. CODE ANN. §§ 59-1109 (1955) & -1113 to -1117 (Supp. 1957).

188. 204 Tenn. at 531, 322 S.W.2d at 223.

189. *Id.*, 322 S.W.2d at 222.

amounted to reviewing implicitly a debatable legislative purpose and rejecting it as illegitimate.

The court in the *Dilworth* case relied in part on *Smith v. Cahoon*,[190] a 1931 United States Supreme Court decision invalidating a Florida law[191] that required owners of commercial motor vehicles to post liability bonds or to furnish insurance policies for the protection of those injured through the negligence of the carriers. Among the exceptions were carriers engaged in transporting agricultural and seafood products. The court held that the classification was fatal to the statute because it bore no rational relation to the statutory purpose of safeguarding the public in using the highways.[192] The threat to the public safety did not vary according to the nature of the cargo of the regulated carriers.

*Smith v. Cahoon* has been criticized in a perceptive analysis[193] that may bring into question *Dilworth* and such decisions as those cited earlier invalidating agricultural exemptions to workers' compensation laws in other states. When a law is concerned with traffic safety or workers' welfare, must exceptions to its coverage be justifiable solely in those terms? The agricultural exemption involved in *Cahoon* had nothing to do with safety but obviously was designed to foster the production of farm and seafood products by relieving their transportation from the expense of a new, burdensome regulation. If government can promote particular interests by subsidies, tax advantages, or other governmental programs, it seems reasonable that the state should be able to do so by granting exemptions from regulatory measures, so long as one private interest is not favored at the expense of another. Adoption of this view would go far to prevent expansive review from threatening regulatory schemes because of their many benign exemptions, which so often are essential to obtaining legislative passage.

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190. 283 U.S. 553 (1931).

191. 1929 Fla. Laws ch. 13700, §§ 1-15.

192. 283 U.S. at 553.

193. Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205, 1225-26 (1970). For a related discussion of the difficulty of reviewing legislative classifications for rationality when multiple purposes are involved, see Note, *Legislative Purpose, Rationality, and Equal Protection*, 82 YALE L.J. 123 (1972).

The final instance of expansive judicial review in Tennessee involves taxation, not economic regulation, but it belongs in this survey as an a fortiori example of expansive judicial review for reasonableness. In *Logan's Supermarkets, Inc. v. Atkins*[194] the court considered a gross receipts tax[195] levied upon a merchant issuing trading stamps redeemable by the merchant himself but inapplicable to a merchant who issued stamps redeemable by a third party. Applying a general rule that the legislature may not exclude arbitrarily a class from the operation of a privilege tax, the court held the tax unconstitutional because of the exemption.[196] It is rare that a tax fails because of exemptions, and the logical extension of the *Logan's* decision might endanger many taxes. The court undoubtedly was influenced by the bias for one merchant over another and by the resulting competitive advantage.

These instances of expansive judicial review are impressive proof that such review is available in practice in Tennessee. They should arm any challenger of a statute on substantive due process or equal protection grounds with effective ammunition for contending that those defending statutory prohibitions or classifications, even in the economic area, must advance at least a fairly debatable showing of an actual rational basis. Considered along with the persuasive and increasing trend towards intermediate standards of review in other states, they tempt one to predict that Tennessee will join that trend.

## VI. Deferential Judicial Review in Tennessee

Despite the strength of the nine modern precedents just discussed, those seeking to uphold Tennessee legislation will also find an abundance of judicial authority for rejecting an intermediate standard of review. Much legislation has been upheld under such terms as "presumption of constitutionality," "conceivable rational basis," and "respect for legislative judgments." More importantly, the Tennessee Supreme Court has recently reiterated its adherence to the two-tiered level of review to

194. 202 Tenn. 438, 304 S.W.2d 628 (1957).
195. Act of Mar. 5, 1957, ch. 97, 1957 Tenn. Pub. Acts 321 (repealed).
196. 202 Tenn. at 445, 304 S.W.2d at 631.

which the United States Supreme Court clings as a matter of its formal equal protection analysis.

One of the most noteworthy of such cases is *McKesson & Robbins, Inc. v. Government Employees Department Store, Inc.*,[197] in which the supreme court reaffirmed its position on the constitutionality of Tennessee's Fair Trade Law.[198] The court accepted the claim that the legislative purpose was trade name protection, not price-fixing, and declined to be influenced by the fact that courts in twenty-two other states had by then invalidated similar laws. At one point Justice Burnett's opinion stated that a court should not overrule a legislative judgment of reasonableness "unless it clearly appears to us that those regulations are beyond all reasonable relation to the subject . . . as to amount to an arbitrary usurpation of power, or they are unmistakably and palpably in excess of legislative power, or they are arbitrary beyond all justice."[199]

A case comparable in its reasoning is *Cosmopolitan Life Insurance Co. v. Northington*,[200] which upheld a statutory ban[201] on burial insurance payable in kind rather than in money. Although the court adopted a deferential stance in its language, it noted the potential for abuse and overreaching in the operation of such policies because of the factual circumstances of beneficiaries at the time they are paid.

A case frequently cited for its deferential standard of review is *Ford Motor Co. v. Pace*,[202] which upheld far-reaching regulation of the contractual relationships between automobile manufacturers and dealers, including a virtual tenuring of dealers in their franchises.[203] The court considered factual material, however, and concluded that there was basis in fact for the legislative judgments. That a number of other state courts had upheld similar laws was also treated as evidence of reasonableness.[204]

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197. 211 Tenn. 494, 365 S.W.2d 890 (1963).

198. TENN. CODE ANN. § 69-201 to -205 (1955) (repealed 1975).

199. 211 Tenn. at 499, 365 S.W.2d at 892.

200. 201 Tenn. 541, 300 S.W.2d 911 (1957).

201. Act of Mar. 16, 1955, ch. 195, 1955 Tenn. Pub. Acts 740 (currently codified at TENN. CODE ANN. §§ 56-34-105 to -110 (1980)).

202. 206 Tenn. 559, 335 S.W.2d 360 (1960).

203. TENN. CODE ANN. §§ 59-1701 to -1720 (§ 59-1716 repealed 1977).

204. 206 Tenn. at 572, 335 S.W.2d at 365. The states of Wisconsin, Colo-

Finally, with little discussion, two minor provisions of the complex law were held to be unconstitutional, both apparently being viewed as arbitrary and capricious.[205] The case easily can be reconciled with intermediate review.

Often cited as an example of the application of the conceivable rational basis test for denials of equal protection is *Estrin v. Moss*,[206] which upheld more burdensome regulation[207] of termite exterminators than was applied to other pest control operators. Since the statute treated all termite exterminators alike, however, it was viewed as not involving a discriminatory classification to be subjected to any test. Furthermore, the statute did not involve the favoring of one competitor over another and thus did not implicate one of the underlying equal protection values identified earlier in this Article.

The *Estrin* opinion also considered a substantive due process objection to occupational licensing, of the sort sustained in earlier cases on watchmaking[208] and bookkeeping.[209] Only *Livesay* was discussed, and it was distinguished with the observation that termite eradication and watchmaking are not analogous in their relation to the public welfare.[210]

Other licensing cases have been decided uniformly in favor of the regulations. There are decisions upholding licensing of electricians,[211] opticians,[212] surveyors,[213] and electrologists.[214] In

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rado, Virginia, Florida, Oklahoma, South Dakota, Michigan, Ohio, Mississippi, and Arkansas have related acts. *Id.*, 335 S.W.2d at 365.

205. *Id.* at 580, 335 S.W.2d at 369.

206. 221 Tenn. 657, 430 S.W.2d 345 (1968).

207. TENN. CODE. ANN. §§ 43-609 to -618 (1964) (repealed 1972).

208. Livesay v. Tennessee Bd. of Examiners in Watchmaking, 204 Tenn. 500, 322 S.W.2d 209 (1949).

209. State v. Bookkeepers Business Serv. Co., 53 Tenn. App. 350, 382 S.W.2d 559 (1964).

210. 221 Tenn. at 667-68, 430 S.W.2d at 350.

211. Hughes v. Board of Comm'rs, 204 Tenn. 298, 319 S.W.2d 481 (1958).

212. Tennessee Bd. of Dispensing Opticians v. Eyear Corp., 218 Tenn. 60, 400 S.W.2d 734 (1966).

213. Chapdelaine v. Tennessee State Bd. of Examiners for Land Surveyors, 541 S.W.2d 786 (Tenn. 1976). *See also* 543 S.W.2d 60 (Fones, J., dissenting).

214. Kree Inst. of Electrolysis, Inc. v. State Bd. of Electrolysis Examiners, 549 S.W.2d 158 (Tenn. 1977). Electrolysis is the removal of human hair by

all these cases, however, the court acted upon a record or common knowledge of facts which supported the public's interest in being protected from persons unqualified in the occupations involved. For instance, in the electrolysis case, the court relied on evidence advanced by the state licensing board that minimal instruction and training are essential to the proper practice of electrology.[215] In the surveying case the court noted its knowledge from experience that substantial litigation is engendered because of inaccurate and improper surveys.[216]

The most significant recent case in which the Supreme Court of Tennessee has considered the scope of judicial review in this area is *Harrison v. Schrader*,[217] which upheld shortened statutes of limitations[218] for medical malpractice actions and which aligned Tennessee against previously mentioned state courts which have invalidated such measures under intermediate standards of review. The court restated the conceivable rational basis test and relied on some of the United States Supreme Court decisions[219] in which it has used that test to abdicate meaningful judicial review in this area. The court, however, took notice of the burgeoning crisis in medical malpractice and considered strong factual justifications for measures reasonably designed to hold down the cost of medical care.[220] Deferential review was therefore not essential to the holding in *Harrison*. It might well have been reached under an intermediate standard.

In another recent case the court has indicated its adherence to the United States Supreme Court's two-tiered review in equal protection matters. *City of Memphis v. International Brother-*

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use of electricity and needles.

215. *Id.* at 161. The court also noted the more extensive training and apprenticeships required by the state for licensing of barbers and, by a fortiori reasoning, relied on State *ex rel.* Melton v. Nolan, 161 Tenn. 293, 30 S.W.2d 601 (1930), the case upholding licensure of barbers.

216. 541 S.W.2d at 788.

217. 569 S.W.2d 822 (Tenn. 1978).

218. TENN. CODE ANN. § 23-3415(a) (Supp. 1977)

219. Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307 (1976); Dandridge v. Williams, 397 U.S. 471 (1970); McGowan v. Maryland, 366 U.S. 420 (1961).

220. 569 S.W.2d at 826-27.

*hood of Electrical Workers*[221] upheld a requirement that city employees reside within Shelby County. The court noted that the highest level of review—strict scrutiny—is required by the United States Supreme Court only for suspect classifications and those classifications affecting a fundamental right.[222] Since neither element was present, the court tested only for a "rational basis," but did not use the term "conceivable." Several actual factual bases were set forth; again, it is believed that the result could have been the same under an intermediate standard.

The Supreme Court of Tennessee has employed deferential review to uphold few, if any, economic regulations that would not have been upheld under an intermediate standard. None of the opinions indicates that recent developments in other states favoring intermediate review have been brought to the attention of Tennessee courts. The standard has not been rejected expressly, and it would be easy to reconcile the standard with the results of the great majority of Tennessee precedents. The way is thus open for the court to join other states including Alaska, California, Michigan, Wisconsin, and Pennsylvania in adopting an intermediate standard of review.[223]

In every instance in which the Tennesee Supreme Court has stated a deferential standard of review in upholding a regulation, it expressly or intuitively has satisfied itself that it was not flying into the face of reality by acting on fictionalized or imagined factual assumptions. One of the justices personally stated to the author concerning the electrolysis licensing decision[224] that "[t]hose folks [referring to the licensing board] made a pretty good case."[225]

Whatever the formal standard of review, it can be expected that the individual justices of the Supreme Court of Tennessee

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221. 545 S.W.2d 98 (Tenn. 1976).

222. *Id.* at 102.

223. This intermediate standard of review stops considerably short of the judicial activism, or Lochnerism, still found in some decisions from such states as Alabama, Georgia, Nebraska, and North Carolina.

224. Kree Inst. of Electrolysis, Inc. v. State Bd. of Electrolysis Examiners, 549 S.W.2d 158 (Tenn. 1977).

225. Conversation with the late Justice Joseph W. Henry, Tennessee Supreme Court, in Knoxville, Tennessee (Mar. 1980).

will continue to require that supporters of a regulation make "a pretty good case."

# ATTORNEYS' LIABILITY FOR ERRORS OF JUDGMENT— AT THE CROSSROADS†

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## I. INTRODUCTION

The professional is distinguished from other skilled and knowledgeable individuals because his undertakings usually require judgmental decisions to resolve issues that are unsettled and subject to disagreement among the most learned. Of all professionals, lawyers are the most vulnerable to an error disclosed by reflection in hindsight, and the essence of the legal system portends a high frequency of errors. Unlike any other profession, the practice of law often involves a process by which attorneys must take positions inconsistent with those of their client's adversaries, antagonists, or competitors. In most cases only one side will prevail.

This vulnerability is not limited to the advocate, for even the adviser must face the reality that law is not an exact science. What an attorney thinks the law is today may not be what a court decides tomorrow. A court once commented that for an attorney to be able to guarantee that no judge would ever disagree with his judgment, the attorney would have to equip his library with a crystal ball.[1] It is unfair to subject attorneys to liability because judges, who are only lawyers having the additional responsibility of declaring the law,[2] disagree with the attorney's position. Even judges concede that the infallibility of their opinions depends solely upon the finality of their rulings.[3]

The rule that an attorney is not liable for an error of judgment on an unsettled proposition of law is universally recognized[4] and has developed concurrently with the concept of legal

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1. Denzer v. Rouse, 48 Wis. 2d 528, 180 N.W.2d 521 (1970).
2. Bowman v. Tallman, 40 How. Pr. 1 (N.Y. 1869).
3. People v. Clerk, 109 Cal. App. 3d 88, 167 Cal. Rptr. 51 (1980).
4. *E.g.*, U.S. — Savings Bank v. Ward, 100 U.S. 195 (1879); Woodruff v. Tomlin, 616 F.2d 424 (6th Cir. 1980); Mazer v. Security Ins. Group, 368 F. Supp. 418 (E.D. Pa. 1973), *aff'd*, 507 F.2d 1338 (3d Cir. 1975); Leighton v. New York, S. & W. R.R., 303 F. Supp. 599 (S.D.N.Y. 1969); Eberhardt v. Harkless, 115 F. 816 (W.D. Mo. 1902). Ala. — Pearson v. Darrington, 32 Ala. 227 (1858); Goodman & Mitchell v. Walker, 30 Ala. 482 (1857). Ariz. — Martin v. Burns, 102 Ariz. 341, 429 P.2d 660 (1967); Mageary v. Hoyt, 91 Ariz. 41, 369 P.2d 662 (1962); Talbot v. Schroeder, 13 Ariz. App. 230, 475 P.2d 520 (1970). Ark. — Pennington's Ex'rs v. Yell, 11 Ark. 212 (1850). Cal. — Kirsch v. Duryea, 21 Cal. 3d 303, 578 P.2d 935, 146 Cal. Rptr. 218 (1978); Smith v. Lewis, 13 Cal. 3d 349, 530 P.2d 589, 118 Cal. Rptr. 621 (1975); Lucas v. Hamm, 56 Cal. 2d 583, 364

malpractice. The rule has been applied faithfully since its incep-

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P.2d 685, 15 Cal. Rptr. 821 (1961), *cert. denied*, 368 U.S. 987 (1962); Hinckley v. Krug, 4 Cal. Unrep. 208, 34 P. 118 (1893); Ruchti v. Goldfein, 113 Cal. App. 3d 928, 170 Cal. Rptr. 375 (1980); Bacquet v. Livingston, 57 Cal. App. 3d 914, 129 Cal. Rptr. 514 (1976); Fazio v. Hayhurst, 247 Cal. App. 2d 200, 55 Cal. Rptr. 370 (1966); Sprague v. Morgan, 185 Cal. App. 2d 519, 8 Cal. Rptr. 347 (1960); Metzger v. Silverman, 62 Cal. App. 3d Supp. 30, 133 Cal. Rptr. 355 (1976). Ga. — Cox v. Sullivan, 7 Ga. 144 (1849); Hughes v. Malone, 146 Ga. App. 341, 247 S.E.2d 107 (1978). Ill. — Smiley v. Manchester Ins. & Indem. Co., 71 Ill. 2d 306, 375 N.E.2d 118 (1978); Stevens v. Walker & Dexter, 55 Ill. 151 (1870); Bronstein v. Kalcheim & Kalcheim, Ltd., 90 Ill. App. 3d 957, 414 N.E.2d 96 (1980); Schmidt v. Hinshaw, Culbertson, Moelmann, Hoban & Fuller, 75 Ill. App. 3d 516, 394 N.E.2d 559 (1979); Morrison & Whitlock v. Burnett, 56 Ill. App. 129 (1894). Ind. — Citizens' Loan, Fund & Sav. Ass'n v. Friedley, 123 Ind. 143, 23 N.E. 1075 (1890); United States Mortgage Co. v. Henderson, 111 Ind. 24, 12 N.E. 88 (1886); Hillegass v. Bender, 78 Ind. 225 (1881). Kan. — Haverty v. Haverty, 35 Kan. 438, 11 P. 364 (1886). Ky. — Humboldt Bldg. Ass'n Co. v. Ducker's Ex'x, 111 Ky. 759, 64 S.W. 671 (1901). La. — Ramp v. St. Paul Fire & Marine Ins. Co., 263 La. 774, 269 So. 2d 239 (1972); Breedlove v. Turner, 9 Mart. (o.s.) 353 (La. 1821). Mass. — Varnum v. Martin, 32 Mass. (15 Pick.) 440 (1834); Dearborn v. Dearborn, 15 Mass. 301 (1818); Gilbert v. Williams, 8 Mass. 51 (1811). Mich. — Babbitt v. Bumpus, 73 Mich. 331, 41 N.W. 417 (1889); Coats v. Bussard, 94 Mich. App. 558, 288 N.W.2d 651 (1980). Minn. — Togstad v. Vesely, Otto, Miller & Keefe, 291 N.W.2d 686 (Minn. 1980); Meagher v. Kavli, 256 Minn. 54, 97 N.W.2d 370 (1959). Mo. — Gabbert & Mitchell v. Evans, 184 Mo. App. 283, 166 S.W. 635 (1914). N.J. — Morris v. Muller, 113 N.J.L. 46, 172 A. 63 (1934); Hopper v. Gurtman, 17 N.J. Misc. 289, 8 A.2d 376 (1939). N.M. — George v. Caton, 93 N.M. 370, 600 P.2d 822 (N.M. Ct. App.), *cert. denied*, 93 N.M. 172, 598 P.2d 215 (1979). N.Y. — Farr v. Newman, 14 N.Y.2d 183, 199 N.E.2d 369, 250 N.Y.S.2d 272 (1964); Gimbel v. Waldman, 193 Misc. 758, 84 N.Y.S.2d 888 (1943); Patterson v. Powell, 31 Misc. 250, 64 N.Y.S. 43 (1900); Bowman v. Tallman, 40 How. Pr. 1 (N.Y. 1869). N.C. — Hodges v. Carter, 239 N.C. 517, 80 S.E.2d 144 (1954). Okla. — Collins v. Wanner, 382 P.2d 105 (Okla. 1963). Pa. — Enterline v. Miller, 27 Pa. Super. Ct. 463 (1905); Meredith v. Woodward, 16 Wkly. Notes Cas. 146 (Pa. C.P. 1885). R.I. — Holmes v. Peck, 1 R.I. 242 (1849). Tenn. — Bills v. Polk, 72 Tenn. (4 Lea) 364 (1880); Stricklan v. Koella, 546 S.W.2d 810 (Tenn. Ct. App. 1976), *cert. denied, id.* (Tenn. 1977); Hill v. Mynatt, 59 S.W. 163 (Tenn. Ch. App. 1900); Scott & Co. v. Hughes, 35 S.W. 1092 (Tenn. Ch. App. 1895). Tex. — Morgan v. Giddings, 1 S.W. 369 (Tex. 1886); Morrill v. Graham, 27 Tex. 646 (1864), Medrano v. Miller, 608 S.W.2d 781 (Tex. Civ. App. 1980). Wash. — Cook, Flanagan & Berst v. Clausing, 73 Wash. 2d 393, 438 P.2d 865 (1968). Wis. — Denzer v. Rouse, 48 Wis. 2d 528, 180 N.W.2d 521 (1970); Malone v. Gerth, 100 Wis. 166, 75 N.W. 972 (1898). Eng. — Kemp v. Burt, 110 Eng. Rep. 515 (K.B. 1833); Montriou v. Jefferys,

tion. Within the last five years the number of lawsuits against attorneys for errors of judgment has caused an unprecedented judicial examination of the rule. In some instances the protection of the rule has been supplemented, but more frequently its availability has been limited. Such encroachments affect not only the extent of an attorney's liability but also the attorney's basic ability to function. A cornerstone of the attorney-client relationship is the trust and confidence that clients place in their attorneys. This trust is based upon the belief that lawyers will exercise their honest and best judgment.

To the extent that judgmental decisions become the basis of malpractice liability, the instinct of self-protection tends to diminish candor. Few attorneys would be willing to advise conduct that could materially prejudice the client's rights even though the commensurate benefits to the client might be substantial. Although the legal professional is not likely to be reduced to an automaton, if judgmental decisions continue to form the basis for legal malpractice actions, the attorney's advice in the future may consist of caveats, disclaimers, and equivocation — not candor.

This Article traces the error of judgment rule from its origins through the rapid changes of the past few years. An analysis of the components of the rule necessarily requires an examination of the philosophical and practical foundations of the lawyer's functions. The policy considerations are examined and their consequences are discussed. The only prediction that can be made safely is that the vulnerability of lawyers to malpractice suits for judgment calls is approaching a crossroads. Neither strict liability nor complete immunity is a desirable alternative. Change is not necessarily undesirable, but the risk is that change may occur inadvertently without consideration of the issue of judgmental protection, the attendant policy considerations, and the ultimate consequences. Change will occur, but the desirability of that change should not first be evaluated in hindsight.

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172 Eng. Rep. 51 (K.B. 1825); Ireson v. Pearman, 107 Eng. Rep. 930 (K.B. 1825); Reece v. Righy, 106 Eng. Rep. 912 (K.B. 1821); Pitt v. Yalden, 98 Eng. Rep. 74 (K.B. 1767).

## II. Historical Antecedents

### A. *English Law*

The antecedent of the rule that an attorney is not liable for an error of judgment can be traced to the very origin of the concept of professional negligence in the 1767 decision of *Pitt v. Yalden*.[5] In that case, a solicitor had been employed to collect a debt. As debtors' prisons were still the rule, the lawyer succeeded in obtaining the arrest and imprisonment of the defaulting party. The attorney, however, mistakenly interpreted the relevant statute as providing two judicial terms after the time of the arrest in which to declare the debt. Moreover, the attorney was unaware of two earlier decisions holding that the term in which the arrest occurred was to be counted as one of the two terms for purposes of the applicable limitation period. As a result, the debt was discharged. The unhappy creditor then sued the attorney.

When the matter reached the House of Lords, Lord Mansfield observed that the defendant was a "country attorney" and probably unaware of the two decisions. Lord Mansfield concluded that the language of the relevant statute was unclear and reasoned that attorneys should not be liable for errors of judgment as to debatable propositions: "Not only counsel, but Judges may differ, or doubt, or take time to consider. Therefore, an attorney ought not to be liable in cases of reasonable doubt."[6] Thus the rule was established that an attorney would not be liable for an error concerning a doubtful or debatable proposition of law.[7]

The English courts also undertook to define the legal knowledge for which an attorney was responsible. In *Montriou v. Jefferys*,[8] an action for attorney's fees, Chief Justice Abbott stated, "No attorney is bound to know all the law; God forbid that it

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5. 98 Eng. Rep. 74 (K.B. 1767).

6. *Id.* at 75. *See also* Kemp v. Burt, 110 Eng. Rep. 515 (K.B. 1833) (applying the same rules where an attorney assumed that a statute would be interpreted literally rather than liberally).

7. Parker v. Rolls, 139 Eng. Rep. 284 (C.P. 1854); Baikie v. Chandless, 170 Eng. Rep. 1291 (N.P. 1811).

8. 172 Eng. Rep. 51 (K.B. 1825).

should be imagined that an attorney, or counselor, or even a Judge is bound to know all the law."[9] The issue was further refined in *Godefroy v. Dalton*,[10] which involved an error by a solicitor.

> He is liable for the consequences of ignorance or non-observance of the rules of practice of this Court; . . . Whilst on the other hand, he is not answerable for an error in judgment upon points of new occurance, or of nice or doubtful construction, or of such as are usually entrusted to men in the higher branch of professional law.[11]

Notwithstanding the development of this rule of judgmental protection, errors of inadvertence continued to be a basis of liability. Thus, going to trial without an essential witness[12] or with an erroneous description of property in a deed[13] raised issues of fact for a jury.

### *B. American Law*

The liability rules applied by American courts to a lawyer's error of judgment were influenced by English precedent.[14] Even when such precedent was not cited, logic compelled similar reasoning and conclusions.[15]

Early American decisions viewed the practice of law as a "science."[16] This science, however, often resulted in disagree-

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9. *Id.* at 52.

10. 130 Eng. Rep. 1357, 1361 (C.P. 1830).

11. *Id.* at 1361.

12. Reece v. Righy, 106 Eng. Rep. 912 (K.B. 1821).

13. Ireson v. Pearman, 107 Eng. Rep. 930 (K.B. 1825).

14. Pearson v. Darrington, 32 Ala. 227 (1858); Goodman & Mitchell v. Walker, 30 Ala. 482 (1857); Pennington's Ex'rs v. Yell, 11 Ark. 212 (1850); Citizens' Loan, Fund & Sav. Ass'n v. Friedley, 123 Ind. 143, 23 N.E. 1075 (1890); Hillegass v. Bender, 78 Ind. 225 (1881); Varnum v. Martin, 32 Mass. (15 Pick.) 440 (1834); Dearborn v. Dearborn, 15 Mass. 301 (1818); Gilbert v. Williams, 8 Mass. 51 (1811); Bowman v. Tallman, 40 How. Pr. 1 (N.Y. 1869). *Cf.* Watson v. Muirhead, 57 Pa. 161 (1868) (rule of liability for error of judgment for a conveyancer same as for attorney).

15. Morrison & Whitlock v. Burnett, 56 Ill. App. 129 (1894); United States Mortgage Co. v. Henderson, 111 Ind. 24, 12 N.E. 88 (1886); Breedlove v. Turner, 9 Mart. (o.s.) 353 (La. 1821).

16. Goodman & Mitchell v. Walker, 30 Ala. 482, 495 (1857); Citizens'

ments among the most learned in the profession despite the pains taken to arrive at the correct result.[17] These concepts were carefully refined and eloquently restated almost a century ago by the Indiana Supreme Court when it observed, "There is no obtainable degree of skill or excellence at which all differences of opinion or doubts in respect to questions of law are removed from the minds of lawyers and judges. Absolute certainty is not always possible."[18]

The attorney's error of judgment was usually disclosed only when a judge expressed a contrary opinion.[19] The role of the judiciary in determining the status of the law is such that it has been held that a lawyer cannot be charged with malpractice for failing to appeal from a judge's ruling even though subsequent decisions demonstrate that the judge's decision was erroneous.[20] Underlying the lawyer's protection for an error of judgment, however, was the reality that judges were not infallible because of their skills but only because of their finality.[21]

## III. Required Knowledge

### *A. Settled Propositions*

The basis of judgmental protection is the nearly absolute responsibility of attorneys to educate themselves about general laws, statutes, and legal propositions that are considered well defined. This aspect of a lawyer's judgment has been characterized as merely "clerical or mechanical" since ignorance of such general legal principles is inexcusable.[22]

There are, however, several predicates to this responsibility. First, the legal proposition must be one that is considered

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Loan, Fund & Sav. Ass'n v. Friedley, 123 Ind. 143, 145, 23 N.E. 1075, 1075 (1890); Breedlove v. Turner, 9 Mart. (o.s.) 353, 375 (La. 1821).

17. Citizens' Loan, Fund & Sav. Ass'n v. Friedley, 123 Ind. 143, 23 N.E. 1075 (1890); Breedlove v. Turner, 9 Mart. (o.s.) 353 (La. 1821).

18. 123 Ind. at 145-46, 23 N.E. at 1075 (1890).

19. Bowman v. Tallman, 40 How. Pr. 1 (N.Y. 1869).

20. Pearson v. Darrington, 32 Ala. 227 (1858).

21. People v. Clark, 109 Cal. App. 3d 88, 92, 167 Cal. Rptr. 51, 54 (1980).

22. Von Wallhoffen v. Newcombe, 17 Sup. Ct. (10 Hun.) 236, 240 (N.Y. Sup. Ct. 1877).

clearly defined.[23] Second, the law should be published so that it may be known generally to the profession.[24] Such laws include established principles found in textbooks,[25] published decisions of the courts,[26] and advance sheets.[27] It also has been suggested that attorneys should keep up with the general literature in the profession.[28]

The same predicates apply to statutes, regulations, and rules. An attorney should know the procedural rules of the courts in which he practices[29] as well as the duties and functions of the clerks and administrative officers.[30] An attorney must also know principles of pleading.[31] Similarly, the attorney must be familiar with the jurisdiction's statutes[32] and its periodic revi-

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23. Ariz. — Martin v. Burns, 102 Ariz. 341, 429 P.2d 660 (1967). Cal. — Smith v. Lewis, 13 Cal. 3d 349, 530 P.2d 589, 118 Cal. Rptr. 621 (1975); Lucas v. Hamm, 56 Cal. 2d 583, 364 P.2d 685, 15 Cal. Rptr. 821 (1961), *cert. denied*, 368 U.S. 987 (1962); Bucquet v. Livingston, 57 Cal. App. 3d 914, 129 Cal. Rptr. 514 (1976); Metzger v. Silverman, 62 Cal. App. 3d Supp. 30, 133 Cal. Rptr. 355 (1976); Sprague v. Morgan, 185 Cal. App. 2d 519, 8 Cal. Rptr. 347 (1960). Ga. — Berman v. Rubin, 138 Ga. App. 849, 227 S.E.2d 802 (1976). Ind. — Hillegass v. Bender, 78 Ind. 255 (1881). N.M. — George v. Caton, 93 N.M. 370, 600 P.2d 822 (Ct. App.), *cert. denied*, 93 N.M. 172, 598 P.2d 515 (1979).

24. Goodman & Mitchell v. Walker, 30 Ala. 482 (1858); Citizens' Loan, Fund & Sav. Ass'n v. Friedley, 123 Ind. 143, 23 N.E. 1075 (1890); *In re* A.B., 1 Tuck. 247 (N.Y. Sur. Ct. 1866); Hill v. Mynatt, 59 S.W. 163 (Tenn. Ch. App. 1900).

25. Smith v. Lewis, 13 Cal. 3d 349, 530 P.2d 589, 118 Cal. Rptr. 621 (1975); Citizens' Loan, Fund & Sav. Ass'n v. Friedley, 123 Ind. 143, 23 N.E. 1075 (1890); Hill v. Mynatt, 59 S.W. 163 (Tenn. Ch. App. 1900).

26. 123 Ind. at 143, 23 N.E. at 1075 (1890).

27. Boss-Harrison Hotel Co. v. Barnard, 148 Ind. App. 406, 266 N.E.2d 810 (1971).

28. Hill v. Mynatt, 59 S.W. 163 (Tenn. Ch. App. 1900).

29. Citizens' Loan, Fund & Sav. Ass'n v. Friedley, 123 Ind. 143, 23 N.E. 1075 (1890); Hillegass v. Bender, 78 Ind. 225 (1881); Mich. Cent. R.R. v. Morgan, 227 Mich. 491, 198 N.W. 967 (1924); *In re* Woods, 158 Tenn. 383, 13 S.W.2d 800 (1929).

30. Hillegass v. Bender, 78 Ind. 225 (1881).

31. Citizens' Loan, Fund & Sav. Ass'n v. Friedley, 123 Ind. 143, 23 N.E. 1075 (1890); Hillegass v. Bender, 78 Ind. 225 (1881).

32. W.L. Douglas Shoe Co. v. Rollwage, 187 Ark. 1084, 63 S.W.2d 841 (1933); Jones v. White, 90 Ind. 255 (1883); Hillegass v. Bender, 78 Ind. 225 (1881); Parker-Smith v. Prince Mfg. Co., 172 A.D. 302, 158 N.Y.S. 346 (1916); *In re* Woods, 158 Tenn. 383, 13 S.W.2d 800 (1929).

sions.[33] The need to watch for legislative changes was recognized more than a century ago by a New York court.[34]

### B. *Foreign Law*

The attorney's knowledge cannot always be limited to legal principles of the jurisdiction in which he practices. In a modern society of instantaneous communication and exceedingly rapid transportation, attorneys commonly represent clients whose business operations or legal needs have consequences in other jurisdictions. Although attorneys generally are not educated in the laws of other jurisdictions, the modern view, in accordance with the reality of the practice of law, is that an attorney must possess and exercise the skill and knowledge necessary for the task. This includes knowledge of those laws of any jurisdiction that is material to the transaction.

The present responsibility of attorneys to know foreign law represents a significant evolutionary change. Historically, a determination of the laws of a sister state raised a question of fact for a judge or jury. A court that took judicial notice of the law of a foreign jurisdiction and so instructed a jury committed reversible error.[35] An early case in the historical development of this area was the 1882 New Jersey decision of *Fenaille & Despeaux v. Coudert*,[36] which concerned the responsibilities of a New York attorney to know New Jersey law. The attorney had prepared contracts for the erection of a building in New Jersey but had not filed those documents. Consequently the building was subjected to mechanics' liens. The court concluded that the attorneys only held themselves out to have the skill and knowledge of attorneys practicing in New York: "As attorneys of New York,

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33. *In re* A.B., 1 Tuck. 247 (Sur. Ct. N.Y. County 1866).

34. The error arose from the want of diligent watchfullness in respect to legislative changes. He did not remember that it might be necessary to look at the statutes of the year before. Perhaps he had forgotten the saying that "no man's life, liberty or property are safe while the Legislature is in session."

1 Tuck. at 249 (Sur. Ct. N.Y. County 1866).

35. Brackett v. Norton, 4 Conn. 517 (1823).

36. 4 N.J.L. 286 (1882).

they are not presumed to know the laws of a foreign state."[37] Thus, it was the client's responsibility to ensure that the transaction was reviewed by attorneys in each state in which it could have legal effects.

A New York court, in a factual context almost identical to *Fenaille & Despeaux*, examined the responsibilities of New York attorneys when handling transactions with legal effects in New Jersey and reached a different result. In *Degen v. Steinbrink*[38] the lawyer drafted a mortgage on property located in New Jersey, but since the lawyer failed to comply with the statutory requirements in that state, the client lost priority to other creditors. The court emphasized that the very purpose of the legal retention was to prepare a valid and effective security interest. The law involved was statutory, which according to the court every lawyer should know varies from state to state. The court noted the importance of the New York legal community[39] and concluded that a New York attorney who undertakes a legal task must possess or acquire the legal knowledge to do so.

Today,[40] the predominant view is that an attorney must

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37. *Id.* at 291.

38. 202 A.D. 477, 195 N.Y.S. 810 (1922), *aff'd*, 236 N.Y. 669, 142 N.E. 328 (1923).

39. It would be a very dangerous precedent to adopt in this State, where by reason of its being the financial center of the Union, members of the bar are called upon to advise as to large loans, and to draft instruments securing such loans, that must be filed or recorded in other States, that attorneys could escape liability for unskillful and negligent work, which had rendered the securities worthless, and could shield themselves behind the plea, "I am a New York lawyer; I am not presumed to know the law of any other State." If the attorney is not competent to skillfully and properly perform the work, he should not undertake the service. The defendants were not employed to prepare instruments that might be filed with officials, but such instruments that when so filed would be legally binding and effective for the purpose contemplated.

202 A.D. at 481, 195 N.Y.S. at 814.

40. Both judicial decisions and legislative actions have brought about a marked reversal in the attitude toward a lawyer's responsibility to know foreign law. In 1936 the National Conference of Commissioners on Uniform State Laws adopted the Judicial Notice of Foreign Law Act, which provides that a judge shall take judicial notice of the common law of each state, territory, and other jurisdictions of the United States. Annot., 23 A.L.R.2d 143 (1952). That

know the laws of other jurisdictions that are necessary to effect the client's representation.[41] Under such circumstances, economics and prudence present the attorney and the client with several alternatives. The legal issue may be so uncomplicated that the attorney can gain the requisite knowledge by research and investigation. Alternatively, it may be desirable to engage local counsel in the particular jurisdiction or to refer that portion of the client's representation to other counsel more knowledgeable in the applicable foreign law.

### *C. Research and Investigation*

Although attorneys are obligated to know those principles that are considered settled and known generally to the profession, the reality is that no attorney has instantaneous recall of all such knowledge. Not even the most competent specialist can recite all propositions that are deemed settled within his particular field.

Legal knowledge consists of both present recollection and the added awareness gained from research. Only if a lawyer has had an opportunity to research the law is it fair to hold him responsible for knowledge of particular settled principles. Even then, however, a lawyer is not necessarily negligent when his research fails to disclose all authorities on a subject.[42] The exercise of ordinary skill and knowledge is all that is demanded. One court has held that an attorney cannot be required to know perfectly any area of the law, especially when asked to act at once without the benefit of time for research.[43] The attorney may also be permitted the human frailty of an imperfect memory; otherwise, as one court stated, "No one . . . would dare to pursue the profession, if he was held responsible for the consequences of a

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Act and others modeled after it, *see* CAL. EVID. CODE § 452 (West 1966), state the prevailing rule.

41. Rekeweg v. Federal Mut. Ins. Co., 27 F.R.D. 431 (N.D. Ind. 1961) (Indiana attorney had to know Oklahoma law which barred client's claim); *In re* Roel, 3 N.Y.2d 224, 144 N.E.2d 24, 165 N.Y.S.2d 31 (1957), *appeal dismissed*, 355 U.S. 604 (1958); Degen v. Steinbrink, 202 A.D. 477, 195 N.Y.S. 810 (1922), *aff'd*, 236 N.Y. 669, 142 N.E. 328 (1923).

42. Mecartney v. Wallace, 214 Ill. App. 618 (1919).

43. Breedlove v. Turner, 9 Mart. (o.s.) 353 (La. 1821).

casual failure of his memory, or a mistaken course of reasoning."[44]

An attorney's knowledge must be maintained by such research and investigation as is required to determine those principles necessary to resolve the client's problems.[45] In fact, recent decisions indicate that the historical limitation to those principles "well known" to the profession may no longer be valid because of the sophisticated research skills of the modern attorney.[46] Thus, the knowledge possessed by well-informed attorneys should include those additional principles that, even though not commonly known, readily may be found by standard research techniques.[47]

If the law is truly debatable or unsettled, research will not necessarily lead an attorney to a correct conclusion. When differing views are acceptable, hindsight may be the only reliable standard. It is not surprising that for hundreds of years no court ever suggested that an attorney could be liable for failing to research an area that would not necessarily yield correct answers.

This remained the general law until 1975 when the California Supreme Court in *Smith v. Lewis*[48] reviewed a judgment against a lawyer who had misadvised a client on an unsettled area of the law. The attorney, representing his client in a divorce proceeding, assumed that she could have no community property interest in her husband's retirement benefits in a federal pension. He neither discussed the issue with her nor conducted any legal research. Although the court found to be settled the law that retirement benefits were community property,[49] it agreed with the defendant that the issue whether a federal pension could be treated as an ordinary retirement benefit was one

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44. *Id.*

45. *See* Citizens' Loan, Fund & Sav. Ass'n v. Friedley, 123 Ind. 143, 23 N.E. 1075 (1890).

46. Smith v. Lewis, 13 Cal. 3d 349, 530 P.2d 589, 118 Cal. Rptr. 621 (1975); Metzger v. Silverman, 62 Cal. App. 3d Supp. 30, 133 Cal. Rptr. 355 (1976).

47. 13 Cal. 3d at 349, 530 P.2d at 589, 118 Cal. Rptr. at 621 (1975); 62 Cal. App. 3d at 30, 133 Cal. Rptr. at 355 (1976).

48. 13 Cal. 3d 349, 530 P.2d 589, 118 Cal. Rptr. 621 (1975).

49. *Id.* at 355, 530 P.2d at 593, 118 Cal. Rptr. at 625.

upon which reasonable lawyers could differ.[50] The court, however, concluded that the defendant was entitled to neither a nonsuit nor a jury instruction that an attorney "is not liable for being in error as to a question of law where reasonable doubt may be entertained by well informed lawyers."[51]

In reaffirming the rule that a lawyer is not responsible for failing to anticipate the manner in which legal uncertainties will be resolved, the court emphasized that the basis of judgmental protection is that the attorney exercise judgment.[52] The attorney's liability was not based upon the fact of his error, but rather upon his failure to conduct any reasonable research on an issue so important to the client's representation.

The duty to research and investigate doubtful propositions is not limited to questions of law. In 1976 a Florida court of appeals in *Dillard Smith Construction Co. v. Greene*[53] applied the same reasoning to an action against an attorney who advised a client regarding a contract that the attorney had not read. This omission, said the court, could be a basis of liability even though reasonably careful lawyers reading the same document would have given the same advice.[54] In matters requiring the exercise of judgment the client is entitled to the advice that results from an informed judgment.

In the following years, American courts accepted the proposition that even on doubtful matters attorneys are expected to perform sufficient research to enable them to make an intelligent and informed judgment on behalf of their clients.[55] Before judgmental protection will be afforded, the attorney must first exercise judgment. Few would disagree that the rule is appropri-

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50. *Id.* at 357, 530 P.2d at 594, 118 Cal. Rptr. at 626.

51. *Id.* at 360, 530 P.2d at 605, 118 Cal. Rptr. at 628.

52. *Id.* at 358-59, 530 P.2d at 595, 118 Cal. Rptr. at 627.

53. 337 So. 2d 841 (Fla. Dist. Ct. App. 1976).

54. *Id.* at 843.

55. Cal. — Smith v. Lewis, 13 Cal. 3d 349, 530 P.2d 589, 118 Cal. Rptr. 621 (1975); Horne v. Peckham, 97 Cal. App. 3d 404, 158 Cal. Rptr. 714 (1979); Metzger v. Silverman, 62 Cal. App. 3d Supp. 30, 133 Cal. Rptr. 355 (1976). Fla. — Dillard Smith Constr. Co. v. Greene, 337 So. 2d 841 (Fla. Dist. Ct. App. 1976). Minn. — Togstad v. Vesely, Otto, Miller & Keefe, 291 N.W.2d 686 (Minn. 1980). N.M. — George v. Caton, 93 N.M. 370, 600 P.2d 822 (Ct. App.), *cert. denied,* 93 N.M. 172, 598 P.2d 215 (1979).

ate when the attorney affirmatively recognizes that the law is not settled or that the proposition is doubtful. Research and investigation is then a predicate of competency, even though the correct answer may not be found.

## IV. Determining the Status of a Legal Proposition

### A. *Introduction*

Implicit in the immunity afforded attorneys for their exercise of judgment on debatable or unsettled points of law is the recognition that an attorney is not required to anticipate correctly the view the courts ultimately may embrace.[56] An attorney is not negligent because he advocates a different view of the law than that ultimately adopted.[57]

In examining an attorney's immunity for a judgmental error, the courts have inquired whether the particular legal principle was uncertain, unsettled, doubtful, or debatable. Although the use of such terms is common, neither their meaning nor their logical interrelation has been subjected to judicial analysis. The words have special significance and are interrelated. An examination of that relationship is a study of the very process through which the law develops.

Despite recognition of the rule that an attorney is not liable for an error of judgment on an unsettled proposition, there appears to be almost no judicial discussion of the manner in which the status of a proposition is determined. Notwithstanding the lack of discussion of the methodology, the reported decisions generally have treated the question as an issue of law for the court,[58] although this proposition has been stated explicitly only

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56. Ahlhauser v. Butler, 5 F. 121 (E.D. Wis. 1893), *aff'd*, 63 F. 792 (7th Cir. 1894); Martin v. Burns, 102 Ariz. 341, 429 P.2d 660 (1967); Bowman v. Tallman, 40 How. Pr. 1 (N.Y. 1869); Patterson v. Powell, 31 Misc. 250, 64 N.Y.S. 43 (Sup. Ct. App. Term 1900); Hodges v. Carter, 239 N.C. 517, 80 S.E.2d 144 (1954); Hill v. Mynatt, 59 S.W. 163 (Tenn. Ch. App. 1900).

57. Patterson v. Powell, 31 Misc. 250, 64 N.Y.S. 43 (Sup. Ct. App. Term 1900).

58. U.S. — Woodruff v. Tomlin, 616 F.2d 914 (6th Cir. 1980); Eberhardt v. Harkless, 115 F. 816 (W.D. Mo. 1902). Ariz. — Martin v. Burns, 102 Ariz. 341, 429 P.2d 660 (1967). Cal. — Smith v. Lewis, 13 Cal. 3d 349, 530 P.2d 589, 118 Cal. Rptr. 621 (1975); Lucas v. Hamm, 56 Cal. 2d 583, 364 P.2d 685, 15

occasionally.[59] This approach is consistent with the rule regarding whether the lawyer erred as an issue of law.[60] Various criteria have been used by the courts to determine the nature of a legal proposition. A commonly quoted view is that there is no liability for a judgmental error regarding a proposition of law "which has not been settled by the court of last resort in the State and on which reasonable doubt may be entertained by well-informed lawyers."[61]

Difficulty arises, however, in determining the status of the law. Often the uncertainty can be established conclusively by published disagreement among the judges of the state's highest court or among the decisions of the state's intermediate courts.[62] A dissent in a decision which "clarified" the law is evidence of

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Cal. Rptr. 821 (1961); Horne v. Peckham, 97 Cal. App. 3d 404, 158 Cal. Rptr. 714 (1979); Sprague v. Morgan, 185 Cal. App. 2d 519, 8 Cal. Rptr. 347 (1960). Fla. — Dillard Smith Constr. Co. v. Greene, 337 So. 2d 841 (Fla. Dist. Ct. App. 1976). Ill. — Morrison & Whitlock v. Burnett, 56 Ill. App. 129 (1894). Ind. — Citizens' Loan, Fund & Sav. Ass'n v. Friedley, 123 Ind. 143, 23 N.E. 1075 (1890). La. — Breedlove v. Turner, 9 Mart. (o.s.) 353 (La. 1821). Mich. — Babbitt v. Bumpus, 73 Mich. 331, 41 N.W. 417 (1889). Minn. — Meagher v. Kavli, 256 Minn. 54, 97 N.W.2d 370 (1959). N.J. — Fenaille & Despeaux v. Coudert, 44 N.J.L. 286 (1882). N.M. — George v. Caton, 93 N.M. 370, 600 P.2d 822 (Ct. App.), *cert. denied*, 93 N.M. 172, 598 P.2d 215 (1979). N.Y. — Farr v. Newman, 14 N.Y.2d 183, 199 N.E.2d 369, 250 N.Y.S.2d 272 (1964); Gimbel v. Waldman, 193 Misc. 758, 84 N.Y.S.2d 888 (1948); Bowman v. Tallman, 27 How. Pr. 212 (N.Y. Super. Ct. 1864), *aff'd*, 40 How. Pr. 1 (N.Y. 1869). N.C. — Hodges v. Carter, 239 N.C. 517, 80 S.E.2d 144 (1954). Okla. — Allred v. Rabon, 572 P.2d 979 (Okla. 1977); Collins v. Wanner, 382 P.2d 105 (Okla. 1963). Tenn. — Stricklan v. Koella, 546 S.W.2d 810 (Tenn. Ct. App. 1976), *cert. denied, id.* (Tenn. 1977); Hill v. Mynatt, 59 S.W. 163 (Tenn. Ch. App. 1900). Tex. — Morrill v. Graham, 27 Tex. 646 (1864).

59. Gimbel v. Waldman, 193 Misc. 758, 84 N.Y.S.2d 888 (1948).

60. *See* R. MALLEN & V. LEVIT, LEGAL MALPRACTICE § 418 (1977).

61. Martin v. Burns, 102 Ariz. 341, 344, 429 P.2d 660, 662 (1967); Meagher v. Kavli, 256 Minn. 54, 60-61, 97 N.W.2d 370, 375 (1959); Allred v. Rabon, 572 P.2d 979, 981 (Okla. 1977); Collins v. Wanner, 382 P.2d 105, 108 (Okla. 1963); Hodges v. Carter, 239 N.C. 517, 520, 80 S.E.2d 144, 146 (1954).

62. Breedlove v. Turner, 9 Mart. (o.s.) 353 (La. 1821); Meagher v. Kavli, 256 Minn. 54, 97 N.W.2d 370 (1959); Farr v. Newman, 14 N.Y.2d 183, 199 N.E.2d 369, 250 N.Y.S.2d 272 (1964); Patterson v. Powell, 31 Misc. 250, 64 N.Y.S. 43 (1900); Bowman v. Tallman, 40 How. Pr. 1 (N.Y. 1869); Collins v. Wanner, 382 P.2d 105 (Okla. 1963); Morrill v. Graham, 27 Tex. 646 (1864).

the debatable nature of the proposition.[63] Over a century ago a New York court recognized that it would be a most oppressive burden to impose liability for taking a position on an unsettled proposition which would require the lawyer to be wiser and more skillful than those who have the duty to declare the law.[64]

When the issue has not yet reached the state's courts, the inquiry is simply whether the attorney's position is reasonable. The answer usually is determined by examining whether his opinion falls within the spectrum of views expressed by ordinary members of the profession.[65] A dispute among the adverse parties' expert witnesses in a legal malpractice case may itself be persuasive evidence that the proposition involved is unsettled.[66]

The spectrum begins with those propositions of law that have the *appearance* of being settled but which in reality are not settled. Indicia then appear of what the law may be or doubt as to what the law is, but the ultimate resolution remains uncertain. As these indicia increase and become recognized, the propositions begin to become debatable ones and attorneys begin to urge differing views. The debate then resolves into a well-defined dichotomy of diverse views similar to contrary appellate decisions. Ultimately, the debate over the proposition is concluded and the law again returns to an apparently settled condition.

### *B. Apparently Settled Propositions*

The aphorism that law is more an art than a science is illustrated best by the frequent misconception that particular legal principles are settled. The history of American jurisprudence demonstrates that legal customs, practices, or beliefs, that were

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63. Sprague v. Morgan, 185 Cal. App. 2d 519, 8 Cal. Rptr. 347 (1960); Breedlove v. Turner, 9 Mart. (o.s.) 353 (La. 1821); Collins v. Wanner, 382 P.2d 105 (Okla. 1963).

64. Bowman v. Tallman, 40 How. Pr. 1 (N.Y. 1869).

65. *E.g.*, Martin v. Burns, 102 Ariz. 341, 429 P.2d 660 (1967); Brown v. Gitlin, 19 Ill. App. 3d 1018, 313 N.E.2d 180 (1974); Bowman v. Tallman, 40 How. Pr. 1 (N.Y. 1869); Hodges v. Carter, 239 N.C. 517, 80 S.E.2d 144 (1954); Hill v. Mynatt, 59 S.W. 163 (Tenn. Ch. App. 1900); Garr, Scott & Co. v. Hughes, 35 S.W. 1092 (Tenn. Ch. App. 1895).

66. Collins v. Wanner, 382 P.2d 105 (Okla. 1963).

respected for decades suddenly have been found to be imprudent, outdated, or erroneous by a judicial decision. Thus, propositions which are unsettled as discussed in this section may include those propositions which are apparently settled. The frequency of such frustrations is well documented in American jurisprudence.

A leading and illustrative example is the 1954 North Carolina Supreme Court decision of *Hodges v. Carter*.[67] For many years, attorneys in North Carolina had commenced actions against out-of-state insurance companies by sending summonses and complaints to the state Commissioner of Insurance. After twenty years of the practice, however, a group of foreign insurance carriers challenged the authority of the Commissioner to accept service of process on their behalf.[68] After the supreme court's agreement with the insurance companies, the client sued his attorney for malpractice. The attorney ultimately prevailed when the same supreme court held that he could not be liable for following what had appeared to be the law until his error was so suddenly disclosed.[69]

In an earlier New York decision, an attorney was protected by the error of judgment rule for his failure to plead the statute of frauds as a defense to a breach of contract action.[70] At the time, the law in New York appeared to be well settled that it was not necessary to plead the statute as a defense when the existence of the contract had been denied. The court reasoned that the attorney could not be liable for the subsequent judicial reversal of a well-settled principle of pleading that had endured for more than fifty years.[71]

At about the same time, a similar judicial turnabout was experienced by Indiana attorneys. An attorney advised his client, a bank, that a mortgage executed by husband and wife on land held by them as tenants by the entirety would be valid.[72] The

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67. 239 N.C. 517, 80 S.E.2d 144 (1954).

68. *Id.* at 518, 80 S.E.2d at 145.

69. *Id.* at 520, 80 S.E.2d at 146.

70. Patterson v. Powell, 31 Misc. 250, 64 N.Y.S. 43 (Sup. Ct. App. Term 1900).

71. *Id.* at 253, 64 N.Y.S. at 46.

72. Citizens' Loan, Fund & Sav. Ass'n v. Friedley, 123 Ind. 143, 23 N.E. 1075 (1890).

Indiana Supreme Court later found the interest to be void.[73] The subsequent legal malpractice action by the bank failed when the same supreme court concluded that the attorney's mistake was obvious only when the court determined that the law was not as it had been assumed to be by the reasonably careful and prudent lawyers in the state.[74]

### C. *Uncertain Propositions*

Perhaps the most common applications of the error of judgment rule are those instances in which the absence of precedent, authoritative analysis, and meaningful debate leave the attorney with his judgment as the only reliable tool to resolve the issue. Such propositions accurately are described as "uncertain," notwithstanding the conviction of the attorney on the accuracy of his advice. The lawyer who undertakes to render advice under such circumstances is held to know what reasonably prudent lawyers should know, but he is not held to a standard of absolute perfection. The courts often have examined malpractice claims against attorneys that arise because a judgment call concerning an uncertain principle was later proved to be incorrect by a subsequent judicial decision.

One recurring problem concerns an attorney's advisory function. For example, an attorney erred in advice on the value of an estate for federal estate tax purposes.[75] The lawyer had advised his client to obtain a judgment of possession against property within the estate and that the judgment would have no effect on the ultimate determination by the Internal Revenue Service on the date the estate was to be valued. The IRS then used the date of the judgment as the valuation date, which resulted in substantially increased estate taxes because the estate property had appreciated within that time. The heirs then sued the attorney to recover the difference between the amount paid in taxes and the amount due had the judgment not been obtained. The court found that the precise question involved had

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73. *Id.* at 145, 23 N.E. at 1076.

74. *Id.*, 23 N.E. at 1075-76.

75. Smith v. St. Paul Fire & Marine Ins. Co., 344 F. Supp. 555 (M.D. La. 1972).

not been decided previously by either the IRS or by the courts.[76] The lawyer was not liable since the state of the law at the time the advice was given was uncertain.[77]

Legal uncertainty is manifested particularly in the preparation of documents and their interpretation when the precise verbiage has not been construed previously. In such a situation, courts have been cautious in imposing liability. Attorneys are not required to predict infallibly how a court will interpret documents that they have drafted. Under this reasoning an attorney was not liable for preparing an erroneous property description in a warranty deed that was construed against his client more than twenty years after the deed had been drafted.[78] Similarly, attorneys have been excused for errors in drafting court orders which are later construed adversely to the client's interest.[79]

This rule has been applied also when an attorney's conduct has been influenced by his own interpretation of the law. An attorney who chose not to file a formal claim with the executrix of a deceased defendant's estate prior to amending a complaint to add the estate as a defendant was not liable for the dismissal of his client's breach of contract suit since the law was uncertain regarding the necessity of filing such a claim.[80] In a 1967 Arizona case the issue arose when an attorney obtained an order setting aside a default judgment which had been taken against his client.[81] When the plaintiff appealed, however, the attorney failed to assert the nonappealability of the order, which resulted in the default being reinstated. The attorney was not liable for the error since the decision was one of first impression.

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76. *Id.* at 556.

77. *Id.* at 559. "The mere fact that an attorney formulates an opinion and in good faith acts upon it, and it is later found that his opinion is not affirmed by the Courts, does not require or necessarily support the conclusion that the attorney is guilty of malpractice." *Id.*

78. *See* Denzer v. Rouse, 48 Wis. 2d 528, 534, 180 N.W.2d 521, 525 (1970) (dicta).

79. Morrison & Whitlock v. Burnett, 56 Ill. App. 129 (1894).

80. Allred v. Rabon, 572 P.2d 979 (Okla. 1977).

81. Martin v. Burns, 102 Ariz. 341, 429 P.2d 660 (1967).

### *D. Uncertain but Debatable Propositions*

A proposition which is uncertain because of the lack of definitive views eventually becomes a subject of discussion in the profession. Although the debate may continue as courts reach conflicting decisions, it first manifests itself among attorneys. The ultimate resolution of the issue remains uncertain. This evolutionary step in the law—going from a truly uncertain status to a status that evokes differing views—is illustrated by legal malpractice decisions that set forth divergent testimony of the adverse parties' lawyer-experts.

The nature of propositions was initially examined by a Louisiana court almost a century ago in *Breedlove v. Turner*.[82] The attorney made a mistake when he filed the client's cause of action in the wrong court. Although the issue of jurisdiction had been considered in a prior decision, the court's statements were dictum,[83] and were ignored not only by the defendant but also by many members of the bar. The court observed that except for this dictum the proposition was uncertain and doubtful.[84] Finally, the court noted that in the very decision that finally settled the issue, a learned judge dissented from the opinion of the majority.[85] These criteria justified judgmental protection.

A more modern illustration of uncertain but debatable propositions is the 1974 Illinois decision of *Brown v. Gitlin*.[86] The attorney failed to register under the state's blue sky laws the sale by one owner to the only other owner of fifty percent of the stock in a closely held corporation. The purchaser succeeded in voiding the sale on the ground of nonregistration, and the seller promptly sued his attorney for malpractice. At trial, experts for both sides disagreed over the standards in the profession for determining whether the sale was subject to registration. The court observed that since the issue was one on which reasonable lawyers differed and no certain answer existed, liability should not be imposed.[87]

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82. 9 Mart. (o.s.) 353 (La. 1821).
83. *Id.* at 374.
84. *Id.*
85. *Id.* at 376.
86. 19 Ill. App. 3d 1018, 313 N.E.2d 180 (1974).
87. *Id.* at 1021, 313 N.E.2d at 183.

Uncertain but debatable propositions are inherent in the judgmental process of an attorney who advises a client whether to accept a settlement. In a 1976 Minnesota decision the court refused to second-guess the judgment of an attorney who advised his client to compromise his cause of action because of unfavorable deposition testimony from a physician.[88] The court reasoned that although the client also might have obtained a judgment in excess of the settlement had the case proceeded to trial, the client also might have obtained far less.[89] Thus, the uncertainty of the possible outcome of the case, along with the debatable adequacy of the settlement, precluded liability.

Statutory interpretation often is uncertain and frequently is debated. A 1976 California case concerned the interpretation of a twenty-five year old venue statute.[90] The court concluded that the meaning of a statutory reference to the term "claim" was debatable since disparate views had been expressed on its meaning both in California and in other jurisdictions.[91] Moreover, the resolution was uncertain because no previous California decision had discussed the meaning of the word "claim" as used in the statute, and no amount of research would have resolved the uncertainty. Under these circumstances the lawyer could not be liable for failing to anticipate correctly the resolution of the issue.

### *E. Debatable Propositions*

The last stage in the development of the law is reached when clearly articulated and diverse viewpoints are established in an attempt to resolve an unsettled issue. The ensuing debate takes the form of inconsistent trial or appellate court decisions or may be evidenced by a vigorous dissent to the opinion which purports to resolve the debate.

For example, in an 1893 Wisconsin decision a New York attorney was engaged by a Wisconsin creditor to attach assets belonging to a defaulting New York debtor.[92] The attorney com-

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88. Glenna v. Sullivan, 310 Minn. 162, 245 N.W.2d 869 (1976).

89. *Id.* at 170, 245 N.W.2d at 873.

90. Metzger v. Silverman, 62 Cal. App. 3d Supp. 30, 133 Cal. Rptr. 355 (1976).

91. *Id.* at 37, 133 Cal. Rptr. 360.

92. Ahlhauser v. Butler, 57 F. 121 (E.D. Wis. 1893).

menced attachment proceedings, but the affidavit filed by the attorney was challenged successfully as legally deficient. In a subsequent malpractice action by the client-creditor, the attorney was exonerated when the court found that the relevant statute, on its face, apparently authorized the making of an affidavit virtually identical to that filed by the attorney.[93] More importantly, not only were there two inconsistent intermediate appellate decisions, but there was no decision on point from the state's highest court. Thus, the attorney was not held liable for an error on such a debatable point.[94]

An attorney certainly is less likely to be held liable for an error of judgment when the judiciary itself is in disagreement, particularly when the dispute occurs in the jurisdiction's court of final review. For example, when dissenting members of the Minnesota Supreme Court disagreed about the correctness of an evidentiary ruling by the trial court, the attorneys who had failed to object to the admission of certain evidence at trial were not liable for malpractice.[95] The fact of judicial disagreement established that the proposition was debatable, that is, one upon which reasonable doubt could have been entertained by well-informed lawyers. Similarly, in an early Texas decision, the court refused to subject an attorney to liability for failing to present a mortgage debt to the administrator of an estate when the necessity for such action was an "open and controverted point" which had not yet been settled by the courts.[96]

Appellate decisions that are contrary to a lawyer's position are often the catalyst for legal malpractice suits. Such decisions invariably disclose logic and authorities not advanced by the lawyer. Yet, the existence of a dissenting view in the decision which resolves the issue normally entitles the attorney to the protection of the error of judgment rule.[97] As a California court

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93. *Id.* at 124.

94. *Id.* at 125.

95. Meagher v. Kavli, 256 Minn. 54, 97 N.W.2d 370 (1959).

96. Morrill v. Graham, 27 Tex. 646 (1864).

97. Sprague v. Morgan, 185 Cal. App. 2d 519, 8 Cal. Rptr. 347 (1960) (dispute about interpretation of statute); Meagher v. Kavli, 256 Minn. 54, 97 N.W.2d 370 (1959) (dispute about admissibility of evidence at trial); Bowman v. Tallman, 40 How. Pr. 1 (N.Y. 1869) (interpretation of property devise clause in will).

recently observed: "We concede our infallibility may well exist only because on some occasions we are final."[98] Thus, the law will remain apparently settled until a court with more finality is asked to reconsider the issue.

## V. JUDGMENT DEFINED

### A. *Introduction: Adviser v. Advocate*

Notwithstanding centuries of applying the error of judgment rule in attorney malpractice actions, the courts have not analyzed or defined the judgmental process being protected. That process depends upon the requirements of the legal task. That task may require a lawyer to function either as an adviser or as an advocate. Although both functions may be performed simultaneously, the respective ethical obligations imposed upon the lawyer are different.[99] The Code of Professional Responsibility explains that the advocate typically deals with past conduct, whereas the adviser must assist the client in determining future conduct and relationships.[100] Although other definitions are possible,[101] the Code approach seems adequate for most ethical and practical purposes. Thus, the rules governing liability arising from erroneous judgmental decisions depend upon the attorney's role. The adviser undertakes to counsel the client regarding a future course of action; the advocate undertakes to achieve a specified goal or result for the client.

The adviser should counsel the client about the likely state

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98. People v. Clark, 109 Cal. App. 3d 88, 94, 167 Cal. Rptr. 51, 56 (1980).

99. *See* ABA CODE OF PROFESSIONAL RESPONSIBILITY [hereinafter cited as CODE], Ethical Considerations [hereinafter cited as EC] 7-3, 7-4.

100. *Id.*, EC 7-3.

101. Another dichotomy is that of advocate and counselor. *See* Thode, *The Ethical Standard for the Advocate*, 39 TEX. L. REV. 575 (1961); *Professional Responsibility: Report of the Joint Committee*, 44 A.B.A. J. 1159 (1958) [hereinafter cited as Thode]. The counselor may appear in a representative capacity, but usually not in an adversary proceeding. Thode, *supra*, at 578.

Another approach has been to divide the nonadvocate function into three categories: compelled negotiations, voluntary negotiations, and counseling. Again, these functions are contrasted to the advocate's position by ascertaining whether the adversary process is involved. Schwartz, *The Professionalism and Accountability of Lawyers*, 66 CALIF. L. REV. 669 (1978) [hereinafter cited as Schwartz].

of the law[102] and the possible consequences of a particular action.[103] The attorney may even advise the client on the nonlegal and moral aspects of the matter.[104] This advice, however, usually concerns issues of law, the preparation of documents, and the legal consequences of particular transactions or conduct.

As adviser and advocate the lawyer exercises judgment. While the accuracy of the adviser's judgmental decisions is usually determined by the standards set forth in subsequent judicial decisions, the advocate's conduct is often measured by the pragmatic standard of success. These differences have practical significance. The advocate, especially in the litigation process, should take whatever steps are necessary to maximize the likelihood that the client will prevail.[105] Doubts concerning propriety should be resolved in favor of the client.[106] Despite the attorney's personal belief, any position favorable to the client that is neither unlawful nor frivolous should be urged upon the court.[107]

The advocate's judgmental standard is not based necessarily upon what is right or wrong; rather, it is based upon what is most likely to achieve the client's goal. The art of persuasion is one of the principal tools of the advocate. Every circumstance must be evaluated for its likely effect on the ultimate outcome. This includes consideration of evidentiary matters as well as considerations of the possible effect of urging specific legal propositions. Even the very techniques of persuasion must be reevaluated constantly to determine their emotional impact and effectiveness. Matters that must be counseled by the adviser may be legitimately rejected by the advocate as detrimental to the goal of the client. Legal propositions may even be abandoned by the advocate for tactical reasons.[108]

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102. CODE, *supra* note 99, EC 7-3, 7-5.

103. *Id.*, EC 7-5.

104. *Id.*, EC 7-8.

105. Schwartz, *supra* note 101, at 673.

106. CODE, *supra* note 99, EC 7-3.

107. *Id.*, EC 7-4.

108. *See* Woodruff v. Tomlin, 616 F.2d 924, 933 (6th Cir. 1980); Smith v. Lewis, 13 Cal. 3d 349, 359, 530 P.2d 589, 595, 118 Cal. Rptr. 621, 627 (1975).

### B. *Advisory Function*

The lawyer as adviser must not only know the current state of the law[109] but also must be able to counsel the client about what the law is *likely* to be.[110] The adviser has a duty to avoid involving his client in murky areas of the law if research reveals alternative courses of conduct.[111]

A lawyer functions as adviser in interpreting documents, such as wills,[112] contracts,[113] and security instruments.[114] The advisory function also encompasses drafting such documents and counseling about their potential legal effect.

An old Illinois decision[115] illustrates the advisory function of the advocate. During the course of litigation the lawyer was required to prepare an order incorporating a ruling by the court. Some years later, in subsequent litigation, the order was construed as depriving the client of a substantial portion of the estate of his deceased father. In the resulting malpractice action the attorney was held not liable for failing to anticipate the subsequent construction of the order he had drafted.[116] The error was afforded judgmental protection because the court found it was unreasonable to expect an attorney to draft a document which would never be questioned by some higher authority in the future.[117]

In *Gimbel v. Waldman*[118] an attorney advised his client to accept a $25,000 settlement of her claim under the will of her deceased husband rather than test the validity of an *in terrorem*

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109. *See* notes 22-55 *supra* and accompanying text.

110. CODE, *supra* note 99, EC 7-3, 7-5.

111. *See* Horne v. Peckham, 97 Cal. App. 3d 404, 158 Cal. Rptr. 714 (1979).

112. *E.g.*, Ramp v. St. Paul Fire & Marine Ins. Co., 263 La. 774, 269 So. 2d 239 (1972); Bowman v. Tallman, 40 How. Pr. 1 (N.Y. 1869); Gimbel v. Waldman, 193 Misc. 758, 84 N.Y.S.2d 888 (Sup. Ct. 1948).

113. Dillard Smith Constr. Co. v. Greene, 337 So. 2d 841 (Fla. Dist. Ct. App. 1976).

114. Citizens' Loan, Fund & Sav. Ass'n v. Friedley, 123 Ind. 143, 23 N.E. 1075 (1890).

115. Morrison v. Burnett, 56 Ill. App. 129 (1894).

116. *Id.* at 135-36.

117. *Id.* at 136.

118. 193 Misc. 758, 84 N.Y.S.2d 888 (Sup. Ct. 1948).

clause.[119] If the wife had claimed her elective share pursuant to the relevant New York statute, she would have been entitled to $45,000. The lawyer was held not liable for malpractice, however, since the court determined that the law governing such clauses was "nebulous and unsatisfactory."[120]

In 1961, the California Supreme Court in *Lucas v. Hamm*[121] found that a bequest drafted by the attorney was barred by the rule against perpetuities, but held that the attorney was not liable for his error. The court cited the many "demonstrable blunders" by lawyers in the interpretation and application of this rule.[122] Describing it as a "technicality-ridden legal nightmare,"[123] the court did not conclude that the law was debatable or unsettled, but implied that mastering the rule against perpetuities was beyond the skills and knowledge of the ordinary attorney. Subsequent decisions, however, severely limited the impact of the opinion and made it unlikely that an attorney could claim again as a defense that the particular task was beyond any lawyer's skills.[124] This decision does illustrate, however, that a particularly complex and difficult legal issue is likely to be entitled to judgmental protection.

### C. *Advocate Function*

Because an advocate must consider a multitude of factual circumstances and because of the uncertainty of what will persuade at a particular moment, it is appropriate to describe the advocate's decisions as tactical. Only recently have the courts addressed analytically the issue whether a lawyer as an advocate should be liable for an erroneous tactical decision. This issue has been addressed in the context of litigation, the most common and extreme form of advocacy.

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119. *Id.* at 761, 84 N.Y.S.2d at 892.

120. *Id.*, 84 N.Y.S.2d at 891 (quoting *In re* Estate of Brush, 154 Misc. 480, 481, 277 N.Y.S. 559, 560 (N.Y. Sur. Ct. 1935)).

121. 56 Cal. 2d 583, 364 P.2d 685, 15 Cal. Rptr. 821 (1961).

122. *Id.* at 592, 364 P.2d at 690, 15 Cal. Rptr. at 826.

123. *Id.*, 364 P.2d at 690, 15 Cal. Rptr. at 826 (citing Leach, *Perpetuities Legislation*, 67 HARV. L. REV. 1349, 1349 (1954)).

124. Smith v. Lewis, 13 Cal. 3d 349, 530 P.2d 589, 118 Cal. Rptr. 621 (1975); Bucquet v. Livingston, 57 Cal. App. 3d 914, 129 Cal. Rptr. 514 (1976).

The ability of a client to use an error in tactical judgment as a basis for a legal malpractice action is often hampered by problems in proving proximate cause. Because of the innumerable variables and subjective considerations, an action based upon a tactical error will often fail because of the inability of the plaintiff to prove what would have happened had the attorney acted otherwise. For example, whether to put a witness on the stand to corroborate testimony has been characterized as a matter totally dependent upon an attorney's judgment.[125] Similarly, the Supreme Court of Minnesota held that whether a settlement offer is reasonable under the circumstances of a particular case calls for professional judgment; therefore, an attorney should not be liable for such an error of judgment if he acts in the honest belief that his advice is wellfounded and in the best interests of the client.[126]

Although the issue of an attorney's liability for an error of judgment in litigation has been addressed on a piecemeal, case-by-case basis, the subject was not examined directly until 1977 in the Tennessee Court of Appeals decision of *Stricklan v. Koella*.[127] The client charged the attorney with failing to use discovery depositions at trial and with failing to move for a change of venue. The court characterized these charges of negligence as a refusal to utilize trial tactics insisted upon by the client.[128] Although the court stated that resolution of these issues called for impermissible speculation, it directed its attention to the more basic policy considerations which had compelled the English courts to adopt immunity for barristers.[129] The court cited a lawyer's duty to the court to uphold truth and justice and the obligation to disregard the instructions of a client that conflict with that duty.[130] Secondly, the court noted that following a

125. Oda v. Highway Ins. Co., 44 Ill. App. 2d 235, 252, 194 N.E.2d 489, 498 (1963).

126. Glenna v. Sullivan, 310 Minn. 162, 169, 245 N.W.2d 869, 872-73 (1976).

127. 546 S.W.2d 810 (Tenn. Ct. App. 1976), *cert. denied, id.* (Tenn. 1977).

128. *Id.* at 812.

129. *Id.* at 813.

130. *Id.*

client's instructions could lead to unnecessarily long trials.[131] The Tennessee court concluded that "there can be no cause of action against an attorney arising out of the manner in which he honestly chooses to present his client's case to the trier of the facts."[132]

Pending at the same time in the United States District Court for the Western District of Tennessee was the case of *Woodruff v. Tomlin*,[133] which involved a multitude of similar legal malpractice charges against a Tennessee lawyer. As in *Stricklan*, the attorney was charged with failing to change venue and failure to utilize witnesses. Other contentions included the failure to object to an erroneous jury instruction, the failure to consult with a traffic reconstruction expert, the failure to cite to the court certain statutes bearing on the case, and the manner in which the attorney argued on appeal. Following a mistrial by the jury, the trial court, relying on the rationale of the *Stricklan* decision,[134] granted the defendant's motion for judgment notwithstanding the verdict. Upon appeal, the Sixth Circuit reversed the judgment of the district court[135] and primarily reasoned that *Stricklan* did not characterize accurately Tennessee law. The court granted a rehearing in response to a petition joined in by amici on behalf of the state and local bar associations which urged the binding effect of the *Stricklan* decision.[136]

On rehearing, a majority of the court interpreted *Stricklan* to mean that an attorney cannot be liable for an error in the conduct of litigation that results from "an honest exercise of professional judgment."[137] The court agreed that this was a sound rule: "otherwise, every losing litigant would be able to sue his attorney if he could find another attorney who was willing to second guess the decisions of the first attorney with the advantage of hindsight."[138] Thus, the court formulated the rule that

131. *Id.*
132. *Id.* at 814.
133. 423 F. Supp. 1284 (W.D. Tenn. 1976).
134. *Id.* at 1286.
135. 593 F.2d 33 (6th Cir. 1979).
136. Woodruff v. Tomlin, 616 F.2d 924, 926-28 (6th Cir. 1980) (on rehearing).
137. *Id.* at 930.
138. *Id.*

an attorney could not be liable for an error of judgment in the selection of trial tactics.[139] The attorney, however, would remain liable for nontactical errors resulting from a failure to exercise the required skill and care.

The *Woodruff* case arose out of an automobile accident in which the driver and passenger, who were sisters, sustained serious injuries when a large truck collided with their vehicle. The suit filed on their behalf was met by an action by the driver of the truck for injuries he sustained. The same attorney who filed the original action also undertook the defense. Both actions were consolidated for trial. After a mistrial, verdicts were rendered against the sisters on each of their claims and in favor of the driver of the truck against both of the sisters. On appeal all judgments were affirmed except for the judgment against the passenger-sister which was reversed for lack of evidence.[140]

The legal malpractice suit which followed raised a catalog of errors allegedly committed by the sisters' lawyer. The attorney's failure to obtain a change of venue was protected as a tactical decision and the allegation that a better decision would have resulted from the change of venue was rejected as speculative. Although the attorney erred in failing to object to a jury instruction, the court's review of the controlling Tennessee judicial decisions at the time of the error disclosed that the law was unsettled and debatable; therefore, the lawyer was not liable for his error of judgment.[141] The decision not to consult a traffic reconstruction expert was considered to be tactical. The attorney could choose to question the cause of the accident by demonstrative evidence rather than by expert testimony. The court for the same reasons rejected the charge that the attorney should have impeached an adverse witness by cross-examination.[142] Absent bad faith, the attorney could not be held liable for his tactical decisions.

Moreover, the manner in which the attorney argued the appeal was also found to be a tactical, judgmental decision. The attorney could legitimately argue in favor of one client over the

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139. *Id.* at 931.
140. 593 F.2d at 35-36.
141. 616 F.2d at 931.
142. *Id.* at 932-33.

other on appeal. Although the attorney conceded the strength of the evidence against one of his clients, that client was not prejudiced, and the other client's appeal had greater credibility.

The court also ruled that when judgment had not been exercised by the attorney, litigable issues of fact would determine the attorney's liability for the remaining charges.[143] Since the attorney disputed the client's charges that he had been informed of the identity of certain witnesses, the court found that if the client's testimony was accepted, the failure to investigate and interview could be a basis for liability.[144] Finally, since the attorney had not explained why he failed to cite certain pertinent statutes, the court applied the rule that an attorney is charged with knowledge of settled propositions of law and could be found liable for damages proximately caused by that omission.[145]

### *D. Decisions Made by the Client*

A difficult and far from settled question is identifying the criteria which determine when judgment decisions are to be made by the client rather than by the attorney. A lawyer has broad judgmental authority in representing a client. Research and investigation, part of the attorney's judgmental authority, have been explained as necessary so that an attorney can make an informed and intelligent judgment *on behalf* of the client.[146] Absent specific contrary instructions, the litigation attorney controls the manner and details of the lawsuit.[147]

Some guidance for the lawyer appears in the Ethical Considerations to Canon 7. The basic principle is that certain decisions, such as whether to accept a settlement or waive a defense, are properly made by the client.[148] The guidelines of Ethical

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143. *Id.* at 934.

144. *Id.*

145. *Id.* at 935 (citing *In re* Woods, 158 Tenn. 383, 390, 13 S.W.2d 800, 803 (1929)). The court also reversed on the charge of representing conflicting interests without the informed consent of the clients. The trial court found the question of damage to be speculative. The court of appeals held the issue to be one of fact for the jury. *Id.* at 936.

146. *See* Smith v. Lewis, 13 Cal. 3d 349, 358-59, 530 P.2d 589, 595, 118 Cal. Rptr. 621, 628 (1975).

147. Thode, *supra* note 101, at 595-96.

148. CODE, *supra* note 99, EC 7-7. *See* R. MALLEN & V. LEVIT, *supra* note

Consideration 7-7, however, are vague: "In certain areas of legal representation not affecting the merits of the cause or substantially prejudicing the rights of a client, a lawyer is entitled to make decisions on his own. But otherwise the authority to make decisions is exclusively that of the client . . . ."[149]

A catalog of those judgmental decisions which belong to the client have developed on a case-by-case basis. Thus, the attorney's authority does not derive from absolute rules but depends upon the circumstances of the particular case. In fact, in the absence of a specific statute or rule, the question of an attorney's authority to exercise judgment has been determined by applying the same standard of care which measures competence within the legal profession.[150]

Despite the attorney's research and investigation, certain issues surrounding a client's problem may remain unsettled or debatable. The attorney's research efforts may not resolve doubts or may lead him to conclude that only hindsight or future judicial revelation will provide accurate answers. The attorney's responsibilities to the client are not satisfied in such a situation by simply determining that a proposition is doubtful or by unilaterally deciding the issue; instead the attorney must inform the client that the issue is unsettled or debatable and allow the client to make the decision.

Once it is determined that the decision is for the client, the attorney's role then becomes that of adviser. The process involved is analogous to the so-called doctrine of informed consent. The Code addresses the subject under the aspirational guidelines of Ethical Consideration 7-8.[151] The client should be informed of the alternatives, counseled on the relevant considerations, and cautioned on the possible consequences of each alternative.

These rules have been recognized in situations in which attorneys undertake to certify or prepare an abstract of title.[152] The issue has arisen when an attorney has discovered a potential

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60, §§ 333 & 346.

149. CODE, *supra* note 99, EC 7-7.

150. Lipscomb v. Krause, 87 Cal. App. 3d 970, 151 Cal. Rptr. 465 (1978).

151. CODE, *supra* note 99, EC 7-8.

152. *See* R. MALLEN & V. LEVIT, *supra* note 60, § 376.

defect which could affect the marketability of title. The courts have stated that whether the potential defect affects the marketability of title is for the client to decide upon the advice of counsel.[153] If the attorney unilaterally makes this decision he does so at his peril.[154]

The principles have also been applied in those extreme situations in which the attorney has argued for judgmental protection as a defense to a charge that the attorney's conduct potentially was prejudicial to the client's rights. Such examples include stipulating to set aside a default[155] or agreeing to compromise a judgment.[156] Although some of these instances can be rationalized as examples of unauthorized conduct, they also indicate a growing recognition of an attorney's obligation to solicit the client's decision when the attorney recognizes that the unsettled or debatable nature of a proposition requires a choice among alternatives.

Ironically, the risk of such errors does not exist for the equivocal attorney or for an attorney whose doubts have not been dispelled by research, for then the client may be so informed and given the opportunity to choose. The problem exists for the attorney who believes he has the correct answer. A successful lawyer usually has the confidence in his skills that results from years of experience and achievement. Is that lawyer to be penalized because another lawyer, acting as a professional witness and relying upon the skills of hindsight, is able to state that the first lawyer not only should have been equivocal but should have informed the client that the law was unsettled?

As has been discussed previously,[157] the law is not only unsettled when it is recognizably so, but also is unsettled when the principle that appears to be accepted or is most logical is not that which is ultimately accepted. Thus, inherent in the protection for judgmental decisions is the freedom of an attorney to

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153. Gilman v. Hovey & Buchanan, 26 Mo. 280 (1858); Dodd v. Williams, 3 Mo. App. 278 (1877); Byrnes v. Palmer, 18 A.D. 1, 45 N.Y.S. 479 (1897).

154. 3 Mo. App. 278 (1877).

155. Walpole v. Carlisle, 32 Ind. 415 (1869); Clussman v. Merkel, 16 N.Y. Super. Ct. (3 Bosw.) 402 (1858).

156. Burgraf v. Byrnes, 94 Minn. 418, 103 N.W. 215 (1905).

157. *See* notes 56-98 *supra* and accompanying text.

err with confidence. Candid, confident advice may prove to be unfounded in hindsight. Honesty rather than infallibility, however, is the obligation of the attorney-adviser under the Code of Professional Responsibility.[158]

### *E. Judgmental Process*

An extremely important issue likely to arise in future cases is whether attorneys should be liable for the quality and quantity of their judgmental processes when addressing an unsettled or debatable proposition of law. The issue was raised by a reference in the *Smith v. Lewis* decision to an attorney's obligation to conduct "reasonable" research.[159] That reference was not expanded, however, because the attorney-defendant had not undertaken any research.

Both policy and practical considerations dictate that an attorney who exercises an informed judgment should not be subjected to liability for the adequacy of his research, investigation, and thought processes. Imposing liability for advising on an unsettled or debatable proposition of law is likely to abrogate the error of judgment rule. The problem is that a lawyer's judgmental decisions invariably are reviewed in hindsight. The standard will be the subsequent judicial decision which has clarified the law. That decision establishes the criterion that a client's expert witness in a legal malpractice suit can use to demonstrate which thought processes the lawyer should have followed and which research and investigation methods should have been undertaken. No lawyer who reached a different conclusion could have complied with such a standard of care. Those who fail to pass the test of hindsight may face exposure to a legal malpractice claim.

It is not sufficient to respond that the lawyer ultimately will be vindicated by the trier of fact if his conduct was reasonable. As demonstrated by *Smith v. Lewis*, once a lawyer loses judgmental protection, the issue of liability is no longer one of law but one of fact. The impact upon the profession is as much the threat of being subjected to a legal malpractice suit as the real-

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158. CODE, *supra* note 99, EC 7-3.

159. 13 Cal. 3d 349, 358, 530 P.2d 589, 595, 118 Cal. Rptr. 621, 627 (1975).

ity of those few instances in which liability is imposed. That exposure exists in any adversary proceeding in which lawyers necessarily take inconsistent positions one of which will ultimately and necessarily be shown to be in error. The fabric of a legal malpractice suit exists when one attorney disagrees with the processes that lead to the other's conclusions.

As demonstrated by the adversary system itself, there are always lawyers who will disagree on almost any issue. Since law is not an exact science, no level of skill or excellence exists for which all differences of opinion or doubts will be removed from the minds of lawyers and judges.[160] Few lawyers would be willing to provide their clients with truly candid, unqualified opinions if the risk of an error is a malpractice trial in which the attorney's fate will be decided by expert witnesses disputing the quality of his research and investigation.

In 1980, this issue was before the Minnesota Supreme Court in *Togstad v. Vesely, Otto, Miller & Keefe*.[161] The attorney-defendant was consulted regarding a potential medical malpractice claim. After interviewing the client for almost an hour, the attorney recommended against pursuing the case but stated he would review his opinions with another lawyer. The attorney, because of his lack of expertise in the area of medical malpractice, testified that he consulted with a lawyer in another firm who allegedly concurred in his opinion. The attorney, therefore, did not revise his opinion and the client did not pursue the medical malpractice action. As a legal malpractice action, however, the client's cause of action, according to a jury, would have resulted in a judgment for $649,500.[162]

The supreme court found not only a violation of the standard of care because the attorney failed to advise the client of the applicable statute of limitations, but also a deficiency in the attorney's judgment processes.[163] The attorney asserted as a de-

160. Citizens' Loan, Fund & Sav. Ass'n v. Friedley, 123 Ind. 143, 23 N.E. 1075 (1890); George v. Caton, 93 N.M. 370, 600 P.2d 822 (Ct. App.), *cert. denied*, 93 N.M. 172, 598 P.2d 215 (1979).

161. Togstad v. Vesely, Otto, Miller & Keefe, 291 N.W.2d 686 (Minn. 1980).

162. *Id.* at 689.

163. *Id.* at 686.

fense that he should not be liable for an error in judgment. The court observed that the case did not involve a "mere error" in judgment.[164] The gist of the plaintiffs' claim was that the attorney "failed to perform the minimal research that an ordinarily prudent attorney would do before rendering legal advice."[165] In support of this proposition the court relied on an expert witness who testified that the standard of care required that the attorney check hospital records and consult with a medical expert before rendering his opinion.

The *Togstad* opinion could be explained on the basis that the attorney did not, as in *Smith v. Lewis*, conduct *any* research or investigation. Aside from interviewing the client, the attorney's only other activity was consulting with a more specialized attorney. But even that consultation may not have occurred, since the specialist had no recollection of discussing the matter with the defendant-attorney. Thus, the jury could have concluded that the attorney failed to do any research or investigation. The court's opinion suggests that there is a standard of minimal research that can be the basis of a malpractice suit even when the issue is debatable and the attorney's conclusion is reasonable. But, the court did not elaborate upon the issue or consider the consequences of such a rule.

The standard of care exception to the error of judgment rule creates the potential for a malpractice suit against the lawyer whose client either loses a lawsuit or is advised not to pursue a course of action. To subject attorneys to liability for the *adequacy* of their research and investigation portends an onerous financial burden for the profession as guarantors of the success of their clients' causes of action and impairs an attorney's advisory function. Such liability would deter attorneys from rendering affirmative and candid opinions; legal advice would be couched with disclaimers, equivocation, and the ultimate recommendation that a client consider consulting with other counsel who might disagree.

Nevertheless, a client is entitled to the benefit of an *informed* judgment. When the issue is one that is settled and can be identified through ordinary research and investigation tech-

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164. *Id.* at 693.
165. *Id.*

niques, an attorney should not be able to avoid liability by claiming the error was one of judgment. On the other hand, when the proposition is one on which reasonable lawyers could disagree or one which involves a choice of strategy, an error of informed judgment should not be gauged by hindsight or second-guessed by an expert witness.

If a court determines that the attorney has researched, investigated, and considered an issue that is unsettled or debatable, liability should be precluded and the quality of the attorney's efforts should not become the subject of a trial. As in cases involving conflicting policy considerations,[166] the initial inquiry should be one of law. But when informed judgment is not exercised as in *Smith*, and arguably in *Togstad*, the attorney's conduct will be subjected to review under the standard of care and the literal strict liability that results when an error is judged by hindsight.

### *F. Supplementary Policy Considerations*

The courts agree that the litigation attorney is entitled to wide discretion in choosing between alternative strategies.[167] In part, this attitude is merely an application of the error of judgment rule. Yet, an additional reason for protection of the attorney's judgment is that our system of justice imposes obligations on an attorney that may conflict with the loyalty owed a client.

The effect of supplementary policy considerations on the need for judgmental protection was first examined in the 1978 California Supreme Court decision of *Kirsch v. Duryea*.[168] The defendant-attorney had filed a medical malpractice action on behalf of the plaintiff. After several years and further consultations with physicians, the attorney decided that because of insufficient evidence of malpractice a trial was not justified. He advised his client that he intended to withdraw. Failing to receive a response, he filed a motion to withdraw from the case. The client was unable to secure other counsel, and the case was dismissed because it had not been brought to trial within the statutory

166. *See* notes 167-77 *infra* and accompanying text.

167. Woodruff v. Tomlin, 616 F.2d 924 (6th Cir. 1980); Smith v. Lewis, 13 Cal. 3d 349, 530 P.2d 589, 118 Cal. Rptr. 621 (1975).

168. 21 Cal. 3d 303, 578 P.2d 935, 146 Cal. Rptr. 218 (1978).

period.[169]

In the legal malpractice suit which followed, the jury concluded that the lawyer erred in his opinion on the merits of the medical malpractice action and determined that the action had a value of $237,000.[170] Among the issues before the California Supreme Court was whether the decision could be affirmed on the basis of "erroneous evaluation of the merits of the cause of action."[171]

The court observed that, on the one hand, an attorney is obligated to protect and pursue the client's interests. On the other hand, an attorney in deciding whether to pursue a cause of action must respect the legitimate interests of fellow members of the bar, the judiciary, and the administration of justice.[172] Perhaps because of the recognition of a judicial system clogged with weak, tenuous, and unmeritorious causes of action, the court emphasized that such judgmental decisions should not be measured by the usual guidelines:

> To hold the attorney responsible in damages when in retrospect it appears he mistakenly sacrificed his client's interests in favor of his public obligations would place an impossible burden upon the practice of law. Moreover, awarding damages against the attorney would violate sound public policy, because an attorney frequently faced with the question whether vigorous advocacy in favor of a client should be curtailed in light of public obligation would tilt in favor of the client at the expense of our system of justice.[173]

Because an attorney in advising a client must consider policy considerations which may conflict with his client's interests, the propriety of a judgmental error is not to be determined by the normal standard of care. The California Supreme Court treated the issue as one of law. The judicial standard is whether the attorney's choice to favor other policy considerations was "so

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169. *Id.* at 307, 578 P.2d at 938, 146 Cal. Rptr. at 221.

170. *Id.* at 308, 578 P.2d at 938, 146 Cal. Rptr. at 221.

171. *Id.* at 310, 578 P.2d at 939, 146 Cal. Rptr. at 223.

172. *Id.* at 309, 578 P.2d at 939, 146 Cal. Rptr. at 222.

173. *Id.*, 578 P.2d at 939, 146 Cal. Rptr. at 222. *See also* Stricklan v. Koella, 546 S.W.2d 810, 813 (Tenn. Ct. App. 1977); CODE, *supra* note 99, EC 7-10; *id.*, Disciplinary Rule 7-102 A.

manifestly erroneous that no prudent attorney would have done so."[174] The California court reversed in favor of the lawyer without remanding the case for factual determination.[175]

Although treating the issue of an attorney's liability for an erroneous judgment call as a question of law may be attacked as self-protection by the profession, this approach primarily protects the ability of our judicial system to function properly and preserves the willingness of attorneys to provide clients with the candid advice dictated by ethical standards.[176] If liability were treated as an issue of fact, it could be resolved only after a litigation trial based on conflicting expert testimony. Few lawyers would be willing to risk a legal malpractice suit because they advised a client against initiating or continuing a cause of action. Since self-defense is a strong motivation it would have an adverse effect on both the client and the legal system. Few attorneys would give candid views to clients on meritless cases. Clients would be referred to other lawyers until time limitations had expired or until a lawyer was willing to express his belief that the case was groundless. Alternatively, attorneys might pursue unmerited causes of action. The effect of such litigation upon an already strained judicial system is obvious; the consequences would likely be an increase in retaliatory suits by unhappy adversaries against both attorneys and their clients.[177]

## VI. CONCLUSION

The professional has felt increasingly the impact of consumerism and its consequence—litigation. Of all professionals, the lawyer continues to be the most vulnerable to errors of judgment, which are likely to be a primary source of legal malpractice litigation in the 1980s.

The determination whether a lawyer made a judgmental or tactical error is based upon a judicial perspective at the time of review. Judicial restraint and careful deliberation, therefore, are essential. It should be remembered that the attorney who erred by today's standards may be noted for his perception tomorrow.

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174. 21 Cal. 3d at 309, 578 P.2d at 939, 146 Cal. Rptr. at 222.
175. *Id.* at 312, 578 P.2d at 940, 146 Cal. Rptr. at 224.
176. *See* CODE, *supra* note 99, EC 7-3, 7-7, 7-8.
177. *See* R. MALLEN & V. LEVIT, *supra* note 60, §§ 45.1-.16.

In the history of American law, greatness has often been attributed to lawyers who have challenged those concepts which remained unquestioned by their peers. Among the judiciary, particular stature has been accorded the dissenters whose views and reasoning, although rejected by their contemporaries, were ultimately vindicated by the passage of time.[178] While judgmental errors resulting from ignorance should continue to be a basis of malpractice liability, attorneys should be protected from malpractice charges that are based solely on an error or disagreement with their judgmental processes. We must not forget that the reasoning of those accused of error today may provide the rationale for what the law will be tomorrow.

178. The following observations of those jurists recognized for their wisdom in dissent are illustrative but far from comprehensive: "In three decades on the Court, [Hugo] Black had seen his early dissents become majorities. Black had provided the basis for many of the Warren Court's landmark decisions, and some observers even argued that the 'Black Court' would be a more appropriate title." B. WOODWARD & S. ARMSTRONG, THE BRETHREN 62 (1979). *See also* Frank, *Hugo L. Black: He Has Joined the Giants*, 58 A.B.A. J. 21 (Jan. 1972); Emerson, *Justice Douglas and Lawyers with a Cause*, 89 YALE L.J. 616 (1980): "Although history will certainly place [Justice Douglas] among the greatest of our justices, he did not, during his lifetime, appeal to everybody." *Id.* at 616.

# RELIEF FOR SMALL BUSINESSES: TWO NEW EXEMPTIONS FROM SEC REGISTRATION

FREDRICH H. THOMFORDE, JR.*

Two new exemptions from SEC registration are now available for small businesses.[1] The first exemption, Rule 242, is a two million dollar exemption for sales of securities to thirty-five "unaccredited investors" and an unlimited number of "accredited investors."[2] The second exemption, section 4(6) of the Securities Act of 1933, exempts sales of securities to "accredited investors" in amounts up to five million dollars.[3] This Article will outline the requirements of each exemption and will note briefly their relation to other existing exemptions available under federal law.[4]

## I. THE REGISTRATION REQUIREMENT: AN OVERVIEW

Section 5 of the Securities Act of 1933 makes it unlawful to sell or to offer to sell a security without first registering the security with the SEC.[5] The purpose of requiring registration is to protect investors by providing them with full and complete in-

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1. There is no single definition of small business. As used in this Article, the term "small business" includes those businesses that are owned by less than 500 shareholders and whose stock is not traded actively on an exchange or over the counter.

2. 17 C.F.R. § 230.242 (1980).

3. Securities Act of 1933 § 4(6) (to be codified at 15 U.S.C. § 77d(6) (1980)). Section 4(6) was added to the Securities Act of 1933 pursuant to section 602 of the recently enacted Small Business Investment Incentive Act of 1980, Pub. L. No. 96-477, 94 Stat. 2294. The Securities Act of 1933 is hereinafter referred to as the Act or as the Securities Act.

4. The existing exemptions are detailed in Thomforde, *Exemptions from SEC Registration for the Sale of Securities*, 47 TENN. L. REV. 1 (1979) [hereinafter cited as Thomforde].

5. Securities Act of 1933 § 5, 15 U.S.C. § 77e (1976).

formation upon which to base their investment decisions.[6] Registration with the SEC includes the preparation of a printed prospectus that must be delivered to all purchasers.[7] The prospectus must describe fully the issuer, its history, its management, its financial condition, and the proposed use of the proceeds of the new issue.[8] Compliance with the registration requirements is both time-consuming and expensive. One practitioner estimates the minimum expense of registration to be one hundred thousand dollars.[9] In addition, at least three months is needed to complete the registration process, and a delay of six months is not unusual for the first offering of a registration.[10]

Prior to 1980 only four exemptions from registration were available to small businesses.[11] First, Rule 240 exempts sales of less than one hundred thousand dollars by corporations with fewer than one hundred shareholders.[12] The principal shortcoming of Rule 240 is the relatively small amount of securities it exempts. A second exemption is the intrastate exemption provided by Rule 147.[13] The principal problems associated with Rule 147 include the need to limit offers to residents of a single state and the difficulty of ascertaining whether eighty percent of the corporation's revenues are derived "from the operation of a business . . . or from the rendering of services within such state."[14] A third exemption is Regulation A, which exempts sales of up to one and one-half million dollars.[15] Regulation A, however, is described more aptly as a short form registration because

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6. *See* Preamble, Securities Act of 1933, 15 U.S.C. § 77 (1976).

7. *Id.* § 5(b)(2), 15 U.S.C. § 77e(b)(2) (1976).

8. *Id.* § 10, 15 U.S.C. § 77j (1976).

9. Alberg & Lybecker, *New SEC Rules 146 and 147: The Nonpublic and Intrastate Offering Exemptions from Registration for the Sale of Securities*, 74 COLUM. L. REV. 622 (1974).

10. Schneider & Manko, *Going Public—Practice, Procedure and Consequences*, 15 VILL. L. REV. 283, 297 (1970).

11. For a complete discussion, see Thomforde, *supra* note 4.

12. 17 C.F.R. § 230.240 (1980).

13. *Id.* § 230.147.

14. *Id.* § 230.147(c)(2)(i)(B).

15. *Id.* § 230.254. Regulation A consists of Rules 251-264. 17 C.F.R. § 230.251-.264 (1980).

it requires the filing and distribution of printed documents similar to those required by full registration.[16]

The fourth and perhaps most popular exemption is the private placement exemption provided for in section 4(2) of the Act.[17] While Rule 146 attempts to provide objective criteria for establishing the private placement exemption, the Rule poses serious compliance difficulties.[18] For example, offers and sales can be made only to "sophisticated" investors or to wealthy investors who are represented by a sophisticated "offeree representative."[19] Ascertaining whether an offeree meets the Rule's definition of sophistication is not easy.[20] Furthermore, if sales are made by small corporations, the issuer must supply written information that is substantially the same as that required by full registration.[21] Thus, the Rule imposes significant costs in terms of time, expense, and uncertainty.

## II. RULE 242

In response to the perceived shortcomings of the exemptions summarized above, the Securities and Exchange Commission promulgated Rule 242 to facilitate the capital formation needs of small businesses.[22] The Rule permits corporations to raise two million dollars during a six month period if sales of securities are made only to accredited purchasers or to a limited number of nonaccredited purchasers. The seven key requirements of Rule 242 are discussed below.

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16. Regulation A requires (1) the filing of a notification which is analogous to a registration statement and (2) the delivery to purchasers of an offering circular which is analogous to a prospectus. 17 C.F.R. § 230.255-.256 (1980).

17. Securities Act of 1933 § 4(2), 15 U.S.C. § 77d(2) (1976).

18. 17 C.F.R. § 230.146 (1980).

19. *Id.* § 230.146(d).

20. For example, the issuer must have reasonable grounds to believe, even before making an offer to sell, that the offeree has "such knowledge and experience in financial and business matters that he is capable of evaluating the merits and risks of the prospective investment." 17 C.F.R. § 230.146(d)(1)(i) (1980). Questions relating to the sophistication test are discussed in Thomforde, *supra* note 4, at 23-26.

21. 17 C.F.R. § 230.146(e)(1) (1980).

22. *Id.* § 230.242.

### A. Qualified Issuers

Rule 242(a)(5) limits the availability of the exemption to corporations. Thus the exemption is not available to limited partnerships and other forms of business organizations. In this respect, Rule 242 is more restrictive than Rule 146. Moreover, the corporation claiming the exemption cannot be an investment company; cannot be engaged in significant oil, gas, or mining operations; or cannot be a majority-owned subsidiary of such a company.[23] Rule 242(a)(5)(v) disqualifies any issuer who has been guilty of prior violations of the securities laws.[24] Such disqualification, however, may be removed by the Commission in its discretion.[25]

### B. Accredited and Nonaccredited Purchasers

Like Rule 146, Rule 242(e) limits the number of ultimate purchasers to thirty-five. Unlike the requirement of Rule 146, however, these purchasers need not be sophisticated; Rule 242(e) thus relieves the issuer of the time-consuming, expensive, and ambiguous sophistication requirements of Rule 146.[26] Moreover, Rule 242 permits additional sales to an unlimited number of "accredited" purchasers.[27]

Rule 242(a)(1) defines the term "accredited person" to include three classes of investors: (1) certain institutional investors, (2) noninstitutional investors who purchase securities worth at least one hundred thousand dollars, and (3) certain officers and directors of the issuer. The following institutions are considered accredited persons when computing the thirty-five purchaser limitation: Banks as defined in section 3(a)(2) of the Act; insurance companies as defined in section 2(13) of the Act; ERISA employment benefit plans that are managed by banks, insurance companies, or investment advisors; investment compa-

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23. *Id.* § 230.242(a)(5).

24. Rule 242(a)(5)(v) disqualifies issuers on the same grounds as issuers are disqualified under Regulation A. *See* 17 C.F.R. § 230.252(c)(3) (1980).

25. *Id.* § 230.242(a)(5)(v).

26. The sophistication requirements of Rule 146 are discussed in Thomforde, *supra* note 4, at 23-26.

27. 17 C.F.R. § 230.242(e)(2)(iv) (1980).

nies; and small business investment companies.[28] In addition, Rule 242(a)(1)(ii) excludes from the thirty-five purchaser limitation persons who purchase one hundred thousand dollars or more of the issue. Such persons, however, must have paid in full and in cash, or must have agreed to pay in full within sixty days. Finally, Rule 242(a)(1)(iii) excludes from the purchaser limitation "any director or executive officer" of the issuer. An executive officer is defined to mean "the president, secretary, treasurer, any vice president in charge of a principal business function . . . and any other person who performs similar policy-making functions."[29]

Even when sales are made to nonaccredited purchasers, certain relatives need not be counted in computing the thirty-five purchaser limitation. Thus, Rule 242(e)(2) excludes from the computation "[a]ny relative, spouse, or relative of the spouse of a purchaser who has the same home as the purchaser."[30] In addition, Rule 242(e)(2)(iii) excludes certain trusts and corporations in which the purchaser has an interest. On the other hand, Rule 242(e)(3) does not permit a corporation "or other organization" to be formed for the purpose of evading the thirty-five purchaser limitation. In such cases, even though the corporation or organization is the nominal purchaser, each beneficial owner will be counted as a separate purchaser.

### *C. Limitation on Size of Offering*

Offerings pursuant to Rule 242 are limited to two million dollars during any six month period.[31] The Rule provides specific requirements for computing the limit, including provisions relating to the operation of the integration doctrine.[32]

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28. *Id.* § 230.242(a)(1)(i).

29. *Id.* § 230.242(a)(3).

30. *Id.* § 230.242(e)(2)(i).

31. *Id.* § 230.242(c), *as amended by* SEC Securities Act Release No. 6250 (Oct. 23, 1980), 21 SEC Docket 244 (1980), [1980 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 82,671.

32. The integration doctrine is designed to prevent an issuer from evading the registration requirements of the Act by dividing a large, single offering into two or more smaller, technically exempt offerings. Thus, the SEC will look through form to substance and treat the series of small, technically exempt offerings as a single offering subject to registration. When deciding whether to

In computing the two million dollar ceiling, a deduction must be made for the amount of "the aggregate gross proceeds for all securities sold pursuant to any section 3(b) exemption . . . six months prior to the commencement and during the offering of the issue of securities pursuant to [Rule 242]."[33] The "other securities" exemptions based on section 3(b) are Rule 240[34] and Regulation A.[35] Thus, proceeds from any Rule 240 or Regulation A offering during the six months prior to the Rule 242 offering will reduce the amount available for sale under Rule 242. One need not deduct certain employee benefit plans specified in the subsection.[36]

If sales not falling within the ambit of section 3(b) are made during the six month period, general integration principles apply.[37] If sales are made more than six months prior to the Rule 242 offering, or more than six months after the Rule 242 offering is complete, such sales will not be integrated with the Rule 242 offering, regardless of whether such sales are based on section 3(b).[38] This safe harbor, however, is contingent on the absence of other sales of the same or a similar class of securities during either six month period, with the exception of sales made pursuant to a section 3(b) exemption.[39]

Finally, the term "securities of the issuer" as used in the Rule includes, in addition to securities of the issuer, all securities issued by "any predecessor" of the issuer and all securities issued by "any affiliate . . . which was organized or became such

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integrate the smaller offerings into a single offering, the SEC will consider the following factors:

> (1) Are the offerings part of a single plan of financing; (2) Do the offerings involve issuance of the same class of security; (3) Are the offerings made at or about the same time; (4) Is the same type of consideration to be received, and, (5) Are the offerings made for the same general purpose.

SEC Securities Act Release No. 4434 (Dec. 6, 1961), [1973] 1 FED. SEC. L. REP. (CCH) ¶ 2272.

33. 17 C.F.R. § 230.242(c) (1980).
34. *Id.* § 230.240.
35. *Id.* § 230.251-.264.
36. *Id.* § 230.242(c).
37. The general integration principles are enumerated in note 32 *supra*.
38. 17 C.F.R. § 230.242(b) (1980).
39. *Id.*

an affiliate within the preceding twelve months."[40] The purpose of this limitation is to prevent an issuer from circumventing the limitations of the Rule either by forming or spinning off related enterprises, each of which takes advantage of the two million dollar exemption.

### *D. Restrictions on Resale*

Stock purchased pursuant to Rule 242 is treated as if it were purchased in a private placement and is, therefore, restricted.[41] Thus, resales of such securities require registration, unless an exemption is found pursuant to Rules 144[42] or 237,[43] or pursuant to section 4(1) of the Act.[44] In some cases, the combined effect of Rules 144 and 237 is to prevent resales of the restricted securities for periods ranging from two to five years,[45] as well as to limit the amount of such resales to fifty thousand dollars or one percent of the issuer's outstanding stock.[46] Rule 242(g) requires the issuer to "exercise reasonable care" to notify prospective purchasers of the restrictions by (1) "[m]aking reasonable inquiry" to determine whether the purchaser is buying with a view to resale to others; (2) "[i]nforming the purchaser of the restrictions on resale"; and (3) "[p]lacing a legend on the certificate" giving notice of the restrictions on resale.[47]

### *E. Information Requirements*

If securities are sold only to accredited purchasers, the Rule does not require that any specific information be supplied to the

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40. *Id.* § 230.242(a)(6).

41. *Id.* § 230.242(g).

42. *Id.* § 230.144.

43. *Id.* § 230.237.

44. Securities Act of 1933 § 4(1), 15 U.S.C. § 77d(1) (1976). Rules 144 and 237 and section 4(1) are described in Thomforde, *supra* note 4, at 37-43.

45. The restriction period is two years under Rule 144, 17 C.F.R. § 230.144(d)(1) (1980), and five years under Rule 237, 17 C.F.R. § 230.237(a)(3) (1980).

46. The limitation on the amount of resales is the lesser amount of $50,000 or 1% of the outstanding stock under Rule 237, 17 C.F.R. § 230.237(b) (1980), and 1% of the outstanding stock under Rule 144, 17 C.F.R. § 230.144(e) (1980).

47. 17 C.F.R. § 230.242(g)(1)-(3) (1980).

purchasers. If, however, any securities are sold to nonaccredited persons, then all purchasers, including the accredited purchasers, must receive certain specific written information.[48] In general, however, the information requirements of Rule 242 are easier to comply with than the analogous requirements of Rule 146. The precise information that must be given to purchasers depends on whether the issuer is subject to the reporting requirements of the Securities Exchange Act.[49]

If the issuer is subject to the reporting requirements of the Securities Exchange Act, the information requirements of Rule 242 can be satisfied by supplying a copy of the "most recent annual report, definitive proxy statement, and any other reports or documents required to be filed."[50] Additionally, the issuer must supply information about the new issue and the use of the proceeds.[51] If the issuer is not subject to the reporting requirements of the Securities Exchange Act, the issuer must provide the information required by Part I of Form S-18, a simplified registration form,[52] except that only the financial statements for the most recent fiscal year need be certified.[53] If the securities are sold both to accredited and to nonaccredited purchasers, the issuer must notify nonaccredited purchasers in writing of any written information given to the accredited purchasers. The issuer must also provide access to such written information on request.[54] Finally, the issuer must give all offerees an opportunity to ask questions about the issuer and to obtain further information, when available, to verify the written information supplied pursuant to Rule 242(f)(1).[55]

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48. *Id.* § 230.242(f).

49. Section 12 of the Securities Exchange Act of 1934 requires periodic reports to be filed with the SEC if the corporation has 500 shareholders and $1,000,000 in assets. Securities Exchange Act of 1934 § 12(g), 15 U.S.C. § 78l(g) (1976).

50. 17 C.F.R. § 230.242(f)(1)(iii) (1980).

51. *Id.* § 230.242(f)(1)(ii).

52. *Id.* § 230.242(f)(1)(i).

53. *Id.* § 230.242(f)(3).

54. *Id.* § 239.28.

55. *Id.* § 230.242(f)(2).

### *F. Advertising and Solicitation*

Rule 242(d) prohibits general advertising to the public. The prohibition is aimed at media advertisements, which include "newspaper, magazine or similar medium or broadcast over the television or radio."[56] Presumably, however, indiscriminate mass mailing campaigns would be proscribed as a form of "general advertisement or solicitation."[57] It should be noted that offerings to accredited persons are conditioned on the issuer having "reasonable grounds to believe . . . , after making reasonable inquiry," that the person is accredited "at the time of the sale."[58] The determination whether an offeree is accredited under Rule 242 is easier than the determination of sophistication under Rule 146.[59]

The ban against general solicitation does not prohibit the issuer from using the services of a broker-dealer to distribute the issue. The broker, however, is subject to the ban on general advertisement and general solicitation.[60]

### *G. Notice on Form 242*

Rule 242(h) requires the issuer to file a notice of sale with the Commission's Office of Small Business Policy, Division of Corporation Finance, in Washington, D.C. Such notices must be filed "[n]o later than ten days after the first sale . . . in reliance on this rule," and ten days "after the completion date of the offering."[61] If more than six months transpire between the first sale and the completion of the offering, the notice must be filed at the end of each six month period.[62] Form 242, a detailed notice requirement, appears as Appendix A to this Article.

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56. *Id.* § 230.242(d).

57. A mass mailing campaign to persons not personally known to the issuer is clearly a general solicitation.

58. 17 C.F.R. § 230.242(a)(1) (1980).

59. *See* notes 17 & 18 *supra* and accompanying text.

60. "Neither the issuer *nor any person acting on its behalf* shall offer or sell securities pursuant to this rule by means of any form of general solicitation or general advertising . . . ." 17 C.F.R. § 230.242(d) (1980) (emphasis added).

61. *Id.* § 230.242(h)(1).

62. *Id.* § 230.242(h)(1)(iii).

## III. New Section 4(6)

On October 21, 1980, Congress amended the Securities Act of 1933 by adding section 4(6).[63] Section 4(6) exempts sales of securities to accredited purchasers not exceeding the amount exempt under section 3(b) of the Act from registration.[64] Section 3(b) has been amended to increase the exempted amount from two million dollars to five million dollars.[65] Section 4(6) prohibits advertisements and public solicitations and requires the filing of "such notice with the Commission as the Commission shall prescribe."[66] On November 7, 1980, the Commission adopted Form 4(6) to satisfy the notice requirement.[67] This section of the Article will compare the requirements of section 4(6) with those of Rule 242.

### *A. Qualified Issuers*

Unlike Rule 242, section 4(6) is not limited to issuers who are corporations.[68] Thus, limited partnerships may take advantage of the exemption. Moreover, section 4(6) does not disqualify issuers on the basis of the nature of the issuer's business as does Rule 242.[69]

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63. Securities Act of 1933 § 4(6) (to be codified at 15 U.S.C. § 77d(6) (1980)). The text of new section 4(6) states:

> [T]ransactions involving offers or sales by an issuer solely to one or more accredited investors, if the aggregate offering price of an issue of securities offered in reliance on this paragraph does not exceed the amount allowed under section 3(b) of this title, if there is no advertising or public solicitation in connection with the transaction by the issuer or anyone acting on the issuer's behalf, and if the issuer files such notice with the Commission as the Commission shall prescribe.

*Id.*

64. Securities Act of 1933 § 3(b), 15 U.S.C. § 77c(b) (1976).

65. *Id.*, 15 U.S.C. § 77c(b), *as amended by* Small Business Investment Incentive Act of 1980 § 301, Pub. L. No. 96-477, 94 Stat. 2291.

66. Securities Act of 1933 § 4(6) (to be codified at 15 U.S.C. §77d(6) (1980)).

67. SEC Securities Act Release No. 6256 (Nov. 7, 1980), 21 SEC Docket 523 (1980), [1980 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 82,686.

68. Rule 242 is limited to corporations. 17 C.F.R. § 230.242(a)(5) (1980).

69. Rule 242 disqualifies investment companies and certain companies involved in oil, gas, or mining operations. *Id.* § 230.242(a)(5)(i)-(iv).

### B. Accredited and Nonaccredited Purchasers

Both Rule 242 and section 4(6) are available for sales to an unlimited number of accredited purchasers.[70] Section 4(6), however, is not available for sales to unaccredited purchasers, as are those of Rule 242. For purposes of section 4(6), accredited purchasers include the same institutional investors that are included in the Rule 242 definition of accredited purchaser.[71] Rule 242 also defines accredited purchasers to include certain key officers and persons who invest one hundred thousand dollars or more.[72] Such persons, however, are not necessarily accredited under section 4(6) because the term "accredited investor" used in section 4(6) is defined in section 2(15) to include institutional investors, but not to include other classes of investors unless and until the Commission promulgates a specific rule to that effect.[73] Since no particular reason appears to exist for defining the term more restrictively for section 4(6) purposes than for Rule 242 purposes; a rule to that effect should be forthcoming.[74]

### C. Limitations on Size of Offering

The section 4(6) exemption is available for offerings of up to five million dollars, as opposed to the two million dollar limit imposed by Rule 242.[75] Unlike Rule 242, however, section 4(6)

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70. *Id.* § 230.242(e)(2)(iv).

71. The term "accredited investor" used in § 4(6) is defined in new § 2(15) of the Act to include the same institutions that are exempt under Rule 242(a)(1)(i). The new § 2(15) is 15 U.S.C. § 77b(15) (1976), *as amended by* Small Business Investment Incentive Act of 1980 § 603, Pub. L. No. 96-477, 94 Stat. 2294.

72. 17 C.F.R. § 230.242(a)(1)(ii)-(iii) (1980).

73. For example, key officers may be other classes of investors not included in the definition of accredited investor. Securities Act of 1933 § 2(15), 15 U.S.C. § 77b(15) (1976).

74. The Commission currently is studying the matter, with a view to rulemaking. *See* SEC Securities Act Release No. 6274 (Dec. 23, 1980), 21 SEC Docket 1013 (1980) (to be reprinted in [1981 Transfer Binder] FED. SEC. L. REP. (CCH)).

75. 17 C.F.R. § 230.242(c) (1980), *as amended by* SEC Securities Act Release No. 6250 (Oct. 23, 1980), 21 SEC Docket 244 (1980), [1980 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 82,671. When Rule 242 was first promulgated, § 3(b) of the Act, on which Rule 242 is based, had a $2,000,000 limit. At

does not provide a safe harbor for applying the integration doctrine.[76] Thus, general integration principles[77] must be applied on a case by case basis. This creates some uncertainty in determining the availability of the exemption.

### *D. Advertising and Solicitation*

Section 4(6), like Rule 242, prohibits advertising and "public solicitations."[78] Neither exemption, however, prohibits the aid of a broker-dealer in placing the offering so long as the broker avoids public solicitations. In any event, because section 4(6) is available only for sales to accredited purchasers, the issuer or his agent must have reasonable grounds to believe that the purchaser is accredited before consummating a sale.[79]

### *E. Restrictions on Resale*

Since Rule 242 stock is restricted,[80] the purchaser's right to resell the securities is limited. Section 4(6) makes no mention of this potential problem. It seems safe to conclude, however, that if a person purchases section 4(6) stock from an issuer with a view to immediate resale to a nonaccredited person, the transaction will constitute an underwriting transaction as defined by section 2(11).[81] If so, the resale transaction will be subject to registration unless an exemption can be established under Rule

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this time, the limits of § 242 were set by reference to § 3(b). On October 21, 1980, Congress amended § 3(b), increasing the permissible statutory limit to $5,000,000. Small Business Investment Incentive Act § 301, Pub. L. No. 96-477, 94 Stat. 2291 (1980). Thereafter, the SEC amended Rule 242 to fix the limit available under the Rule at $2,000,000 rather than $5,000,000. SEC Securities Act Release No. 6250 (Oct. 23, 1980), 21 SEC Docket 244 (1980), [1980 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 82,671.

76. The safe harbor of Rule 242 is discussed in text accompanying notes 31-40 *supra*.

77. The general integration principles are discussed in note 32 *supra*.

78. Rule 242 prohibits general advertising and solicitation. 17 C.F.R. § 230.242(d) (1980).

79. If indiscriminate sales could be made to purchasers without any regard to some reasonable belief regarding their qualifications, the purpose of the section would be thwarted.

80. *See* text accompanying notes 41-47 *supra*.

81. Securities Act of 1933 § 2(11), 15 U.S.C. § 77b(11) (1980).

144[82] or Rule 237,[83] or under section 4(1).[84] Thus, regardless of whether section 4(6) specifically describes the stock as restricted, the usual resale problems and restrictions will come into play.

### *F. Information Requirements*

Section 4(6) imposes no requirement that purchasers receive written information from the issuer prior to sale. Rule 242 requires specified information to be supplied, but only when sales are made to unaccredited purchasers.[85] Although issuers are relieved of the information requirements of either Rules 242 or 146, the antifraud provisions of the Securities Act apply.[86] Thus, written or oral misrepresentations or omissions will subject the issuer to liability for fraud.

### *G. Notice on Form 4(6)*

Finally, section 4(6), like Rule 242, requires that a detailed notice of sale be filed with the Commission.[87] Form 4(6) has been promulgated by the SEC for use in connection with sales made pursuant to section 4(6).[88] A copy of Form 4(6) is included as Appendix B to this article.

## IV. CONCLUSION

Rule 242 and section 4(6) are welcome relief for small businesses. These new exemptions represent significant improvements over the existing exemptions, particularly Rules 146 and 240. Each new exemption avoids the difficulty of compliance with the ambiguous sophistication requirements of Rule 146 private placements. To the extent that an accredited purchaser is

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82. 17 C.F.R. § 230.144 (1980).

83. *Id.* § 230.237.

84. Securities Act of 1933 § 4(1), 15 U.S.C. § 77d(1) (1976).

85. 17 C.F.R. § 230.242(f) (1980).

86. The basic antifraud provisions are the Securities Act of 1933 § 12(2), 15 U.S.C. § 77l(2) (1976), and the Securities Act of 1933 § 10(b), 15 U.S.C. § 78j(b) (1976).

87. 17 C.F.R. § 230.242(h) (1980).

88. SEC Securities Act Release No. 6256 (Nov. 7, 1980), 21 SEC Docket 523 (1980), [1980 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 82,686.

involved, the new exemptions also avoid the thirty-five purchaser limitation imposed by Rule 146. Finally, as compared with Rule 146, the information requirements are relaxed under Rule 242 and eliminated under section 4(6).

On the other hand, although the new exemptions impose dollar limitations on an exempt offering that do not exist under Rule 146, these limitations are a dramatic improvement over the one hundred thousand dollar limitation of Rule 240.[89] Moreover, the new exemptions, unlike Rule 240,[90] are not limited to corporations with fewer than one hundred shareholders.

The patchwork quilt of exemptions under the Securities Act continues to grow.[91] Although each exemption has its relative advantages and disadvantages, new Rule 242 and new section 4(6) are the first meaningful additions for small businesses.

89. 17 C.F.R. § 230.240 (1980).

90. *Id.*

91. The Commission has announced recently that it is considering adopting modifications to Rules 146, 240, 242, and Regulation A. The Commission's principal interest is whether to increase the dollar limitations imposed by Rules 240 and 242 and Regulation A, and whether to add an accredited investor concept to Rule 146. SEC Securities Act Release No. 6274 (Dec. 23, 1980), 21 SEC Docket 1013 (1980), to be reprinted in [1981 Transfer Binder] FED. SEC. L. REP. (CCH).

# APPENDIX A

## SECURITIES AND EXCHANGE COMMISSION
## Washington, D.C. 20549

## NOTICE OF SALES OF SECURITIES PURSUANT TO RULE 242

FORM 242

Nature of this filing with respect to this issue.

NEW AMENDED

Original

Combined Original and Final

Six-Month Update

Final

Instructions: Five copies of this notice are to be filed with the Commission: (a) no later than 10 days after the first sale of securities in any issue is made in reliance on the rule; (b) no later than 10 days after the completion date of the offering of such issue (except that only one notice need be filed if the offering of the issue is completed within the 10-day period described in "(a)" above and this notice is filed no later than at the conclusion of that period but subsequently to the completion of the issue); and (c) every six months after the first sale of securities in the issue is made in reliance on the rule, unless a final notice has been filed in accordance with "(b)" above. If more than one notice is required to be filed as to any issue of securities offered in reliance on the rule, notices other than the original notice need only report the issuer's name and information in response to Part D and any material changes in Parts A through C from the facts previously reported. This notice shall be deemed to be filed with the Commission for purposes of the rule as of the date on which the notice is received by the Commission, or, if delivered to the Commission after the date on which it is due, as of the date on which it is mailed by means of United States registered or certified mail to the Commission's Office of Small Business Policy, Division of Corporation Finance, at the Commission's principal office at 500 North Capitol Street, Washington, D.C. 20549.

Issuer's Name, Address, and Telephone Number (including area code).
Instruction. State the address of the issuer's executive offices and, if different, the address at which the issuer's principal business operations are conducted or proposed to be conducted.

NAME

ADDRESS OF EXECUTIVE OFFICES

CITY STATE ZIP

AREA CODE TELEPHONE NUMBER

ADDRESS OF PRINCIPAL BUSINESS OPERATIONS

CITY STATE ZIP

AREA CODE TELEPHONE NUMBER

General Instructions. Please check the box(es) for the appropriate response(s) to each item or fill in the blanks. Please answer all items. If the answer to any question is "none," please indicate. If additional space is required, indicate the answer on the attached continuation sheet.

A. Basic Identification of Issuer.

1. Has the issuer filed any periodic reports pursuant to Section 13 or 15(d) of the Securities Exchange Act of

1934?

If yes, please indicate the file number of the docket in which the periodic reports are filed.

2. Please indicate the issuer's IRS employer identification number.

3. Has the issuer been assigned a CUSIP number for its securities?

If yes, please specify the first six (6) digits.

4. Please check the appropriate box for each exchange or market, if any, where the issuer's securities are traded.

American Stock Exchange
Boston Stock Exchange
Cincinnati Stock Exchange
Midwest Stock Exchange
National Association of Securities Dealers
New York Stock Exchange
Philadelphia Stock Exchange
Pacific Stock Exchange
Other
Please specify

_____

_____

None

5. Please indicate the issuer's Standard Industrial Classification (SIC) at the 3 or 4 digit level.

B. Statistical Information about the Issuer

Instruction. Please enter the letter for the appropriate response to each item in Part B in the box indicated.

1. What were the issuer's gross revenues at the end of its latest fiscal year?

a. Less than $500,000
b. $500,001 - $1,000,000
c. $1,000,001 - $3,000,000
d. $3,000,001 - $5,000,000
e. $5,000,001 - $10,000,000
f. $10,000,001 - $25,000,000
g. $25,000,001 - $100,000,000
h. Over $100,000,000

2. What were the issuer's total consolidated assets as of the end of its latest fiscal year?

a. Less than $50,000
b. $50,000 - $250,000
c. $250,001 - $500,000
d. $500,001 - $1,000,000
e. $1,000,001 - $3,000,000
f. $3,000,001 - $5,000,000
g. $5,000,001 - $10,000,000
h. Over $10,000,000

3. What was the issuer's net income at the end of its latest fiscal year?

a. None
b. Less than $50,000
c. $50,000 - $250,000
d. $250,001 - $500,000
e. $500,001 - $1,000,000
f. $1,000,001 - $3,000,000
g. $3,000,001 - $5,000,000
h. $5,000,001 - $10,000,000
i. Over $10,000,000

4. What was the issuer's shareholders' equity at the end of its latest fiscal year?

a. Less than $25,000
b. $25,000 - $125,000
c. $125,001 - $250,000
d. $250,001 - $500,000
e. $500,001 - $1,000,000
f. $1,000,001 - $3,000,000
g. $3,000,001 - $5,000,000
h. $5,000,001 - $10,000,000
i. Over $10,000,000

5. How many shareholders did the issuer have at the end of its latest fiscal year?

a. 1 - 10
b. 11 - 25
c. 26 - 50
d. 51 - 99
e. 100 - 199
f. 200 - 299
g. 300 - 399
h. 400 - 499
i. 500 or more

6. How many shares were held by non-affiliated shareholders at the end of the issuer's latest fiscal year?

| | |
|---|---|
| a. Less than 500,000 | d. 2,500,001 - 3,500,000 |
| b. 500,001 - 1,500,000 | e. 3,500,001 - 5,000,000 |
| c. 1,500,001 - 2,500,000 | f. Greater than 5,000,000 |

7. How many shares were outstanding at the end of the issuer's latest fiscal year?

| | |
|---|---|
| a. Less than 500,000 | d. 2,500,001 - 3,500,000 |
| b. 500,001 - 1,500,000 | e. 3,500,001 - 5,000,000 |
| c. 1,500,001 - 2,500,000 | f. Greater than 5,000,000 |

8. How many full-time employees did the issuer have at the end of its latest fiscal year?

| | |
|---|---|
| a. 0 | g. 41 - 50 |
| b. 1 - 5 | h. 51 - 100 |
| c. 6 - 10 | i. 101 - 250 |
| d. 11 - 20 | j. 251 - 500 |
| e. 21 - 30 | k. 501 - 750 |
| f. 31 - 40 | l. Over 750 |

9. How many part-time employees did the issuer have at the end of its latest fiscal year?

| | |
|---|---|
| a. 0 | e. 21 - 30 |
| b. 1 - 5 | f. 31 - 40 |
| c. 6 - 10 | g. 41 - 50 |
| d. 11 - 20 | h. Over 50 |

C. Brief Narrative Information About the Issuer.

1. In what year was the issuer incorporated?

2. In what state is the issuer incorporated? Please enter the standard two-letter U.S. Postal Service abbreviation. Enter "CN" if the issuer is incorporated in Canada.

3. Please briefly describe the issuer's business.

_____

_____

_____

_____

4. Please list the full name and address of the chief executive officer, each affiliate, and each promoter of the issuer involved in the offering of securities as to which sales pursuant to Rule 242 are reported on this Form. The term "promoter" includes—

(a) Any person who, acting alone or in conjunction with one or more other persons, directly or indirectly takes the initiative in founding and organizing the business or enterprise of an issuer; or
(b) Any person who, in connection with the founding or organizing of the business or enterprise of an issuer, directly or indirectly receives in consideration of services or property, or both services and property, 10 percent or more or any class of securities of the issuer or 10 percent or more of the proceeds from the sale of any class of securities. However, a person who receives such securities or proceeds either solely as brokerage commissions or solely in consideration of property shall not be deemed a promoter within the meaning of this paragraph if such person does not otherwise take part in founding and organizing the enterprise.

_____

NAME

_____

ADDRESS CITY STATE ZIP

_____

NAME

_____

ADDRESS CITY STATE ZIP

5. Please list the full name and address of each person who has been or will be paid or given directly or indirectly any commission or similar remuneration for solicitation of purchasers in connection with sales of securities in any offering pursuant to Rule 242.

NAME

ADDRESS CITY STATE ZIP

NAME

ADDRESS CITY STATE ZIP

D. Section 3(b) Sales Limit and Other Information About the Offering

1. Type and aggregate offering price of securities intended to be sold pursuant to Rule 242 in this issue.

a. Debt $_____

b. Equity $_____

c. Convertible $_____

2. Number of accredited and non-accredited persons who have purchased securities in this issue in transactions in reliance on Rule 242 and aggregate dollar amounts of their purchases to date.

| | Number of Purchasers | Aggregate Dollar Amount |
|---|---|---|
| Accredited persons | | $ |
| Non-accredited persons | | |
| Total | | $ |

3. Dollar amount of all section 3(b) sales of securities (other than sales pursuant to an exemption from registration provided by Regulation A pursuant to any employee plan as defined in paragraph (d)(1) of Rule 16b-3 under the Securities Exchange Act of 1934 which meets the conditions of paragraphs (a) through (c) of that rule) in the preceding six months by type and exemption.

| Exemption | Type | Dollar Amount |
|---|---|---|
| Rule 242 | | $ |
| Regulation A | | |
| Rule 240 | | |
| Total | | $ |

4. Furnish a reasonably itemized statement of all expenses in connection with the issuance and distribution of the securities being offered in this issue. Insofar as practicable, give amounts for the items listed below. The information may be given as subject to future contingencies. If the amounts of any items are not known, estimates designated as such by an asterisk ("*") shall be given.

a. Blue Sky Fees and Expenses $_____

b. Transfer Agents' Fees _____

c. Printing and Engraving Costs _____

d. Legal Fees _____

e. Accounting Fees _____

f. Engineering Fees _____

g. Sales Commissions (including Finders' Fees) _____

h. Other Expenses (Identify)

_____ _____

_____ _____

Total $_____

5. Indicate below the amount of the gross proceeds to the issuer (other than amounts specified in Item D.4. above) proposed to be used or used for each of the following purposes:

| | | Payments to officers, directors and affiliates | Payments to others |
|---|---|---|---|
| a. | Salaries and Fees | $_____ | $_____ |
| b. | Purchase of Real Estate | _____ | _____ |
| c. | Purchase and Installation of Machinery and Equipment | _____ | _____ |
| d. | Construction of Plant Building and Facilities | _____ | _____ |
| e. | Development Expense (product development, research, patent costs, etc.) | _____ | _____ |
| f. | Purchase of Raw Materials, Inventories, Supplies, etc. | _____ | _____ |
| g. | Selling, Advertising, and Other Sales Promotion | _____ | _____ |
| h. | Acquisition of Other Businesses | _____ | _____ |
| i. | Repayment of Loans | _____ | _____ |
| | Other—Please Specify | | |
| | j. _____ | _____ | _____ |
| | k. _____ | _____ | _____ |
| | l. _____ | _____ | _____ |
| | m. _____ | _____ | _____ |
| | n. _____ | _____ | _____ |
| | Total | $_____ | $_____ |

E. Undertaking

The undersigned issuer hereby undertakes to furnish to the Securities and Exchange Commission, upon the written request of its staff, the information furnished by the issuer to any non-accredited person pursuant to paragraph (f)(1) of Rule 242.

Pursuant to the requirements of Rule 242 under the Securities Act of 1933, the issuer has duly caused this notice to be signed on its behalf by the undersigned duly authorized officer or person acting in a similar capacity.

Date of Notice: Issuer _____

_____

_____

Officer

Instruction: Print the name and title of the signing representative under his signature. At least one copy of the notice filed with the Commission's principal office in Washington, D.C. shall be manually signed. Any copies not manually signed shall bear typed or printed signatures.

[Attention: Intentional misstatements or omissions of fact constitute Federal criminal violations (see 18 U.S.C. 1001).]

# Appendix B

U.S. SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

## NOTICE OF SALES OF SECURITIES PURSUANT TO SECTION 4(6) OF THE SECURITIES ACT OF 1933

**Nature of this filing with respect to this issue.**

INSTRUCTION: Circle "N" for a new filing or "A" for an amended filing.

| | | | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|
| ORIGINAL | 1 | N A | COMBINED ORIGINAL AND FINAL | 2 | N A | SIX-MONTH UPDATE | 3 | N A | FINAL | 4 | N A |

INSTRUCTIONS: Five copies of this notice are to be filed with the Commission: (a) no later than 10 days after the first sale of securities in any issue is made in reliance on Section 4(6) (original); (b) no later than 10 days after the completion date of the offering of such issue (final), *except that only one notice need be filed if the offering of the issue is completed within the 10-day period described in "(a)" above and this notice is filed no later than at the conclusion of that period but subsequently to the completion of the issue* (combined original and final); and (c) every six months after the first sale of securities in the issue is made in reliance on Section 4(6), unless a final notice has been filed in accordance with "(b)" above (6-month up-date). If more than one notice is required to be filed as to any issue of securities offered in reliance on the exemption notices other than the original notice need only report the issuer's name and information in response to Part D and any material changes from the facts previously reported in Parts A through C. This notice shall be deemed to be filed with the Commission for purposes of the exemption as of the date on which the notice is received by the Commission, or, if delivered to the Commission after the date on which it is due, as of the date on which it is mailed by means of United States registered or certified mail to the Commission's Office of Small Business Policy, Division of Corporation Finance, at the Commission's principal office at 500 North Capitol Street, Washington, D.C. 20549.

INSTRUCTION: State the address of the issuer's executive offices and, if different, the address at which the issuer's principal business operations are conducted or proposed to be conducted.

| | | |
|---|---|---|
| NAME | | |
| ADDRESS OF EXECUTIVE OFFICES | | |
| CITY | STATE | ZIP |
| AREA CODE | TELEPHONE NUMBER | |
| ADDRESS OF PRINCIPAL BUSINESS OPERATIONS | | |
| CITY | STATE | ZIP |
| AREA CODE | TELEPHONE NUMBER | |

GENERAL INSTRUCTIONS: Please check the box(es) for the appropriate response(s) to each item or fill in the blanks. Please answer all items. If additional space is required, indicate the answer on the attached continuation sheet.

A. Basic Identification of Issuer.

1. Has the issuer filed any periodic reports pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934?

   If yes, please indicate the file number of the docket in which the periodic reports are filed.

2. Please indicate the issuer's IRS employer identification number. If an application for such number is pending, please enter "00-0000000."

3. Has the issuer been assigned a CUSIP number for its securities?

   If yes, please specify the first six (6) digits. If no, please enter "000000."

4. Please check the appropriate box for each exchange or market, if any, where the issuer's securities are traded.

   American Stock Exchange
   Boston Stock Exchange
   Cincinnati Stock Exchange
   Midwest Stock Exchange
   Over-the-Counter (including
     National Association of Securities Dealers
     Automated Quotations System)
   New York Stock Exchange
   Philadelphia Stock Exchange
   Pacific Stock Exchange

   Other *Please Specify*

   _____

   _____

   None.

5. Please indicate the issuer's Standard Industrial Classification (SIC) at the 3 or 4 digit level. If the issuer has more than one SIC, please enter the issuer's primary SIC. If a 3 digit SIC is given, enter "X" in the left-most box.

B. Statistical Information About the Issuer

INSTRUCTION: Please enter the letter for the appropriate response to each item in Part B in the box indicated. If the issuer's first fiscal year has not yet ended, furnish the requested information as of a date, or as to a period ending on a date, no more than 90 days prior to the first sale of securities in this issue.

1. What were the issuer's gross revenues for its most recently ended fiscal year?

   a. Less than $500,000
   b. $500,001 - $1,000,000
   c. $1,000,001 - $3,000,000
   d. $3,000,001 - $5,000,000
   e. $5,000,001 - $10,000,000
   f. $10,000,001 - $25,000,000
   g. $25,000,001 - $100,000,000
   h. Over $100,000,000

2. What were the issuer's total consolidated assets as of the end of its latest fiscal year?

   a. Less than $50,000
   b. $50,000 - $250,000
   c. $250,001 - $500,000
   d. $500,001 - $1,000,000
   e. $1,000,001 - $3,000,000
   f. $3,000,001 - $5,000,000
   g. $5,000,001 - $10,000,000
   h. Over $10,000,000

3. What was the issuer's net income for its most recently ended fiscal year?

   a. None or net loss
   b. $1 - $50,000
   c. $50,000 - $250,000
   d. $250,001 - $500,000
   e. $500,001 - $1,000,000
   f. $1,000,001 - $3,000,000
   g. $3,000,001 - $5,000,000
   h. $5,000,001 - $10,000,000
   i. Over $10,000,000

4. What was the issuer's shareholders' equity at the end of its latest fiscal year?

   a. Less than $25,000
   b. $25,000 - $125,000
   c. $125,001 - $250,000
   d. $250,001 - $500,000
   e. $500,001 - $1,000,000
   f. $1,000,001 - $3,000,000
   g. $3,000,001 - $5,000,000
   h. $5,000,001 - $10,000,000
   i. Over $10,000,000

5. How many shareholders did the issuer have at the end of its latest fiscal year?

   a. 0 - 10
   b. 11 - 25
   c. 26 - 50
   d. 51 - 99
   e. 100 - 199
   f. 200 - 299
   g. 300 - 399
   h. 400 - 499
   i. 500 or more

6. How many shares were held by non-affiliated shareholders at the end of the issuer's latest fiscal year?

   a. Less than 500,000
   b. 500,001 - 1,500,000
   c. 1,500,001 - 2,500,000
   d. 2,500,001 - 3,500,000
   e. 3,500,001 - 5,000,000
   f. Over 5,000,000

7. How many shares were outstanding at the end of the issuer's latest fiscal year?

   a. Less than 500,000
   b. 500,001 - 1,500,000
   c. 1,500,001 - 2,500,000
   d. 2,500,001 - 3,500,000
   e. 3,500,001 - 5,000,000
   f. Over 5,000,000

8. How many full-time employees did the issuer have at the end of its latest fiscal year?

   a. 0
   b. 1 - 5
   c. 6 - 10
   d. 11 - 20
   e. 21 - 30
   f. 31 - 40
   g. 41 - 50
   h. 51 - 100
   i. 101 - 250
   j. 251 - 500
   k. 501 - 750
   l. Over 750

9. How many part-time employees did the issuer have at the end of its latest fiscal year?

   a. 0
   b. 1 - 5
   c. 6 - 10
   d. 11 - 20
   e. 21 - 30
   f. 31 - 40
   g. 41 - 50
   h. Over 50

C. Brief Narrative Information About the Issuer.

1. In what year was the issuer incorporated; or organized?

2. In what state is the issuer incorporated or organized? Please enter the standard two-letter U.S. Postal Service abbreviation. Enter "CN" if the issuer is organized in Canada.

3. Please briefly describe the issuer's business.

_____

_____

_____

_____

4. Please list the full name and address of the following persons: each promoter of the issuer involved in the offering of securities as to which sales pursuant to Section 4(6) are reported on this notice, the issuer's chief executive officer, and each of the issuer's affiliates. Indicate the status of each person named by placing an "X" in the applicable box(es) opposite such person's name. The term "promoter" includes . . .

   (a) Any person who, acting alone or in conjunction with one or more other persons, directly or indirectly takes the initiative in founding and organizing the business or enterprise of an issuer; or
   (b) Any person who, in connection with the founding or organizing of the business or enterprise of an issuer, directly or indirectly receives in consideration of services or property, or both services and property, 10 percent or more of any class of securities of the issuer or 10 percent or more of the proceeds from the sale of any class of securities. However, a person who receives such securities or proceeds either solely as brokerage commissions or solely in consideration of property shall not be deemed a promoter within the meaning of this paragraph if such person does not otherwise take part in founding and organizing the enterprise.

| | | | |
|---|---|---|---|
| NAME | | | |
| ADDRESS | CITY | STATE | ZIP |
| NAME | | | |
| ADDRESS | CITY | STATE | ZIP |

5. Please list the full name and address of each person who has been or will be paid or given directly or indirectly any commission or similar remuneration for solicitation of purchasers in connection with sales of securities in any offering pursuant to Section 4(6).

| | | | |
|---|---|---|---|
| NAME | | | |
| ADDRESS | CITY | STATE | ZIP |
| NAME | | | |
| ADDRESS | CITY | STATE | ZIP |

D. Section 3(b) Sales Limit and Other Information About the Offering

INSTRUCTION: If a response to any item is "none" or "zero," please enter zero ("0") in the corresponding space.

1. Type and aggregate offering price of securities intended to be sold pursuant to Section 4(6) in this issue.

   a. Debt ..... $_____

   b. Equity ..... $_____

   c. Convertible ..... $_____

| | Number of Purchasers (A) | Aggregate Dollar Amount (B) |
|---|---|---|
| 2. Number of accredited persons who have purchased securities in this issue in transactions in reliance on Section 4(6) and aggregate dollar amounts of their purchases to date. | _____ | $_____ |

3. Furnish a reasonably itemized statement of all expenses in connection with the issuance and distribution of the securities being offered in this issue. Insofar as practicable, give amounts for the categories listed below. The information may be given as subject to future contingencies. If the expenditure in any category is not known, furnish an estimate and place an "X" in the box to the left of the amount given.

   a. Blue Sky Fees and Expenses ..... $_____

   b. Transfer Agents' Fees ..... _____

   c. Printing and Engraving Costs ..... _____

   d. Legal Fees ..... _____

   e. Accounting Fees ..... _____

   f. Engineering Fees ..... _____

   g. Sales Commissions *(including Finders' Fees)* ..... _____

   h. Other Expenses *(Identify)*

   _____ _____

   _____ _____

   Total $_____

4. Indicate below the amount of the gross proceeds to the issuer *(other than amounts specified in Item D.4 above)* proposed to be used or used for each of the purposes listed below. If the amount to be used for any purpose is not known, furnish an estimate and place an "X" in the box to the left of the amount given.

| | Payments to officers, directors and affiliates (A) | Payments to others (B) |
|---|---|---|
| a. Salaries and Fees | $_____ | $_____ |
| b. Purchase of Real Estate | _____ | _____ |

| | | |
|---|---|---|
| c. Purchase and Installation of Machinery and Equipment | $_____ | $_____ |
| d. Construction of Plant Building and Facilities | _____ | _____ |
| e. Development Expense *(product development, research, patent costs, etc.)* | _____ | _____ |
| f. Purchase of Raw Materials, Inventories, Supplies, etc. | _____ | _____ |
| g. Selling, Advertising, and other Sales Promotion | _____ | _____ |
| h. Acquisition of other Businesses | _____ | _____ |
| i. Repayment of Loans | _____ | _____ |
| j. Working Capital | _____ | _____ |
| Other—Please Specify | | |
| k. _____ | _____ | _____ |
| l. _____ | _____ | _____ |
| m. _____ | _____ | _____ |
| n. _____ | _____ | _____ |
| Total | $_____ | $_____ |

The issuer has duly caused this notice to be signed on its behalf by the undersigned duly authorized officer or person acting in a similar capacity.

DATE OF NOTICE

_____

ISSUER _____

SIGNATURE _____

NAME _____

TITLE _____

INSTRUCTION: Print the name and title of the signing representative under his signature. At least one copy of the notice filed with the Commission's principal office in Washington, D.C. shall be manually signed. Any copies not manually signed shall bear typed or printed signatures.

# COMMENTS

## DEFENDING THE PUBLIC INTEREST: CITIZEN SUITS FOR RESTITUTION AGAINST BRIBED OFFICIALS

### I. INTRODUCTION

Your friendly neighborhood government official has been a bit too friendly. He has accepted bribes and kickbacks in exchange for political favors. Is it possible for you, a private citizen, to force him to give money he has received as bribes to the state treasury? This Comment will be concerned with the citizen's right to restitution of monies wrongfully obtained by public officers.[1]

The prevailing distrust of bureaucracy and government officials has given individual citizens and taxpayers the desire to keep a tight rein on public officials, especially with the recent rash of bribery allegations both in Tennessee and in the United States Congress. The ability to sue public officials would constitute a powerful weapon for citizens to use against wayward officials. The harassment potential of suits would be outweighed by their beneficial effect in forcing officials to disgorge monies wrongfully obtained. Although no official who accepts a bribe expects to be caught, fewer officials might risk getting caught if they knew that they could be forced to return the bribe and be subjected to criminal sanctions. Some jurisdictions encourage citizen suits against public officials[2] who take bribes, while other jurisdictions, including Tennessee, insist that only the attorney general or a comparable local official can institute civil proceed-

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1. The criminal consequences of taking bribes are beyond the scope of this Comment.

2. *See* notes 87-102 *infra* and accompanying text.

ings on behalf of the community.[3] Many jurisdictions have not addressed the issue whether a civil action could be maintained by private citizens against officials who have succumbed to bribery. This Comment will explore the various attitudes toward this type of suit.

Recovery against bribed officials can be sought on various theories. Citizens can sue wayward officials for breaching their fiduciary duty to the public, for violating basic principles of agency, or for disregarding statutory prohibitions against receiving bribes. Because of the high standard of conduct imposed upon public officials, officers are subject to civil suits for failing to maintain those standards. This Comment is concerned with those civil suits in which citizens, on behalf of the public, seek restitution of monies wrongfully obtained by public officials.

Public-interest suits for recovery against bribed officials are similar to class actions since the named plaintiff is a representative of all other citizens, but many of the strict requirements concerning the certification of a class action are not present in public-interest litigation. Like class action remedies, the remedies sought in public-interest suits will benefit the public as a whole rather than a citizen-plaintiff in his individual capacity.

Presently, the only impediment to public-interest suits is the question of standing. Since all citizens have an interest in punishing corrupt officials, all citizens should have the right to bring a derivative action against bribed officials on behalf of the public. Unfortunately, some states refuse to allow a private citizen to represent the public interest; they require that all civil suits against public officials be brought by the state attorney general or other public official.

## II. Theories of Recovery Against Public Officials

### A. *Public Trust*

It is well settled that a public office is a public trust and that officers are fiduciaries for the people they serve.[4] Because of

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3. *See* notes 61-86 *infra* and accompanying text.

4. *See generally* Katz v. Brandon, 156 Conn. 521, 535, 245 A.2d 579, 587 (1968); County of Cook v. Barrett, 36 Ill. App. 3d 623, 627, 344 N.E.2d 540, 545 (1975); Fairbank v. Stratton, 14 Ill. 2d 307, 311, 152 N.E.2d 569, 571 (1958);

their position, officers are held to a high standard of conduct, which must always be guided by rules of good faith, fidelity, and integrity.[5] The New Jersey Supreme Court in *Driscoll v. Burlington-Bristol Bridge Co.*[6] fully explained the obligations imposed upon public officers at common law:

> As fiduciaries and trustees of the public weal [officers] are under an inescapable obligation to serve the public with highest fidelity. In discharging the duties of their office they are required to display such intelligence and skill as they are capable of, to be diligent and conscientious, to exercise their discretion not arbitrarily but reasonably, and above all to display good faith, honesty and integrity. They must be impervious to corrupting influences and they must transact their business frankly and openly in the light of public scrutiny so that the public may know and be able to judge them and their work fairly.[7]

Public officers are trustees of the public at all times and cannot use their offices for personal gain.[8] President Kennedy expressed this fundamental principle in a memorandum:

> [An officer] must refrain from any use of his public office which is motivated by, or gives the appearance of being motivated by, the desire for private gain for himself or other persons, including particularly those with whom he has family, business or

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City of Boston v. Dolan, 298 Mass. 346, 354, 10 N.E.2d 275, 281 (1937); City of Boston v. Santosuosso, 298 Mass. 175, 181, 10 N.E.2d 271, 275 (1937); Rankin v. Board of Educ., 135 N.J.L. 299, 303, 51 A.2d 194, 197 (1947); State v. McKelvey, 12 Ohio St. 2d 92, 95, 232 N.E.2d 391, 393 (1967); *In re* Marshall, 363 Pa. 326, 336, 69 A.2d 619, 625 (1949).

5. *See, e.g.*, Trist v. Child, 88 U.S. 441, 450 (1874); Terry v. Bender, 143 Cal. App. 2d 198, 206, 300 P.2d 119, 125 (1956); State v. Kearns, 129 N.E.2d 547, 550 (Ohio C.P. 1955); State *ex rel.* Hollibaugh v. State Fish & Game Comm'n, 365 P.2d 942, 948 (Mont. 1961); Huyett v. City of Reading, 57 Berks County L. J. 73, 75, 34 Pa. D. & C. 2d 193, 195 (Pa. C.P. 1964).

6. 8 N.J. 433, 86 A.2d 201 (1952).

7. *Id.* at 474-75, 86 A.2d at 221, *cited in* City of Jersey City v. Hague, 18 N.J. 584, 590, 115 A.2d 8, 11 (1955) (citations omitted).

8. *See, e.g.*, Hulgan v. Gledhill, 207 Ga. 349, 349, 61 S.E.2d 473, 475 (1950); City of Boston v. Dolan, 298 Mass. 346, 354, 10 N.E.2d 275, 281 (1937); State v. McKelvey, 12 Ohio St. 2d 92, 95, 232 N.E.2d 391, 393 (1967); Cotlar v. Warminster, 8 Pa. Commw. Ct. 163, 302 A.2d 859, 862 (1973); ALASKA STAT. § 39.50.090(a) (1974); S.C. CODE § 8-13-410 (1976).

> financial ties. The fact that the desired gain, if it materializes, will not take place at the expense of the government makes this action no less improper.[9]

Even if an officer is not acting strictly within the course of his duty at the time he acquires personal gain, it is a breach of his public trust if the gain is made because he holds the office. In *Reading v. Attorney General*[10] some smugglers paid a British officer to ride in their carriage. Since the border patrol did not search carriages containing British officers, the officer in *Reading* aided the smugglers by riding with them in return for a bribe. Although the officer was not on official duty at the time he was dealing with the smugglers, the House of Lords held that his actions constituted a breach of trust because he received his compensation by virtue of his office. "Whether he is in uniform or not he is always bound to act so as not to prejudice order and good discipline, and . . . he is never entitled to appear in public in uniform in order to earn money without the knowledge and consent of the Crown."[11]

### *B. Agency*

The relationship between the government and a public official has often been likened to the relationship between a principal and his agent.[12] Neither an officer nor an agent can gain personal profits by neglect of a duty or by an abuse of discretion.[13] If an agent breaches his fiduciary duty by using his position to gain a secret profit, he is liable to the principal for the income and gain on property acquired as a consequence of the breach.[14]

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9. 1 G. PALMER, THE LAW OF RESTITUTION § 2.11, at 141 n.1 (1978) (quoting John F. Kennedy's memorandum, May 2, 1963).

10. [1951] A.C. 507.

11. *Id.* at 518.

12. *See, e.g.*, Williams v. State *ex rel.* Morrison, 83 Ariz. 34, 37, 315 P.2d 981, 983 (1957); County of Cook v. Barrett, 36 Ill. App. 3d 623, 628, 344 N.E.2d 540, 545 (1975); Fuchs v. Bidwill, 31 Ill. App. 3d 567, 571, 334 N.E.2d 117, 120 (1975), *rev'd on other grounds*, 65 Ill. 2d 503, 359 N.E.2d 158 (1976).

13. Williams v. State *ex rel.* Morrison, 83 Ariz. 34, 37, 315 P.2d 981, 983 (1957).

14. *See* Anderson Cotton Mills v. Royal Mfg. Co., 221 N.C. 500, 509, 20 S.E.2d 818, 823 (1942).

The Supreme Court in *United States v. Carter*[15] emphasized that a public official must abide by the laws of agency in accounting to his principal (the government) for all secret profits received as follows:

> It would be a dangerous precedent to lay down as law that unless some affirmative fraud or loss can be shown, the agent may hold on to any secret benefit he may be able to make out of his agency. The larger interest of public justice will not tolerate, under any circumstances, that a public official shall retain any profit or advantage which he may realize through the acquirement of an interest in conflict with his fidelity as an agent. If he takes any gift, gratuity or benefit in violation of his duty, or acquires any interest adverse to his principal without a full disclosure, it is a betrayal of his trust and a breach of confidence, and he must account to his principal for all he has received.[16]

If an agent receives a gratuity extended for the purpose of influencing the execution of his agency, that gratuity must also be turned over to his principal.[17]

So long as an agent purports to act in his capacity as agent, any property which he receives belongs to his principal, and the agent is duty-bound to deliver such property to his principal.[18] This rule applies to all property, regardless of whether the receipt of the property is directly related to the purpose of the agency.[19] An agent is bound to a high degree of good faith toward his principal; he cannot avail himself of any advantage his position may give him to profit at his principal's expense.[20] The Privy Council in *Reading v. Attorney General*[21] succinctly summarized these principles of agency in the following manner:

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15. 217 U.S. 286 (1910).

16. *Id.* at 306; *see also* Savage v. Mayer, 33 Cal. 2d 548, 551, 203 P.2d 9, 10 (1949).

17. 217 U.S. at 308.

18. *See* England v. Doyle, 281 F.2d 304, 307 (9th Cir. 1960); Savage v. Mayer, 33 Cal. 2d 548, 551, 203 P.2d 9, 10 (1949).

19. 1 G. PALMER, *supra* note 9, at § 2.11.

20. Conklin v. Joseph C. Hofgesang Sand Co., 407 F. Supp. 1090, 1095-96 (W.D. Ky. 1975) (citing Byer v. International Paper Co., 314 F.2d 831, 833 (10th Cir. 1963)).

21. [1951] A.C. 507.

> [I]t is a principle of law that if a servant, in violation of his duty of honesty and good faith, takes advantage of his service to make a profit for himself, in this sense, that the assets of which he has control, or the facilities which he enjoys, or the position which he occupies, are the real cause of his obtaining the money, as distinct from being the mere opportunity for getting it, that is to say, *if they play the predominant part in his obtaining the money*, then he is accountable for it to the master. It matters not that the master has not lost any profit, nor suffered any damage. Nor does it matter that the master could not have done the act himself. It is a case where the servant has unjustly enriched himself by virtue of his service without his master's sanction. It is money which the servant ought not to be allowed to keep, and the law says it shall be taken from him and given to his master, because he got it solely by reason of the position which he occupied as a servant of his master.[22]

### *C. Statutory Prohibitions*

Several states have codified the obligations owed by public officers to the public.[23] Ethical standards which are based on the theory that a public office is a public trust have recently been added to the statutes of these states. The Delaware Code, for example, requires that officers conduct themselves in such a manner as to avoid suspicion among the public; specifically, officers must avoid acts which violate their trust and reflect unfavorably upon the state and its government.[24]

In addition to broad ethical standards imposed upon officers, many states specifically prohibit officers from receiving any compensation, payment of expenses, or other item of monetary value that may cause the officer to give preferential treatment to any person or to be unduly influenced in making public

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22. *Id.* at 514 (emphasis added) (quoting Reading v. The King [1948] 2 K.B. 268, 275).

23. *See* ALASKA STAT. § 39.50.010(b)(1) (1974); DEL. CODE ANN. tit. 29, § 5851 (1979); FLA. STAT. ANN. § 112.311 (West 1975); GA. CODE ANN. § 89-925 (1980); NEV. REV. STAT. § 281.230 (1979); OR. REV. STAT. § 244.010 (1979); S.C. CODE § 8-13-10 (1976); WIS. STAT. ANN. § 19.45(1) (West 1980).

24. DEL. CODE ANN. tit. 29, § 5855(a) (1979).

decisions.[25] It is important for these statutes to be strictly enforced to avoid the improper influence of officers in the execution of their public duties.[26]

## III. Suits Against Public Officials

### A. *Availability of Civil Remedies in Bribery Cases*

Bribery of public officials is commonly a crime;[27] thus, the attorney general is responsible for prosecuting people who give or receive bribes.[28] The existence of extensive legislation governing criminal bribery and fraud does not preclude the maintenance of a civil action based on a common-law right.[29] A court may impose both civil and criminal sanctions against a public official with respect to the same act without infringing upon double jeopardy protections.[30] The double jeopardy clause of the fifth amendment prohibits the imposition of two *criminal* punishments for the same offense.[31] In a bribery case the criminal and civil penalties serve different functions. The criminal penalty punishes a defendant for committing a crime, thereby maintaining the integrity of the criminal justice system. On the other hand, the civil penalty punishes an officer for breaching his fiduciary duty, thereby maintaining the integrity of public

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25. *See* Ariz. Rev. Stat. Ann. § 38-504 (1974); Del. Code Ann. tit. 29, § 5855(b) (1979); Fla. Stat. Ann. § 112.313 (West 1977); Hawaii Rev. Stat. § 84-11 (1976); Iowa Code Ann. § 68B.5 (West 1973); La. Rev. Stat. § 42:1115 (West 1980); Nev. Rev. Stat. § 281.350 (1979); N.M. Stat. Ann. § 5-12-3 (1974); Or. Rev. Stat. § 244.040 (1979); R.I. Gen. Laws § 36-14-4(f) (1980); Tex. Rev. Civ. Stat. art. 6252-9b, § 8 (Vernon 1980); Va. Code § 2.1.351 (1979); Wash. Rev. Code § 42.18.200 (1969); Wis. Stat. Ann. § 19.45(3) (West 1980); Wyo. Stat. § 9-8-318 (1977).

26. *See* State *ex rel.* Corrigan v. Hensel, 198 N.E.2d 84, 87 (Ohio App. 1964).

27. *See, e.g.*, Ala. Code tit. 13, §§ 13-5-30 to -45 (1975); Ark. Stat. Ann. § 41-2703 (1977); Colo. Rev. Stat. §§ 18-301 to -308 (1978).

28. *See, e.g.*, Ala. Code tit. 36, § 36-15-14 (1975); Ark. Stat. Ann. § 12-712 (1979); Colo. Rev. Stat. § 24-31-101 (1973).

29. Continental Management, Inc. v. United States, 527 F.2d 613, 620 (Ct. Cl. 1975).

30. United States *ex rel.* Marcus v. Hess, 317 U.S. 537, 548-49 (1943).

31. *Id.* at 549.

administration.[32]

When an attorney general successfully prosecutes a public official for bribery, the factual foundation is laid for the attorney general or concerned citizens to bring a civil action for restitution against the official.[33] Moreover, since the official has had a chance to defend against the charge of bribery in a criminal action in which the attorney general had to prove guilt beyond a reasonable doubt, he may be barred from defending against civil bribery charges by the doctrine of collateral estoppel.[34] However, the absence of a preceding criminal suit should not preclude a civil action. In *Driscoll v. Burlington-Bristol Bridge Co.*[35] the New Jersey Supreme Court stated: "That the shortcomings of some public officers may not make them accountable in our criminal courts does not mean that their nefarious acts cannot successfully be attacked through the processes of the civil law."[36] Thus, civil actions for accounting and constructive trust could be brought against public officials independent of criminal actions on theories of public trust[37] and agency law.[38]

When a citizen seeks relief against a public official who has accepted a bribe, he wants the court to force the wayward officer to remit the money wrongfully acquired to the public treasury as a form of restitution for the public. The most common approach taken in this equitable action is a suit for an accounting or a suit imposing a constructive trust.[39] A constructive trust is a trust by operation of law which is imposed against one who has obtained the legal right to property which he has no equitable right to

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32. United States v. Kearns, 595 F.2d 729, 734 (D.C. Cir. 1978).

33. 66 ILL. B.J. 272, 275 (1978).

34. *See* Allen v. McCurry, 101 S. Ct. 411 (1980).

35. 8 N.J. 433, 86 A.2d 201 (1952).

36. *Id.* at 476, 86 A.2d at 222, *cited in* City of Jersey City v. Hague, 18 N.J. 584, 591, 115 A.2d 8, 12 (1955).

37. *See* notes 4-11 *supra* and accompanying text.

38. *See* notes 12-22 *supra* and accompanying text.

39. *See* Bonelli v. State, 71 Cal. App. 3d 459, 469, 139 Cal. Rptr. 486, 493 (1977); County of Cook v. Barrett, 36 Ill. App. 3d 623, 628, 344 N.E.2d 540, 545 (1975); Hyland v. Simmons, 152 N.J. Super. 569, 575, 378 A.2d 260, 263 (Ch. Div. 1977), *aff'd*, 163 N.J. Super. 137, 394 A.2d 376 (App. Div. 1978); Commonwealth *ex rel.* Kane v. Hilton, 24 Pa. Commw. Ct. 285, 287, 355 A.2d 841, 843 (1976).

enjoy.[40] The doctrine of constructive trust has been applied in public-interest litigation to give recovery to the public when an official has breached his fiduciary duty.[41] A fiduciary holds any profits received on behalf of another in constructive trust for the benefit of the special relationship.[42] The purpose of a constructive trust is to prevent unjust enrichment.[43] This purpose has particular relevance in a fiduciary relationship, in which the fiduciary is strictly prohibited from making a secret profit.[44]

When a constructive trust is imposed upon a public official who has received bribes, the court will force the officer to account for all monies received and to transfer the money to the public treasury.[45] If suit is brought by a citizen rather than by the attorney general, a successful plaintiff may be able to recover attorneys' fees and costs of litigation from the defendant's bribe money before it is placed in the public treasury.[46] Although the constructive trust has common-law roots, some states have passed statutes prescribing the recovery of money wrongfully obtained by public officials.[47]

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40. *See* Sears, Roebuck & Co. v. American Plumbing & Supply Co., 19 F.R.D. 334, 343 (E.D. Wis. 1956) (quoting 54 AM. JUR. *Trusts* § 218 (1936)); Hyland v. Simmons, 152 N.J. Super. 569, 575, 378 A.2d 260, 263 (Ch. Div. 1977), *aff'd*, 163 N.J. Super. 137, 394 A.2d 376 (App. Div. 1978).

41. *See* Bonelli v. State, 71 Cal. App. 3d 459, 469, 139 Cal. Rptr. 486, 493 (1977); County of Cook v. Barrett, 36 Ill. App. 3d 623, 633, 344 N.E.2d 540, 547 (1975); City of Boston v. Santosuosso, 298 Mass. 175, 180, 10 N.E.2d 271, 275 (1937); City of Minneapolis v. Canterbury, 122 Minn. 301, 307, 142 N.W. 812, 814 (1913); Reading v. Attorney General, [1951] A.C. 507, 514-15; 55 COLUM. L. REV. 1085, 1086 (1955).

42. *See* D. DOBBS, REMEDIES § 10.4, at 684 (1st ed. 1973); RESTATEMENT OF RESTITUTION § 197 (1937).

43. *See* County of Cook v. Barrett, 36 Ill App. 3d 623, 627, 344 N.E.2d 540, 545 (1975); City of Jersey City v. Hague, 18 N.J. 584, 596, 115 A.2d 8, 15 (1955); Commonwealth *ex rel.* Kane v. Hilton, 24 Pa. Commw. Ct. 285, 355 A.2d 841, 843 (1976); D. DOBBS, *supra* note 42, § 10.6, at 701.

44. *See* notes 8-10 *supra* and accompanying text; *see also* RESTATEMENT OF RESTITUTION § 190 (1937).

45. *See* McCarty v. City of St. Paul, 279 Minn. 62, 155 N.W.2d 459 (1967).

46. Shillito v. City of Spartanburg, 214 S.C. 11, 27-28, 51 S.E.2d 95, 100 (1948).

47. *See* HAWAII REV. STAT. § 84-19 (1979) (forfeiture of any fee, compensation, gifts, or profits); OR. REV. STAT. § 244.360 (1974) (officer forfeits twice

It is not necessary to establish a loss to the public for a constructive trust to be imposed.[48] Public policy will not permit an officer who occupies a position of trust and confidence toward the public to abuse that relation to his own profit, regardless of whether there is a loss to the public.[49] When an officer breaches his fiduciary duty by taking bribes, the public is entitled to recoup whatever monies he may have received.[50] It should not matter that the money was not taken from the public treasury originally, for it is better to allow the public to receive a windfall by getting money that was not taken from the public treasury than to allow an officer to retain a secret profit obtained in violation of the duties he owed to the public.[51] The government may require an officer to account for all he has received by way of gain, gifts or profits, irrespective of any actual damage sustained by the government.[52]

In *County of Cook v. Barrett*[53] the Illinois Court of Appeals supported its order directing the defendant-public official to remit all bribes received to the county treasury[54] as follows:

> A constructive trust is not an action for "recovery" or compensation under any theory of contract or tort. It is a strict equitable doctrine applied to cure a fiduciary's breach of his duty of loyalty by erasing the source of his conflict of interest, and transferring it to the innocent beneficiary. Bad faith is not an essential element of disloyalty . . . , and good faith is no defense to the charge. Courts are not interested in a fiduciary's

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compensation received); TENN. CODE ANN. § 12-4-102 (1980) (forfeiture of all pay and compensation); VA. CODE § 2.1-355 (1970); WASH. REV. CODE § 42.18.290 (1979) (officer forfeits up to three times compensation received).

48. United States v. Carter, 217 U.S. 286, 305 (1910); State v. McKelvey, 12 Ohio St. 2d 92, 96, 232 N.E.2d 391, 393 (1967).

49. Brophy v. Cities Serv. Co., 31 Del. Ch. 241, 246, 70 A.2d 5, 8 (1949).

50. United States v. Bowen, 290 F.2d 40, 44-45 (5th Cir. 1961).

51. Tettenborn, *Bribery, Corruption and Restitution—The Strange Case of Mr. Maheson*, 95 L.Q. REV. 68, 73 (1979).

52. United States v. Carter, 217 U.S. 286, 317 (1910).

53. 36 Ill. App. 3d 623, 344 N.E.2d 540 (1975).

54. The defendant in this case did not deny that he was guilty of accepting bribes. He claimed, however, that the county was entitled only to fees and allowances legally collected, as the allowance of recovery by a public body of bribes or kickbacks paid to its officers would be against public policy! *Id.* at 626, 344 N.E.2d at 544.

> particular motive for accepting a payment or gift, but rather with the general effect of such payments or gifts. Nor are courts concerned with the question of actual damage to the beneficiary.[55]

Thus, it is generally agreed that a constructive trust can be imposed on a public official for bribes he has received in violation of his official duties.[56] It does not matter if the public suffered no monetary damage when the officer received his bribe,[57] nor does it matter that the officer was not on duty at the time he accepted the bribe.[58] So long as the bribe was offered to influence the officer because of his position as a public official, receipt constitutes a breach of the officer's fiduciary duty to the public.[59] It follows, then, that the public is entitled to demand that the officer forfeit any bribes wrongfully received to the public treasury.[60]

### *B. Citizen Standing in Suits Against Public Officials*[61]

The attorney general usually has inherent authority to defend the public interest in actions against public officials who accept illicit payments for the exercise of corrupt influences in the course of their official duties.[62] Some jurisdictions provide

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55. *Id.* at 631-32, 344 N.E.2d at 548.

56. *See* note 41 *supra*.

57. *See* Reading v. Attorney General, [1951] A.C. 507, 514-15.

58. *Id.*

59. *Id.*

60. *See* note 41 *supra*.

61. Since this Comment is primarily concerned with suits against public officials on the state and local levels, federal rules of standing are beyond its scope. Interesting questions arise when bribery of a federal official is involved. In one sense, standing could logically be limited to citizens who actually elect a particular congressman, but in another sense, congressional duties extend beyond a congressman's particular home state. Since the acts of Congress as a body affect the nation as a whole, an argument could be advanced for the proposition that any citizen in the United States would have standing to sue a federal official who had accepted a bribe. These questions are currently relevant with the recent ABSCAM developments.

62. *See* Pratt v. Security Trust & Sav. Bank, 15 Cal. App. 2d 630, 636-37, 59 P.2d 862, 867 (1936); Hyland v. Simmons, 152 N.J. Super. 569, 574, 378 A.2d 260, 261 (Ch. Div. 1977), *aff'd*, 163 N.J. Super. 137, 394 A.2d 376 (App. Div. 1978).

that public officials can be sanctioned for breach of duty solely by suit brought by the attorney general or some other authorized public official.[63] In these jurisdictions, a private citizen is allowed to sue a public official only when the citizen can show that he has a specific and independent legal right different from that of the public at large or that he has suffered a special injury caused by the official's actions.

The reason behind the policy in these jurisdictions is the belief that public officers should not be subjected to litigation at the whim of any dissatisfied citizen.[64] The theory is that the attorney general will represent adequately the interests of the public at large, and taxpayers need only to remedy personal, as opposed to common public, injuries.[65]

In *Fuchs v. Bidwill*[66] plaintiff-citizens filed a complaint for an accounting, a declaration of public trust, and other equitable relief. Plaintiffs alleged that the owner of a racetrack had sold interests in the racetrack to various Illinois legislators for a nominal fee. The owner later repurchased the interests from the legislators at substantial profit to the defendant-legislators. These transactions, plaintiffs argued, constituted secret profit given to the legislators for the purpose of influencing their votes to benefit the racetrack. Plaintiffs alleged that the legislators had breached their fiduciary duties to the public and asked that the defendants be required to account for the money wrongfully received by the legislators. The attorney general, though requested, had refused to bring an action against the legislators;[67] therefore, plaintiffs sought to represent the public interest as

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63. *See, e.g.*, Koehler v. A Century of Progress, 354 Ill. 347, 349-50, 188 N.E. 445 (1933); Booth v. Metropolitan Sanitary Dist., 79 Ill. App. 2d 310, 317, 224 N.E.2d 591, 594 (1967); Tuscan v. Smith, 130 Me. 36, 44, 153 A. 289, 293 (1931); William Penn Parking Garage, Inc. v. City of Pittsburgh, 346 A.2d 269, 286 (Pa. 1975). The courts in the cited cases denied standing to citizens who merely asserted a right common to the right of the entire public that required the law to be obeyed.

64. 130 Me. at 43, 153 A. at 293.

65. *Id.*, 153 A. at 293.

66. 65 Ill. 2d 503, 359 N.E.2d 158 (1976), *rev'g* 31 Ill. App. 3d 567, 334 N.E.2d 117 (1975).

67. The attorney general in this case was William J. Scott, who was recently convicted of tax fraud. N.Y. Times, Mar. 20, 1980, § 1, at A18, col. 1.

concerned citizens and taxpayers.[68]

In discussing the plaintiffs' standing in *Fuchs*, the Illinois Supreme Court held that "the public interest will not be served in permitting persons, without limitation, to institute actions of this nature against public officials when the Attorney General has declined to act."[69] The court emphasized that it could find no case in which a citizen was held to have standing to bring an action where misappropriation of public funds or public property was not involved.[70] Insisting that the attorney general was the only proper party to seek either an accounting or the imposition of a constructive trust upon a public official, the court refused to allow the citizens to sue on behalf of the public interest.[71] It did not matter that the attorney general did not act, although he should have done so.[72]

A line of Tennessee cases beginning with *State ex rel. Wallen v. Miller*[73] in 1957 comports with the Illinois Supreme Court's decision in *Fuchs*. In the *Miller* case, the issue was

> whether private citizens, without the intervention of the District Attorney [might] maintain a suit in the nature of quo warranto against an allegedly unfaithful public officer to have him removed from office and declared to be ineligible for the same or similar position for ten years and to obtain a recovery for the use of Hamilton County for the amounts wrongfully paid this officer.[74]

Plaintiffs in *Miller* were suing a public official who allegedly had a personal interest in a contract which he had negotiated on behalf of the county. The Tennessee Supreme Court held in *Miller* that wrongs against the public generally must be redressed in

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68. 65 Ill. 2d at 508, 359 N.E.2d at 158-60.

69. *Id.* at 510, 359 N.E.2d at 162.

70. *Id.* at 509, 359 N.E.2d at 161.

71. *Id.*, 359 N.E.2d at 161.

72. *Id.* at 510, 359 N.E.2d at 162. Ironically, the attorney general in the *Fuchs* case filed an *amicus curiae* brief in favor of granting plaintiffs' standing. "The brief neither disputes plaintiffs' assertion that the Attorney General declined to bring the action nor states his reasons for so doing." *Id.* at 509, 359 N.E.2d at 161.

73. 202 Tenn. 498, 304 S.W.2d 654 (1957).

74. *Id.* at 500, 304 S.W.2d at 655.

actions brought by the attorney general.[75] In refusing to allow private citizens to institute proceedings to vindicate a matter of general public interest, the court reasoned that citizens, if allowed to sue, would unduly harass public officials since every citizen would have the same interest and the same right to institute proceedings arising out of a given official's act.[76] The court recognized that although suits may be brought on relation of individuals, such suits must always be in the name of the attorney general, who can dismiss any action which he deems improperly brought.[77] Without discussing the merits of the plaintiffs' claim, the court in *Miller* denied standing to citizens seeking to protect the public interest and insisted that suit be brought, if at all, by the attorney general.

After *Miller* the Tennessee courts consistently held that the legal enforcement of public-interest matters is in the province of the district attorney general. Tennessee citizens cannot institute public-interest litigation unless they have suffered special injury or will be affected in a different manner from every other citizen.[78] The discretion of the attorney general will control in Tennessee, and the attorney general can refuse to bring an action deemed not to be in the public interest.[79] Furthermore, citizens cannot maintain suits which the attorney general refuses to institute.[80] The Tennessee Supreme Court indicated a possible willingness to depart from this strict attitude in the future, however, when it made the following statement in *Bennett v. Stutts*:[81]

> We recognize that the requirement that suits in the nature

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75. *Id.* at 508, 304 S.W.2d at 658.

76. *Id.* at 507, 304 S.W.2d at 658 (citing Newman v. United States *ex rel.* Frizzell, 238 U.S. 537 (1915)). The viability of this reasoning is discussed in text accompanying notes 106-17 *infra*.

77. *Id.* at 508-09, 304 S.W.2d at 659.

78. *See* Sachs v. Shelby County Election Comm'n, 525 S.W.2d 672 (Tenn. 1975); Bennett v. Stutts, 521 S.W.2d 575 (Tenn. 1975); Country Clubs, Inc. v. City of Knoxville, 395 S.W.2d 789 (Tenn. 1965); City of Fairview v. Spears, 210 Tenn. 404, 359 S.W.2d 824 (1962); State *ex rel.* Abernathy v. Anthony, 206 Tenn. 597, 335 S.W.2d 832 (1960).

79. State v. Parker, 204 Tenn. 30, 32, 315 S.W.2d 396, 396-97 (1958).

80. *Id.*, 315 S.W.2d at 397.

81. 521 S.W.2d 575 (Tenn. 1975).

> of a *quo warranto* and those seeking to redress public wrongs be brought by the District Attorney General can create insurmountable problems. Public spirited citizens should not be stifled or stopped in their search for solution to public wrongs and official misconduct . . . .[82]

The *Bennett* court, in dictum, moved away from the rigid policy of treating the district attorney general's refusal to institute suit as the conclusion of an issue of official misconduct.[83] The court suggested that the trial court evaluate the district attorney general's refusal in an *in limine* hearing, and that the trial court allow to proceed any claims which are found to be "prima facie meritorious."[84]

Other jurisdictions also require citizens to request the attorney general or other authorized officials to institute proceedings against public officials.[85] After a proper demand is made, however, these jurisdictions will allow a citizen to maintain suit if the attorney general refuses to comply with his demand. Citizens who wish to sue public officials on behalf of the public interest seek to engage in a derivative action analogous to shareholders' derivative suits in the private corporate context. Some courts have commented on this similarity in allowing taxpayers to sue public officials after the attorney general has refused their demand to institute suit.[86]

Some courts have become very lenient in allowing citizen

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82. *Id.* at 577.

83. *Id.*

84. *Id.*

85. *See, e.g.*, Schaefer v. Berinstein, 140 Cal. App. 2d 278, 293, 295 P.2d 113, 123 (1956); People *ex rel.* Lee v. Kenroy, Inc., 54 Ill. App. 3d 688, 693, 370 N.E.2d 78, 82 (1977); Grob v. Nelson, 8 Wis. 2d 8, 13, 98 N.W.2d 457, 459-60 (1959); Madison Metro. Sewerage Dist. v. Committee on Water Pollution, 260 Wis. 229, 247, 50 N.W.2d 424, 434 (1951).

86. *See* Massachusetts v. Mellon, 262 U.S. 447, 486-87 (1923) (dictum); State *ex rel.* Nimon v. Village of Springdale, 6 Ohio St. 2d 1, 5, 215 N.E.2d 592, 595 (1966); Shillito v. City of Spartanburg, 214 S.C. 11, 29, 51 S.E.2d 95, 102 (1948) (citing State *ex rel.* Bonner v. Andrews, 131 Tenn. 554, 571-72, 175 S.W. 563, 567 (1914)); Madison Metro. Sewerage Dist. v. Committee on Water Pollution, 260 Wis. 229, 249, 50 N.W.2d 424, 435 (1951) (citing 52 AM. JUR. *Taxpayer's Actions* § 10 (1936)); Roberts v. City of Madison, 250 Wis. 317, 320, 27 N.W.2d 233, 234 (1947).

suits to redress public wrongs.[87] These courts have begun to adopt the attitude that citizens need not have a special interest or suffer special injury to entitle them to vindicate public rights. An Ohio court recognized that when the question involved is one of public right and the complaint merely seeks to force an officer to carry out his public duty, all citizens must be regarded as real parties in interest.[88] This court held that a particular taxpayer need not show any special interest so long as he is interested in having the laws enforced and in having the officer's duty executed.[89] It has also been held that citizens should have the right to complain about public officials' acts when they maintain that the officials are violating their fiduciary duties to the public.[90] Some state statutes permit any concerned citizen to sue to enforce the ethical standards that govern public officials.[91]

The major objection to a lenient rule of citizen standing expressed by the courts has been the fear of indiscriminate filing of suits.[92] This fear has no basis, however, in the context of suits to require bribed officials to account for their illicit profits, since such suits hold no promise of personal recovery for the plaintiff. The New Jersey Supreme Court discounted this objection to citizen suits in *State ex rel. Ferry v. Williams*[93] by stating:

> The general indifference of private individuals to public omissions and encroachments, the fear of expense in unsuccessful and even in successful litigation, and the discretion of the court, have been, and doubtless will continue to be, a sufficient guard to these public officials against too numerous and unreasonable attacks.[94]

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87. Mackey v. McDonald, 504 S.W.2d 726, 731 (Ark. 1974); City of Chicago *ex rel.* Cohen v. Keane, 64 Ill. 2d 559, 561, 357 N.E.2d 452, 454 (1976); State *ex rel.* Nimon v. Village of Springdale, 6 Ohio St. 2d 1, 5, 216 N.E.2d 592, 597 (1966).

88. State *ex rel.* Nimon v. Village of Springdale, 6 Ohio St. 2d 1, 4, 215 N.E.2d 592, 597 (1966).

89. *Id.*, 215 N.E.2d at 597.

90. Wilbur v. Howard, 70 F. Supp. 930, 932 (E.D. Ky. 1947), *rev'd on other grounds*, 166 F.2d 884 (6th Cir. 1948).

91. *See* ALASKA STAT. § 39.50.100 (1974); IOWA CODE ANN. § 68B.9 (1973).

92. *See* 66 ILL. B.J. 272, 274 (1978).

93. 41 N.J.L. 332 (1879).

94. *Id.* at 339.

Citizens, therefore, should be permitted to proceed with claims designed to recover for public coffers bribes received by public officials in derogation of their fiduciary duties.[95]

New Jersey is one of the few states that has consistently upheld the right of citizens to maintain proceedings seeking sanctions for the wrongful acts of public officials without a showing of any special interest or injury. The court in *Haines v. Burlington County Bridge Commission*[96] explained New Jersey's policy in the following manner:

> "[N]o consistent rule of law, nor any reason of wise public policy" . . . would deny relief "when the citizen, at his own expense, and at the risk of burdensome costs, seeks to intervene for the purpose of averting imminent injury to the public, of which he is a part."
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> . . . .
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> [If taxpayer standing is denied,] "no recourse could be had to the courts for relief from void, extravagant, ultra vires action of the city council, because there would be no one . . . to institute the suit to prevent a public wrong, except the state in certain circumstances. The public welfare requires that such right be lodged in the citizens of a community."[97]

Whenever a citizen presents serious charges of officer misconduct affecting the public interest, the New Jersey courts will allow him to secure relief in civil courts either in his own name or through proceedings instituted on his behalf by the attorney general.[98] These courts exercise great discretion in annulling the illegal acts of public officials and in compelling the performance of their public duties at the instance of citizens who have no

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95. Fuchs v. Bidwill, 31 Ill. App. 3d 567, 574, 334 N.E.2d 117, 122 (1975), *rev'd*, 65 Ill. 2d 503, 359 N.E.2d 158 (1976).

96. 1 N.J. Super. 163, 63 A.2d 284 (App. Div. 1949).

97. *Id.* at 171-72, 63 A.2d at 288 (quoting Oliver v. Mayor of Jersey City, 63 N.J.L. 96, 99, 42 A. 782, 783 (Sup. Ct. 1899), *rev'd on other grounds*, 63 N.J.L. 634, 44 A. 709 (N.J. 1899) and Miller v. Town of Milford, 224 Iowa 753, 770, 276 N.W. 826, 834 (1937)).

98. Driscoll v. Burlington-Bristol Bridge Co., 8 N.J. 433, 476, 86 A.2d 201, 222 (1952), *cited in* City of Jersey City v. Hague, 18 N.J. 584, 589, 115 A.2d 8, 11 (1955); Haines v. Burlington County Bridge Comm'n., 1 N.J. Super. 163, 168, 63 A.2d 284, 287 (App. Div. 1949); State *ex rel.* Ferry v. Williams, 41 N.J.L. 332, 337 (Sup. Ct. 1879).

more interest in the controversy than the rest of the community. Actions concerning public interests other than the misappropriation of public funds may be brought without the intervention of the attorney general.[99]

In a suit by a city against public officials who allegedly extorted money from the city, the New Jersey Supreme Court unequivocally stated that citizens could sue public officials for misconduct. In *City of Jersey City v. Hague*[100] the court held that "the city ha[d] the power to bring suit for the recovery of its property in the same manner as natural persons."[101] After tracing the historical attitude of the New Jersey courts in favoring taxpayer standing, the New Jersey Supreme Court held that real parties in interest, natural persons or municipal corporations, could sue public officials who violated their fiduciary duties without the intervention of the attorney general.[102]

This more liberal view of citizen standing in public-interest litigation is logical when the question is viewed realistically. If the public trust doctrine[103] is viable, the citizens, as beneficiaries of the trust, must have a right to enforce the trust. If they must wait for governmental action, they may be barred from ever bringing an official to court.[104] If a citizen truly is concerned with the enforcement of a public official's duties, he will institute proceedings much more vigorously than the attorney general, an official operating in the same system as the defendant. Just as lawyers and doctors are hesitant to testify against members of their own profession in malpractice actions, an attorney general may be reluctant to bring charges against a fellow officer for violating the public trust.[105] Realistically, the only means for

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99. *See* State *ex rel.* Ferry v. Williams, 41 N.J.L. 332, 337 (Sup. Ct. 1879).

100. 18 N.J. 584, 115 A.2d 8 (1955).

101. *Id.* at 596, 115 A.2d at 15.

102. *Id.*, 115 A.2d at 15.

103. *See* text accompanying notes 4-26 *supra*.

104. Paepcke v. Public Bldg. Comm'n, 46 Ill. 2d 330, 341, 263 N.E.2d 11, 18 (1970); *see also* 66 ILL. B.J. 272, 275 (1978).

105. Tennessee's requirement that suits against public officials be brought by the attorney general may be more understandable than similar requirements in states where the state attorney general is an elected official. Since the Tennessee attorney general is appointed by the state supreme court,

obtaining civil relief against a public official who breaches his fiduciary duties by accepting bribes is to grant concerned citizens the right to institute suits against the official.

### C. *Similarity of Public-Interest Litigation to Class Actions*

When a citizen sues to enforce a public official's duties, he is not seeking recovery for himself, but rather he is seeking restitution for the public at large. An action on behalf of all taxpayers may be considered equivalent to traditional class action litigation,[106] but the citizens in a derivative suit on behalf of the public may not have to comply with the usual requirements for class actions since no personal gain is sought.[107] Class actions and public-interest actions have some generic characteristics in common. Both actions present issues to the court which are larger than the individual interest of the litigant who appears in court. Both actions "seek to assure a just resolution of a controversy by genuine adverseness and adequate protection of the interests represented."[108]

An important characteristic of class actions is the effect of a judgment on nonparty members of the class. A judgment ren-

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he should be divorced from political obligations surrounding elected officials, thereby increasing the likelihood that he would be willing to prosecute a public official.

106. Northington v. Davis, 134 Cal. Rptr. 610, 612 (Cal. App. 1976), *aff'd*, 23 Cal. 3d 955, 593 P.2d 221, 154 Cal. Rptr. 524 (1979) (dictum); Huyett v. City of Reading, 57 Berks County L. J. 73, 77, 34 Pa. D. & C.2d 193, 197 (Pa. C.P. 1964).

107. *See* Kelley v. City of Ashland, 562 S.W.2d 312, 314 (Ky. 1978) (in suit aimed at requiring public officer to do his duty, suit may be brought in name of plaintiff-taxpayers, without necessity for joining all other taxpayers in class action); Zauber v. Murray Sav. Ass'n, 591 S.W.2d 932, 935 (Tex. Civ. App. 1979) (in shareholder derivative suit in Texas, plaintiff does not have to comply with requirements of class action suit).

For discussion of requirements of class action generally, see La Sala v. American Sav. & Loan Ass'n, 5 Cal. 3d 864, 489 P.2d 1113, 97 Cal. Rptr. 849 (1971); Gerhard v. Stephens, 68 Cal. 2d 864, 442 P.2d 692, 69 Cal. Rptr. 612 (1968); English v. Holden Beach Realty Corp., 254 S.E.2d 223 (N.C. App. 1979); FED. R. CIV. P. 23(a).

108. Homburger, *Private Suits in the Public Interest in the United States of America*, 23 BUFFALO L. REV. 343, 387 (1974) [hereinafter cited as Homburger].

dered in a class suit is treated as res judicata as to members of the class who are not formal parties to the suit.[109] Unless the procedure adopted by the parties to the action does not fairly insure protection of the interest of absent parties bound by it,[110] a claim of lack of due process by nonparty class members does not exist.[111] The theory is that the self-interest of the parties coincides with the interest of the rest of the class; thus adequate litigation of the common issues is assured.[112] Since some kind of notice to class members is generally required,[113] once the members have been given adequate notice, they cannot claim ignorance of the litigation. Thus, they are all bound by the judgment, regardless of whether it is favorable to the class.[114] If a person does not wish to be bound by the judgment, he must opt out of the class before litigation. If he does not give notice that he wishes to be excluded from the suit, he will be bound by the

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109. *See* McDonald v. Medical Mut. of Cleveland, Inc., 41 Ohio Misc. 158, 324 N.E.2d 785, 792 (Ohio C.P. 1974); Gant v. City of Lincoln, 193 Neb. 108, 111, 225 N.W.2d 549, 552 (1975); Brown v. Brown, 6 Wash. App. 249, 256, 492 P.2d 581, 585 (1971).

110. Gant v. City of Lincoln, 193 Neb. 108, 111, 225 N.W.2d 549, 552 (1975) (citing Hansberry v. Lee, 311 U.S. 32, 41-43 (1940)).

111. *See* Gant v. City of Lincoln, 193 Neb. 108, 225 N.W.2d 549 (1975).

112. Shutts v. Phillips Petroleum Co., 222 Kan. 527, 556, 567 P.2d 1292, 1314 (1977).

113. When notice is required, the absence of adequate notice can be detrimental to the defendant. Absent notification, no class member will be bound by the result of the litigation. Therefore, if defendant loses the first case, he cannot deny its validity in subsequent cases because of collateral estoppel. If defendant wins the first case, however, class members who did not get the requisite notice of that suit are not precluded from bringing later actions. Home Sav. & Loan Ass'n v. Superior Court, 42 Cal. App. 3d 1006, 1011, 117 Cal. Rptr. 485, 488 (1974).

Notice is not required in all jurisdictions; however, a judgment will sometimes be held binding on an entire class regardless of whether notice is given. Gallano v. Running, 139 N.J. Super. 239, 250, 353 A.2d 158, 164 (Law Div. 1976); *see also* McDonald v. Medical Mut. of Cleveland, Inc., 41 Ohio Misc. 158, 324 N.E.2d 785, 792 (Ohio C.P. 1974); Brown v. Brown, 6 Wash. App. 249, 256, 492 P.2d 581, 585 (1971). The courts in *McDonald* and *Brown* indicated that there is no notice requirement under FED. R. CIV. P. 23(b)(2) and that notice is discretionary for the trial court.

114. Tack v. City of Roseville, 239 N.W.2d 752, 757 (Mich. App. 1976); Gallano v. Running, 139 N.J. Super. 239, 250, 353 A.2d 158, 164 (Law Div. 1976).

result.[115]

Public-interest actions differ from class actions in their subsequent effect only in the sense that subsequent public-interest suits on the same matter are precluded by stare decisis rather than res judicata.[116] The effect of stare decisis is that subsequent citizen suits against a public official for bribery will be dismissed because the court will adhere to the prior result. In most instances, therefore, all citizens are considered to be parties to the proceedings when a citizen brings a derivative action, and thus, they will be bound by the judgment.[117] The advantage of stare decisis, however, is that it is not as absolute as res judicata.[118] If the first public-interest suit against an official was brought by a citizen who was friendly to the defendant's interests, the plaintiff might not vigorously prosecute his suit, and thus, would facilitate judgment for the defendant. If subsequent citizens could show the relationship between the original plaintiff and the defendant, the court might allow a subsequent suit to proceed, even though a second suit would not be permitted in ordinary class actions, which are subject to the law of res judicata. Absent these trumped-up suits, however, citizens generally will be bound by the judgment in the original action, thereby aborting the hazard of multiple suits on the same action.

## IV. CONCLUSION

The purpose of this Comment has been to examine civil sanctions against public officials who accept bribes. By imposing

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115. Cooper v. American Sav. & Loan Ass'n, 55 Cal. App. 3d 274, 285, 127 Cal. Rptr. 579, 585 (1976); Colwell Co. v. Superior Court, 50 Cal. App. 3d 32, 35, 123 Cal. Rptr. 228, 229 (1975); Home Sav. & Loan Ass'n v. Superior Court, 42 Cal. App. 3d 1006, 1011, 117 Cal. Rptr. 485, 487 (1974).

116. Homburger, *supra* note 108, at 388.

117. McCarroll v. Farrar, 199 Ark. 320, 324, 134 S.W.2d 561, 564 (1939). *See also* Liken v. Shaffer, 141 F.2d 877, 882 (8th Cir.), (applied principle to shareholder derivative suit) *cert. denied sub nom.* Wilson v. Shaffer, 323 U.S. 756 (1944).

118. Stare decisis is a rule that binds a court to its own prior decisions; a court, however, is free to reverse its prior decisions if it sees fit. On the other hand, if a party is barred by res judicata, he cannot even get the court to hear his case, thus leaving no chance for getting a different result. *See generally* F. JAMES & G. HAZARD, CIVIL PROCEDURE (2d ed. 1977).

appropriate widespread equitable civil remedies such as constructive trusts and accounting for profits, courts can reduce officers' incentives to engage in corrupt acts.[119] When the offending officer can be forced to forfeit all illegal gains in addition to, or instead of, facing criminal penalties imposed for acceptance of bribes, he may be less tempted to accept the bribe initially.

Emphasis has been placed on citizen suits for a variety of reasons. First, under the public trust concept, public officers owe a fiduciary duty to the public. As beneficiaries of this trust, citizens should be allowed to institute proceedings to enforce the officers' fiduciary duties. Second, if citizens are not allowed to sue public officials, civil sanctions will not likely be imposed in most circumstances. The attorney general or other authorized official naturally would be hesitant in instituting proceedings against a fellow officer. Finally, concerned citizens must be permitted to protect the public interest. Fundamental precepts of democracy teach that we have a government by the people and for the people. Citizens need to have the ability to protect and strengthen their government by having the power to place a check on wayward government officials.

The chief argument against citizen suits in public-interest litigation is that they will create an undue burden on public officials by forcing them continually to defend lawsuits. That concern is not as viable as it sounds. If there is no basis for a lawsuit, the court presumably will have the power to assess all costs of defense against a citizen who sued an official for harassment purposes. The laws of res judicata and stare decisis serve to preclude more than one suit concerning a particular act by a public official. Therefore, officials need not fear multiple prosecution for accepting a particular bribe. Also, when viewed practically, the number of concerned citizens willing to spend the time and money instituting litigation on behalf of the public interest, with no hope for personal gain, is probably minimal. This Comment suggests that the option of maintaining a citizen suit in the public interest needs to be available for those who wish to use it.

If citizens can hold a tighter rein on public officials by forcing them to account for all monies received while in office, the

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119. 40 MINN. L. REV. 880, 881 (1956).

degree of corruption among government officials might decrease substantially. If the public has the right to confiscate any bribes received, bribery itself might become less widespread, and officers might perform their fiduciary duties to the public in a more wholesome atmosphere. Even if the degree of corruption and bribery does not decrease, however, the public is entitled to the restitution of bribes acquired in violation of an officer's public trust. Regardless of the deterrent effect of these civil suits, a wayward official should not be allowed to retain unlawful profit obtained by virtue of his office.[120]

BETH A. LEVINE

120. In April 1981 the state of Maryland and three taxpayers sued former Vice-President Spiro Agnew to recover $298,110 in alleged bribes received while Agnew was governor of Maryland. The taxpayers' attorney used a public trust theory for recovery: "Spiro Agnew used the privilege of his high office for his own purposes. He violated his trust." N.Y. Times, Apr. 22, 1981, § 1, at A16, col. 1.

# THE EFFECT OF THE PUBLIC USE REQUIREMENT ON EXCESS CONDEMNATION

## I. INTRODUCTION

Excess condemnation is an exercise of eminent domain wherein the condemning authority takes more land than actually is necessary for the public improvement.[1] This practice runs counter to the traditional rule followed by the courts, which states that only the amount of land necessary for the improvement may be condemned.[2] Moreover, the federal and state constitutions permit property to be taken only for a public use.[3] Hence, the definition of public use is crucial in determining the validity of excess condemnation. The phrase "public use," however, defies absolute definition.[4] The current trend in the courts

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1. R. CUSHMAN, EXCESS CONDEMNATION 1-4 (1917); City of Cincinnati v. Vester, 281 U.S. 439, 441 (1930). Actually, the term "excess condemnation" is a misnomer. The term does not mean an excess beyond that which is legally permitted. The term "excess" only refers to more land than is actually needed to construct the project. Cushman also found that excess condemnation was misunderstood because of its many forms and purposes. R. CUSHMAN, *supra*, at 1-2. Although this work is somewhat dated, Cushman provides an excellent study of excess condemnation.

2. *See* note 50 *infra*.

3. The United States Constitution provides that no "private property [shall] be taken for public use, without just compensation." U.S. CONST. amend. V. For examples of state constitutions, see COLO. CONST. art. II, § 15 ("Private property shall not be taken or damaged, for public or private use, without just compensation."); ME. CONST. art. I, § 21 ("Private property shall not be taken for public uses without just compensation; nor unless the public exigencies require it."); MINN. CONST. art. I, § 13 ("Private property shall not be taken, destroyed or damaged for public use without just compensation therefor, first paid or secured."); MONT. CONST. art. III, § 14 ("Private property shall not be taken or damaged for public use without just compensation having been first made to or paid into the court for the owner."). *See generally* Note, *Excess Condemnation—To Take Or Not To Take—A Functional Analysis*, 15 N.Y.L.F. 119 (1969) [hereinafter cited as Note, *Excess Condemnation*].

4. Barnes v. City of New Haven, 140 Conn. 8, 15, 98 A.2d 523, 527 (1953); *see* Dayton Gold & Silver Mining Co. v. Seawell, 11 Nev. 394 (1876). "No ques-

is to give public use the broad definition of "securing a public benefit."[5] Under this test, almost any taking could meet the public use requirement. Only the blatant transfer of land from one private landowner to another without an associated governmental objective is not considered to be a public use.[6] Indeed, the prevailing definition of public use is too broad to be valuable in determining whether condemnation of excess land should be permitted.

Without meaningful guidelines, all exercises of excess condemnation arguably could meet the public use requirement, thereby rendering the protection against unnecessary governmental confiscations meaningless. Without articulating clear guidelines, courts have upheld some exercises of excess condemnation but have denied others. What distinctions between various exercises of excess condemnation make a particular type constitutional or unconstitutional? If public use is the universal, doctrinal limitation on excess condemnation, how can courts permit excess condemnation under the auspices of public use in one situation and deny it for a lack of public use in a similar situation? Has the definition of public use become so broad that all exercises of excess condemnation soon will be permitted? This Comment will answer these questions by analyzing the effect of an expansive definition of public use on excess condemnation and by criticizing excess condemnation as it presently exists. Particular emphasis will be placed on possible limitations on the power of excess condemnation. Although excess condemnation traditionally has been justified under three theories, a fourth theory will be proffered. This fourth theory is necessary to incorporate recent federal decisions that allow potentially broad exercises of excess condemnation. Finally, the potentially damaging effect that excess condemnation has on constitution-

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tion has ever been submitted to the courts upon which there is a greater variety and conflict of reasoning and results than that presented as to the meaning of the words 'public use'. . . ." *Id.* at 400-01.

5. *See generally* 2A P. NICHOLS, NICHOLS' THE LAW OF EMINENT DOMAIN § 7.2[2] (3d ed. J. Sackman 1979); Nichols, *The Meaning Of Public Use In The Law Of Eminent Domain*, 20 B.U.L. REV. 615, 626-33 (1940) [hereinafter cited as Nichols, *Public Use*]; 58 YALE L.J. 599 (1940).

6. Meidinger, *The "Public Uses" of Eminent Domain: History and Policy*, 11 ENVT'L L. 1, 42 (1980) [hereinafter cited as Meidinger, *"Public Uses"*].

ally protected rights will be discussed in terms of balancing governmental power against private rights.

## II. General Background

### A. *Historic Development of the Public Use Requirement*

The power of eminent domain is well established as an inherent attribute of sovereignty.[7] Thus, the federal and state constitutions are not the *source* of the power to condemn but rather, they provide the *limitations* on that power.[8] The only two constitutional limitations[9] on the exercise of eminent domain are that the use of condemned property must be a public use and that just compensation must be paid to the owner of the acquired property.[10]

Because extremely diverse uses have been held to constitute a public use, a comprehensive definition of public use is impossible.[11] Moreover, the definition of public use has changed with time[12] and varies from state to state.[13] The public use require-

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7. Madisonville Traction Co. v. Saint Bernard Mining Co., 196 U.S. 239, 247 (1905); United States v. Jones, 109 U.S. 513, 518 (1883); Boom Co. v. Patterson, 98 U.S. 403, 406 (1878); West River Bridge Co. v. Dix, 47 U.S. 793, 797, 6 How. 507, 532 (1848).

8. Madisonville Traction Co. v. Saint Bernard Mining Co., 196 U.S. 239, 251-52 (1905).

9. The due process clause of the fourteenth amendment also applies to deprivations of property. U.S. Const. amend. XIV, § 1, provides in relevant part: "[N]or shall any state deprive any person of life, liberty, or property without due process of law . . . ." *See* Fallbrook Irr. Dist. v. Bradley, 164 U.S. 112, 158, 168-70 (1896). This clause is also in the fifth amendment. "No person shall be . . . deprived of life, liberty, or property, without due process of law . . . ." U.S. Const. amend. V. The fifth amendment has been held applicable to the states through the fourteenth amendment. *See* Missouri Pac. Ry. v. Nebraska, 164 U.S. 403, 416-17 (1896).

10. *See* note 3 *supra*.

11. New York City Housing Auth. v. Muller, 270 N.Y. 333, 340, 1 N.E.2d 153, 155 (1936) (comprehensive definition is "unwise if not futile"); Johnson City v. Cloninger, 213 Tenn. 71, 78, 372 S.W.2d 281, 284 (1963) ("phrase means different things in different contexts").

12. For an in-depth treatment of the historical development of the public use requirement, see Burger, *The Public Use Requirement In Eminent Domain*, 57 Or. L. Rev. 203 (1978); Meidinger, *"Public Uses," supra* note 6; Nichols, *Public Use, supra* note 5; Special Project, *The Private Use of Public*

ment was not a major issue in early decisions because the exercise of eminent domain was limited to milldams, roads, and drainage.[14] Those uses were acceptable because of the scarcity of capital and the need for national economic expansion.[15] Dams and roads allowed the opening of the interior of the country and accelerated the development of industry. Moreover, the large amount of unimproved private land did not render the few governmental takings burdensome.[16]

The claim that the condemnation was not for a public use first arose when private corporations such as railroads were delegated the power to condemn private property and when municipal governments extended their activities to public service.[17] Initially, public use was defined restrictively as use *by* the public;[18] this restrictive interpretation served to disallow certain uses of eminent domain that were thought of as subsidizing private enterprise at the expense of private property rights.[19] One effect of this narrow definition of public use was that courts were forced to disregard the ultimate purpose of the taking and to consider only the immediately proposed use of the property.[20] Thus, uses that ultimately may have benefited the public have been overturned as not serving a public use.[21] Consequently, courts began

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*Power: The Private University and the Power of Eminent Domain*, 27 VAND. L. REV. 681 (1974) [hereinafter cited as Special Project, *Private Use*]; 58 YALE L.J. 599 (1949).

13. *See* City of Cincinnati v. Vester, 281 U.S. 439, 446 (1930) (consider local conditions and judgment of the state courts); W.S. Ranch Co. v. Kaiser Steel Corp., 388 F.2d 257, 261 (10th Cir. 1967); *In re* Tuthill, 163 N.Y. 133, 139-40, 57 N.E. 303, 305 (1900). Developing a comprehensive definition of public use is also complicated by variety in the scope of judicial review given the question of public use. *See* text accompanying notes 33-54 *infra*.

14. NICHOLS, *supra* note 5, §§ 7.1, 7.512.

15. Meidinger, *"Public Uses," supra* note 6, at 18.

16. 58 YALE L.J. 599, 600 (1949).

17. NICHOLS, *supra* note 5, §§ 7.1-7.1[1].

18. West River Bridge Co. v. Dix, 47 U.S. 793, 797, 6 How. 507, 533 (1848); Bloodgood v. Mohawk & H.R.R., 18 Wend. 9, 60 (N.Y. 1837). *See also* Nichols, *Public Use, supra* note 5, at 617 n.14.

19. Special Project, *Private Use, supra* note 12, at 694.

20. Nichols, *Public Use, supra* note 5, at 626-27.

21. Salisbury Land & Improv. Co. v. Commonwealth, 215 Mass. 371, 102 N.E. 619 (1913) (creation of a public beach); Pennsylvania Mut. Life Ins. Co. v. City of Philadelphia, 242 Pa. 47, 88 A. 904 (1913) (protect the beauty of a

to look at the ultimate purpose of a project in order to justify a taking that eventually would benefit the public.[22]

The definition of public use was expanded greatly as a result of slum clearance and urban redevelopment.[23] The landmark case of *New York City Housing Authority v. Muller*[24] was the first to hold that slum clearance and housing were public uses.[25] The decision was based on the ultimate community-wide benefit that would result from the elimination of slums.[26] This broadened the public use definition because consideration of the public benefit previously was immaterial to the narrow definition of use by the public. Since *Muller*, even land acquired for a housing project outside a slum area has been held to be for a public use.[27]

Urban redevelopment has broadened further the scope of the public use requirement. Urban redevelopment involves the taking of private property by the condemning authority and the subsequent transfer of that property to other private owners for the development of the acquired land.[28] Thus, the government has transferred private property from one private owner to another. Such action has been upheld because the elimination of slum conditions and the creation of a pleasant neighborhood are the dominant purposes of the action and thereby create a public

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parkway).

22. International Paper Co. v. United States, 282 U.S. 399 (1931). The government advocated the narrow definition so that its action would not be a taking and the paying of just compensation could be avoided. The Court rejected this argument and held that since the ultimate use of the property was for the national defense, the public use requirement had been met. *Id.* at 408. *See also* Highland v. Russell Car & Snow Plow Co., 279 U.S. 253, 260 (1929). The use-by-the-public test was rejected in Mt. Vernon-Woodberry Cotton Duck Co. v. Alabama Interstate Power Co., 240 U.S. 30, 32 (1916).

23. *See generally* Berger, *The Public Use Requirement In Eminent Domain*, 57 OR. L. REV. 203, 214-16 (1978).

24. 270 N.Y. 333, 1 N.E.2d 153 (1936).

25. Nichols, *Public Use*, *supra* note 5, at 630.

26. 270 N.Y. 333, 343, 1 N.E.2d 153, 156 (1936).

27. Berman v. Parker, 348 U.S. 26, 34 (1954); Neufeld v. O'Dwyer, 192 Misc. 538, 544, 79 N.Y.S.2d 53, 59 (Sup. Ct. 1948); Housing Auth. v. Wooten, 257 N.C. 358, 366-67, 126 S.E.2d 101, 107 (1962).

28. NICHOLS, *supra* note 5, § 7.751561, at 7-188. In another form of urban renewal the city develops the land and then conveys it to a private party. *Id.*

use.[29]

In the urban redevelopment case of *Berman v. Parker*[30] the United States Supreme Court gave public use its broadest definition. The *Berman* Court held that even property not subject to urban blight could be taken in order to achieve integrated plans for redevelopment and slum prevention.[31] Furthermore, the Court extended the definition of public use to include uses which provided aesthetic benefits to the community.[32]

The scope of review of public use issues as set forth in *Berman* also had the result of expanding the definition of public use. Relying on previous United States Supreme Court holdings in which the doctrine of separation of powers rendered legislative decisions presumptively constitutional,[33] the *Berman* Court found judicial review in eminent domain cases to be extremely narrow.[34] This decision rendered the legislative classification of a use as public to be "well-nigh conclusive."[35] Consequently, the

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29. *See* Schneider v. District of Columbia, 117 F. Supp. 705, 724 (D.D.C. 1953), *aff'd sub nom.* Berman v. Parker, 348 U.S. 26 (1954); David Jeffrey Co. v. City of Milwaukee, 267 Wis. 559, 583, 66 N.W.2d 362, 375 (1959).

Another rationale to justify the transfer of property to private owners is that the public purpose has been accomplished. *See* Zurn v. City of Chicago, 389 Ill. 114, 129, 59 N.E.2d 18, 25 (1945).

30. Berman v. Parker, 348 U.S. 26 (1954). In *Berman* a statute provided for the condemnation of property and for the subsequent sale or lease of that property to private parties in order to redevelop the District of Columbia. D.C. CODE ANN. §§ 5-701 to -737 (1973) (current version). A landowner asserted that since his property was not blighted, it was impermissible to take his property under the guise of slum clearance. The Court held that so long as the purpose of the taking was within the authority of the legislature, the legislature was the sole judge of the means to achieve that purpose. 348 U.S. at 33. Property that was not blighted was taken so that the area could be redesigned as a whole, rather than by piecemeal redevelopment. *Id.* at 34.

31. *Id.* at 35.

32. *Id.* at 33.

33. Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 388 (1926) (if legislative classification is fairly debatable, it will be allowed to control); Old Dominion Land Co. v. United States, 269 U.S. 55, 66 (1925) (legislative determination entitled to deference until shown impossible).

34. 348 U.S. at 32. "In such cases the legislature, not the judiciary, is the main guardian of the public needs . . . ." *Id.*

35. *Id.* "The definition [of public use] is essentially the product of legislative determinations . . . . [W]hen the legislature has spoken, the public in-

definition of public use was broadened as courts almost blindly accepted the legislature's determination of what constituted a public use. Nevertheless, the issue of the appropriate scope of review for questions of public use is not well settled. For example, in the landmark case of *United States ex rel. TVA v. Welch*[36] three Justices disagreed with the majority's assessment of the appropriate scope of review.[37] The majority thought that one function of Congress was to determine what type of taking constituted a public use.[38] The Court concluded that any departure from that standard "would result in courts deciding what is and is not a governmental function."[39] Justice Reed, with whom Chief Justice Stone concurred, would have granted great weight to the legislative determination but would have allowed judicial review.[40] Justice Frankfurter's concurring opinion expressed the thought that the majority's opinion always would allow for judicial review.[41] After *Berman* and *Welch* the scope of review of public use in federal courts is limited by deference to legislative decisions. Some commentators believe that the disinclination of the *Berman* and *Welch* Courts to allow meaningful judicial review of the public use effectively eliminated the public use requirement.[42]

The scope of judicial review on the question of public use is quite varied in state courts. Some states have constitutional provisions that specifically declare questions of public use to be reserved for judicial review without regard to the legislative determination.[43] Other states have adopted this position in their

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terest has been declared in terms well-nigh conclusive." *Id.*

36. 327 U.S. 546 (1946). *See* text accompanying notes 95-98 *infra*.

37. *Id.* at 555-57 (Reed, J., concurring); *id.* at 557-58 (Frankfurter, J., concurring).

38. *Id.* at 551.

39. *Id.* at 552.

40. *Id.* at 556 (Reed, J. & Stone, C.J., concurring).

41. *Id.* at 557-58 (Frankfurter, J., concurring).

42. *See* Special Project, *Private Use*, *supra* note 12, at 689; 76 DICK. L. REV. 266 (1971); 58 YALE L.J. 599 (1949). Doubtless one reason for this position is that in this century the Supreme Court has never overturned a state court decision that a use was public. *See* United States *ex rel.* TVA v. Welch, 327 U.S. 546, 552 (1946).

43. *E.g.*, COLO. CONST. art. II, § 15; MISS. CONST. art. 3, § 17; OKLA. CONST. art. II, § 24; WASH. CONST. art. I, § 16.

judicial decisions.[44] Still other states adopt the federal approach and give legislative determinations a presumption of constitutionality.[45] The majority rule appears to be that while the legislature initially has the right to determine the issue of public use, the question is one that the judiciary ultimately must decide.[46] Regardless of the scope of review given the issue of public use in state courts, those courts seldom overturn a legislative determination that a use is for the public[47] because the standard by which courts review the determination of public use is often a narrow one of bad faith, fraud, or arbitrariness.[48] Thus, although the public use requirement is within the power of the judiciary to review, particular takings seldom will be overturned because of the judicial deference given legislative decisions.

One important aspect of the scope of review in eminent domain law concerns the question of necessity. If the scope of review is narrow, not only is the question of the amount of land to be taken beyond judicial inquiry, so is any question of necessity.

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44. *E.g.*, Salisbury Land & Improv. Co. v. Commonwealth, 215 Mass. 371, 102 N.E. 619 (1913); Komposh v. Powers, 75 Mont. 493, 501, 244 P. 298, 301 (1926); Town of Perry v. Thomas, 82 Utah 159, 22 P.2d 343 (1933).

45. *E.g.*, Northeastern Gas Transmission Co. v. Collins, 138 Conn. 582, 87 A.2d 139 (1952) (mere delegation of authority to condemn is sufficient declaration that use is public); Heirs of W.L. Champion v. City of Atlanta, 149 Ga. App. 470, 472, 254 S.E.2d 706, 708 (1979) (condemnor afforded discretion); Highland Realty, Inc. v. Indianapolis Airport Auth., 395 N.E.2d 1259, 1271 (Ind. Ct. App. 1979) (condemnor's discretion only disturbed if clear abuse); State Transp. Bd. v. May, 137 Vt. 320, 323, 403 A.2d 267, 269 (1979) (determination not disturbed if made in good faith).

46. NICHOLS, *supra* note 5, § 7.4.

47. *See* Capron, *Excess Condemnation in California—A Further Expansion of the Right to Take*, 20 HASTINGS L.J. 571, 576-77 (1969) [hereinafter cited as Capron, *Excess Condemnation*]. *See also* Special Project, *Private Use*, *supra* note 12, at 704-05.

48. *See* Anaheim Union High School Dist. v. Vieira, 241 Cal. App. 2d 169, 172, 51 Cal. Rptr. 94, 96 (1966) (public use not disputed except for bad faith or fraud); Louisiana Resources Co. v. Stream, 351 So. 2d 517, 519 (La. Ct. App. 1977) (unless condemnor acted arbitrarily or capriciously the determination is valid). *Contra*, Opinion of the Justices, 231 A.2d 431, 433 (Me. 1967) (advisory opinion) (public use requires more than public benefit); Square Butte Elec. Coop. v. Hilken, 244 N.W.2d 519, 521 (N.D. 1976) (public use requires more than being within purposes of condemnation statute).

Hence, the taking will be upheld.[49] It is difficult to reconcile this very limited review of necessity questions with the universal mandate that a condemning authority take only that which is necessary for the public project.[50] For example, questions of the necessity or feasibility of taking land,[51] of what estate in land to take,[52] of how much land to take,[53] and of which land to take[54] all have been denied judicial scrutiny because of deference to the legislature. Thus, at both the state and federal levels the legislature is given broad discretion and great power in the area of taking private property.

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49. *See* United States v. 416.81 Acres of Land, 514 F.2d 627 (7th Cir. 1975); United States v. Certain Real Estate, 217 F.2d 920 (6th Cir. 1954); Midkiff v. Tom, 483 F. Supp. 62 (D. Hawaii 1979).

50. 21 U. PITT. L. REV. 60, 61 (1959); *see, e.g.*, Miller v. Transcontinental Gas Pipe Line Corp., 358 F. Supp. 1357, 1362 (W.D. La. 1973) (only needed property may be taken); Williams v. City of Valdez, 603 P.2d 483 (Alaska 1979) (only what is reasonably necessary); Gregory v. Oklahoma Miss. River Prods. Lines, 223 Ark. 668, 267 S.W.2d 953 (1954) (no more than public need requires); Heirs of W.L. Champion v. City of Atlanta, 149 Ga. App. 470, 254 S.E.2d 706 (1979) (limited to amount reasonably necessary); County of Blue Earth v. Stauffenberg, 264 N.W.2d 647 (Minn. 1978) (taking need only be reasonably necessary); Town of Rumney v. Banel, 118 N.H. 786, 394 A.2d 323 (1978) (only reasonable necessity need be shown); Hobbs Mun. School Dist. No. 16 v. Knowles Dev. Co., 606 P.2d 541 (N.M. 1980) (only what is reasonably necessary and no more).

51. United States v. 416.81 Acres of Land, 514 F.2d 627 (7th Cir. 1975) (court will not review necessity for taking); United States v. 2606.84 Acres of Land, 432 F.2d 1286 (5th Cir. 1970) (actual necessity for taking is beyond judicial review).

52. United States v. Winnebago Tribe, 542 F.2d 1002 (8th Cir. 1976) (nature and extent of interest taken is agency discretion); United States v. 6.321 Acres of Land, 479 F.2d 404 (1st Cir. 1973) (lease or buy); Chapman v. Public Util. Dist. No. 1, 367 F.2d 163 (9th Cir. 1966) (decision to take fee instead of easement is not reviewable).

53. United States v. 20.53 Acres of Land, 478 F.2d 484 (10th Cir. 1973) (how much land taken is a legislative question); Woodland Mkt. Realty Co. v. City of Cleveland, 426 F.2d 955 (6th Cir. 1970) (extent of property taken is legislative function); United States *ex rel.* TVA v. 544 Acres of Land, 314 F. Supp. 273 (E.D. Tenn. 1969) (amount of land taken is beyond judicial inquiry).

54. United States *ex rel.* TVA v. 544 Acres of Land, 314 F. Supp. 273 (E.D. Tenn. 1969) (need for particular acreage is not judicial question); Claiborne Elec. Coop. v. Garrett, 357 So. 2d 1251 (La. Ct. App. 1978) (which land to take is within agency discretion as long as not arbitrary).

### B. *Development of Excess Condemnation*

As the definition of public use expanded, some courts accepted arguments that the condemnation of more land than physically was needed to construct the public improvement nevertheless was needed to accomplish the public use or benefit.[55] Only if courts found a public use would the excess condemnation be permitted.[56] Since there was no comprehensive definition of public use,[57] courts differed in their reaction to the exercise of excess condemnation.[58] Other types of condemnation theoretically similar to excess condemnation allowed the courts to accept excess condemnation as a logical step. For example, in

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55. *E.g.*, Kern County Union High School Dist. v. McDonald, 180 Cal. 7, 179 P. 180 (1919) (when remnant was worthless, manifestly unjust for district to pay full value for land and get only 80%; thus allowed excess to be taken); Forest Preserve Dist. v. Wike, 3 Ill. 2d 49, 119 N.E.2d 734 (1954) (adjacent land permitted to be taken to protect forest area); City of Tulsa v. Williams, 100 Okla. 116, 227 P. 876 (1924) (additional land taken above reservoir in order to protect the water supply).

56. Any exercise of eminent domain must meet this constitutional requirement as well as other constitutional requirements. *See* notes 3 & 9 *supra*.

57. *See* note 4 *supra*.

58. *E.g.*, Gretna v. Brooklyn Land Co., 182 La. 543, 162 So. 70 (1935); Mayor of Baltimore v. Clunet, 23 Md. 449 (1865); Opinion of the Justices, 204 Mass. 607, 91 N.E. 405 (1910) (advisory opinion); Winger v. Aires, 371 Pa. 242, 89 A.2d 521 (1952); City of Richmond v. Carneal, 129 Va. 388, 106 S.E. 403 (1921).

In *Gretna* the court allowed an excess to be taken because the landowner was not seriously injured and the city could decrease the cost of the improvement by selling the excess. 182 La. at 549, 162 So. at 72. The court said in *Clunet* that taking the unneeded remainder of a lot and selling it was a valid method of decreasing overall cost. 23 Md. at 464-65. *Opinion of the Justices* involved a plan by the legislature to take land adjacent to a new road and sell that land in a manner which would promote Boston's trade. The plan was disallowed because the court found that the purpose of the plan was profit, which was not a public use. 204 Mass. at 610, 91 N.E. at 407. In *Winger* the court refused to allow excess condemnation because the school board did not have the authority to take an excess and later sell it. 371 Pa. at 247, 89 A.2d at 523. A statute that authorized cities to condemn excess land adjacent to new streets and to sell the land was declared unconstitutional in *Carneal*. 129 Va. at 403, 106 S.E. at 409. Although the court admitted that the method was good financing that would decrease costs, the court said that this was not a public use of the property. *Id.* at 393, 106 S.E. at 405.

*Nashville & Chattanooga Railroad v. Cowardin*[59] the railroad, though granted only the power to condemn for a right of way, was allowed to condemn extra property to build a depot because the depot was an implicit need of the railroad.[60] In *Ashwander v. TVA*[61] a dispute arose over who had the right to generate hydroelectric power. The Court held that even though TVA did not build the dam to generate power, TVA acquired a property right in the falling water because this property right was "an inevitable incident of constructing a dam."[62] Thus, the acquisition of excess property other than land and the condemnation of extra property closely associated with the improvement have been upheld. Another precedent for excess condemnation is the power of the government to dispose of property acquired but not needed for the public improvement.[63] Since excess condemnation by definition provides the government with unneeded land, the government must be able to dispose of the property in order to make the taking of the excess portion worthwhile. Therefore, profits made by the government from the sale of excess property have been upheld and will not defeat a project that has a public use.[64] A final precedent is the acquisition of land for future uses.[65] The government often attempts to take land in advance of actual, present need so that the necessary land will be availa-

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59. 30 Tenn. 239, 11 Hum. 348 (1850).

60. *Id.* at 242, 11 Hum. at 351-52.

61. 297 U.S. 288 (1936).

62. *Id.* at 330.

63. See U.S. CONST. art. IV, § 3, cl. 2, which provides in part, "The Congress shall have Power to dispose of . . . Property belonging to the United States . . . ."; Ashwander v. TVA, 297 U.S. 288, 330 (1936).

64. 297 U.S. 288 (1936); United States v. Chandler-Dunbar Water Power Co., 229 U.S. 53 (1913); *see also* Cottrill v. Myrick, 12 Me. 222, 233 (1835); Gardner Water Co. v. Town of Gardner, 185 Mass. 190, 194, 69 N.E. 1051, 1053 (1904); Courtesy Sandwich Shop, Inc. v. Port of N.Y. Auth., 12 N.Y.2d 379, 389, 190 N.E.2d 402, 405, 240 N.Y.S.2d 1, 6 (1963).

65. *E.g.*, Town of New Windsor v. Ronan, 329 F. Supp. 1286 (S.D.N.Y. 1971) (condemnation for future use permitted); City of St. Petersburg v. Vinoy Park Hotel Co., 352 So. 2d 149 (Fla. Dist. Ct. App. 1977) (no need to show present use); Pidstawski v. South Whitehall Township, 33 Pa. Commw. Ct. 162, 380 A.2d 1322 (1977) (although not immediately used, the taking must be necessary eventually). *Contra*, Krauter v. Lower Big Blue Natural Resources Dist., 199 Neb. 431, 259 N.W.2d 472 (1977) (must be immediate use).

ble when the time comes to build a public project.[66] Courts that allow taking for future uses do not require a showing that the land is taken for a specific public improvement.[67] Therefore, a taking of property in anticipation of a future need is essentially an acquisition of land not needed for any public improvement.

To avoid difficulty in proving public use, some states specifically have enacted constitutional provisions or statutes that authorize the use of excess condemnation.[68] Although this legislative action merely begs the question whether the excess condemnation is actually for a public use, the courts, giving deference to legislative decisions in this area, refuse to make the appropriate judicial inquiry.[69] Thus, courts have found a comprehensive analysis of any theory of excess condemnation to be unnecessary.[70] As a result of this limited review, excess condemnation is upheld regardless of whether the condemnation of the excess makes good sense.[71] Moreover, courts seldom explore the constitutionality of a particular exercise of excess condemnation.[72]

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66. C. HAAR, LAND-USE PLANNING 683 (3d ed. 1977).

Sometimes a city may take land for future uses as part of an overall plan of urban land use. This type of program is called land banking. The land bank would provide land for public projects when the need for the project arose. Also, land banking could be used to control the real estate market and promote orderly urban growth. *Id.* at 683-85; MODEL LAND DEVELOPMENT CODE art. 6, commentary at 255-61 (1975). The Model Land Development Code does provide for land banking. *Id.* §§ 61-101 to -502.

67. *See* note 65 *supra*.

68. *E.g.*, MASS. CONST. pt. I, art. X (as amended by amend. 39); MO. CONST. art. I, § 27; R.I. CONST. art. XVII, § 1; WIS. CONST. art. XI, § 3A; HAWAII REV. STAT. § 101-2 (1976); NEV. REV. STAT. § 37-020 (1979). *See* 46 COLUM. L. REV. 108, 111 (1946); 21 U. PITT. L. REV. 60, 63 (1959).

69. *See* text accompanying notes 33-54 *supra*.

70. *Cf.* United States *ex rel.* TVA v. Welch, 327 U.S. 546 (1946) (function of Congress to decide what taking is for public use); United States *ex rel.* TVA v. Road Easement, 424 F. Supp. 567 (E.D. Tenn. 1976) (taking for associated purposes allowed); United States *ex rel.* TVA v. 544 Acres of Land, 314 F. Supp. 273 (E.D. Tenn. 1969) (neither amount nor character of taking is for judicial determination).

71. *Id.*

72. *See* State *ex rel.* State Hwy. Dep't v. 9.88 Acres of Land, 253 A.2d 509 (Del. 1969) (no explanation of recoupment); Wes Outdoor Advertising Co. v. Goldberg, 55 N.J. 347, 262 A.2d 199 (1970) (vague limits on excess con-

## III. Theories of Excess Condemnation

Although all exercises of excess condemnation permit the taking of more land than is needed, each exercise is based on one of four different rationales: the remnant theory, the protective theory, the recoupment theory, and the broader public purpose theory. The remnant theory, the earliest accepted justification for excess condemnation,[73] permits the taking of an entire parcel of land when what remains after the taking of necessary land, the remnant, is but a small, odd-shaped, or unusable portion.[74] Under the protective theory, the taking of land additional to that which is necessary to construct the public improvement is allowed in order to control its use and thereby protect the public project.[75] The recoupment theory of excess condemnation allows the government to condemn additional land adjacent to the public improvement and to sell that excess in order to recapture value and decrease the total cost of the project.[76] A fourth theory of excess condemnation can be recognized in recent federal cases.[77] These cases allow the government to take excess land not needed for the particular project in order to achieve broad public purposes associated with the original condemnation. This theory will be called the broader public purpose theory. Several theories may apply to a single transaction even though the theories are theoretically distinct.[78] For instance, land taken under the remnant theory could be sold and the profit used to recoup some of the project's costs. Also, the four theories provide flexibility for cities in land-use planning. Cities

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demnation).

73. Nichols, *supra* note 5, § 7.5122[1].

74. People v. Thomas, 108 Cal. App. 2d 830, 239 P.2d 914 (1952) (small, irregular in shape, and in location inaccessible to the owner).

75. Forest Preserve Dist. v. Wike, 3 Ill. 2d 49, 119 N.E.2d 734 (1954) (protect and preserve a forest area).

76. Atwood v. Willacy County Nav. Dist., 271 S.W.2d 137 (Tex. Civ. App. 1954) (excess condemnation and sale allowed district to be self-supporting).

77. United States *ex rel.* TVA v. Welch, 327 U.S. 546 (1946) (physical, social, economic development); United States *ex rel.* TVA v. Two Tracts of Land, 532 F.2d 1083 (6th Cir. 1976) (conveyed for development); Midkiff v. Tom, 483 F. Supp. 62 (D. Hawaii 1979) (redistribution of land holdings).

78. R. Cushman, *supra* note 1, at 9; Capron, *Excess Condemnation*, *supra* note 47, at 581.

would like to be able to use the power of excess condemnation as a means to control the use of property adjacent to the public improvement;[79] the power potentially could reduce the cost of public projects.[80] A landowner may even demand that government be forced to exercise eminent domain when the owner is left holding a worthless remnant after the government has taken what is needed.[81] Each theory has a distinct rationale, which will be analyzed separately.

### *A. Remnant Theory*

The remnant theory of excess condemnation is essentially an application of the de minimis rule.[82] Basically, the theory provides for the taking of extra land—the remnant—if that land has been rendered worthless by the original taking.[83] If the remnant is of little practical value to the landowner because it is small, odd-shaped, or landlocked, the remnant is called a physical remnant.[84] By allowing the government to take physical remnants, economic waste is avoided. The government can consolidate tracts and replat the property so that a usable piece of property is obtained. Early attempts to justify the taking of a physical remnant were unsuccessful because courts ruled that this type of condemnation failed to meet the narrow definition of public use.[85] The theory gained acceptance when New York

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79. 58 YALE L.J. 599, 606 (1949). Several states have constitutional and statutory provisions that allow the excess land taken to be conveyed with appropriate restrictions on the use of that property so that the public improvement is protected. *See e.g.*, MASS. CONST. pt. I, art. X (as amended by amend. 39); N.Y. CONST. art. XVIII, § 8; OHIO CONST. art. XVIII, § 10; R.I. CONST. art. XVII, § 1; WIS. CONST. art. XI, § 3A; DEL. CODE ANN. tit. 17, § 175 (1975); HAWAII REV. STAT. § 101-2 (1976); TENN. CODE ANN. § 54-16-104 (1980).

80. Hart, *Excess Condemnation A Solution of Some Problems of Urban Life*, 11 MARQ. L. REV. 222, 229-30 (1926-27); Steiner, *Excess Condemnation*, 3 MO. L. REV. 1, 1 (1938).

81. *See* Kern County Union High School Dist. v. McDonald, 180 Cal. 7, 179 P. 180 (1919) (defendant alleged that what was left him was worthless).

82. *See* 21 U. PITT. L. REV. 60, 62 (1959).

83. NICHOLS, *supra* note 5, § 7.5122[1][a].

84. *Id.*

85. *Id.*; Note, *Excess Condemnation*, *supra* note 3, at 121-22; *see* Embury v. Conner, 3 N.Y. 511 (1850); *In re* St. Albany St., 11 Wend. 149 (N.Y. Sup. Ct. 1834).

amended its constitution to specify that excess condemnation to create adequate building sites was a public use.[86] The physical remnant theory is widely accepted today as a result of the expanded scope of public use.[87] The number of condemnations based on the remnant theory have increased greatly[88] because the needs of an expanding society have underscored the economic advantages that can inure to the government from condemning remnants.[89] Consequently, the theory no longer is applied only to small, unusable portions of property.[90] Two new economically oriented theories of remnant acquisition have developed: economic remnants and financial remnants.[91]

An economic remnant is created when the condemnation of the entire tract of land is only slightly more expensive than the condemnation of the needed land.[92] By taking an economic remnant the government can maximize the amount of land taken for the least amount of money, thereby reducing the unit cost of the taking. Additionally, the sale of the excess decreases the overall cost of the project. The public use requirement has been held to be satisfied under this theory if the taking of the whole parcel secures an economic advantage to the government.[93] In other words, the public interest is served by the exercise of good busi-

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86. *See* NICHOLS, *supra* note 5, at § 7.5122[1][a]. N.Y. CONST. art. IX, § 1(e) provides authorization for local governments to take property for public use and allows excess condemnation only to the extent necessary for the public use of adjacent land.

For analysis of California's excess condemnation legislation, see Capron, *Excess Condemnation in California—A Further Expansion of the Right to Take*, 20 HASTINGS L.J. 571 (1969).

87. *See also* 21 U. PITT. L. REV. 60, 62 (1959).

88. Note, *Excess Condemnation, supra* note 3, at 120.

89. NICHOLS, *supra* note 5, § 7.5122[1][b].

90. Note, *Excess Condemnation, supra* note 3, at 120. In one case the condemnation of .65 acres was the basis for the excess condemnation of 54 acres—just the reverse of the traditional theory, a true case of "the tail wagging the dog." People *ex rel.* Dep't of Pub. Works v. Superior Court, 68 Cal. 2d 206, 218, 436 P.2d 342, 350, 65 Cal. Rptr. 342, 350 (1968) (Mosk, J., dissenting).

91. *See generally* NICHOLS, *supra* note 5, § 7.5122[1][b] to .5122[1][c]; Note, *Excess Condemnation, supra* note 3, at 124-33.

92. *See* Note, *Excess Condemnation, supra* note 3, at 125.

93. United States *ex rel.* TVA v. Welch, 327 U.S. 546 (1946); People *ex rel.* Dep't of Pub. Works v. Superior Court, 68 Cal. 2d 206, 436 P.2d 342, 65 Cal. Rptr. 342 (1968); State v. Buck, 94 N.J. Super. 84, 226 A.2d 840 (1967).

ness judgment. Serving the public interest is a qualification on remnant takings in several states.[94]

In the landmark decision of *United States ex rel. TVA v. Welch*[95] economic factors greatly influenced the decision to take more land than was needed. The controversy arose when TVA planned to build a dam that would flood the only road to an isolated mountain community. To compensate for the destruction of the road TVA could pay damages for the flooded road, pay for construction of a similar road, or pay for an improved highway. Since it was wartime, the immediate construction of a new road was impossible, and TVA chose to pay damages. The damage payment was unacceptable to the state and county because the money, unlike a road, could not restore access to the town. As a compromise, the entire community and all isolated lands were condemned even though that property was not necessary for the construction of the dam.[96] This excess land was turned over to the Great Smoky Mountains National Park. Several of the affected landowners challenged the taking on the basis that Congress had not given TVA the authority to take land under these circumstances. In considering the dispute, the Court first concluded that the legislative determination of public use was due great deference.[97] Although there was no explicit statutory authorization for TVA to condemn this additional land, the Court viewed the entire transaction as an integrated effort by TVA to achieve its broad authorization to foster physical, economic, and social development of the area.[98] Thus, consideration of costs was determined to be a valid factor for agency decision making.

Similarly, the New Jersey Supreme Court in *State v. Buck*[99] permitted the state highway commission to count costs and thereby maximize the amount of land taken for the least amount of money. The highway commission had condemned all five

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94. *E.g.*, OHIO CONST. art. XVIII, § 10; DEL. CODE ANN. tit. 17, § 175 (1975); HAWAII REV. STAT. § 101-2 (1976); N.J. REV. STAT. § 27-7A-4.1 (1966); VT. STAT. ANN. tit. 19, § 221 (1968); WASH. REV. CODE § 47.52.050 (1970).

95. 327 U.S. 546 (1946).

96. *Id.* at 550, 552.

97. *Id.* at 551-52.

98. *Id.* at 552-53.

99. 94 N.J. Super. 84, 226 A.2d 840 (1967).

acres of defendant's land even though it needed only about four acres. The decision to uphold the excess condemnation turned on the fact that the appraised value of all the land was $46,000, while the value of the needed land was $45,000.[100] The court concluded that it was sound business judgment to avoid the expense of litigation and a potentially high damage award by taking the excess and paying a minimal increase in cost.[101]

On this same basis of cost economics, the California Supreme Court created the notion of a financial remnant in *People ex rel. Department of Public Works v. Superior Court*.[102] A financial remnant is actually a specific type of economic remnant in which the severance costs to the remnant property approach or exceed the cost of condemning the entire parcel. In the *Public Works* case, two-thirds of an acre of farm land was condemned in order to make way for a new highway. The tract of land was situated so that the condemnation of this small portion landlocked the remaining fifty-four acres of the parcel. The landowners argued that fifty-four acres could not be the remnant of two-thirds of an acre; they sought to keep their land and to be paid severance damages.[103] Because of the high cost of severance damages in the case, the California Supreme Court allowed the fifty-four acres to be taken as a financial remnant.[104] The rationale used by the court in accepting this excess condemnation was that unless the financial remnant was taken, the government would be forced to pay full cost for the parcel in the form of severance damages but actually would get title only to a small portion of the tract.[105] Therefore, as a matter of sound economics, since the government had paid for the entire tract, the government should get the entire tract. Minimizing ultimate costs of public projects, therefore, was held to satisfy the public use

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100. *Id.* at 87, 226 A.2d at 841-42.

101. *Id.* at 88, 226 A.2d at 842. Good business judgment was also the rationale used by the court in United States v. Agee, 322 F.2d 139 (6th Cir. 1963). Additional unflooded land was permitted to be taken for a dam project in order that the government could avoid the high cost of providing an access to the remnant. *Id.* at 142.

102. 68 Cal. 2d 206, 436 P.2d 342, 65 Cal. Rptr. 342 (1968).

103. *Id.* at 208-09, 436 P.2d at 344, 65 Cal. Rptr. at 342.

104. *Id.* at 212-13, 436 P.2d at 346, 65 Cal. Rptr. at 346.

105. *Id.* at 213, 436 P.2d at 346, 65 Cal. Rptr. at 346-47.

requirement.

These expansions of the remnant theory—economic and financial remnants—are results of the liberalized definition of public use. Consequently, the remnant justification is used to condone the taking of nontraditional remnants even though there is no clear explanation why this theory is acceptable. The statutory limitation on the remnant taking in *Public Works* was that the remnant must be "of little value to the owner."[106] This broad language, however, did not help the owner retain his fifty-four acres. The only requirements that the California Supreme Court placed on the practice of condemning financial remnants were that the practice could be used only to avoid excessive severance or consequential damages, and that the practice must give the state an economic benefit.[107] This hardly can be a guideline for the exercise of remnant taking because it merely defines financial remnant. The definition is too simple to provide the conceptual framework necessary to evaluate the varied applications. Hence, all takings that meet this definition would be permitted.

The Montana Supreme Court in *State Highway Commission v. Chapman*[108] took a stricter view of economic remnants than California had taken in *Public Works*. The Montana statute allowed the taking of remnants "of little market value."[109] The court required a total loss of value to the remnant before the remnant could be taken.[110] This interpretation gives greater importance to the preservation of individual property rights because the state is not allowed to take merely when it has an economic advantage. As a dissent in *Public Works* pointed out, "Condemnation is not a necessary antidote for excessive damages."[111] Consider the government's situation in terms of private

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106. CAL. STS. & HY. CODE § 104.1 (West 1969) (repealed 1975) (current version at CAL. CIV. PROC. CODE § 1240.410 (Cum. Supp. 1981)).

107. 68 Cal. 2d at 210, 436 P.2d at 344-45, 65 Cal. Rptr. at 344-45.

The size of the tract imposes a practical limitation on the exercise of excess condemnation under any of the remnant theories. The most that can be taken under a remnant theory is the entire tract.

108. 152 Mont. 79, 446 P.2d 709 (1968).

109. MONT. REV. CODES ANN. § 32-3905 (Supp. 1977) (current version).

110. 152 Mont. at 85, 446 P.2d at 712.

111. 68 Cal. 2d at 221, 436 P.2d at 351, 65 Cal. Rptr. at 351 (Mosk, J.,

enterprise. If private enterprise contemplates a project but the cost analysis shows that it is too costly, the company's business judgment says the project must be foregone. But if government contemplates a project that runs into excessive severance costs, the government is able to proceed because of the public need for the project. The taking of economic remnants decreases costs, and thereby allows the project to proceed with the benefit of decreased costs. Nevertheless, economics should not obscure the basic issue whether public rights have been exalted to the derogation of individual property rights.[112]

Even if the cost savings of taking economic remnants is considered sufficient justification to meet the public use requirement, courts should calculate costs more carefully in order to assure greater protection for individual property. Professor Michelman has stated that the present utilitarian analysis used by the courts in eminent domain proceedings is incomplete.[113] He defines the missing factor—demoralization costs—as the loss of future production from the deprived landowner as a result of his demoralization and the losses accruing from other demoralized observers who fear similar governmental action.[114] The de-

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dissenting).

112. The government may incorporate other social values in addition to economics in determining the public need for a particular project. Nevertheless, when government acts in its enterprise capacity, it should be bound by the same cost analysis as private enterprise. If government is not bound in this situation, abuse of power and inefficient government is almost inevitable. Moreover, the Constitution strikes the balance between public rights and private rights. The fifth amendment provides a limitation on governmental takings that also secures individual property rights. *See* notes 3 & 9 *supra*. That limitation is the public use requirement. In order that governmental takings do not denigrate individual property rights, the courts must scrutinize whether the taking is, in fact, for a public use rather than defer to the legislative judgment. Otherwise, there is no check on governmental power, and the constitutional balance between public rights and private property rights cannot be assured. Thus, the courts will not be usurping a legislative function, but rather they will ensure that the legislative function is exercised properly.

113. Michelman, *Property, Utility and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1214-16 (1967).

114. *Id.* at 1214. Michelman recognizes the difficulty in assessing demoralization costs. One way he would avoid the difficulty of assessing demoralization costs by permitting a taking only when it obviously is efficient. *Id.* at 1235.

moralization costs should be considered in order to reach the most efficient outcome. Applying this theory to the cost analysis used for economic remnants, courts should allow the economic remnant to be taken only if the benefit to the public (measured by reduction in the project's cost) is greater than the demoralization costs. This formula, rather than the present analysis used by the courts, would better reflect whether the remnant acquisition was actually in the best interests of the public.

### *B. Protective Theory*

Under the protective theory excess land adjacent to the public improvement but unnecessary to its construction is taken so that the government may control the use of that land[115] either by holding the property or by selling it with the appropriate use restrictions attached. Controlling the use of the adjacent property allows the government to protect the public improvement, to preserve its usefulness, to ensure that the objective of the principal project is achieved, or to enhance the value of the surroundings. The justification for permitting excess condemnation under this theory is a variation of the end justifying the means: unless this method of excess condemnation is allowed, the value to the public from the improvement will be lost or diminished. The constitutionality of this concept is well settled because purposes such as protection and preservation of public improvements are well within the broad definition of public use.[116] Therefore, challenges to this type of taking often raise the issue whether condemnation for protective purposes is within the statutory grant of authority to condemn.

The most common grant of authority to condemn for protective purposes has been to state highway commissions for the development of safe highways.[117] States have responded to the great increase in traffic volume and high-speed expressways with a variety of enactments that specifically authorize condemnation of areas adjacent to highway projects. Some statutory grants of authority are very broad. The grants of excess condemnation in

115. NICHOLS, *supra* note 5, § 7.5122[2].
116. *Id.* § 7.5122[2], at 7-140.2 n.37.
117. *Id.* § 7.5122[2][a].

Missouri,[118] New Jersey,[119] New York,[120] Ohio,[121] Pennsylvania,[122] and Wisconsin[123] are so broad that they encompass excess condemnation for public uses such as airports, slum clearance, and parking lots as well as for highways. Nine states have highway legislation which specifies that excess condemnation promoting safe roads and enhancing their beauty will be a public use.[124] Delaware,[125] New Hampshire,[126] Vermont,[127] and Tennessee[128] limit excess condemnation for highway purposes to controlled-access highways. Over half the states have some variation of the Model Controlled-Access Highway Act, which allows takings that are in the best interest of the public.[129] Since public use is not disputed under this theory, the major concern of the courts in permitting this type of excess condemnation is whether the excess condemnation is reasonably related to the achievement of the purposes of the original condemnation.[130] For example, if the legislation allows the resale of the excess land without restrictions, as is possible in Rhode Island[131] and Massachu-

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118. MO. CONST. art. I, § 27, allows excess condemnation if "reasonably necessary to effectuate the purposes intended." *Id.*

119. N.J. CONST. art. IV, § 6(3), allows excess condemnation for uses authorized by law.

120. N.Y. CONST. art. IX, § 1(e), allows excess condemnation for public uses so long as use can be made of the land after the government reconveys it.

121. OHIO CONST. art. XVIII, § 10, allows excess condemnation if it furthers the public use.

122. PA. STAT. ANN. tit. 53, § 1552 (Purdon 1980), allows city to condemn land for public uses, including parking lots and street lighting.

123. WIS. CONST. art. XI, § 3A, allows excess condemnation for public works such as highways, playgrounds, and buildings.

124. *See* NICHOLS, *supra* note 5, § 7.5122[2][a], at 7-140.5 n.40; Note, *Excess Condemnation, supra* note 3, at 136-38; *e.g.*, TENN. CODE ANN. § 54-16-104 (1980); WASH. REV. CODE § 47.12.250 (1970); WYO. STAT. § 24-2-109 (1977).

125. DEL. CODE ANN. tit. 17, § 175 (1975).

126. N.H. REV. STAT. ANN. § 236:2 (1977).

127. VT. STAT. ANN. tit. 19, § 1863a (1968).

128. TENN. CODE ANN. § 54-16-104 (1980).

129. *See* 21 U. PITT. L. REV. 60, 66 (1959) (citing Highway Research Board, Special Report 26, EXPRESSWAY LAW 52-54 (1957)).

130. This is determined by considering whether the statutory grant of the authority to condemn an excess reasonably is related to achieving the purpose for the original condemnation.

131. R.I. CONST. art. XVII, § 1.

setts,[132] then the purpose of taking the excess—to control its use—could be thwarted by conveying the excess without use restrictions.

The application of the protective theory to control the use of the adjacent land through condemnation and subsequent sale with restrictions may not be necessary since the modern municipal zoning powers are broad enough to accomplish most governmental purposes.[133] Therefore, excess condemnation for protective purposes is not the only available alternative. When evaluating the use of excess condemnation to protect a project, courts should consider alternative means of protection, as well as whether the excess condemnation reasonably is related to achieving the public purpose.

### *C. Recoupment Theory*

The recoupment theory allows the government to attempt to recapture the value bestowed on adjacent property by a public improvement through the condemnation and sale of that adjacent property.[134] Recoupment is simply one method of financing public projects, which in essence allows the government to make money. The justification for the theory is that the adjacent landowner should not be able to reap the benefit of increased property values from the large public expenditure on adjacent land.[135] Therefore, since the government created the increase in value, it is entitled to that excess value. This is an anomaly because no compensation is required if the government decreases the value of the neighboring land short of a taking. Likewise, a private developer who causes surrounding property values to soar because of his project cannot sue those landowners for the return of the benefit he has conferred upon them. Although recoupment is used frequently in Europe to finance public projects, it has not been used widely in the United States.[136] Re-

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132. MASS. CONST. pt. I, art. X (as amended by amend. 39).

133. *See* Agins v. City of Tiburon, 447 U.S. 255 (1980); Village of Belle Terre v. Boraas, 416 U.S. 1 (1974).

134. *See* Steiner, *Excess Condemnation*, 3 Mo. L. REV. 1 (1938).

135. *See* Note, *Excess Condemnation*, *supra* note 3, at 150.

136. *Id.* at 150-51. The article treats foreign exercises of recoupment and the theory's socio-economic roots. For an in-depth treatment of recoupment in

coupment has been used, however, in conjunction with other theories of condemnation. For example, the city may take several physical remnants, replat the boundaries, and then resell the property. In those cases, however, the recoupment motive is usually secondary. In most cases the acceptability of the initial action makes the subsequent sale acceptable because it is only secondary or incidental.[137] The exercise of excess condemnation for the sole purpose of recoupment is the most difficult action to justify under the federal constitution. Only some of the state constitutions authorizing excess condemnation are broad enough to allow recoupment.[138]

The landmark cases invalidating the recoupment concept are pre-1930 cases,[139] which were decided prior to the expansion of the public use definition. In *Opinion of the Justices*,[140] a 1910 case, the Supreme Judicial Court of Massachusetts advised its legislature that condemnation for recoupment purposes did not meet the public use requirement. The legislature planned to take excess property adjacent to a new street in Boston to use to promote trade and commerce in the area. The court ruled that the profit motive associated with this condemnation was an impermissible governmental purpose.[141] Other early justifications for the invalidation of recoupment were that such action violated due process[142] and that the government did not specify a

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foreign countries, see R. CUSHMAN, *supra* note 1, at 142-211.

137. United States v. Chandler-Dunbar Water Power Co., 229 U.S. 53, 72 (1913) (sale was incidental purpose); Courtesy Sandwich Shop, Inc. v. Port of N.Y. Auth., 12 N.Y.2d 379, 389, 190 N.E.2d 402, 405, 240 N.Y.S.2d 1, 6 (1963) (incidental revenue production); Ryan v. Louisville & N. Terminal Co., 102 Tenn. 111, 125, 50 S.W. 744, 747 (1899) (purely incidental right).

138. *See, e.g.*, MASS. CONST. pt. I, art. X (as amended by amend. 39) (excess land may be taken so long as inadequate building sites are not created); OHIO CONST. art. XVIII, § 10 (excess may be taken if in furtherance of public use); R.I. CONST. art. XVII, § 1 (excess may be taken so long as inadequate building sites are not created); WIS. CONST. art. XI, § 3A (state allowed to take land and to convey it with restrictions to protect the public works).

139. City of Cincinnati v. Vester, 281 U.S. 439 (1930) (dicta); Opinion of the Justices, 204 Mass. 607, 91 N.E. 405 (1910) (advisory opinion); City of Richmond v. Carneal, 129 Va. 388, 106 S.E. 403 (1921).

140. 204 Mass. 607, 91 N.E. 405 (1910).

141. *Id.* at 610, 91 N.E. at 407.

142. City of Richmond v. Carneal, 129 Va. 388, 106 S.E. 403 (1921).

use for the property.[143]

More recently, the United States Supreme Court expanded the definition of public use in *Berman v. Parker*[144] to a degree that would permit recoupment. The *Berman* Court determined that so long as the purpose of the taking was within the authority of the legislature, the legislature was the sole judge of the means to achieve that purpose.[145] Relying on *Berman*, the federal district court in *Midkiff v. Tom*[146] refused to overturn a state statute which had the effect of producing revenue for the state. The statute granted the state the power to condemn certain residential property and then sell the property to those who had been leasing it. The revenue produced by the sales would offset the cost of condemnation. Thus, condemnation and revenue generating sales permitted the implementation of social policy at very little, if any, governmental cost.[147] As long as the statute was reasonably related to achieving a permissible governmental purpose, the Court would not overturn the legislation.[148]

Some state courts have also accepted profit motives and thus have accepted the recoupment theory associated with condemnations when the condemnation also served a public use. In *Courtesy Sandwich Shop, Inc. v. Port of New York Authority*[149] landowners asserted that the condemnation of their property in order to create the World Trade Center was not for a public use. They protested that the part of the World Trade Center that was not functionally related to the purpose of world trade was used solely to produce revenue to offset the losses of the Port

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143. *Cf.* City of Cincinnati v. Vester, 281 U.S. 439 (1930) (held that Ohio constitution required a specified use for excess condemnation).

144. 348 U.S. 26 (1954). *See* note 30 *supra* and accompanying text.

145. 348 U.S. at 33.

146. 483 F. Supp. 62 (D. Hawaii 1979). Although this case does not concern recoupment by excess condemnation, the case expanded the definition of public use.

147. *Id.* at 67. The avowed purpose of the legislation was to remedy serious landholding problems in Hawaii. *Id.*

148. *Id.* at 67, 70.

149. 12 N.Y.2d 379, 190 N.E.2d 402, 240 N.Y.S.2d 1 (1963). Justice Van Voorhis strongly dissented because he viewed this as a governmental intrusion on free enterprise and a destruction of private property rights. *Id.* at 393-400, 190 N.E.2d at 407-11, 240 N.Y.S.2d at 9-15 (Van Voorhis, J., dissenting).

Authority's railroad. The New York Court of Appeals allowed the Port Authority to recoup its costs because the recoupment was not the primary purpose of the project. The primary purpose was to build the World Trade Center and thereby stimulate the economy of New York. The court ruled that the recoupment performed a public function because it helped achieve the overall purpose of the project.[150]

Although recent cases have not decided the validity of recoupment per se, they definitely have set a precedent for the government to finance public projects through eminent domain so long as there is some traditional public use associated with the project. To permit recoupment merely because of its association with a permissible public purpose is to obscure the basic issue of its validity. The real question is whether the public need to recapture the increased value of adjacent property outweighs the harm done to the landowner who loses the property. Even if the public undoubtedly may recapture the enhanced value,[151] must the individual necessarily lose his property? A better-reasoned approach would permit recapture while allowing the landowner to retain title to the property. If economic gain to the public is the principle behind recoupment, then the principle should be limited strictly to that purpose.

Several methods of returning the value to the public exist. For example, many states provide that a damage award can be offset by the value conferred when only a portion of the land-

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150. *Id.* at 389, 190 N.E.2d at 405, 240 N.Y.S.2d at 6. Under the enabling statute 90% of the property could be used to produce revenue solely to offset deficits of the railroad and yet the project still would be deemed "for a public use." *Id.* at 396, 190 N.E.2d at 409, 240 N.Y.S.2d at 12 (Van Voorhis, J., dissenting).

151. The concept of recapturing conferred value was accepted by Chief Judge Breitel of the New York Court of Appeals. In the context of determining whether a property owner was able to obtain a reasonable return on *his* investment, Breitel recognized that much of the value of a piece of urban property was not the result of private effort but actually resulted from opportunities for exploitation made available by a community. Penn Central Transp. Co. v. City of N.Y., 42 N.Y.2d 324, 328, 366 N.E.2d 1271, 1273, 397 N.Y.S.2d 914, 916 (1973), *aff'd*, 438 U.S. 104 (1978). Breitel thought that society was entitled its due to the extent it had created value. *Id.* at 328, 366 N.E.2d at 1273, 397 N.Y.S.2d at 916.

owner's land is taken.[152] The enhanced value also could be assessed as a tax against the property benefited by the public improvement.[153] The major difficulty in this approach lies in the complex questions that must be answered in determining which property is benefited and to what degree. If this assessment is not made fairly and accurately, problems arise because of unequal treatment. The tax would be most effective if assessed after the completion of the project in order to reflect the actual value bestowed. Also, the tax should be assessed gradually to avoid taxing the landowner before he is able to realize the increased value. Therefore, recoupment suffers from practical as well as from legal problems.

### *D. Broader Public Purpose Theory*

Many of the recent excess condemnation cases involve complex circumstances that render analysis under traditional excess condemnation theories awkward.[154] Even some accepted methods for taking more land than needed do not fit within the existing theoretical framework.[155] For example, urban redevelop-

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152. Note, *Excess Condemnation*, *supra* note 3, at 168-69 & n.87.

153. *Id.* at 168, 170-71.

154. *See* United States *ex rel.* TVA v. Welch, 327 U.S. 546 (1946) (issues included public use, just compensation, high damage award, protection theory, remnant theory, and scope of delegated power); Courtesy Sandwich Shop, Inc. v. Port of N.Y. Auth., 12 N.Y.2d 379, 190 N.E.2d 402, 240 N.Y.S.2d 1 (1963) (cooperative effort by local government and private enterprise to improve economy).

155. Because substitute condemnation does not fit within the three traditional theories of excess condemnation, some commentators categorize it as a separate theory of excess condemnation. *See* NICHOLS, *supra* note 5, §§ 7.5122, at 7-128 & 7.226; Note, *Excess Condemnation*, *supra* note 3, at 172-86. In substitute condemnation land is taken from one landowner and given to another landowner as compensation when money damages will not adequately compensate that landowner for the loss of his property. For example, in Brown v. United States, 263 U.S. 78 (1923), the government, instead of paying damages, condemned additional land to secure a town site for a community whose town would be flooded by a reservoir.

The broader public purpose theory is sufficiently expansive to incorporate substitute condemnation, because the purpose for taking the additional land—compensation—accomplishes a broader public purpose than the purpose for the original taking.

ment, although considered by some to be excess condemnation under a protection theory,[156] does not fit neatly within any category because the excess is not an ancillary condemnation for the protection, preservation, or recapture of the cost of the redevelopment. Rather, the excess is taken to become a part of the redevelopment. Some cases do not fit conveniently into any one of the present theories because of the number of purposes and techniques involved.[157] Many projects no longer spawn simple condemnation cases that present a single question of public use. Governmental projects have become broader and more ambitious.[158] The expansion of the governmental action is directly related to the liberal public use definition and the narrow scope of review that is given legislative decisions. Therefore, a new category—excess condemnation to achieve a broader public purpose—has been created to recognize the effect of a liberal definition of public use. Under this theory the excess is taken to accomplish a public purpose broader than that of the original taking.[159] In the clearest example of this theory, a condemning authority takes land to build a hydroelectric dam but also takes excess land around the dam in order to provide land for industrial development or recreation. The excess land is not used to secure an economic advantage, to protect the dam, or to recoup costs. Rather, the excess land is taken to accomplish a broader public purpose than the purpose of the dam.[160]

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156. Note, *Excess Condemnation*, *supra* note 3, at 146-48.

157. *E.g.*, United States *ex rel.* TVA v. Welch, 327 U.S. 546 (1946) (taking excess only viable option); United States *ex rel.* TVA v. Two Tracts of Land, 532 F.2d 1083 (6th Cir. 1976) (taking land for Tellico Dam and for redevelopment); United States v. Certain Real Estate, 217 F.2d 920 (6th Cir. 1954) (public and private use of excess); Atwood v. Willacy County Nav. Dist., 271 S.W.2d 137 (Tex. Ct. Civ. App. 1954) (high damage award avoided by recoupment).

158. For example, the development of the World Trade Center created more office space than existed in all of Boston. *See* Meidinger, *"Public Uses,"* *supra* note 6, at 36.

159. *E.g.*, United States *ex rel.* TVA v. Welch, 327 U.S. 546 (1946) (fostered physical, social, and economic development); United States *ex rel.* TVA v. Two Tracts of Land, 532 F.2d 1083 (6th Cir. 1976) (promoted industrial and recreational development); Illinois Cent. R.R. v. TVA, 445 F.2d 308 (6th Cir. 1971) (allowed to condemn to achieve statutory purpose).

160. This paradigm is based on an actual case and holding. *See* United

This fourth concept of excess condemnation is much broader than the traditional theories. Under the broader public purpose theory the end is capable of justifying almost any means. Excess condemnation to achieve a broader public purpose is simply recognition of the fact that the public use definition is so broad that any legitimate governmental objective will be allowed. Indeed, perhaps the concept cannot properly be labeled a theory; it really is only the recognition that the traditional justifications for excess condemnation are becoming unnecessary. The merit in creating a new category is in recognizing the emphasis that the concept places on public use and on the legislature's power to control eminent domain. The concept is applicable particularly in the federal courts because they have transformed the public use requirement into a substantive due process question.[161] Thus, in the federal courts the public use requirement will be met if the excess condemnation is reasonably related to achieving a permissible governmental objective. Since the government typically has combined the exercise of excess condemnation with a traditionally acceptable public purpose,[162] the broad definition of public use will allow the government to justify taking additional land for nontraditional purposes. The very real danger of this approach is that governmental condemnations would in effect become immune from judicial review. Some cases and commentators discount the potential for abuse of eminent domain because the government is required to exercise due process and pay just compensation.[163] Just compensation, however, does not always fully compensate the deprived landowner.[164] Moreover, the emotional wrench of

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States *ex rel.* TVA v. Two Tracts of Land, 532 F.2d 1083 (6th Cir. 1976) (Tellico Dam).

161. *See* Midkiff v. Tom, 483 F. Supp. 62, 66-67 (D. Hawaii 1979).

162. *See* note 158 *supra*.

163. *See* United States v. Agee, 322 F.2d 139 (6th Cir. 1963); People *ex rel.* Dep't of Pub. Works v. Superior Court, 68 Cal. 2d 206, 436 P.2d 342, 65 Cal. Rptr. 342 (1968); Stoebuck, *The Property Right of Access Versus the Power of Eminent Domain*, 47 TEX. L. REV. 733 (1969).

164. There are a number of costs incurred by the deprived landowner that are held to be noncompensable. Costs such as attorney's fees, appraisal fees, and the cost of removing personalty have been held to be noncompensable. *See* Capron, *Excess Condemnation in California—A Further Expansion*

being forced to abandon one's property will always exist. Also, it is questionable whether the substantive due process standard for public use is as sensitive to government abuse as is the stricter standard used in some state courts.[165] If this new category is recognized, then the theory for governmental condemnations is more easily understood and better evaluated.

### *E. Problems with Excess Condemnation*

Despite the broad definition of public use, courts have accepted some theories of excess condemnation more readily than others.[166] Since the broad definition of public use provides no clear test by which to determine whether a particular project serves a public use,[167] jurisdictions may differ on whether a particular use meets the public use requirement. A continuum representing an analysis of the reasoning behind the various decisions reflects how a court determines whether excess condemnation is for a public use. The continuum is based on the degree of association that the excess condemnation has with the original condemnation.[168] Those exercises of excess condemnation that are more closely associated with the public project should be more readily acceptable than those exercises that are more independent. Thus, acquisition of physical remnants and of land to protect the public project are upheld because they are so closely associated with the original condemnation. In many cases, excess condemnation for these purposes is necessary to assure usefulness. The taking of economic remnants and condemning for broad public purposes, however, are less related to the protection and usefulness of the original condemnation because these theories involve uses of the excess property beyond immediate construction of the project. Finally, making money for the government or governmental authority is the most independent use of the excess property. Yet, the failure of the courts to ap-

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*of the Right to Take*, 20 HASTINGS L.J. 571, 594 n.107 (1969).

165. *See also* Note, *Excess Condemnation*, *supra* note 3, at 145.

166. *Compare* City of Cincinnati v. Vester, 281 U.S. 439 (1930) *and* City of Richmond v. Carneal, 129 Va. 388, 106 S.E. 403 (1921) *with* Atwood v. Willacy County Nav. Dist., 271 S.W.2d 137 (Tex. Ct. Civ. App. 1954).

167. *See* note 4 *supra*.

168. *See also* R. CUSHMAN, *supra* note 1, at 11.

preciate and articulate these differences causes virtually every exercise of excess condemnation to escape scrutiny entirely.

Abandoning review of excess condemnation is even more serious than a lack of review in traditional condemnation proceedings. With eminent domain, one is assured at least that the property taken will be put to a public use. Since excess condemnation is supplemental to the original taking, there is greater danger that the power to take the excess will be abused. The excess need only reasonably promote the purpose of the original condemnation in order to be permitted. Eminent domain is limited to the land needed to provide for the improvement. Excess condemnation is not so limited. Great amounts of land potentially could be taken as an excess. Thus, stricter review of excess condemnation is essential to guard against abuse and to protect the constitutional rights of private property owners.

Without a judicially enforced public use requirement, the federal constitutional limitations on excess condemnation are weak. If the fifth amendment[169] is to be given full effect, then due process, just compensation, and public use are separate requirements for eminent domain. The federal courts, however, have transformed the public use requirement into a substantive due process test.[170] The *Midkiff* court thought it irrational not to have all governmental interferences with property meet the same test—substantive due process.[171] This reasoning denies the fact that eminent domain is the only governmental action against property that the constitution requires to meet a public use test and for which the government is required to pay.

Since the breadth of the public use concept dilutes the constitutional objections to excess condemnation, the more pertinent question becomes whether an individual landowner should be forced to give up his property whenever the government desires excess land for a purpose that it declares to be public. If

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169. *See* notes 3 & 9 *supra*.

170. The substantive due process test simply means that the legislative decision to take certain land will be upheld as long as the decision is reasonably calculated to achieve a permissible governmental objective. *See* Berman v. Parker, 348 U.S. 26, 33 (1954); Midkiff v. Tom, 483 F. Supp. 62, 67 (D. Hawaii 1979).

171. 483 F. Supp. at 67.

courts are to serve as an effective check on arbitrary conduct, they must balance the public need against the harm caused to individual property rights in excess condemnation cases. With a broad definition of public use, this becomes a particularly difficult question because "[w]hat seems to one person the grossest invasion of sacred private rights seems to another merely obvious and necessary protection of community interests."[172] Where the balance is struck also depends upon one's social, economic, and political philosophy.[173] Federal courts traditionally have considered the striking of the balance to be a legislative function; therefore, they have deferred to legislative judgments.[174] As a result landowners have lost their property to nontraditional public uses, and government has used eminent domain to aid private enterprise directly. "This ever-growing ascendancy of government over private property and over free enterprise is no respecter of persons and cannot long be harnessed by those who expect to use it for private ends."[175] The surrender of private property rights to the will of the government heralds the coming of the collectivist state.[176] Excess condemnation, in which the rights and desires of the individual often are sacrificed to an ill-defined or irrational notion of the public good, should be an infrequent practice that is exercised only when the public need clearly outweighs the harm to individual landowners.

Excess condemnation should not be accepted merely because it promotes economic efficiency or accomplishes objectives that are desirable but otherwise unattainable. With the exception of remnant consolidation, the government may achieve the same purposes furthered by excess condemnation through its police powers of regulation and taxation while imposing fewer burdens on the landowner. The promotion of economic efficiency is unlikely if courts automatically defer to the legislature. For instance, in *Midkiff* the court refused to consider arguments

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172. R. CUSHMAN, *supra* note 1, at 10.

173. *Id.*

174. *See* United States *ex rel.* TVA v. Welch, 327 U.S. 546, 552 (1946).

175. Courtesy Sandwich Shop, Inc. v. Port of N.Y. Auth., 12 N.Y. 379, 398, 190 N.E. 402, 411, 240 N.Y.S.2d 1, 13 (1963) (Van Voorhis, J., dissenting).

176. *Id.* at 399, 190 N.E. at 411, 240 N.Y.S.2d at 14 (Van Voorhis, J., dissenting).

that the legislative judgment was wrong.[177] The court thought that legislative errors could be corrected by the voters.[178] This remedy is not effective because an individual landowner has little power over the legislature. Also, voters have little effect on the actions of government agencies. Any legislative remedy would be slow in coming, which would mean that the landowner would be without his land or home while he awaited legislative reform. Thus, stricter judicial review provides a more effective remedy. There is little assurance that efficiency is promoted if courts do not review the alternatives that are available to the government. If the courts required the government to state its reasons for the condemnation and to consider alternatives and costs such as demoralizing costs before taking, then the exercise of excess condemnation would be efficient. Even if government is trying to make the most economically sound judgment when it exercises excess condemnation, unless all alternatives and costs are weighed, there is no assurance that the most economically sound choice is made. The goal of the condemnation should be efficiency with as small an intrusion on private property rights as possible.

## IV. CONCLUSION

Property rights are secured to the individual by the Constitution.[179] If a person is secure in the knowledge that the government will not take his property except for a public use, with just compensation paid, and with due process of law, the person becomes a more productive citizen. The landowner will feel secure in establishing his home or business free from governmental competition and expropriation. This security promotes stability, encourages investment and development of property, maintains property values, and fosters a civic pride that produces better citizens.[180] Despite cogent arguments for a stricter standard of

177. Midkiff v. Tom, 483 F. Supp. 62, 70 (D. Hawaii 1979).

178. *Id.*

179. *See* notes 3 & 9 *supra*. The founding fathers would protect property rights to the same degree as personal rights. "Government is instituted no less for protection of the property than of the persons of individuals." THE FEDERALIST No. 54 (J. Madison) 339 (Mentor 1961).

180. *Cf.* State *ex rel.* Twin City Bldg. & Inv. Co. v. Houghton, 144 Minn.

review in excess condemnation cases, the United States Supreme Court is unlikely to change its traditional standard of deferential review to legislative judgments. With ambiguous guidelines and minimal review, the power to take property invites abuse. Judicial review of the power of eminent domain has been nonexistent in many cases.[181] Thus, in the federal context, use of eminent domain and excess condemnation will continue to expand under a liberal definition of public use and limited judicial review.

At the state level, some courts are willing to scrutinize closely the exercise of eminent domain.[182] Nevertheless, the controls on the exercise of excess condemnation have not kept pace with the development of sophisticated uses for condemnation.[183] For example, many of the states that have legislation permitting excess condemnation enacted these provisions before the public use definition broadened.[184] Because challenges to the constitutionality of the taking have not been very successful, landowners have shifted their attacks to the statute that granted the power of eminent domain. Thus, landowners attempt to prove that the power was not exercised in the manner prescribed by statute.[185]

Because of its flexibility and the limited review of its exercise, excess condemnation is an attractive method for influencing land development and financing public projects. Also, eminent domain increasingly is relied upon by government as a catalyst for public policy.[186] Eminent domain provides the means to accomplish such broad-based programs as urban redevelopment

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1, 20, 176 N.W.2d 159, 162 (1920) (effect of zoning).

181. *See* note 157 *supra*.

182. *E.g.*, Williams v. City of Valdez, 603 P.2d 483, 491 (Alaska 1979) (condemnation statute strictly construed); Opinion of the Justices, 231 A.2d 431, 433 (Me. 1967) (public use requires more than public benefit); Square Butte Elec. Coop. v. Hilken, 244 N.W.2d 519, 521 (N.D. 1976) (public use requires more than being within purposes of condemnation statute).

183. *Cf.* Note, *Excess Condemnation*, *supra* note 3, at 161.

184. *Id.*

185. *E.g.*, State v. Jeanerette Lumber & Shingle Co., 350 So. 2d 847, 861 (La. 1977) (rehearing) (court will review whether the taking exceeded the statutory grant of authority to take); City of Pipestone v. Halbersma, 294 N.W.2d 271, 274 (Minn. 1980) (necessity for taking is judged under the statute); Carter v. State, 198 Neb. 519, 524, 254 N.W.2d 390, 392 (1977) (statutory grant of eminent domain is strictly construed).

186. C. HAAR, LAND-USE PLANNING 604 (3d ed. 1977).

and landholding reform.[187] As a consequence, a great expansion of excess condemnation will occur in two areas. First, the government will use excess condemnation to expand energy creation and distribution projects to encompass other public purposes in addition to supplying power.[188] Second, the government will join with private enterprise in using excess condemnation to amass the property and capital needed to accomplish large entrepreneurial projects that also serve a public objective.[189] Although social objectives are important governmental purposes, there is a limit beyond which the government cannot practice excess condemnation without damaging constitutionally protected rights of private property. The courts must guard against encroachments on this limitation if private property and free enterprise are to survive against an acquisitive government.

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187. *See, e.g.*, Berman v. Parker, 348 U.S. 26 (1954) (slum clearance and redevelopment); United States *ex rel.* TVA v. Welch, 327 U.S. 546, 553 (1946) (fostering an orderly and proper physical, economic, and social development); Midkiff v. Tom, 483 F. Supp. 62 (D. Hawaii 1979) (landholding reform).

188. Already there has been a great amount of litigation involving condemnation by power suppliers such as TVA. *See generally* Meidinger, *"Public Use," supra* note 6, at 33-43.

189. *See* Poletown Neighborhood Council v. City of Detroit, No. 66294 (Mich. Sup. Ct. Mar. 13, 1981) (city condemned land affecting 1362 households for new automotive plant); Courtesy Sandwich Shop, Inc. v. Port of N.Y. Auth., 12 N.Y.2d 379, 190 N.E.2d 402, 240 N.Y.S.2d 1 (1963) (cooperative effort by government and private enterprise); Knoxville's Comm. Dev. Corp. v. Wright, 600 S.W.2d 745 (Tenn. Ct. App. 1980) (private enterprise assists government in World's Fair). *Contra*, King County v. Johnson, 611 P.2d 1343 (Wash. Ct. App. 1980) (withdrawn from publication) (condemnation for sports arena supported by government and private enterprise held not for the public use). Another practical problem is the opportunity for local government abuse of excess condemnation powers.

# THE TAX CONSEQUENCES OF NET GIFTS

## I. INTRODUCTION

A net gift is a gratuitous transfer of property in which the donor transfers the property to the donee conditioned upon the donee's agreement to pay the applicable gift taxes resulting from the transfer.[1] The premise underlying the net gift doctrine is that the donor intends only to make a gift equaling the value of the property transferred less the amount of the gift tax owed.[2] Therefore, the amount of the gift tax on the transfer is not considered property that effectively passes from the donor to the donee and is thus not taxable as a gift.[3]

Any of several motives may induce the donor to make a net gift. Primarily, the donor may want to avoid paying the gift tax either because of an insufficiency of cash or other liquid assets[4] or because of an inability or unwillingness to liquidate property to produce the necessary cash.[5] A donor might also make a net

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1. A net gift has also been described as a gratuitous transfer of property "with a string attached." 38 MD. L. REV. 110, 110 (1978) (citing 28 U. FLA. L. REV. 682 (1976)). More clearly defined, the "string" is an encumbrance or obligation imposed on the gift property that either may pre-exist or may arise at the time of the conveyance. 38 MD. L. REV. 110, 110 (1978) (citing Survalsky, *Net Gifts—A Critical Look at* Johnson v. Commissioner, 75-05 TAX MNGM'T MEM. (BNA) 2 (1975)).

The donor who makes the transfer is primarily liable for payment of the gift tax. I.R.C. § 2502(d). A gift tax that is not paid by the donor when due, however, becomes a personal liability of the donee to the extent of the value of the gift received. I.R.C. § 6901(a)(1)(A)(iii).

2. *See* Turner v. Commissioner, 49 T.C. 356, 360-61 (1968), *aff'd per curiam*, 410 F.2d 752 (6th Cir. 1969).

3. Lingo v. Commissioner, 13 T.C.M. (CCH) 436, 441 (1954); Harrison v. Commissioner, 17 T.C. 1350, 1357 (1952), *acq.* 1952-2 C.B. 2.

4. Faber, *Gift Tax Planning: The New Valuation Tables; Net Gifts; Political Gifts; and Other Problems*, 31 N.Y.U. INST. ON FED. TAX. 1217, 1234 (1973) [hereinafter cited as Faber].

5. *See* Kopp, *Gifts Subject to Donee Payment of Tax: Timing, Risks and Computations*, 27 N.Y.U. INST. ON FED. TAX. 375, 375-76 (1969) [hereinaf-

gift to limit the value of the gift,[6] to reduce the amount of gift tax,[7] or to attempt to shift the realized gain on the sale of appreciated gift property to a donee in a lower marginal income tax bracket.[8] In addition to these economic reasons for making net gifts, a donor who is financially able to pay the gift tax might psychologically oppose paying the tax since he generously has given the gift to the donee.[9] A final motivation might be the donor's desire to provide the donee with an educational experience of managing financial and tax affairs, for example, when a parent makes a gift to a child.[10]

Although the Commissioner of Internal Revenue (Commissioner) has recognized the validity of net gifts for gift tax purposes, he has asserted continually that the transfer produces an income tax liability on the part of the donor. The courts, however, have not accepted the Commissioner's position on the income tax consequences of such transactions; indeed, courts generally have held that the transaction does not produce any income tax consequences to the donor. This income tax controversy, the most frequently litigated issue in the net gift area, is the central focus of this Comment. Other issues raised by the Commissioner's position include the donor's gain on the transaction, the transferee's basis in the gift property, and the transferee's holding period for property receiving capital gains treatment. Finally, this Comment will discuss the appropriate

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ter cited as Kopp].

A situation in which the donor is unwilling or unable to pay the gift tax might arise when the gift property is a nonliquid asset of substantial value, such as stock in a closely held corporation, real estate, art, jewelry, or fine collector's items. For example, a donor may be unwilling to sell a portion of the property when the property is an item that he desires to keep in the family; a donor may be unable to sell a portion of the property if the property is indivisible or not readily marketable.

6. *See* note 12 *infra* and accompanying text.

7. *See id.*

8. Faber, *supra* note 4, at 1235. This situation might arise when the donor has appreciated property (for example, securities) that he can sell to pay the gift tax. By giving the appreciated property to the donee in a lower marginal income tax bracket, the donee can sell the securities to pay the gift tax, and a lower income tax liability from the sale of the securities will result.

9. Kopp, *supra* note 5, at 376.

10. Faber, *supra* note 4, at 1235.

method for gift and estate tax treatment of net gifts.

## II. Gift Tax Consequences of Net Gifts

The gift tax consequences of a net gift are well established. In Revenue Ruling 75-72,[11] the Commissioner has sanctioned the use of a gift tax computation method for net gifts whereby the gross value of the gift property is reduced by the amount of the gift tax to be paid by the donee, and the gift tax is assessed on the net amount of the gift.[12] To qualify for this treatment, the parties must show expressly or impliedly from the circumstances surrounding the transfer that payment of the gift tax by the do-

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11. 1975-1 C.B. 310 (superseding Rev. Rul. 71-232, 1971-1 C.B. 275).

12. *Id.* The amount of the gift tax is computed by using the net amount of the gift property. The final gift tax payable is a result of two mutually dependent variables: the taxable value of the gift (which is dependent on the gift tax paid) and the amount of the gift tax (which is dependent on the taxable value of the gift). An algebraic formula is used for determining the amount that will be subtracted from the gross value of the gift to produce the value of the net gift to be taxed:

$$\frac{\text{tentative tax}}{1 + \text{rate of tax}} = \text{true tax}$$

The tentative tax is the tax computed on the gross value of the gift property. The rate of tax is the rate on the gross value of the gift in excess of the nearest tax bracket amount. The true tax is the amount to be deducted from the gross value of the transferred property.

The following is an example of the computation of the gift tax due on a net gift from a gross transfer of property worth $400,000:

| | | | |
|---|---|---|---|
| Gross gift | | | $400,000 |
| Less: gift tax for quarter | | | T |
| Net transfer for quarter | | | $400,000 - T |
| Less: annual exclusion | | | 3,000 |
| Taxable gift for quarter | | | $397,000 - T |
| Taxable gift | | $397,000 - T | |
| Bracket and tax thereon | | 250,000 | $ 70,800 |
| Balance and tax at 34% | | $147,000 - T | 49,980 - .34T |
| Tentative tax before credit | | | $120,780 - .34T |
| Less: unified credit | | | 47,000 |
| Tentative tax for quarter | | | $ 73,780 - .34T |

$$\text{True tax} = \frac{\text{Tentative Tax}}{1 + \text{Rate of Tax}} = \frac{73{,}780}{1.34} = \$\ 55{,}059.70$$

nee was a condition of the transfer.[13] The Commissioner emphasized that "[t]his Revenue Ruling is concerned only with the gift tax consequences of the [net gift] transaction and not with the income tax consequences thereof."[14]

This revenue ruling was the result of two earlier Tax Court cases[15] in which gifts were made in trust and the trustees were obligated to pay the gift tax. In these cases the Tax Court held that the gift tax should be assessed only on the value of the transferred property less the amount of the gift taxes paid.[16] The court reasoned that the donor did not intend the amount of the property necessary to pay the gift tax to be part of the gift. Instead, such property was characterized as an interest retained in the property by the donor; it therefore did not pass from the donor to the donee.[17]

## III. Estate Tax Consequences of Net Gifts

The Tax Reform Act of 1976 enacted a procedure to determine the amount of a decedent's taxable estate; this procedure calls for adding the amount of the post-1976 adjusted taxable

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| | Proof | |
|---|---|---|
| Gross transfer | | $400,000.00 |
| Less gift tax for quarter | | 55,059.70 |
| Net transfer for quarter | | $344,940.30 |
| Less: annual exclusion | | 3,000.00 |
| Taxable gift for quarter | | $341,940.30 |
| Taxable gift | $341,940.30 | |
| Bracket and tax thereon | 250,000.00 | $ 70,800.00 |
| Balance taxed at 34% | $ 91,940.30 | 31,259.70 |
| Gift tax before credit | | $102,059.70 |
| Less: unified credit | | 47,000.00 |
| Gift tax (same as above) | | $ 55,059.70 |

*Id.* at 311.

13. *Id.*

14. *Id.* at 313.

15. Lingo v. Commissioner, 13 T.C.M. (CCH) 436 (1954); Harrison v. Commissioner, 17 T.C. 1350 (1952), *acq.* 1952-2 C.B. 2.

16. 13 T.C.M. at 441; 17 T.C. at 1356.

17. 17 T.C. at 1356-57.

gifts[18] to the amount of the gross estate. The amount of taxable gifts to be added back into the estate in a net gift situation is just as the name implies—the net amount of the gift, which is the gross value of the property transferred less the gift tax paid by the donee.[19] A tentative tax is then computed on the taxable estate.[20] The aggregate amount of the gift tax payable by the decedent after December 31, 1976, is subtracted from the tentative tax.[21] Thus the gift tax paid by the donee is used to reduce the value of the decedent donor's estate tax.[22]

If the donor makes a net gift within three years of his death, then the value of the net gift must be included in the value of the decedent donor's gross estate.[23] Also, any gift tax "paid . . . by the decedent or his estate" within three years of his death on any post-1976 gift must be included in the value of the donor's gross estate.[24] This is commonly known as "grossing up" the estate.

Whether the estate would be grossed up in a net gift transaction wherein the donee, rather than the donor, pays the gift

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18. The phrase "adjusted taxable gifts" means "the total amount of the taxable gifts (within the meaning of section 2503) made by the decedent after December 31, 1976, other than gifts that are includible in the gross estate of the decedent." I.R.C. § 2001(b)(2).

19. *See* Kopp, *supra* note 5, at 393.

20. I.R.C. § 2001(b)(1).

21. *Id.* § 2001(b)(2).

22. A simple example of the computation of the federal estate tax is shown below. The net gift amount is based on the amount determined in note 12 *supra*. The $341,940.30 net gift is a result of subtracting the $3,000 annual exclusion and the $55,059.70 gift tax from the gross gift of $400,000.

| | |
|---|---|
| Gross estate | $2,000,000.00 |
| Plus: adjusted taxable gift | 341,940.30 |
| Taxable estate | $2,341,940.30 |
| Tentative tax | $ 948,350.75 |
| Less: gift tax paid by donee | 55,059.70 |
| Federal estate tax due | $ 893,291.05 |

23. I.R.C. § 2035(a).

24. I.R.C. § 2035(c) reads in pertinent part: "The amount of the gross estate . . . shall be increased by the amount of any [gift] tax paid . . . by the decedent or his estate on any gift made . . . after December 31, 1976, and during the 3-year period ending on the date of the decedent's death."

tax is unclear. The literal language of section 2035(c)[25] of the Internal Revenue Code does not require a grossing up under such circumstances, and the relevant Treasury regulations do not provide any assistance on this issue. The legislative history of the section, however, suggests that the estate would be grossed up by the amount of the gift tax paid, regardless of who paid the tax.[26]

## IV. HISTORICAL DEVELOPMENT OF INCOME TAX CONSEQUENCES OF NET GIFTS

The earliest cases concerning the issue of a donee paying the gift tax resulting from a transfer of property involved transfers in trust in which trust income was used to discharge the gift tax liability arising from the transfer.[27] Whether the trust agree-

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25. *See id.*

26. H.R. REP. No. 1380, 94th Cong., 2d Sess. 1-186, 12 (1976), *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 3356, 3366, *as quoted in* I FED. TAXES EST. & GIFT (P-H) ¶ 120,351-A (1980). The committee report states that gift tax paid on transfers within three years of death should be included in the decedent's estate in all cases. *Id.* The report does not state that the gift tax must be paid by the donor or his estate, as does the statute. This presents a plausible argument that the congressional intent was to gross up the decedent's estate regardless of who paid the gift tax.

At least one commentator has suggested that a grossing up would be required in a net gift transaction. Jones, *Selected Current Estate & Gift Tax Developments*, THIRTEENTH ANN. S. FED. TAX INST., Q-33 (1978).

27. Estate of Sheaffer v. Commissioner, 37 T.C. 99 (1961), *aff'd*, 313 F.2d 738 (8th Cir. 1963) [hereinafter referred to as *Sheaffer I*]; Estate of Staley v. Commissioner, 47 B.T.A. 260 (1942), *aff'd*, 136 F.2d 368 (5th Cir.), *cert. denied*, 320 U.S. 786 (1943).

In *Staley* the donor transferred stock in trust in return for the trustee's promise to pay him $150,000 from the trust income that the donor intended to use to pay the gift tax on the transfer. The Board of Tax Appeals rejected the taxpayer's argument that the $150,000 should have been viewed as a partial sale with a gift of the remainder. The Board found the argument to be an artificial characterization because there was obviously a gift of all the corpus and income that the donor either reserved or retained for his own use. 47 B.T.A. at 264-65. The taxpayer's argument would have resulted in a nontaxable return of capital to the taxpayer since his basis exceeded the amount of the gift taxes. *Id.* at 265. The Fifth Circuit Court of Appeals affirmed the Board of Tax Appeals in holding that this trust arrangement was income reserved by the donor and thus taxable to him as ordinary income. 136 F.2d at

ment reserved trust income to the donor for his personal use[28] or whether it called for the trustee to pay the gift tax liability,[29] the courts have held that the amount of income reserved or the amount of liability discharged was realizable taxable income to the donor.[30] The courts were not concerned with whether the donor was characterized as a preferred beneficiary or whether he reserved income from the trust;[31] they found a realization of taxable income to the donor because, under section 677 of the Internal Revenue Code,[32] he was considered the owner of any portion of a trust that might be distributed to himself or held or accumulated for his benefit.

The usefulness of section 677 in net gift situations soon was diminished as imaginative tax lawyers and taxpayers were able to devise trust agreements that eluded the statute's reach. When

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370.

In *Sheaffer I* the donor transferred securities in trust; a provision in the trust agreement required the trustee to pay all the federal and state gift taxes arising from the transfer. In accordance with the trust agreement, the trustee paid the gift taxes partially with funds obtained from a loan and partially with dividend income from the securities. The Tax Court held that only the dividends used by the trustee to pay the gift tax were taxable to the donor under section 677 of the Internal Revenue Code. 37 T.C. at 104. The court relied on its decision in *Staley* and found the cases indistinguishable. 37 T.C. at 105. In paying the gift tax by the date due, the trustee clearly was satisfying the statutory liability of the donor; the court felt that this fact was dispositive of the case. *Id.* The Eighth Circuit Court of Appeals affirmed the Tax Court and stated, "What the trustee received as trust income and applied to payment of the gift tax, the [donor] in reality constructively received, and on that [he] must be taxed." 313 F.2d at 743.

28. *See* 47 B.T.A. 260 (1942).

29. *See* 37 T.C. 99 (1961).

30. *See* note 27 *supra*.

31. 37 T.C. at 106; 47 B.T.A. at 265.

32. I.R.C. § 677 reads in part:

INCOME FOR BENEFIT OF GRANTOR.

(a) General Rule. The grantor shall be treated as the owner of any portion of a trust, whether or not he is treated as such owner under section 674, whose income without the approval or consent of any adverse party is, or, in the discretion of the grantor or a nonadverse party, or both, may be—

(1) distributed to the grantor or the grantor's spouse;

(2) held or accumulated for future distribution to the grantor or the grantor's spouse . . . .

the trust agreement gave the trustee the discretion to pay the gift tax from borrowed funds, and when the trustee obtained a loan for such purpose and later discharged the loan out of trust income from subsequent years, it was held that the donor did not receive any taxable income in the years of repayment.[33] The theory behind these decisions was that the donor no longer had any interest in the trust and that his relationship with the trust income terminated after the gift tax liability had been satisfied from the loan proceeds.[34]

The income tax consequences of a net gift to individuals arose for the first time in the case of *Turner v. Commissioner*.[35] In *Turner* the donor made nine separate gifts of securities with a low basis; three of these gifts were to named individuals and

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33. Estate of Sheaffer v. Commissioner, 25 T.C.M. (CCH) 646 (1966) [hereinafter referred to as *Sheaffer II*]; Estate of Morgan v. Commissioner, 37 T.C. 981 (1962), *aff'd*, 316 F.2d 238 (6th Cir.), *cert. denied*, 375 U.S. 825 (1963).

In *Morgan* the donor established an irrevocable trust in stock which specified that the trustees were to pay any gift tax liability arising from the transfer either by selling part of the corpus or by obtaining a loan using the corpus as security. The trustee borrowed a sufficient amount to pay the gift tax and paid the tax in 1956. The loan was repaid from trust income in 1957 and 1958. The Commissioner, relying on *Sheaffer I*, argued that payments on the loan were in substance payments of the donor's legal obligation and therefore taxable under section 677 of the Internal Revenue Code. 37 T.C. at 983. The Tax Court rejected this argument and held that since the repayment of the loan in later years did not confer any benefit upon the donor, and since the donor no longer had any relationship with the trust, section 677 was not applicable and the donor realized no taxable income of any kind in such later years. *Id.* at 985.

In light of *Morgan*, there was an entirely new proceeding which involved the taxpayer in *Sheaffer I* and which dealt with a deficiency in the gift tax at issue in *Sheaffer I*; this deficiency was assessed against the donor in 1958. The deficiency was paid with current trust income and with borrowed funds. The issue was whether either of these methods produced realizable income to the donor. Both parties felt that *Sheaffer I* and *Morgan* were inconsistent, but the *Sheaffer II* court reasoned otherwise and reconciled the cases. Following *Morgan*, the court held that the use of trust income for the repayment of a loan used to discharge the donor's gift tax liability was not taxable to the donor. 25 T.C.M. (CCH) at 650. The *Sheaffer II* court also held that the use of current trust income to pay the 1958 gift tax deficiency was taxable to the donor in accordance with *Sheaffer I*. *Id.* at 652.

34. 25 T.C.M. (CCH) at 650-51.

35. 49 T.C. 356 (1968), *aff'd per curiam*, 410 F.2d 752 (6th Cir. 1969).

six were to trusts. Each transfer was conditioned on the donee paying the resulting gift tax. The three individual donees paid their share of the gift tax liability either out of available cash or from the proceeds of the sale of a portion of the donated securities; the trust donees paid their share of the gift tax liability from proceeds of the sale of a portion of the donated securities, supplemented either by loans or by small amounts of current trust income.[36] The Commissioner was unable to invoke section 677 against the individual donees, and since the trustees used only a small amount of trust income to pay the trusts' gift tax, the Commissioner had little reason to invoke section 677 against the trusts. He argued instead that each transfer was a part sale, part gift and that the donor realized taxable gain to the extent that the gift taxes paid by the donees exceeded the donor's basis in the transferred securities.[37] In his brief, however, the Commissioner conceded that the transfers in trust were not part sales but were totally gifts.[38] This left at issue only the question whether the gifts to the three individuals could be classified as part sales, part gifts resulting in taxable gain by the donor,[39] or

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36. *Id.* at 359-60.

37. *Id.* at 357.

38. *Id.* at 362. The Commissioner distinguished gifts in trust from gifts to individuals on the grounds that the trustees were not personally liable for the gift taxes, while the individual donees personally promised to pay the tax. Thus, in the transfers to individuals the donor did not retain any interest in the transferred property but instead accepted the personal promises of the donees. *Id.* at 362-63.

The reason for the Commissioner's concession that the transfers in trust were not part sales, part gifts is not entirely clear. It appears that the concession was the Commissioner's attempt to justify his change in approach between the prior trust cases, *see* notes 27 & 33 *supra*, and his approach in *Turner*. In the prior trust cases, the Commissioner argued that the transfers in trust were gifts with a retained interest to the donor equal to the amount of gift tax paid that was taxable to the donor as ordinary income under section 677 of the Code. The taxpayers argued that the transfers were part sale, part gift, with the sale portion being equal to the gift tax. If the Commissioner had argued that the *Turner* transfers to trust were part sale, part gift, the cases in which he had successfully argued that the transfers to trust were not part sale, part gift would have fallen into disrepute.

39. The Commissioner's part sale argument was premised on the fact that the individual donees personally had promised to pay the gift tax that was exchanged for the donor's retained interest in the property (the amount of gift

whether the gifts to the three individuals were net gifts with no taxable income attributable to the donor.[40]

The Tax Court in *Turner* decided against the Commissioner and held that the transaction produced no income tax consequences to the donor.[41] In reaching its decision the court examined the earlier trust cases[42] and concluded that "a condition imposed by the [donor] that the [donee] . . . pay the gift tax resulting therefrom does not alter the result that the transfer constituted a gift. The rationales of the [earlier] cases are totally inconsistent with a finding that the transfer was a part sale, part gift."[43] The court stated that this conclusion, based on the facts of the case and on the close family relationship involved, correctly reflected the intent of the donor.[44]

The *Turner* court's primary emphasis was on the intent of the parties. In determining that the donor intended only to make a net gift to each donee, a determination that precluded any finding of a partial sale and a resulting taxable gain, the court relied on the maxim that the substance rather than the form of the transaction must govern the income tax consequences.[45] The court expressed concern that the Commissioner's

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taxes payable). 49 T.C. at 362-63. Therefore, the Commissioner felt the donees' promises to pay the gift taxes were sufficient consideration for the sale portion of the transfer. *See id.*

40. *Id.* at 360.

41. *Id.* at 364.

42. *See* notes 15, 27 & 33 *supra*. *See also* text accompanying note 17 *supra*.

43. 49 T.C. at 362.

44. *Id.*

45. *Id.* at 363. The substance over form doctrine was expressed by Justice Black in Commissioner v. Court Holding Co., 324 U.S. 331 (1945): "The incidence of taxation depends upon the substance of a transaction . . . . To permit the true nature of a transaction to be disguised by mere formalisms, which exist solely to alter tax liabilities, would seriously impair the effective administration of the tax policies of Congress." 324 U.S. at 334.

The *Turner* court rejected the Commissioner's distinction between individual and trust donees as further evidence that the Commissioner's position was untenable. 49 T.C. at 363. The court reasoned that the Commissioner's position ignored the realities of the situation because the donor could not expect to find a trustee who would assume personal liability for the gift tax due on the transfer. The source of funds for the gift tax liability would be the transferred property itself. Therefore, a distinction based on the type of prom-

approach in determining the donee's basis in the gift property would result in an unjustifiable double credit for the gift tax paid.[46] *Turner* subsequently was affirmed per curiam by the Sixth Circuit.[47]

In two subsequent net gift cases[48] the *Turner* rationale was followed in holding that no income tax consequences befell the donor when he made gifts conditioned upon the donee's payment of the gift taxes. The Tax Court again rejected the Commissioner's part sale, part gift argument.

The *Turner* decision was questioned by the Sixth Circuit Court of Appeals in *Johnson v. Commissioner*.[49] The taxpayer[50]

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ise obtained from the donee did not support any distinction between individual and trust donees. *Id.*

46. *Id.* at 363-64. The donee's basis for property acquired by part sale, part gift is governed by Treas. Reg. § 1.1015-4 (1964). *See* note 141 *infra*. The *Turner* court felt that to allow the donee to receive credit twice for the same payment, once as a payment for the property, and once as an adjustment for gift tax paid, was persuasive that the part sale, part gift characterization was not appropriate for the facts of that case. 49 T.C. at 364. *Contra*, note 143 *infra* and accompanying text.

47. 410 F.2d 752 (6th Cir. 1969).

48. Estate of Davis v. Commissioner, 30 T.C.M. (CCH) 1363 (1971), *aff'd per curiam*, 469 F.2d 694 (5th Cir. 1972); Krause v. Commissioner, 56 T.C. 1242 (1971).

In *Krause* the donor made gifts to three trusts for the benefit of his grandchildren upon the condition that the trustees pay the gift tax. The trustees paid the gift tax out of borrowed funds even though accrued trust income could have been used to pay the gift tax liability. The Commissioner argued that the donor received taxable income either under section 677 or under the part sale, part gift theory. The court held that the donor was chargeable with income under section 677, but only to the extent of trust income earned up until the time the gift taxes were paid. 56 T.C. at 1245-46. The court, however, rejected the Commissioner's part sale, part gift argument by relying on *Turner* for authority that the donor intended a net gift and not a part sale. *Id.* at 1248.

In *Davis* the donor made a gift outright to one of his sons and gifts in trust to his other two sons; the donees agreed to pay the gift tax. The Commissioner argued part sale, part gift, but again the court rejected this argument and continued to adhere to the authority of *Turner*. 30 T.C.M. at 1368.

49. 59 T.C. 791 (1973), *aff'd*, 495 F.2d 1079 (6th Cir.), *cert. denied*, 419 U.S. 1040 (1974).

50. There were three taxpayers involved in the case, all of whom entered into similar transactions. 59 T.C. at 797. For simplicity, reference will be made to only one taxpayer.

in *Johnson*, pledging 50,000 shares of stock as collateral, borrowed $200,000 from a bank on a nonrecourse note. The shares had a fair market value of over $500,000 with a basis of only $10,812.50. The taxpayer transferred the stock to a trust for the benefit of his children. The trustees then replaced the taxpayer's note with their own notes secured by the same collateral, and the taxpayer paid the gift tax liability of approximately $150,000.[51] On his federal gift tax return, the taxpayer reduced the value of the transferred stock by $200,000, the amount of the outstanding indebtedness.[52] The gift tax of approximately $150,000, figured on the net amount of the gift, was paid by the taxpayer out of the proceeds of the loan; this left the taxpayer with approximately $50,000 for his own use.[53] The Tax Court held that the transaction was a part sale, part gift and that the taxpayer realized taxable income to the extent that the loan proceeds exceeded his basis in the stock.[54] The court distinguished *Turner* both factually and on the issues presented.[55]

On appeal, the Sixth Circuit in *Johnson* affirmed the holding of the Tax Court but rejected as irrelevant and conclusory[56] that court's characterization of the transaction as part sale, part gift. The circuit court concluded that income tax liability was

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51. *Id.* at 793-96.

52. *Id.* at 796.

53. *Id.* at 813.

54. *Id.* at 812. The court reasoned that the making of the loan by the taxpayer and the transfer of stock to trusts to secure the loan were not separate, unrelated transactions. Instead, these transactions were part of an overall scheme whereby the taxpayer sought to realize a substantial portion of the appreciated value of the stock without incurring any income tax liability, while at the same time making gifts of stock to trusts for his children. *Id.* at 807.

55. In distinguishing *Turner* the court stated:

> The transfers in the present case were not conditioned on the payment of the gift tax liabilities by the recipients and no issue involving the payment of gift taxes is presented herein. Nor was there any reservation or retention by the donors in the present case, of any right or interest in the corpus or income of the trusts such as was found by the Court in the *Turner* case. Nor, in our opinion, are the loans in the present case to be equated with the gift tax liabilities in the *Turner* case.

*Id.* at 812-13.

56. 495 F.2d at 1082.

dependent upon whether the taxpayer received something of value when his encumbered stock was transferred.[57] The court explained its finding of income tax liability by relying on three different theories. First, under section 61 of the Internal Revenue Code,[58] the amount received by the taxpayer, free and clear of any repayment obligation, was gross income regardless of the use to which the taxpayer put the money.[59] Second, since the donor is obligated to pay the gift tax on a transfer,[60] and since the $150,000 receipt can be viewed as a payment of the donor's gift tax by the donee, then under the constructive receipt of income doctrine of *Old Colony Trust Co. v. Commissioner*,[61] the donor has realized income to the extent that his legal obligation was discharged by a third party.[62] Third, the taxpayer shed a $200,000 debt by transferring the encumbered stock into trust; under *Crane v. Commissioner*,[63] the taxpayer realized income equal to the amount of the encumbrance disposed of, regardless of the fact that he was not personally liable.[64] The court did not choose among these approaches. Rather, it concluded that under any of these theories, the taxpayer realized a taxable gain on the transaction.[65]

In rejecting the taxpayer's argument relying on *Turner*, the Sixth Circuit in *Johnson* abandoned the *Turner* court's focus on the intent of the donor in favor of a more objective determina-

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57. *Id.* at 1083.

58. I.R.C. § 61 provides in part: "[G]ross income means all income from whatever source derived, including (but not limited to) the following items: . . . (3) Gains derived from dealings in property; . . . ."

59. 495 F.2d at 1083.

60. I.R.C. § 2502(d) provides that "[t]he [gift] tax . . . shall be paid by the donor."

61. 279 U.S. 716 (1929). In *Old Colony Trust* the taxpayer-employee's income tax liability was paid by his employer. The Supreme Court held that the amount of the tax paid was income to the employee, and thereby established the principle that "[t]he discharge by a third person of an obligation to him is equivalent to receipt by the person taxed." *Id.* at 729.

62. 495 F.2d at 1083.

63. 331 U.S. 1 (1947). In *Crane* the amount of a mortgage on a seller's property for which the seller had no personal liability was held to be part of the amount realized by the seller on the sale of the property. *Id.* at 14.

64. 495 F.2d at 1083.

65. *Id.*

tion of economic benefit accruing to the donor as a result of the transaction.[66] The court expressed disapproval of *Turner* and the "maze of cases" that preceded it;[67] the court appeared to overrule *Turner* implicitly when it stated that "[t]he same result would be reached if we describe the $150,000 used to pay the gift taxes on the transfer into trust as equivalent to what happened in *Turner* (donee's assumption of donor's gift tax liability). . . . The payment of a donor's gift tax liability by the donee constitutes income to the donor."[68] Despite this language, the Sixth Circuit in *Johnson* declined to overrule *Turner* expressly. Instead it limited that case by stating that "*Turner* has no precedential value beyond its peculiar fact situation, in view of the Commissioner's concessions in that case . . . ."[69] Nevertheless, the *Johnson* court appeared to put an end to the favorable income tax treatment of net gifts.[70] The Commissioner's concessions in *Turner*, however, were limited to the gifts in trust;[71] no such concession was made on the gifts to individuals. Therefore, *Johnson* left open the question of the income tax consequences of gifts to individuals.

The first net gift case to reach the Tax Court after the Sixth Circuit's opinion in *Johnson* was *Hirst v. Commissioner*.[72] In *Hirst*, a case factually similar to *Turner*, an 81 year-old widow transferred nonincome-producing real property to her son and his family. The property had a fair market value of over $400,000 and an adjusted basis of $8,377. Since the donor lacked sufficient liquid assets to pay the resulting gift tax, she conditioned the gift upon her son's paying the resulting gift tax liability.[73] The gift taxes were later paid by her son on the net gift.[74]

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66. *Id.* at 1082-83.

67. *Id.* at 1085. *See* notes 27 & 33 *supra*. In none of these cases did the Commissioner argue—or the courts carefully consider—that, aside from section 677, certain amounts should be taxable income to the donor. 495 F.2d at 1085.

68. *Id.* at 1083.

69. *Id.* at 1086.

70. *See* 36 U. PITT. L. REV. 517, 536 (1974), which predicted an end to the favorable income tax treatment of net gifts.

71. 49 T.C. at 357.

72. 63 T.C. 307 (1974), *aff'd*, 572 F.2d 427 (4th Cir. 1978).

73. 63 T.C. at 308.

74. *Id.* at 309. See note 12 *supra* for computation of net gifts.

The donor's income tax return reflected none of these transactions. The Commissioner assessed a deficiency against her based on the same theory he had pursued unsuccessfully in *Turner*.[75]

The taxpayer in *Hirst* took the proposed deficiency to the Tax Court, which concluded that the donor realized no taxable income as a result of the transfer of the property and the subsequent gift tax payments by her son.[76] The court declined to accept the Commissioner's argument that *Johnson* was controlling[77] and felt compelled to follow *Turner*. According to the court, the facts of *Turner* more closely resembled those of *Hirst*.[78] The court, however, appeared to harbor some reservations, for at the outset it acknowledged that liability for a gift tax is placed on the donor by statute, that payment of the tax by the donee must be regarded as discharging that liability of the donor, and that the discharge of a solvent taxpayer's liability ordinarily confers a benefit on him that may be considered taxable income.[79] The court also recognized that there was much force to the Government's position[80] and that a realistic approach would require imposition of income taxes on the donor.[81] Finally, the court urged the Fourth Circuit Court of Appeals to overrule the decision by stating that:

> [I]n the absence of any clear-cut overruling of prior law by a Court of Appeals, we are not prepared at this time to re-examine an intricate and consistent pattern of decision that has evolved over the years in this field, notwithstanding that there may be much to be said in favor of a more "realistic" approach

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75. 63 T.C. at 309-10.
76. *Id.* at 315.
77. *Id.* at 314.
78. *Id.* at 312.
79. *Id.* at 310.
80. *Id.* at 315. The court reasoned that in net gift situations:
> In substance, a portion of the transferred property equal in value to the amount of the gift tax is not treated as having been part of the gift. But surely that portion did not vanish into thin air, and a strong argument can be advanced for the conclusion that it was exchanged for the donee's payment of the gift tax on the "net gift," a transaction that may result in the realization of gain or loss depending upon the donor's basis in the property.

*Id.*
81. *Id.*

> to the problem. Things have gone too far by now to wipe the slate clean and start all over again.[82]

On appeal, the Fourth Circuit[83] agreed with the Tax Court that *Turner* remained a viable precedent and controlled the decision in *Hirst*.[84] Judge Haynsworth, writing for the majority, distinguished *Johnson* on the ground that it involved a pretransfer reduction of a portion of the appreciated value of the asset transferred as a result of the donor borrowing against it immediately prior to its transfer to the donees.[85] Since the borrowed funds were not committed to payment of the gift tax, and since the donee repaid the loan, the donor was enriched to the extent of the loan.[86] In contrast, the court stated that Mrs. Hirst received no economic benefit from the transaction, that she did not intend to sell anything, and that she intended only to make a gift to her family.[87] Therefore, the finding of the Tax Court was correct given the familial, noncommercial context of the

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82. *Id.*

83. The case originally was heard by a three-judge panel, a majority of whom decided to reverse the judgment of the Tax Court. 572 F.2d at 428. Judge Thomsen, United States District Judge for the District of Maryland, sitting by designation, prepared the majority opinion for the panel. Judge Bryan prepared a dissenting opinion. After the opinions were circulated, but before they were filed, a majority of the court voted to rehear en banc and then decided to affirm the Tax Court decision. Chief Judge Haynsworth prepared a supplementary opinion that became the majority opinion; Judge Bryan's opinion became a concurring opinion; Judge Thomsen's opinion became a dissenting opinion. *Id.*

84. *Id.*

85. *Id.* at 430.

86. *Id.* at 430-31.

87. *Id.* at 430. The court stated that there was no economic gain of any kind accruing to Mrs. Hirst, except for the release of the normal tax burden of a real estate owner. *Id.* The court explained this conclusion by hypothesizing that Mrs. Hirst could have kept the property and borrowed funds to pay both the real estate taxes and interest on the loans. By so doing Mrs. Hirst would have retained any subsequent appreciation in value of the land but would have reduced the amount of the estate to go to her son and his family by the amount of the loans. This would have produced no income tax liability, and the ultimate effect would have been to transfer payment of real estate taxes to her son and his family. This process described by the court was similar to that actually done by the taxpayer in transferring payment of the gift tax. *Id.* n.9.

transfer.[88] In a thorough and well-reasoned dissent, Judge Thomsen contended that *Turner* had been decided wrongly and that the case therefore should be overruled.[89] Nevertheless, by relying on *Turner* the *Hirst* opinion demonstrated a return to a subjective analysis in determining the donor's intent. The court did little more than state conclusions that the donor did not intend to sell anything. The *Hirst* court incorrectly analyzed the transaction under the economic benefit analysis established in *Johnson*, an approach that more correctly demonstrates the true nature of net gifts.

Despite his defeat in *Hirst* and his continued unsuccessful attempts at arguing part sale, part gift in net gift situations,[90] the Commissioner set forth this same argument in 1978 in *Estate of Henry v. Commissioner*.[91] In *Henry* the Commissioner assessed an income tax deficiency against a donor who made gifts in trust for the benefit of her eight grandchildren upon condition that the trustees pay all the federal and state gift taxes. The fair market value of the gifts was $6,820,000 with a basis of $114,940.97. The trustees borrowed the funds to pay over $2,000,000 in gift taxes. The Commissioner argued that the transaction was a part sale, part gift with the donor receiving the amount of the gift tax payment as consideration for the transfer.[92] The taxpayer argued that she had made a net gift

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88. *Id.* at 430.

89. 572 F.2d at 437 (Thomsen, J., dissenting).

90. See note 1 *supra* and accompanying text for a description of net gifts.

91. 69 T.C. 665 (1978), *appeal docketed*, No. 78-1340 (6th Cir. July 31, 1978). Other net gift cases that have held for the taxpayer on the authority of *Henry* include: Weeden v. Commissioner, 39 T.C.M. (CCH) 699 (1979), *appeal docketed*, No. 80-7127 (9th Cir. Mar. 13, 1980); Benson v. Commissioner, 37 T.C.M. (CCH) 989 (1978), *appeal docketed*, No. 79-10 (6th Cir. Jan. 22, 1979); Owen v. Commissioner, 37 T.C.M. (CCH) 272 (1978), *appeal argued*, No. 78-1341 (6th Cir. June 6, 1980); Bradford v. Commissioner, 70 T.C. 584 (1978), *appeal docketed*, No. 79-1094 (6th Cir. Feb. 13, 1979).

92. 69 T.C. at 669. In the prior cases involving gifts in trust upon payment of the gift taxes by the trustee, *see* notes 27 & 33 *supra* and accompanying text, the Commissioner had argued that the payment of the gift tax by the donee was income to the donor under section 677 of the Internal Revenue Code. 69 T.C. at 671. Only as an alternative argument had the Commissioner advanced his part sale, part gift rationale. *Id. Turner* marked the first trust case in which the Commissioner strongly argued part sale, part gift. *Id.* at 670.

that had no income tax consequences.[93] The Tax Court concluded that *Turner* was controlling and stated that "a transfer to a trust cannot be distinguished from a transfer to an individual."[94] Therefore, the court explained, *Turner* was indistinguishable in its basic facts from the instant case.[95] In support of its rejection of the Commissioner's part sale, part gift argument, the court cited cases from the Fourth,[96] Fifth,[97] and Sixth[98] Circuit Courts of Appeal rejecting the part sale, part gift rationale as applied to gifts conditional upon the donee's payment of the gift tax.[99] The court's primary emphasis was on the donor's intent to make a gift of the property, the donor's intent not to sell the property,[100] and on the principle of stare decisis.[101] The court, using the same statement it made in *Hirst*, seemed aware of its improper analysis but was unwilling to abandon years of clear precedent when it stated that "[t]hings have gone too far by now to wipe the slate clean and start all over again."[102]

With the Tax Court's treatment of *Hirst* and *Henry* indicating that the Sixth Circuit's reasoning in *Johnson* was not being

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93. *Id.* at 669.

94. *Id.* at 674.

95. *Id.* The court dealt with *Johnson* by stating that since the Sixth Circuit decided *Johnson* "on its own facts without specifically overruling *Turner*, the Sixth Circuit's comments on [limiting the precedential value of] *Turner* must be viewed as dictum, and not the clear position of that Court on the issue presented in the instant case." *Id.*

96. Hirst v. Commissioner, 63 T.C. 307 (1974), *aff'd*, 572 F.2d 427 (4th Cir. 1978); *see* notes 72-89 *supra* and accompanying text.

97. Estate of Davis v. Commissioner, 30 T.C.M. (CCH) 1363 (1971), *aff'd per curiam*, 469 F.2d 694 (5th Cir. 1972); *see* note 48 *supra*.

98. Turner v. Commissioner, 49 T.C. 356 (1968), *aff'd per curiam*, 410 F.2d 752 (6th Cir. 1969); *see* notes 35-47 *supra* and accompanying text.

99. 69 T.C. at 673.

100. *Id.* at 674.

101. *Id.* at 675. The court stated that:

> [U]nder the principle of stare decisis and fair play with a taxpayer who has relied upon our prior opinions, which opinions have been affirmed by higher courts or in respect of which appeals have been dismissed, we must follow the *Turner* case and hold that [the donor] did not realize taxable income as a result of the conditional transfers here in dispute.

*Id.*

102. *Id.*

followed in net gift cases, the Tax Court was faced with *Evangelista v. Commissioner*,[103] a case factually similar to *Johnson*. In *Evangelista*, the taxpayer transferred 33 vehicles to trust for the sole benefit of his children. Prior to the transfer, the taxpayer had acquired the vehicles through executing a promissory note on which he was personally liable. The trustee then assumed liability for payment of the balance of the promissory note on the 33 vehicles. At this time the note had a balance due of $62,603.36; the adjusted basis of the vehicles was $34,203.34. Dr. Evangelista did not report any income on his return as a result of this transfer. The Commissioner assessed a deficiency based on the difference in the outstanding indebtedness and the adjusted basis of the property transferred.[104] The taxpayer, relying on *Turner*,[105] argued that the transaction was a net gift. The Commissioner argued first that *Turner* and the other net gift cases[106] were decided wrongly, and alternatively that Dr. Evangelista realized gain under *Old Colony Trust* and *Crane*.[107]

The Tax Court in *Evangelista* distinguished *Turner* on the grounds that the liability in *Turner* originated as a part of the transfer, whereas in *Evangelista* and in *Johnson* the transferor's liability arose before the transfer of property; the transactions in these latter two cases resulted in a tax benefit to the transferor.[108] Because of this distinction, the Tax Court refused to consider the Commissioner's first argument that the holdings in

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103. 71 T.C. 1057 (1979), *aff'd*, 629 F.2d 1218 (7th Cir. 1980).

104. *Id.* at 1060-61.

105. *Id.* at 1062.

106. In addition to *Turner*, the Commissioner argued that the following similar cases were wrongly decided: Hirst v. Commissioner, 63 T.C. 307 (1974), *aff'd*, 572 F.2d 427 (4th Cir. 1978); Estate of Davis v. Commissioner, 30 T.C.M. (CCH) 1363 (1971), *aff'd per curiam*, 469 F.2d 694 (5th Cir. 1972); Estate of Henry v. Commissioner, 69 T.C. 665 (1978), *appeal docketed*, No. 78-1340 (6th Cir. July 31, 1978).

107. 71 T.C. at 1062.

108. *Id.* at 1063-64. Although the debt arose at a different time in *Turner* from that in *Johnson* or *Evangelista*, this fact is irrelevant for the determination of income under the discharge of debt doctrine. *See* text accompanying notes 123-26 & 137 *infra*. The Tax Court probably was correct in not reconsidering *Turner* based on the *Evangelista* facts, but its theory of distinguishing *Turner* was not correct for income tax purposes.

*Turner* and the other net gift cases were incorrect.[109] The Tax Court instead relied on *Johnson*[110] and held that the taxpayer realized a taxable gain on the transfer.[111]

## V. Analysis of Income Tax Treatment of Net Gifts

### *A. Improper Reliance on Donative Intent*

The Commissioner has sanctioned the use of net gifts for gift tax purposes only.[112] The net gift classification should not be extended to income tax law based solely on the Commissioner's classification for gift tax purposes, but should be extended only if appropriate income tax principles support such a classification. The net gift concept in an income tax setting was first established in *Turner v. Commissioner*.[113] The *Turner* court relied, *inter alia*, on the cases of *Harrison v. Commissioner*[114] and

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109. 71 T.C. at 1064.

110. *Id.*

111. *Id.* at 1067. On appeal, the Seventh Circuit affirmed the Tax Court but took an unusual, unnecessary approach. The court stated that the income tax consequences were determined by the characterization of the transaction as gift; as a part sale, part gift; or as some other taxable disposition. 629 F.2d at 1221. The court further stated that the Commissioner's reliance on *Crane* and *Old Colony Trust* was misplaced because both transactions involved taxable dispositions and neither case suggested that a gift may be a taxable disposition. *Id.* at 1221-22.

The Seventh Circuit in *Evangelista* examined *Hirst*, a case that Dr. Evangelista argued was analogous, and determined that the taxpayer in *Hirst* had made a gift. *Id.* at 1223. The court found that Dr. Evangelista, however, had not made a gift, so *Hirst* was inapposite. The court concluded that the transaction should be characterized as a taxable disposition since Dr. Evangelista received an economic benefit to the extent that the liability on the transferred property exceeded the adjusted basis. *Id.* at 1224-25. The court's holding was based on section 1001 of the Internal Revenue Code. The court decided that Dr. Evangelista's transfer of the property in trust was an "other disposition of property" that should be taxed under section 1001. *Id.* at 1225.

The court could have reached the same correct result by relying on *Crane* or *Old Colony Trust*, as did the Tax Court. It is true that the form of the transaction in *Evangelista* was not the same as in *Crane* or *Old Colony Trust*, but the substance of the transactions for income tax purposes was the same.

112. *See* text accompanying notes 11, 12 & 14 *supra*.

113. *See* notes 35-47 *supra* and accompanying text.

114. 17 T.C. 1350 (1952), *acq.* 1952-2 C.B. 2.

*Lingo v. Commissioner*,[115] which established the net gift doctrine for gift tax purposes.[116] The income tax consequences of such a transfer, however, were not litigated in either case. Nevertheless, when the litigated issue was the income tax consequences of a net gift transaction, the *Turner* court stated that "both in a gift tax and income tax context, the major premise . . . is that a condition imposed by the [donor] that the [donee] will pay the gift tax resulting therefrom does not alter the result that the transfer constituted a gift."[117] Thus the court concluded that no income tax consequences resulted.[118]

The error in the *Turner* court's reasoning on this aspect of the case lies in the fact that income tax statutes are not to be construed *in pari materia* with either estate tax or gift tax statutes.[119] The net gift concept was developed for gift tax purposes; therefore, characterization of a transaction as a net gift for gift tax purposes should not preclude treating the transaction as a taxable event for income tax purposes.[120]

The possible reason why the *Turner*, *Hirst*, and *Henry* courts have failed to distinguish the difference between gift tax and income tax consequences in a net gift transaction, and have consequently held that no income tax consequences result, is that these courts have failed to ask the right question. That is, these courts have focused on the donor's intent in the transaction and have disregarded the economic realities of the transaction. The relevant inquiry for determining income tax consequences should not be what the donor intended but rather what the economic consequences of the transaction were. The answer should involve a determination of what the donor received as a result of the transfer of property. Since the donor received an economic benefit in having his gift tax obligation satisfied by the donee, the transfer was for consideration, and income tax consequences should result.[121]

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115. 13 T.C.M. (CCH) 436 (1954).

116. *See* text accompanying notes 15-17 *supra*.

117. 49 T.C. at 362.

118. *Id.* at 364.

119. Farid-Es-Sultaneh v. Commissioner, 160 F.2d 812, 814 (2d Cir. 1947).

120. 572 F.2d at 437 (Thomsen, J., dissenting).

121. See text accompanying notes 132-38 *infra* for discussion of economic

### B. *Misunderstanding the Discharge of Debt Doctrine*

Once it is recognized that the donee must give up something as a condition of receiving the gift, there is little doubt that an exchange has occurred. The payment of the gift tax by the donee in net gift cases[122] usually was a result of an express condition for receipt of the gift. In each case the gift would not have been transferred if the donee had refused to pay the gift tax. Under this qualification, the payment of the gift tax by the donee dictates that the amount of the payment be considered income to the donor because the donor's tax obligation has been satisfied by the donee.

Under the discharge of debt doctrine, a taxable gain does not result solely from the receipt of cash in hand.[123] The critical factor is the donee's payment of the donor's legal obligation;[124] the form of the payment is immaterial.[125] A discharge of indebtedness is income to the donor whether the donee pays the amount of the debt directly to the donor's creditor or whether the donee pays the donor, who in turn pays the creditor.[126]

The general rule is that a debtor realizes income from the discharge of indebtedness; an exception to this rule arises if the cancellation of the indebtedness was not consideration for a

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benefit analysis.

122. In *Turner* the donor transferred shares of stock to family members and to trusts on the express condition that each transferee accept a corresponding amount of the gift tax liability. Each transferee made out a check payable to the donor for the respective amount of gift tax on the property transferred. 49 T.C. at 358-59.

In *Hirst* the donor transferred real property to her son and his family upon her son's oral agreement to pay the resulting gift taxes. The donee paid the gift tax liability directly to the state and federal governments. 63 T.C. at 308-09.

In *Henry* the donor transferred securities to trusts with the trust agreements setting forth provisions requiring the trustees to pay all federal and state gift taxes arising from the transfer. 69 T.C. at 667.

123. Helvering v. Bruun, 309 U.S. 461, 469 (1940).

124. I.R.C. § 2502(d) imposes liability on the donor for gift taxes arising from the transfer of property.

125. Old Colony Trust v. Commissioner, 279 U.S. 716, 729 (1929).

126. *Id.* I.R.C. § 61(a)(12) states that gross income includes income from discharge of indebtedness, but it does not specify how the debt is to be discharged.

transfer of property.[127] In the net gift cases, the donee's payment of the donor's gift tax liability was a requisite for the transfer. Nevertheless, the courts have failed to administer properly the general rule and instead have applied the exception, even though it is inapplicable. An example of the courts' misapplication of the exception to the net gift cases is illustrated by a hypothetical that the *Hirst* court believed analogous to the *Hirst* facts. In the hypothetical, a son had borrowed money from a bank, and his father had paid off the son's loan without discharging any obligation to the son. The payment, the court stated, was not taxable income to the son, but a gift.[128] Although this hypothetical correctly illustrated an example of a nontaxable gift by the discharge of an indebtedness, it was completely inapposite to the *Hirst* facts. Payment of the gift tax by the *Hirst* donee was not motivated by donative intent. Instead, the payment was made as a result of an agreement that the donee would pay the tax; the payment constituted an express condition for the gift. In contrast to the *Hirst* hypothetical in which the father was not discharging any obligation to the son, the net gift donees were discharging an obligation they had promised the donor to discharge.

### C. *Economic Benefit Analysis Replacing Donative Intent Analysis*

The donative intent standard was originated in *Turner*[129] as a means to evaluate the income tax consequences of a net gift transaction and was followed in *Hirst* and *Henry*, perhaps because the facts of those cases so closely resembled the facts of *Turner*. In each of these cases the Commissioner argued that the transaction was in reality a part sale, part gift. The Commissioner's classification of the net transaction has not been accepted by the courts.[130] The courts have shown a tendency to

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127. C. McCarthy, The Federal Income Tax: Its Sources and Applications § 6.88, at 6-26 (1979). If the cancellation was motivated by donative intent and was gratuitous, it was a gift to the debtor. Gifts are excluded from taxable gross income under I.R.C. § 102.

128. 572 F.2d 427, 431 (4th Cir. 1978).

129. *See* text accompanying note 45 *supra*.

130. *See* Johnson v. Commissioner, 495 F.2d 1079, 1083 n.6 (6th Cir.

focus on the gratuitous portion of the transfer (the part gift) and to disregard the nongratuitous portion of the transfer (the part sale).[131]

Because of this attitude by the courts, an alternative approach focusing on the economic realities of the transaction is needed to evaluate the income tax consequences of such transactions. First applied in *Johnson*, an economic benefit analysis more correctly demonstrates the true economic nature of a net gift transaction. In *Johnson*, the donor transferred highly appreciated stock into trust, but before the transfer the donor obtained loans secured by the stock. Upon the transfer into trust, the trustee assumed the obligation to discharge the loan and thereby relieved the donor of the debt.[132] The donor thus received the loan free and clear of any obligation to repay. This transaction, the court concluded, resulted in an economic benefit to the donor and constituted gross income to him. The crucial fact was that the donor received something of value upon transferring his encumbered stock into trust.[133]

After *Johnson*, it seemed the courts would reject the donative intent analysis and apply the more realistic economic benefit analysis to cases involving transfers to individuals as well as transfers to trusts. Four years after *Johnson* was decided in the Sixth Circuit, however, the Fourth Circuit in *Hirst* reverted to the outmoded donative intent standard established in *Turner*.[134] The *Hirst* court refused to follow an economic benefit analysis because of the factual differences in *Hirst* and *Johnson*. The court stated that these differences demonstrated the absence of

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1974). In finding income tax consequences as a result of the transfer of encumbered property to trust, the Sixth Circuit in *Johnson* rejected the Tax Court's reasoning that a part sale, part gift was involved. The court stated that if it adopted this reasoning it "would be hard put to justify the Tax Court's 'finding' to that end." *Id.*

131. *See* text accompanying notes 43-44, 87-88, & 96-99 *supra*.

132. *See* text accompanying notes 50-52 *supra*.

133. 495 F.2d at 1083.

134. Following *Hirst*, the Tax Court decided *Estate of Henry v. Commissioner*, a factually similar case. The *Henry* court found no taxable income to the donor and relied on *Hirst* and *Turner* as authority. Since the reasoning in *Henry* is not different from that in *Hirst*, it will not be discussed in the text under the economic benefit doctrine.

an economic benefit to the donor.[135]

The *Hirst* court further incorrectly attempted to distinguish *Johnson* by reasoning that no economic benefit accrued to the donor. The bases for this reasoning were that no preexisting encumbrance was on the property when it was transferred and that the donor did not receive any in-hand cash benefit when the transaction was completed.[136]

Despite the factual differences between *Hirst* and *Johnson*, the economic realities of the transactions were the same. Thus there was no substantive difference between the donee's assumption of the donor's gift tax in *Hirst* and the trustee's assumption of the donor's debt obligation in *Johnson*. Both situations were attempts by the donor to discharge gift tax liability without incurring income tax consequences.

The different tax results between *Hirst* and *Johnson* are irreconcilable due to the common underlying substance of the transactions. The fact that the gift tax liability in *Hirst* arose at the time of the transfer instead of being a preexisting debt, as in *Johnson*, is not significant because the income tax consequences to the donor under the discharge of debt doctrine are the same regardless of when the debt arose.[137] Furthermore, to focus on the absence of an in-hand cash benefit ignores the principle of constructive receipt of income, which results from discharging another's indebtedness.[138]

Various hypotheticals illustrate the anomalous result reached in *Hirst* by relying on "form over substance."[139] If, for example, the donor in *Hirst* had negotiated a loan before the transfer using the gift property as security, if she had used the

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135. Hirst v. Commissioner, 572 F.2d 427, 431 (4th Cir. 1978). The court explained that "[b]efore the present transaction Mrs. Hirst owed nothing, and by virtue of the transaction she received nothing. She was not better off after the transfer, with the donee undertaking the burden of the gift tax; she was simply not worse off." *Id.*

136. *Id.* at 430. The court stated that "[Mrs. Hirst] did not receive anything for herself; there was no economic gain of any kind accruing to her, except release from the normal tax burden of an owner of real estate." *Id.* (footnote omitted).

137. *See* text accompanying notes 123-26 *supra*.

138. *See* text accompanying notes 123 & 125 *supra*.

139. *See* note 45 *supra*.

proceeds to pay the gift taxes, and if she then had transferred the encumbered property to the donees, she would have realized taxable income.[140] Also, if the donor in *Hirst* had retained a portion of the gift property and had sold it before the transfer to raise cash to pay the gift tax, she would have realized taxable income. Finally, if the donor in *Hirst* had retained a portion of gift property equal in value to the amount of the gift tax due and had exchanged this with the donee for payment of the gift tax, she would have realized taxable income from the exchange.

In spite of the inequity that can result from affixing the label of net gift to a transaction, the courts have allowed a donor to make the same gift as in the above hypotheticals and have let a donor avoid income tax consequences when a third party pays the gift tax due on the transfer, even though the donor realizes economic gain. These decisions demonstrate that the courts have failed to analyze properly the substance of a net gift transaction and have let the form of the transaction dictate the result. A mere label such as net gift should not alter an economic reality.

### *D. Donee's Basis Adjustment for Gift Tax*

One of the bases for the *Turner* court's rejection of the Commissioner's part sale, part gift argument was the court's concern that under section 1.1015-4(a) of the Treasury Regulations[141] such a characterization would allow the donee to receive a double credit in his adjusted basis of the gift property for the gift tax paid.[142] The *Johnson* court, by applying section 1.1015-4(a) to prove that a double credit for the gift tax paid was

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140. These are the exact facts of *Johnson*.

141. Treas. Reg. § 1.1015-4(a) reads:

Tranfers in part a gift and in part a sale.

(a) *General Rule.* Where a transfer of property is in part a sale and in part a gift, the unadjusted basis of the property in the hands of the transferee is the sum of—

(1) Whichever of the following is the greater:

(i) The amount paid by the transferee for the property, or

(ii) The transferor's adjusted basis for the property at the time of the transfer, and

(2) The amount of increase, if any, in the basis authorized by section 1015(d) for the gift tax paid . . . .

142. 49 T.C. at 363-64.

proper, showed that the *Turner* court's concern was without justification.[143]

The following simple example illustrates the proper treatment of the double credit problem under section 1.1015-4(a) in such net gift transactions as existed in *Turner*, *Hirst*, and *Henry*. The example is based on the presumptions that the transaction is a partial sale and that the unified credit is not available. Assume that a grandmother transfers to her grandson property with a fair market value of $20,000 and an adjusted basis of $1,000 on the condition that the grandson pay the $3,200 gift tax resulting from the transfer. Since this is a partial sale, the grandson's basis under section 1.1015-4(a) is the amount deemed paid by him for the property ($3,200) plus the amount of the gift tax paid on the transfer ($3,200).[144] This results in a $6,400 basis for the grandson. Although this may appear to be an unjustified double credit, the same result would be reached if the grandson had paid the grandmother $3,200 cash for the property, and the grandmother had paid the $3,200 gift tax. The grandson's discharge of the gift tax liability is the equivalent of a cash payment to the grandmother as partial consideration for the transfer and for the grandmother's payment of the gift tax. The application of section 1.1015-4(a) and the partial sale characterization produces the same result as would occur if a different form, though not a different substance, of the transaction had occurred.

## VI. The Proper Argument in Net Gift Cases

In the net gift cases the Commissioner's primary argument

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143. 495 F.2d at 1085; see text accompanying notes 50-53 *supra* for the *Johnson* facts. The court calculated that the donee's basis would be determined by adding $200,000 (the amount paid by the transferee for the property) plus $150,000 (gift tax paid), but limited to the fair market value of the gift (approximately $300,000 in this case). The court reasoned that there was actually no double credit involved, because the $150,000 received by the donor that was used to pay his gift tax is included as an increase to the donee's basis; the donor would have to pay a capital gain on the amount of appreciation of his stock and that portion of the stock's increase in value should not be taxed again. *Id.*

144. *See* Johnson v. Commissioner, 495 F.2d 1079, 1085 (6th Cir.), *cert. denied*, 419 U.S. 1040 (1974).

has been that the net gift transaction constituted a part sale, part gift.[145] Yet in substantively identical cases involving a transfer of encumbered property to trust in return for the trustee's assumption of the debt on the property, the Commissioner has argued and the courts have accepted the applicability of the constructive receipt of income doctrine.[146] The argument was that the donor realized income under the discharge of debt doctrine as set forth in *Old Colony Trust*[147] or realized income as a result of the transfer of encumbered property as set forth in *Crane v. Commissioner*.[148] The courts have treated the part sale, part gift characterization as based on the donative intent of the donor to give a gift of only a portion of the value of the property, whereas the courts have treated the *Old Colony Trust* and *Crane* arguments as based on an economic benefit standard.

Perhaps the reason the courts in *Turner, Henry,* and *Hirst* found no income tax liability to the donor was because the Commissioner made the wrong argument. With a part sale, part gift characterization judged under a donative intent standard the problem the courts have faced, as the *Johnson* court pointed out, is that "[i]t is difficult to find that the parties . . . actually intended a part sale, part gift, in view of the obvious tax implications of such an intention."[149] Had the Commissioner strongly

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145. Turner v. Commissioner, 49 T.C. 356, 357 (1968), *aff'd per curiam*, 410 F.2d 752 (6th Cir. 1969); Hirst v. Commissioner, 63 T.C. 307, 312 (1974), *aff'd*, 572 F.2d 427 (4th Cir. 1978); Estate of Henry v. Commissioner, 69 T.C. 665, 669 (1978).

146. *See* Johnson v. Commissioner, 495 F.2d 1079, 1083 (6th Cir.), *cert. denied*, 419 U.S. 1040 (1974); Evangelista v. Commissioner, 71 T.C. 1057, 1062 (1979), *aff'd*, 629 F.2d 1218 (7th Cir. 1980).

147. *See* text accompanying notes 123 & 125 *supra*.

148. 331 U.S. 1 (1947). The taxpayer in *Crane* inherited real property that was subject to a mortgage equal to its fair market value. *Id.* at 3. The taxpayer took the property subject to the mortgage but did not become personally liable for the debt. *Id.* at 2. After operating the property and taking depreciation deductions for seven years, the taxpayer sold the property subject to the mortgage for $2,500. The taxpayer reported $2,500 as her gain on the sale, reasoning that her basis in the property was the equity she inherited, which had a zero value. *Id.* at 3 & 4. The Supreme Court held, however, that the amount of the encumbrance was to be included in the amount realized on the sale. *Id.* at 14.

149. 495 F.2d at 1083 n.6. In finding the part sale, part gift characteriza-

argued an economic benefit analysis in *Turner*, *Hirst*, and *Henry*, he might have been successful. As pointed out in this Comment in the discussion of the discharge of debt doctrine,[150] *Old Colony Trust* should apply to net gift cases to find taxable gain to the donor. Indeed, it would be anomalous to argue that the discharge of income tax liability results in a benefit while the discharge of gift tax liability does not.

The economic benefit argument in net gift transactions also finds support in *Crane*. Although the factual similarity between *Crane* and the net gift cases is not as evident as between *Old Colony Trust* and the net gift cases, the *Crane* principle is still applicable to the facts of *Turner*, *Hirst*, and *Henry*. *Crane* has been extended to apply to the transfer of property that is encumbered in excess of basis to trigger recognition of gain;[151] also, even though the liability in net gift cases did not arise until the gift was made, the fact remains that the liability was transferred. By transferring a liability along with the property, the donor was relieved of a payment that he otherwise would have had to pay. Thus the application of the *Crane* doctrine correctly reflects the economic realities of the net gift transaction, and under an economic benefit analysis *Turner*, *Hirst*, and *Henry* cannot be reconciled with *Crane*.[152]

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tion conclusory, the court further stated that "[i]t is better to apply the Tax Code equitably to basically similar transactions than to impose different results depending upon a hindsight determination of 'actual intent.'" *Id.*

150. *See* text accompanying notes 123-26 *supra*.

151. *See* 28 U. FLA. L. REV. 935, 952 (1976) (citing First National Indus. v. Commissioner, 404 F.2d 1182 (6th Cir. 1968), *cert. denied*, 394 U.S. 1014 (1970); Simon v. Commissioner, 285 F.2d 422 (3d Cir. 1960); Malone v. United States, 326 F. Supp. 106 (N.D. Miss. 1971), *aff'd*, 455 F.2d 502 (5th Cir. 1972)).

152. Examples of identical economic realities resulting in different income tax consequences are illustrated by *Hirst* and *Crane*. In *Hirst*, Judge Haynsworth stated that Mrs. Hirst owed nothing before the transaction and received nothing by virtue of the transaction. 572 F.2d at 431. Likewise, the taxpayer in *Crane* owed nothing on the property she inherited (a nonrecourse mortgage), and she received nothing on its disposition other than a small cash payment. 331 U.S. at 3-4. Nevertheless, the Supreme Court held she realized additional income equal to the amount of the encumbrance. *Id.* at 14.

## VII. Income Tax Treatment of Net Gifts

Dispositions of property by gift, including the Tax Court's treatment of net gifts, generally do not constitute taxable dispositions that result in taxable gain or loss to donors.[153] For purposes of determining gain on a disposition of the property, the donee assumes the donor's adjusted basis in the property at the time of the transfer,[154] and the transferred basis is increased by the gift tax paid on the transfer.[155] If the donee's basis is determined by reference to the donor's basis, then the donee is also allowed to tack on the donor's holding period.[156]

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153. *See* 71 T.C. at 1062.

154. I.R.C. § 1015(a). If, however, the basis (adjusted in accordance with section 1016) is greater than the fair market value of the property at the time of the gift, then for purposes of determining loss, the basis shall be such fair market value. *Id.*

155. I.R.C. § 1015(d). For property acquired by gift prior to January 1, 1977, the transferee was permitted to increase his basis by the full amount of any gift tax paid on the transfer (but not above the fair market value of the property at the time of the gift). I.R.C. § 1015(d)(1)(A).

For property acquired by gift after December 13, 1976, I.R.C. § 1015(d)(6), added by the Tax Reform Act of 1976, modifies the basis adjustment for gift tax paid. Under section 1015(d)(6) the donee's basis is increased only by that proportion of the gift tax attributable to the unrealized appreciation in the property at the time of the gift. The net appreciation in value of a gift is "the amount by which the fair market value of the gift exceeds the donor's adjusted basis immediately before the gift." I.R.C. § 1015(d)(6)(B).

For example, assume a donor pays a $20 gift tax on a transfer of property with a fair market value of $100 and an adjusted basis of $10. The net appreciation in the property is $90. The gift tax adjustment to the donee's basis is $18, determined by multiplying the gift tax ($20) by the ratio of the net appreciation ($90) to the amount of the gift ($100). The donee's basis in the gift property is $28, the donor's transferred basis plus the gift tax adjustment. *See* Ward, *Taxation of Gratuitous Transfers of Encumbered Property: Partial Sales and Section 677(a)*, 63 Iowa L. Rev. 823, 851 (1978) [hereinafter cited as Ward].

156. I.R.C. § 1223(2). The phrase "tack on" means that the donee may include the period of time the donor held the property in determining the donee's holding period.

If the property is disposed of by the donee and he realizes a loss by use of the donor's basis, then the donee must recompute the loss using as the basis the fair market value of the property at the time of the transfer whenever this value is less than the donor's adjusted basis. *See* Treas. Reg. § 1.1015-1(a). In this situation the donee does not tack on the donor's holding period since the

If the Commissioner is successful in his part sale, part gift argument, or if he is successful with a *Crane* or *Old Colony Trust* argument, the income tax treatment of net gifts will be different from the present treatment. In determining his gain, the donor would be allowed to apply the entire adjusted basis of the transferred property against the amount realized on the transfer of the property.[157] As a result of this favorable treatment for the donor, the Commissioner would require that the donee acquire a pure cost basis in the property received.[158] Thus, for purposes of determining gain on a subsequent disposition of the property, the donee's unadjusted basis would be the sum of (1) whichever of the following is greater: (a) the amount paid by the donee for the property, or (b) the donor's adjusted basis at the time of the sale; plus (2) the amount of increase in basis for gift tax paid as allowed by section 1015(d).[159]

Furthermore, the donee should be unable to tack on the transferor's holding period because the transferee's basis would be determined by cost and not by reference to the transferor's

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donee's basis is not determined by reference to the donor's adjusted basis. *See* Ward, *supra* note 155, at 824 & n.14 (citing Rev. Rul. 59-416, 1959-2 C.B. 159, 160).

157. Treas. Reg. § 1.1001-1(e). The Commissioner once argued that the donor should compute the realized gain on a partial sale by apportioning the adjusted basis between the sale and gift elements of the transaction. I.T. 2681, XII-1 C.B. 93 (1933). The Board of Tax Appeals did not adopt this apportionment and instead permitted the entire adjusted basis to be offset against the amount realized. Reginald Fincke, 39 B.T.A. 510, 514 (1939). The Commissioner eventually acquiesced in the decision and promulgated regulations incorporating this position. Treas. Reg. § 1.1001-1(e). See Ward, *supra* note 155, at 826-28 for a detailed discussion of the history of this development.

158. Treas. Reg. § 1.1015-4(a). This regulation does not reflect the changes made by section 1015(d)(6) of the 1976 Tax Reform Act limiting the adjustment of the donee's basis to that portion of the gift tax attributable to the net appreciation of the property. *See* note 155 *supra; see also* Ward, *supra* note 155, at 850-53.

159. Treas. Reg. § 1.1015-4(a). See text accompanying notes 142-44 *supra* for analysis and example of the donee's basis adjustments for a pre-1977 gift under section 1.1015-4(a). For purposes of determining a loss upon disposition of the property by the donee, the donee's unadjusted basis shall not be greater than the fair market value of the property at the time of the transfer. Treas. Reg. § 1.1015-4(a).

basis. This is the position taken by the Commissioner.[160] Nevertheless, the Fifth Circuit has not adopted this position of preventing the tacking of holding periods when the transferee acquired property in a partial sale.[161]

## VIII. CONCLUSION

In the majority of circuits the state of the law concerning the income tax consequences of net gifts is clearly wrong.[162] Although the courts have held that no income tax consequences arise for a donor who conditions his gift on a donee's promise to pay the resulting gift tax, these same courts have ignored the economic realities of the transaction. By focusing on an irrelevant intent test that income tax law has long regarded as unsatisfactory for determining income tax consequences, the courts have carved out an unjustifiable exception to the basic principles of income tax law.

The Commissioner's argument of part sale, part gift correctly characterizes the substance of the transaction regardless of the reluctance of some courts to adopt such a result. The courts should disregard the donor's intent and focus on a more objective economic benefit analysis. Determining income tax consequences by such objective criteria as the amount of gift tax assumed by the donee and the donor's basis in the transferred property will result in more equitable, consistent, and predictable tax consequences in net gift transactions.

The income tax consequences of a net gift have been litigated more frequently in the Sixth Circuit than in any other.

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160. Letter Ruling 7752001, 9 STAND. FED. TAX REP. (CCH) ¶ 6968 (1978).

161. Citizens Nat'l Bank v. United States, 417 F.2d 675, 680 (5th Cir. 1969).

162. On March 4, 1981, the Eighth Circuit held that a net gift produced income to the donor. In Diedrich v. Commissioner, [1981 Adv. Sh.] FED. TAXES (P-H) (47 A.F.T.R. 2d) ¶ 81-488 (8th Cir. Mar. 4, 1981), the Eighth Circuit reversed the Tax Court's holding that no income was realized by the donor. The donor had made a gift expressly conditioned upon donee's promise to pay the gift taxes. The Eighth Circuit agreed with the Commissioner that *Turner v. Commissioner*, *see* notes 35-47 *supra* and accompanying text, and its progeny were decided incorrectly and stated that the correct approach was that taken by the court in *Johnson v. Commissioner*, *see* notes 49-71 *supra* and accompanying text.

*Estate of Henry v. Commissioner*,[163] *Benson v. Commissioner*,[164] and *Owen v. Commissioner*,[165] are currently on appeal to the Sixth Circuit from the Tax Court. The Sixth Circuit, in *Turner*, was the first circuit to hold that no income tax consequences result from the disposition of property by a net gift. Five years later, in *Johnson*, the same court implicitly overruled *Turner*; nevertheless, the teachings of *Turner* have survived *Johnson* in the Tax Court and in other circuits. The current net gift cases before the Sixth Circuit present an opportunity to rectify the incorrect income tax treatment accorded net gifts.[166]

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163. 69 T.C. 665 (1978), *appeal docketed*, No. 78-1340 (6th Cir. July 31, 1978).

164. 37 T.C.M. (CCH) 989 (1978), *appeal docketed*, No. 79-1032 (6th Cir. Jan. 22, 1979).

165. 37 T.C.M. (CCH) 272 (1978), *appeal argued*, No. 78-1341 (6th Cir. June 6, 1980).

166. *Owen* was argued on June 6, 1980, before a three-judge panel consisting of Judges Celebrezze, Edwards, and Kennedy. At the time of this writing, the court had not rendered an opinion. It is interesting to note that Judge Celebrezze authored the opinion in *Johnson*.

# RECENT DEVELOPMENTS

## Civil Procedure — Res Judicata — Effect of Dismissal With Prejudice

*Garrett v. Corry Foam Products, Inc.*, 596 S.W.2d 808 (Tenn. 1980).

Plaintiff brought an action against his employer under the Tennessee Workers' Compensation Statute,[1] seeking compensation for an injury arising out of and in the course of his employment. Defendant, asserting the defense of res judicata, moved for summary judgment.[2] Affidavits and exhibits filed with the motion showed that plaintiff had sued defendant previously on the same cause of action.[3] The previous suit had been dismissed with prejudice by a consent order signed by the parties' attorneys.[4] The trial court dismissed the action. On appeal to the Supreme Court of Tennessee,[5] *held*, reversed and remanded. The words "with prejudice" in an order of dismissal by consent are ineffective to transform the dismissal into a judgment on the

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1. TENN. CODE ANN. §§ 50-901 to -1029 (Supp. 1980). The phrase "workman's compensation" was changed to "workers' compensation" by the Tennessee General Assembly in 1980. Act of March 11, 1980, ch. 534, 1980 Tenn. Pub. Acts 121.

2. TENN. R. CIV. P. 56. In order to grant the motion the trial court had to find that there was "no genuine issue as to any material fact" and that defendant was "entitled to a judgment as a matter of law." TENN. R. CIV. P. 56.03.

3. Submitted with the motion were the affidavit of the clerk of the court and the pleadings and orders in the previous action. There was no mention or evidence of settlement or release. Garrett v. Corry Foam Prods., Inc., 596 S.W. 2d 808, 809 (Tenn. 1980).

4. The order was not signed by either of the parties. *Id.* at 808.

5. Appeal in workers' compensation cases is direct from the trial court to the supreme court. TENN. CODE ANN. § 50-1018 (1977).

merits which will bar a subsequent suit between the same parties on the same cause of action. *Garrett v. Corry Foam Products, Inc.*, 596 S.W.2d 808 (Tenn. 1980).

One purpose of a system of civil procedure is to strike a balance between the interest in attaining a just resolution of conflicts and the interest in achieving an end to litigation.[6] The doctrine of res judicata is an attempt to ensure both justice and finality for the parties to a suit. Under this doctrine, a final judgment on the merits in a previous suit will preclude a subsequent suit between the same parties on the same cause of action.[7] When the previous judgment is unfavorable to the plaintiff, the judgment is a bar to the plaintiff's maintenance of the subsequent suit.[8] Finality is achieved by the preclusion of another suit while justice is protected by the requirement that the previous judgment must have been on the merits.[9] In deciding whether to sustain a defense of res judicata in a particular case, the court must determine whether the previous judgment was on the merits.[10] Difficulty arises when the former suit was terminated at some point prior to a trial or a hearing on the facts and issues.[11] At issue in *Garrett* was the effect of a consent order of dismissal which, by use of the words "with prejudice," purported to bar a subsequent suit.[12] The court had to decide whether the judgment was a bar under the doctrine of res judicata.

It is not clear when dismissals with prejudice came into

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6. Moulton v. Ford Motor Co., 533 S.W.2d 295, 296 (Tenn. 1976).

7. Cromwell v. County of Sac, 94 U.S. 351, 352 (1876).

8. RESTATEMENT OF JUDGMENTS § 48 (1942).

9. The United States Supreme Court has held that "there must be at least one decision on a *right* between the parties before there can be said to be a termination of the controversy, and before a judgment can avail as a bar to a subsequent suit." Haldeman v. United States, 91 U.S. 584, 585 (1875).

10. The Restatement (Second) of Judgments suggests that the phrase "on the merits" is not a test but a conclusion; that is, the phrase is merely descriptive of a judgment which will operate as a bar. RESTATEMENT (SECOND) OF JUDGMENTS § 48, Comment e (Tent. Draft No. 1, 1973).

11. 65 HARV. L. REV. 818, 836 (1952).

12. Other issues discussed by the court but not critical to the holding were the special statutory requirements for judgments in workers' compensation cases and the fact that the parties themselves did not sign the order of dismissal. 596 S.W.2d at 810-11. *See* text accompanying notes 77-81 *infra*.

use;[13] the dismissal probably originated as the converse in law to the dismissal without prejudice in equity.[14] While a dismissal

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13. At common law there was no dismissal in actions at law. An action could be terminated in the defendant's favor by a verdict, by the sustaining of a demurrer, or by a discontinuance, nonsuit, *non prosequitur*, *nolle prosequi*, or *retraxit*. Bond v. McNider, 25 N.C. (3 Ired.) 440 (1843). A discontinuance, nonsuit, or *non prosequitur* resulted from merely procedural defects in the action and did not bar a subsequent suit on the same cause of action. 3 W. BLACKSTONE, COMMENTARIES *296; 1 E. COKE, INSTITUTES (pt. 1) *139.a. (15th ed. London 1794) (1st ed. n.p. n.d.); 2 W. TIDD, THE PRACTICE OF THE COURT OF KING'S BENCH 867-68 (3d Am. ed. Philadelphia 1840) (9th ed. London 1828). A *nolle prosequi* resulted from defects in the substance of the action, either as to one defendant or one issue, while a *retraxit* involved a defect in the substance of the action as a whole. Both a *nolle prosequi* and a *retraxit* were ordinarily bars to subsequent actions. 1 W. TIDD, *supra*, at 681-83; Beecher's Case, 77 Eng. Rep. 559 (K.B. 1608); 4 G. JACOB, THE LAW-DICTIONARY 397 (1st Am. ed. New York & Philadelphia 1811); 5 G. JACOB, THE LAW-DICTIONARY 523 (1st Am. ed. New York & Philadelphia 1811). The dismissal originated in equity. *See* Lloyd v. Powis, 1 Dickens 16 (Ch. 1671). A bill could be dismissed for lack of prosecution or because "the plaintiff had no title to the relief sought by his bill." J. MITFORD, A TREATISE ON THE PLEADINGS IN SUITS IN THE COURT OF CHANCERY 196 (2d ed. Dublin 1795) (1st ed. n.p. n.d.). Dismissal for the latter reason was, like the *nolle prosequi* and *retraxit* at law, a bar to a subsequent suit on the same cause of action; a dismissal for lack of prosecution, however, like a discontinuance, nonsuit, or *non prosequitur* at law, was not a bar to a subsequent suit. *Id.* In accordance with his extraordinary powers as the keeper of the King's conscience, 1 J. POMEROY, A TREATISE ON EQUITY JURISPRUDENCE §§ 33-35 (5th ed. San Francisco 1941), the Chancellor had a power which the law judges did not: the power to provide that a dismissal of a bill based on the determination that the plaintiff had no right to relief would not be a bar to a subsequent suit, J. MITFORD, *supra*, at 196. The Chancellor exercised this power by dismissing the bill without prejudice to the plaintiff's right to maintain a subsequent action. *Id.* The separate systems of law and equity with their attendant procedures became part of the law of Tennessee. J.W. Kelly & Co. v. Conner, 122 Tenn. 339, 360, 123 S.W. 622, 627 (1909). Gradually, many of the common-law procedural rules were modified by statutory and case law. *See, e.g.*, B.E. Dodd & Son v. Nashville, C. & St. L. Ry., 120 Tenn. 440, 110 S.W. 588 (1908); Littlejohn v. Fowler, 45 Tenn. (5 Cold.) 284, 288 (1868); Armstrong v. Harrison, 38 Tenn. (1 Head) 379 (1858); Graham v. Cook, 14 Tenn. (6 Yer.) 404 (1834); Johnston v. Ditty & Smith, 15 Tenn. (7 Yer.) 85 (1834).

14. "This term ['with prejudice'] has a well-recognized legal import; it is the converse of the term 'without prejudice' and is conclusive of the rights of the parties as if the suit had been prosecuted to a final adjudication adverse to the plaintiff." Union Indem. Co. v. Benton County Lumber Co., 179 Ark. 752, 761, 18 S.W.2d 327, 330 (1929). The fusion between courts of law and equity in

without prejudice entered by the Chancellor provided that an adjudication on the merits would not bar a subsequent suit, a dismissal with prejudice entered by the law judge provided that an adjudication not on the merits would bar a subsequent suit. Originally, therefore, the emphasis was upon the involuntary nature of a dismissal with prejudice. Gradually, dismissal with prejudice came to be used in both voluntary and consent dismissals; such dismissals were identified with the *retraxit*, a procedure in actions at law by which the plaintiff voluntarily relinquished his cause of action.[15] A *retraxit* was the plaintiff's "voluntary acknowledgment that he [had] no cause of action."[16] It was "an open and voluntary renunciation of his suit in court."[17] By a *retraxit* the plaintiff did more than admit he had not produced enough evidence to support his cause of action, as in a nonsuit: he admitted that he had no cause of action at all.[18] Therefore, a *retraxit* was an absolute bar to a subsequent suit on the same cause of action[19] and could not be entered by the plaintiff's attorney but only by the plaintiff himself in open

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many states eliminated the distinctions between their respective procedures. Even in Tennessee there was some confusion about the proper court for the application of each set of rules. *See* B.E. Dodd & Son v. Nashville, C. & St. L. Ry., 120 Tenn. 440, 110 S.W. 588 (1908) (court of law has no power to enter dismissal without prejudice); Ford v. Bartlett, 62 Tenn. (3 Bax.) 20 (1873) (discontinuance applies only in courts of law, not in courts of equity).

15. Kronkright v. Gardner, 31 Cal. App. 3d 214, 219, 107 Cal. Rptr. 270, 273 (1973) (dismissal of an action with prejudice is a *retraxit*); Robinson v. Hiles, 119 Cal. App. 2d 666, 672, 260 P.2d 194, 197 (1953) (a dismissal with prejudice is "the modern name for a retraxit"); Steele v. Beaty, 215 N.C. 680, 2 S.E.2d 854 (1939) (plaintiff's statement in open court agreeing to a dismissal is a *retraxit*); Virginia Concrete Co. v. Board of Supervisors, 197 Va. 821, 826-27, 91 S.E.2d 415, 420 (1956) (consent dismissal with prejudice has the effect of a *retraxit*).

16. Beecher's Case, 77 Eng. Rep. at 563.

17. 3 W. BLACKSTONE, COMMENTARIES *296.

18. "At common law a retraxit differed from a voluntary withdrawal by the plaintiff of his action, in that a retraxit terminated both the action and the right of action, while such a withdrawal terminated the action only, leaving in the plaintiff the right to recommence his suit upon the same alleged right." Harvey v. Boyd, 24 Ga. App. 561, 561, 101 S.E. 708, 708 (1919) (Luke, J.; syllabus by the court).

19. 1 E. COKE, *supra* note 13, at *139.a; 3 W. BLACKSTONE, COMMENTARIES *296.

court.[20] The *retraxit* also was equated with consent dismissals which were not expressly with prejudice.[21] Since both the *retraxit* and an adjudication on the merits had the same effect—to bar a subsequent suit on the same cause of action—the same dismissal which was seen as a *retraxit* in some states was seen as an adjudication on the merits in other states.[22]

In *Lindsay v. Allen*[23] the Tennessee Supreme Court rejected the equation of a dismissal by consent with the *retraxit*.[24] Defendant demurred to a bill filed "to enjoin the removal of the county seat of Campbell County from Jacksboro to LaFollette"[25] on the ground that an earlier suit for the same purpose filed by another group of citizens had been dismissed. In reversing the Chancellor's dismissal of the bill on this ground, the court construed the prior dismissal as a consent decree by which plaintiffs dismissed the action in consideration of the payment of costs by

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20. Beecher's Case, 77 Eng. Rep. at 559.

21. *E.g.*, Bardach Iron & Steel Co. v. Tenenbaum, 136 Va. 163, 171, 118 S.E. 502, 505 (1923); Hoover v. Mitchell, 66 Va. (25 Gratt.) 387, 388 (1874); Pethtel v. McCullough, 49 W. Va. 520, 522, 39 S.E. 199, 200 (1901).

22. In some states dismissals by consent have been treated as adjudications on the merits. *See* Root v. Topeka Water Supply Co., 46 Kan. 183, 186-87, 26 P. 398, 399 (1890); Bank of the Commonwealth v. Hopkins, 32 Ky. (2 Dana) 395, 395 (1834). In other states the words "with prejudice" are sufficient to make the dismissal an adjudication on the merits. *E.g.*, DeGraff v. Smith, 62 Ariz. 261, 269, 157 P.2d 342, 345 (1945); Harris v. Moye's Estate, 211 Ark. 765, 767-68, 202 S.W.2d 360, 362 (1947); *In re* Estate of Crane, 343 Ill. App. 327, 344-46, 99 N.E.2d 204, 212-13 (1951); Pulley v. Chicago, Rock I. & Pac. Ry., 122 Kan. 269, 270, 251 P. 1100, 1101 (1927); Mayflower Indus. v. Thor Corp., 17 N.J. Super. 505, 511, 86 A.2d 293, 296 (Chan. Div. 1952). In other cases there is an implication that a dismissal with prejudice is considered an adjudication on the merits only where there is evidence of a compromise settlement. *See, e.g.*, Mensing v. Sturgeon, 250 Iowa 918, 97 N.W.2d 145 (1959); Denny v. Mathieu, 452 S.W.2d 114 (Mo. 1970); Max v. Spaeth, 349 S.W.2d 1 (Mo. 1961). At least one state has incorporated the dismissal with prejudice into its rules of civil procedure, providing that such a dismissal "bars the assertion of the same cause of action or claim against the same party." Mo. R. Civ. P. 67.03.

23. 112 Tenn. 637, 82 S.W. 171 (1904).

24. The court's rejection of *retraxit* was stated in broad terms: "We have no case in this State applying the rule of 'retraxit,' and we shall not now adopt it." *Id.* at 654, 82 S.W. at 174. The court's definition of the term, however, clearly limited it to dismissals by consent. *Id.* at 653, 82 S.W. at 173.

25. *Id.* at 644, 82 S.W. at 171.

defendant.[26] The court noted that a consent decree is binding upon the parties to it and cannot be appealed,[27] but rejected the proposition that "the mere dismissal of a cause by consent of parties will bar a future action."[28] Although the question in *Lindsay* was one of collateral estoppel rather than res judicata,[29] the court quoted with approval from one of the landmark res judicata cases, *Haldeman v. United States*:[30]

> There must have been a right adjudicated or released in the first suit to make it a bar, and this fact must appear affirmatively. . . . Suits are often dismissed by the parties, and a general entry is made to that effect, without incorporating in the record, or even placing on file the agreement. It may settle nothing, or it may settle the entire dispute. If the latter, there must be a proper statement to that effect to render it available as a bar. But the general entry of the dismissal of a suit by agreement . . . is a withdrawal of a suit on terms, which may be more or less important. They may refer to costs, or they may embrace a full settlement of the contested points; but, if they are sufficient to bar the plaintiff, the plea must show it.[31]

Thus, the court in *Lindsay* indicated that a consent decree will be given res judicata effect only when it appears that the prior suit was dismissed pursuant to a settlement or adjustment of rights between the parties.[32]

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26. *Id.* at 650, 82 S.W. at 173. The court did not have the prior decree before it and thus construed it alternatively as a voluntary dismissal and as a dismissal by consent, reaching the same result under both constructions.

27. The court cited numerous cases involving consent decrees. *Id.* at 654, 82 S.W. at 174.

28. *Id.* at 655, 82 S.W. at 174.

29. Since the second suit did not involve the same parties, the question was whether the previous dismissal would bar the subsequent suit by different plaintiffs. RESTATEMENT OF JUDGMENTS §§ 86, 93 (1942) (discussing persons bound by a prior adjudication).

30. 91 U.S. 584 (1875).

31. *Id.* at 586, *quoted in* Lindsay v. Allen, 112 Tenn. 637, 652-53, 82 S.W. 171, 174 (1904).

32. This principle was followed in Third Nat'l Bank v. Scribner, 212 Tenn. 400, 370 S.W.2d 482 (1963), in which the court adopted the general rule that consent judgments have the same res judicata effect as judgments rendered after a trial or hearing on the merits. The court held that an order of dismissal by consent which recited that the parties "have compromised and

The effect of a consent dismissal with prejudice was first considered by the Tennessee Supreme Court in *Long v. Kirby-Smith.*[33] As a result of a three-vehicle accident, plaintiffs brought a personal injury action against three defendants. They entered into a covenant not to sue[34] with two of the defendants. Pursuant to this agreement a consent order[35] was entered dismissing the action against the two defendants "with full prejudice."[36] A jury verdict was rendered against the third defendant, who appealed on the ground that the dismissal "with full prejudice" was an adjudication on the merits barring any further suit on the same cause of action.[37]

The court of appeals first determined that the words "with full prejudice" did not make the dismissal a bar; the words were "in themselves ambiguous and uncertain."[38] In order to ascertain the meaning of the words, the court looked to the covenant not to sue[39] and held that the words "with full prejudice" meant "with the full prejudice provided for in plaintiffs' covenant not to sue."[40] Because the covenant provided that plaintiffs could sue the two defendants again, with defendants allowed to plead the covenant as a "set off or Recoupment,"[41] the court held that the order of dismissal was not a bar to the suit against the third defendant. In its holding the court emphasized the consensual

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settled all the matters in controversy and evidenced same by a written agreement," *id.* at 404, 370 S.W.2d at 484, was an adjudication on the merits and thus a bar to a subsequent suit between the same parties on the same cause of action, *id.* at 410, 370 S.W.2d at 487.

33. 40 Tenn. App. 446, 292 S.W.2d 216 (1956).

34. The parties agreed that the document was a covenant not to sue and not a release. *Id.* at 450-51, 292 S.W.2d at 218.

35. Each plaintiff entered such an order, each identical except for the plaintiff's name. The court quoted from only one. *Id.* at 451, 292 S.W.2d at 218.

36. The parties themselves did not sign the orders. *Id.* at 451, 292 S.W.2d at 218.

37. *Id.* at 452, 292 S.W.2d at 219.

38. *Id.* at 454, 292 S.W.2d at 220.

39. "So we think these orders of dismissal must be read and construed with the covenant not to sue, on which such orders were based . . . ." *Id.* at 455, 292 S.W.2d at 220.

40. *Id.*, 292 S.W.2d at 220.

41. *Id.*, 292 S.W.2d at 220.

nature of the dismissal. In accordance with the principle set out in *Lindsay*,[42] the court looked to the substance of the parties' agreement to determine what was settled by the dismissal.

The court, however, offered a second reason why the order could not be a bar to the action against the third defendant: "[T]he Trial Court had no jurisdiction to enter such a decree."[43] In a misleading discussion of the history of dismissals with and without prejudice, the court noted that the power to dismiss with or without prejudice originally was the Chancellor's alone.[44] The court reasoned that since Tennessee has retained separate courts of law and equity the powers of a law judge in Tennessee do not include the powers of the Chancellor; therefore, the judge of a law court has no power to enter a dismissal with prejudice.[45] Although this conclusion would have been apposite to an involuntary dismissal with prejudice, it fails to explain adequately why the parties could not effectively agree to make the judgment a bar by use of the words "with prejudice." The court, relying on *Lindsay*, apparently reasoned that the parties were attempting a *retraxit* and that the dismissal was ineffective as a bar since *retraxit* is not recognized in Tennessee.[46] By failing to note the

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42. *See* notes 23-32 *supra* and accompanying text.

43. 40 Tenn. App. at 456, 292 S.W.2d at 220.

44. The court accepted the modern misapprehension that a dismissal of a bill in equity that was not without prejudice was automatically with prejudice and a bar to a subsequent suit. *Id.*, 292 S.W.2d at 220. This is misleading. The sources unanimously state that in order to plead a prior adjudication in bar of an action, the defendant had to show that the previous suit was determined after a hearing on the merits. A prior judgment on the merits that was without prejudice could not be pleaded in bar. If there had been a converse exception—if a dismissal with prejudice could be pleaded in bar—the sources certainly would so state, and they do not. J. MITFORD, *supra* note 13, at 196; G. COOPER, A TREATISE OF PLEADING ON THE EQUITY SIDE OF THE HIGH COURT OF CHANCERY 270 (New York 1813); F. VAN HEYTHUYSEN, THE EQUITY DRAFTSMAN 431-32 (1st Am. ed. New York 1819); 1 J. SMITH, A TREATISE ON THE PRACTICE OF THE COURT OF CHANCERY 221-22 (2d Am. ed. Philadelphia 1842) (1st ed. London 1835). Moreover, since the role of the Chancellor was to ameliorate the harshness resulting from the strict application of legal rules, it would be anomalous if his discretion, the tool by which such relief was afforded, could be used to achieve a result even harsher than that reached by the application of legal rules.

45. 40 Tenn. App. at 456-58, 292 S.W.2d at 221-22.

46. *Id.* at 456, 292 S.W.2d at 221.

narrow definition of *retraxit* in *Lindsay*, the court broadened the rejection of *retraxit* to encompass dismissals with prejudice. In determining whether an order of dismissal operates as res judicata, the court said, "The decisive test is whether the judgment of dismissal was on the merits . . . ."[47] Since the court found that the dismissal was not on the merits, the words "with full prejudice" were "disregarded as surplusage."[48]

The *Long* decision set Tennessee apart from other jurisdictions in several important respects. First, the court in *Long* clearly held that the phrase "with prejudice" has no "well-recognized legal import"[49] in Tennessee: the words are to be construed in light of the order itself and any agreement upon which it is based. Second, by its misplaced reliance on *Lindsay*, the court broadened the rejection of *retraxit* to include not only dismissals by consent but also dismissals with prejudice. Third, by requiring that to be a bar the dismissal must have been on the merits, the court did explicitly in its second line of reasoning what it had done implicitly in its first line of reasoning. The court accepted the principle of res judicata approved in *Lindsay*: no matter what the form of the dismissal or the phrases used in it, the court will determine its res judicata effect on the basis of a showing of what the dismissal in fact settled.[50] The plaintiff's right to an adjudication on the merits cannot be defeated.

In another case involving the effect of a dismissal with prejudice, *Patrick v. Dickson*,[51] the Supreme Court of Tennessee used *Long* as a touchstone in holding that the dismissal with prejudice of a paternity action in juvenile court for failure to prosecute[52] was not a bar to a subsequent paternity suit between the same parties. The words "with prejudice" were "a nullity"

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47. 40 Tenn. App. at 458, 292 S.W.2d at 221.

48. *Id.*, 292 S.W.2d at 222.

49. Union Indem. Co. v. Benton County Lumber Co., 179 Ark. 752, 761, 18 S.W.2d 327, 330 (1929).

50. *See* Haldeman v. United States, 91 U.S. 584, 586 (1875), *quoted with approval in* Lindsay v. Allen, 112 Tenn. 637, 652-53, 82 S.W. 171, 174 (1904).

51. 526 S.W.2d 449 (Tenn. 1975).

52. Although the order did not state the reason for the dismissal, in light of plaintiff's failure to appear for trial, the supreme court treated the dismissal as one for failure to prosecute. *Id.* at 450.

because the dismissal was not on the merits.[53] Although the court thus affirmed the basic principle set out in *Long*, it noted a significant new element present in *Patrick*: the Tennessee Rules of Civil Procedure. After quoting the *Long* court's determination that law judges have no power to dismiss cases with or without prejudice, the court went on to say, "The present practice is governed by Rule 41 of the Tennessee Rules of Civil Procedure, but, as aforesaid, these rules do not apply to the juvenile court. That court continues to be governed by the common law rules of *Long* . . . ."[54]

Rule 41 of the Tennessee Rules of Civil Procedure, which became effective January 1, 1971,[55] governs dismissal of actions.[56] Incorporated into Rule 41 is the juxtaposition of the dis-

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53. *Id.* at 453. Whether the dismissal was on the merits was important for another reason: pursuant to TENN. CODE ANN. § 28-106 (1955) (current version at TENN. CODE ANN. § 28-1-105 (1980)), plaintiff had the right to bring a second action within one year of the dismissal of the first if the dismissal was not on a ground "concluding [her] right of action." *Id.*

54. 526 S.W.2d at 453.

55. TENN. R. CIV. P. 1 (compiler's notes 1977) (stating effective date of the Rules).

56. Rule 41 provides:

> 41.01. Voluntary dismissal—Effect thereof. — (1) Subject to the provisions of Rule 23.03 or Rule 66 and of any statute, and except when a motion for summary judgment made by an adverse party is pending, the plaintiff shall have the right to take a voluntary nonsuit or to dismiss an action without prejudice by filing a written notice of dismissal at any time before the trial of a cause; or by an oral notice of dismissal made in open court during the trial of a cause; or in jury trials at any time before the jury retires to consider its verdict and prior to the ruling of the court sustaining a motion for a directed verdict. . . .
>
> (2) Notwithstanding the provisions of the preceding paragraph, a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has twice dismissed in any court an action based on or included [*sic*] the same claim.
>
> 41.02. Involuntary dismissal — Effect thereof. — (1) For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him. . . .
>
> (3) Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this Rule 41, other than a dismissal for lack of jurisdiction or for

missal without prejudice[57] and the dismissal which operates as "an adjudication on the merits."[58] This juxtaposition suggests acceptance of the equation between dismissals with prejudice and dismissals which are adjudications on the merits by indicating that adjudication on the merits, like with prejudice, is the opposite of without prejudice.[59] This concept is incompatible with *Long*[60] and *Patrick*,[61] both of which indicated that in Tennessee the phrase "with prejudice" is not equivalent to "on the merits." Nevertheless, following the reasoning of the court in *Patrick*, the effect of the dismissal of an action in a court in which the Rules of Civil Procedure apply[62] would be determined by Rule 41.

Another development related to the res judicata effect of dismissals was the abandonment in the Restatement (Second) of Judgments of the requirement that to be a bar the former adjudication must have been on the merits.[63] The Restatement (Second) of Judgments notes that the interest in finality may require that the former judgment be a bar "even though the substantive issues have not been tried, especially if the plaintiff has failed to avail himself of opportunities to pursue his reme-

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improper venue or for lack of an indispensable party, operates as an adjudication upon the merits.

57. TENN. R. CIV. P. 41.01(1).

58. TENN. R. CIV. P. 41.01(2) and 41.02(3).

59. A dismissal not without prejudice is equivalent to a dismissal with prejudice. A dismissal not without prejudice is also equivalent to an adjudication on the merits. Therefore, a dismissal with prejudice is the equivalent of an adjudication on the merits.

60. *See* notes 33-50 *supra* and accompanying text.

61. *See* notes 51-54 *supra* and accompanying text.

62. The Rules apply to procedure in the circuit and chancery courts and courts of like jurisdiction. TENN. R. CIV. P. 1.

63. *Compare* RESTATEMENT (SECOND) OF JUDGMENTS § 48 (Tent. Draft No. 1, 1973): "A valid and final personal judgment rendered in favor of the defendant bars another action by the plaintiff on the same claim," *with* RESTATEMENT OF JUDGMENTS § 48 (1942): "Where a valid and final personal judgment is rendered *on the merits* in favor of the defendant, the plaintiff cannot thereafter maintain an action on the original cause of action." (emphasis added). In Tennessee the courts have held consistently that to constitute a bar to a subsequent suit, a prior adjudication must have been on the merits. Hurst v. Means, 34 Tenn. (2 Sneed) 546, 547 (1855); First Nat'l Bank v. Ivie, 41 Tenn. App. 187, 197, 293 S.W.2d 34, 38 (1955) and cases cited therein.

dies in the first proceeding."[64] A prior dismissal, therefore, can bar a subsequent suit. Even if a subsequent suit is barred, however, the interest in justice receives considerable protection from the more liberal pleading and amendment provisions of the Federal Rules of Civil Procedure and similar state rules.[65]

In *Garrett v. Corry Foam Products, Inc.*[66] the Supreme Court of Tennessee faced squarely the problem of determining the effect of a dismissal with prejudice. The court's rationale indicated that common-law rules of procedure and traditional notions of res judicata still play a role in the determination of procedural questions. There were two ways in which the court could have found that the prior dismissal constituted a bar to the subsequent action. First, the court could have focused on the order of dismissal itself and could have considered both its consensual nature and its use of the phrase "with prejudice." Quoting extensively from *Long*, the court affirmed that *retraxit* is not recognized in Tennessee;[67] therefore, the dismissal could not automatically be equated with a *retraxit* so as to bar a subsequent suit. Unfortunately, it is uncertain whether the court realized that it had rejected *retraxit* as the equivalent of both a consent dismissal and a dismissal with prejudice. Since the order itself provided no evidence that there had been any settlement or adjustment of rights between the parties,[68] under traditional notions of res judicata the order did not constitute a judgment on the merits. Clearly, therefore, the court followed *Long* in eschewing the determination of res judicata solely on the basis of the form of the dismissal or its use of the meaningless phrase "with prejudice."

Second, the court could have looked beyond the order itself to the entire record in the previous suit. The court did in fact

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64. RESTATEMENT (SECOND) OF JUDGMENTS § 48, Comment a (Tent. Draft No. 1, 1973).

65. RESTATEMENT (SECOND) OF JUDGMENTS § 48, Reporter's Note to Comment d, 43 (Tent. Draft No. 1, 1973).

66. 596 S.W.2d 808 (Tenn. 1980).

67. *Id.* at 810.

68. The only phrase that conceivably could have been interpreted as evidence of an agreement or settlement was "for reasons satisfactory to the Court," which the supreme court evidently found to be too vague and ambiguous to indicate a settlement. *Id.* at 809.

peruse the entire record,[69] but apparently found no evidence of an agreement with which to construe the phrase "with prejudice," as the court in *Long* had done. The court found that the previous judgment "was not a determination of the plaintiff's right of action *on the merits*, unless the words 'with prejudice' can be held to have had that effect."[70] Thus, in neither the order of dismissal itself nor in the record of the previous suit did the court find evidence of an adjudication on the merits.

The court did not attempt to harmonize its decision with Rule 41 of the Tennessee Rules of Civil Procedure;[71] the court simply stated that "nothing in either the text of that rule or in the committee comments thereto changes the law hereinabove discussed, i.e., that *retraxits* are not recognized in Tennessee."[72] In fact, Rule 41 does not encompass the situation in *Garrett*: a dismissal by consent which purported to operate as an adjudication on the merits.[73] Therefore, *Garrett* exemplifies one situation in which the Rules of Civil Procedure will have to be supplemented by common-law procedural rules.

Even more significant was the court's implicit rejection of the less stringent standard for res judicata espoused by the Restatement (Second) of Judgments.[74] The court did not ask whether the plaintiff had an opportunity to litigate the matter fully in the first action; rather, the court asked whether the is-

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69. *Id.*

70. *Id.*

71. *See* note 56 *supra*.

72. 596 S.W.2d at 810.

73. Rule 41.01 contemplates a situation in which the plaintiff voluntarily and unilaterally dismisses his action. The rule generally provides that such a dismissal will be without prejudice and prescribes the one situation in which a dismissal will be an adjudication on the merits. TENN. R. CIV. P. 41.01(2). Rule 41.02 contemplates a situation in which the judge, either on motion of the defendant or upon a determination under another rule, dismisses the plaintiff's action. The rule provides generally that such a dismissal will operate as an adjudication on the merits except that dismissals for lack of jurisdiction, improper venue, or lack of an indispensable party are not adjudications on the merits. TENN. R. CIV. P. 41.02(3). No provision of Rule 41 deals with the situation in *Garrett*, in which both parties agreed to the dismissal and as part of their agreement attempted to decide its res judicata effect.

74. *See* notes 63-65 *supra* and accompanying text.

sues had in fact been determined in the prior suit. In *Garrett* the court made clear that the standard of res judicata which will be applied when the prior suit was dismissed by consent is the traditional standard[75] approved in *Lindsay*: "There must have been a right adjudicated or released in the first suit to make it a bar, and this fact must appear affirmatively."[76]

Unfortunately, the court discussed two issues which might appear to narrow the holding but which in fact should not. First, the court declared that "an additional reason" for its holding was the fact that the dismissal order was signed only by the parties' attorneys and not by the parties themselves.[77] The issue was not whether the absence of the parties' signatures implied their lack of consent to the dismissal; rather, the question discussed by the court was whether the absence of the parties' signatures was determinative of the res judicata effect of the dismissal. Since the *retraxit* is not recognized in Tennessee, the order could not have been a *retraxit* even if signed by the parties. The absence of the parties' signatures was not determinative because, under the court's analysis, the order of dismissal would have had no greater power with the parties' signatures than it had without them. Because it was not an adjudication on the merits, the prior dismissal in *Garrett* would not have barred the subsequent suit even if the order had been signed by the parties.

The second issue addressed by the court was the particular statutory requirements for settlements in workers' compensation cases.[78] Noting that the order of dismissal did not contain a

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75. 596 S.W.2d at 809. "A party who asserts the defense of *res judicata* or estoppel by judgment has the burden of proving it and must show that the right in question was determined *on the merits* in the former judgment." *Id.* (citations omitted).

76. Haldeman v. United States, 91 U.S. 584, 586 (1875), *quoted in* Lindsay v. Allen, 112 Tenn. 637, 652-53, 82 S.W. 171, 174 (1904).

77. 596 S.W.2d at 810.

78. *Id.* at 811. TENN. CODE ANN. § 50-1006 (Supp. 1980) provides:

> Settlement between parties to be approved by court—Costs—Parties.—The interested parties shall have the right to settle all matters of compensation between themselves, but all settlements, before the same are binding on either party, shall be reduced to writing and shall be approved by the judge of the circuit court or of the

finding by the trial judge that the settlement was in the employee's best interest, the court said that the order "for this reason, too, is invalid as a judgment on the merits."[79] The court's emphasis on the principles of *Long* made clear that it rejected this more narrow basis for its holding in favor of a broader holding applicable not just to workers' compensation cases. If the order of dismissal had contained a finding that the "settlement [was] . . . for the best interest of the employee,"[80] there necessarily would have been evidence of the settlement, and the court, therefore, would have found that the dismissal was on the merits. The requirement that to be a bar the consent dismissal must have been on the merits in traditional res judicata terms is applicable to all actions, including workers' compensation suits.

The court's message to the practitioner is unmistakable. When an action is dismissed by consent because of a settlement, the fact of settlement must be reflected in the record. If it is not feasible to file the written agreement with the court, the order of dismissal should at least reflect the fact that a settlement has been reached. If no settlement or adjustment of rights has been made, the defendant cannot expect protection from a subsequent suit by the use of the words "with prejudice" in the dismissal order. If the phrase "with prejudice" was ever known as a

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chancery court or criminal court of the county where the claim for compensation is entitled to be made. It shall be the duty of the judge of the circuit court or of the chancery court or criminal court to whom any proposed settlement shall be presented for approval under this law, to examine the same to determine whether the employee is receiving, substantially, the benefits provided by the Workers' Compensation Law. . . . Upon such settlement being approved, judgment shall be rendered thereon by the court and duly entered by the clerk. . . . Notwithstanding any other provision of this section, whenever there is a dispute between the parties as to whether or not a claim is compensable or the amount of compensation due, the parties may settle such matter without regard to whether the employee is receiving substantially the benefits provided by the Workers' Compensation Law provided such settlement is approved by a court having jurisdiction of workers' compensation cases and provided further such settlement is found by the court to be for the best interest of the employee.

79. 596 S.W.2d at 811.

80. TENN. CODE ANN. § 50-1006 (Supp. 1980).

shorthand way to indicate that a suit had been settled, it can no longer be accorded that status.

The implication of the court's holding in *Garrett* is that a plaintiff will not be allowed to relinquish voluntarily his cause of action without a settlement or some adjustment of rights between the parties; that is, a plaintiff cannot defeat his own right to an adjudication on the merits. This is the policy embodied with certain limitations in Rule 41.01 of the Tennessee Rules of Civil Procedure[81] regarding voluntary dismissals; a dismissal should not have a greater effect because the plaintiff has secured the defendant's consent to the dismissal. Although arguments of judicial economy might be made for automatically equating a consent dismissal or a dismissal with prejudice with an adjudication on the merits which will bar a subsequent suit, the competing interest in justice is better served by not according any such talismanic quality to a particular form or to particular words. Likewise, an inference of settlement should not be drawn from the consensual nature of a dismissal, which may have resulted from social or economic pressures.[82] Adherence to traditional notions of res judicata requires that evidence of a settlement or of some adjustment of rights be shown before the prior dismissal will constitute a bar. If there has been a settlement, such a showing would not be burdensome.

In *Garrett v. Corry Foam Products, Inc.* the Tennessee Supreme Court clearly announced its intention to apply traditional notions of res judicata in determining whether a prior dismissal will bar a subsequent suit between the same parties on the same cause of action. Neither the consensual nature of a dismissal nor its use of the words "with prejudice" is evidence of an adjudication on the merits. The court made clear that either the order of dismissal itself or the record in the previous action must show an actual settlement or adjustment of rights between the parties.

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81. *See* note 56 *supra*.

82. That such pressures might force a dismissal is especially true when, as in the principal case, there is an employer-employee relationship. The employee's fear of possible future reprisals by the employer, coupled with the inherent inequality of bargaining power between the employer and the employee, conceivably could influence the employee to agree to a consent dismissal with prejudice. *See* 2 A. LARSON, WORKMEN'S COMPENSATION § 68.36 (Desk ed. 1980).

In *Garrett* the court demonstrated both a salutary regard for assuring justice through procedural safeguards and an admirable determination not to sacrifice the interest in a just resolution of conflicts to the interest in finality.

JUDY MAE CORNETT

# Patent Law— Statutory Subject Matter— Genetically Engineered Microorganisms

*Diamond v. Chakrabarty*, 447 U.S. 303 (1980)

Respondent Chakrabarty filed a patent application[1] relating to his creation of a new strain of bacteria[2] with the ability to degrade multiple components of crude oil.[3] The application asserted thirty-six claims[4] of three kinds: (1) Claims for the process of manufacturing the bacteria,[5] (2) claims for the inoculum

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1. Chakrabarty's patent application was assigned to the General Electric Company. Diamond v. Chakrabarty, 447 U.S. 303, 305 (1980). Under the patent laws "[a]pplications for patent, patents, or any interest therein, shall be assignable in law." 35 U.S.C. § 261 (1976).

2. Bacteria are microscopic single-celled organisms occurring naturally in air, water, and soil, and in the bodies of living plants and animals. Bacteria aid in the decomposition of organic matter into food for plant and animal life. 2 McGraw-Hill Encyclopedia of Science and Technology 4, 8 (1977). Bacteria are classified according to genus and species and are described as a pure culture. Each pure culture with different characteristics is called a strain. *Id.* at 8.

3. Chakrabarty's bacteria are capable of degrading four different components of crude oil. 447 U.S. at 305 n.1. Crude oil (unrefined petroleum) is composed primarily of hydrocarbons. 10 McGraw-Hill Encyclopedia of Science and Technology 64 (1977). Each hydrocarbon can be broken down by specific bacteria into carbohydrate, fat, and protein constituents. *Id.* at 72. At present, a mixed culture of bacteria, each with the ability to degrade a particular component of crude oil, is used in the control of oil spills. The culture converts the various hydrocarbons into a soluble food mass for aquatic life. However, the mixed culture lacks stability and is unable to degrade a large amount of oil before disintegrating. The use of a single bacterial strain capable of breaking down multiple hydrocarbons signals a more efficient control of oil spills. 447 U.S. at 305 n.2.

4. Serial No. 260,563 entitled "Microorganisms Having Multiple, Compatible Degradative Energy-Generating Plasmids and Preparation Thereof" filed June 7, 1972. *In re* Chakrabarty, 571 F.2d 40, 41 (C.C.P.A. 1978), *aff'd*, Diamond v. Chakrabarty, 447 U.S. 303 (1980).

5. Chakrabarty's bacteria do not occur in nature; Chakrabarty created the bacteria by transmitting extrachromosomal hereditary units (plasmids) of various strains of bacteria, each capable of degrading a component of crude oil, into a single bacterial cell (genus *Pseudomonas*). 447 U.S. at 305 n.1.

containing the bacteria,[6] and (3) claims for the bacteria themselves.[7] The patent examiner allowed the first two kinds of claims,[8] rejecting the claims to the bacteria on the grounds that microorganisms[9] are products of nature[10] and that living organisms are not within the statutory subject matter of the patent law.[11] The Patent Office Board of Appeals affirmed the rejection on the ground that living organisms are not patentable subject matter.[12] The Court of Customs and Patent Appeals (C.C.P.A.) reversed on the authority of its recent decision in a similar

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Chakrabarty's creation encompasses the developing technology of genetic engineering, or recombinant DNA research. DNA is short for deoxyribonucleic acid, "the complex chemical that codes genetic information for all living cells." 43 Fed. Reg. 60,080 (1978) (Nat'l Inst. of Health Revised Guidelines, Recombinant DNA Research). DNA molecules are found in genes, which in turn are contained in the chromosomes of cells and, in the case of bacteria, in plasmids. 4 McGRAW-HILL ENCYCLOPEDIA OF SCIENCE AND TECHNOLOGY 81, 82B (1977). Genetic engineering involves "[t]he intentional production of new genes . . . by the substitution or addition of new genetic material." McGRAW-HILL DICTIONARY OF THE LIFE SCIENCES 339 (1976).

6. An inoculum is a substance containing bacteria from a pure culture which is used to introduce the bacteria into another substance. McGRAW-HILL DICTIONARY OF THE LIFE SCIENCES 426.

7. 447 U.S. at 305-06.

8. Pat. no. 3,923,603, 941 Off. Gaz. Pat. Office 299 (1975).

9. Microorganisms are simple organisms, visible only with the aid of a microscope; they are ordinarily unicellular and include the protozoa, algae, fungi, and bacteria. 8 McGRAW-HILL ENCYCLOPEDIA OF SCIENCE AND TECHNOLOGY 407, 418 (1977).

10. *In re* Chakrabarty, 571 F.2d 40, 42 (C.C.P.A. 1978). Certain inventions have been denied patents on the ground that they are "products of nature." *See* Federico, *Section 101: Subject Matter for Patents*, in THE LAW OF CHEMICAL, METALLURGICAL AND PHARMACEUTICAL PATENTS 53, 71-74 (H. Forman ed. 1967) [hereinafter cited as Federico]. For the discussion of the "product of nature" doctrine see note 46 *infra* and accompanying text.

11. 571 F.2d at 42. The Patent Act provides that "[w]hoever 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 (1976).

12. Finding that the bacteria did not exist in nature, the Board abandoned the "product of nature" doctrine. Instead, the Board looked to the Plant Patent Act of 1930, ch. 112, 46 Stat. 376, *see* text accompanying note 33 *infra*, and concluded that Congress did not intend § 101 of the Patent Act to encompass living organisms such as bacteria.

case.[13] Upon request, however, the C.C.P.A. vacated the decision for reconsideration.[14] After reconsideration the C.C.P.A. reaffirmed its earlier judgment and held "the fact that microorganisms are alive is a distinction without legal significance."[15] On certiorari to the United States Supreme Court, *held*, affirmed.[16] A live, human-made microorganism is patentable subject matter as a manufacture or composition of matter within the meaning of section 101 of the Patent Act.[17] *Diamond v. Chakrabarty*, 447 U.S. 303 (1980).

The Constitution gives Congress the power to "promote the

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13. *In re* Chakrabarty, 571 F.2d 40 (C.C.P.A. 1978). Prior to its consideration of *Chakrabarty*, the Court of Customs and Patent Appeals had decided *In re* Bergy, 563 F.2d 1031 (C.C.P.A. 1977), which involved a similar issue. Applicant Bergy had discovered an unknown microorganism, *Streptomyces vellosus*, which he was able to isolate as a pure culture. Under the proper laboratory conditions, *Streptomyces vellosus* produced the antibiotic lincomycin, which was previously obtained from *Streptomyces lincolnensis*. The use of *Streptomyces vellosus* resulted in a more efficient recovery of the antibiotic. A patent application was filed for the process, and later amended to include a claim to a biologically pure culture of the microorganism itself. The patent examiner allowed the claim to the process but rejected the claim to the culture, and the Patent Office Board of Appeals affirmed. The Court of Customs and Patent Appeals reversed and held that a biologically pure culture of microorganisms constitutes a manufacture or composition of matter. 563 F.2d at 1038. On the basis of its *Bergy* decision, the Court of Customs and Patent Appeals reversed the prior *Chakrabarty* decision. 571 F.2d at 40. On certiorari, the Supreme Court vacated and remanded the *Bergy* case for reconsideration in light of Parker v. Flook, 437 U.S. 584 (1978). Parker v. Bergy, 438 U.S. 902 (1978). The Supreme Court's action cast doubt on *Bergy*, the basis for the *Chakrabarty* decision, and therefore, the Court of Customs and Patent Appeals vacated the *Chakrabarty* decision and consolidated the case for rehearing with *Bergy*. *In re* Bergy, 596 F.2d 952, 955 (C.C.P.A. 1979). After the court reaffirmed the earlier judgments, the United States Supreme Court granted certiorari. 444 U.S. 924 (1979). Bergy subsequently withdrew his patent application, [1980] PAT., T.M., & COPYRIGHT J. No. 462, A-11 (Jan. 17) and only *Chakrabarty* was left for decision.

14. *See* [1978] PAT., T.M., & COPYRIGHT J. No. 391, AA-1 (Aug. 17). *See* note 13 *supra*.

15. 596 F.2d at 975.

16. 447 U.S. at 318.

17. 35 U.S.C. § 101 (1976). *See* text accompanying note 37 *infra*. The terms "manufacture" and "composition of matter" can be considered synonymous. *See also* Federico, *supra* note 10, at 58.

Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries"[18] and to "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers."[19] The patent laws[20] advance this goal by granting exclusive rights[21] for a limited time[22] to inventors as a spur to research[23] and in exchange for the disclosure of their resulting inventions and discoveries.[24] Since their inception, the

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18. U.S. CONST. art. I, § 8, cl. 8.

19. *Id.* art. I, § 8, cl. 18.

20. 35 U.S.C. §§ 1-293 (1976).

21. A patent gives the patentee "the right to exclude others from making, using, or selling the invention throughout the United States." *Id.* § 154. To protect the patent right, the patent laws provide that "whoever without authority makes, uses or sells any patented invention, within the United States during the term of the patent therefor, infringes the patent." *Id.* § 271. A patentee whose patent has been infringed may bring a civil action, *Id.* § 281, and obtain an injunction, *Id.* § 283, as well as "damages adequate to compensate for the infringement." *Id.* § 284.

22. Currently, the term of a patent is 17 years. *Id.* § 154. Prior to 1836, the term of years was 14. Federico, *Commentary on the New Patent Act*, 35 U.S.C.A. 1, 4 (1954).

23. Kewanee Oil Co. v. Bicron Corp., 416 U.S. 470, 480 (1974). *See* Price, *Basic Philosophy of American Patent System*, (pt. 2), in THE LAW OF CHEMICAL, METALLURGICAL AND PHARMACEUTICAL PATENTS 15, 20-22 (H. Forman ed. 1967).

24. The primary purpose of the patent laws is "the advancement of the arts and sciences. Its inducement is directed to disclosure of advances in knowledge which will be beneficial to society . . . ." Sinclair & Carroll Co. v. Interchemical Corp., 325 U.S. 327, 330-31 (1945) (footnote omitted). To insure disclosure, the patent laws provide that a patent application "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, . . . to make and use the same." 35 U.S.C. § 112 (1976). For failure to describe adequately the invention, a patentee can have his or her patent invalidated. *Cf.* Guaranty Trust Co. v. Union Solvents Corp., 54 F.2d 400, 403 (D. Del. 1931) (defense to alleged patent infringement based on failure of patentee to describe adequately the invention).

The inventor of a product with commercial potential has two options: to apply for a patent or to attempt to keep the invention a trade secret. *See* Woodcock, *What is Prior Art*, in THE LAW OF CHEMICAL, METALLURGICAL AND PHARMACEUTICAL PATENTS 87, 150 (H. Forman ed. 1967). States can provide monopoly protection to inventions under state trade secret laws, even though the invention may be patentable subject matter. Kewanee Oil Co. v. Bicron

patent laws have responded, through legislative revision and judicial interpretation, to the need to extend patent protection to developing technologies.[25] Now, because of the rapidly expanding field of microbiology, the Patent Office is faced with hundreds of applications for patents relating to genetic engineering.[26] *Diamond v. Chakrabarty* represents the first case in which the Supreme Court has had to determine whether the patent laws are intended to include human-made microorganisms. In addressing the issue, the Court limited itself to the narrow question of whether the microorganism fell within the statutory subject matter of "manufacture" or "composition of matter" as provided by section 101 of the Patent Act.[27]

The first patent law was enacted by Congress in 1790.[28] By

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Corp., 416 U.S. 470 (1974). *See* P. ROSENBERG, PATENT LAW FUNDAMENTALS 15-18 (1975). If a patent is issued on the invention the general public is benefited; those knowledgeable in the art will be able to understand the invention and improve upon it, thereby advancing the art as a whole. If the inventor chooses to keep the invention a trade secret, however, others may not be able to improve upon it, which would be detrimental to the public.

25. *See* notes 32, 40, & 46 *infra* and accompanying text.

26. "The research techniques used to produce recombined molecules of deoxyribonucleic acid [recombinant DNA] . . . hold great promise for significantly advancing our understanding of fundamental biological processes. Moreover, this research may also hold potential for the commercial production of needed biological materials and agricultural products." 43 Fed. Reg. 60,080 (1978) (Nat'l Inst. of Health Revised Guidelines, Recombinant DNA Research). Aside from the potential benefits to humankind to be derived from microbiology, microbiological research is now big business. For example, Genentech, a San Francisco corporation, focuses on production of chemicals and pharmaceuticals through genetic engineering. The corporation's gross revenues have soared from $856,335 in 1978 to $3.5 million in the first six months of 1980. Genentech is the first such company to offer its stock to the public and shares are now on sale. Other companies are also involved in the commercial field of genetic engineering, and the U.S. Patent and Trademark Office has over 100 recombinant DNA patent applications to consider. TIME, Oct. 20, 1980, at 72. *See also* Holst, *Basic Philosophy of American Patent System*, (pt. 1), in THE LAW OF CHEMICAL, METALLURGICAL AND PHARMACEUTICAL PATENTS 3 (H. Forman ed. 1967).

27. 447 U.S. at 307. The Court determined that the case at bar did not involve the other statutory conditions of patentability, such as novelty and nonobviousness. *Id.* at 307 n.5. *See* note 37 and accompanying text *infra*.

28. Act of April 10, 1790, ch. 7, 1 Stat. 109. The Act was entitled "Act to promote the progress of useful arts." Authority to grant patents was vested in

the Act of 1870,[29] the patent laws were revised and consolidated, and subsequently were codified by enactment of the Revised Statutes of 1874.[30] Section 4886 of the Revised Statutes contained the conditions of patentability, as well as statutory subject matter.[31] By the Plant Patent Act of 1930,[32] the section was amended to include a provision for the patenting of certain newly cultivated, asexually reproduced varieties of plants.[33] The Patent Act of 1952,[34] currently in force, represents the first com-

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a Board including the Secretary of State, the Attorney General, and the Secretary of War. *Id.* § 1. Under the Act of July 4, 1836, ch. 357, §§ 1 & 7, 5 Stat. 117, the Patent Office was created and, among other things, empowered to examine patent applications.

29. Act of July 8, 1870, ch. 230, 16 Stat. 198.

30. R.S. §§ 475-496 & 4883-4936 (1874).

31. Any person who has invented or discovered any new and useful art, machine, manufacture or composition of matter, or any new and useful improvement thereof, not known or used by others in this country, and not patented or described in any printed publication in this or any foreign country, . . . may . . . obtain a patent therefor.

*Id.* § 4886.

32. Act of May 23, 1930, ch. 312, 46 Stat. 376.

33. *Id.* § 1. The section read, *inter alia*: "any person . . . who has invented or discovered and asexually reproduced any distinct and new variety of plant, other than a tuber-propagated plant, . . . may . . . obtain a patent therefor." In the early days of patent law, plant breeding had not developed as an art, and the courts refused to recognize plants as patentable subject matter on the ground that a plant represented a product of nature. *See Ex parte* Latimer, 46 Off. Gaz. Pat. Office 1638 (1889) (Commissioner of Patents held that fiber derived from the needle of the *Pinus australis* was a product of nature and not subject to patent). *See* Thorne, *Relation of Patent Law to Natural Products*, 6 J. PAT. OFF. SOC'Y 23 (1923). As the science of plant breeding developed, it was recognized that nonnaturally occurring varieties of plants could be cultivated. Congress enacted the Plant Patent Act of 1930 "to afford agriculture . . . the same opportunity to participate in the benefits of the patent system as has been given industry, and thus assist in placing agriculture on a basis of economic equality with industry." *In re* Arzberger, 112 F.2d 834, 837 (C.C.P.A. 1940) (quoting H.R. REP. No. 1129, 71st Cong., 2d Sess. 1 (1930)). The C.C.P.A. in *Arzberger* also found that, although Congress intended the Plant Patent Act of 1930 to assist agriculture, bacteria were not patentable as a plant within the meaning of the Act. *Id.* at 838. *See* Dienner, *Patents for Biological Specimens and Products*, 35 J. PAT. OFF. SOC'Y 286 (1953). For a discussion of the Plant Patent Act of 1930, see Magnuson, *A Short Discussion on Various Aspects of Plant Patents*, 30 J. PAT. OFF. SOC'Y 493 (1948).

34. Pub. L. No. 593, ch. 950, 66 Stat. 792, approved July 19, 1952 [codi-

plete revision of the patent law since 1870.[35]

The Patent Act of 1952 divided statutory subject matter and conditions of patentability[36] into separate sections. Section 101 defines statutory subject matter and provides: "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."[37] Under the Patent

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fied in 35 U.S.C. §§ 1-293 (1976)].

35. Federico, *Commentary on the New Patent Act*, 35 U.S.C.A. 1, 2 (1954).

36. *See* note 37 *infra*.

37. 35 U.S.C. § 101 (1976). Section 102 specifies the requirement of novelty and provides, in part: "A person shall be entitled to a patent unless—(a) the invention was known or used by others . . . or described in a printed publication . . . ." *Id.* § 102. Although § 101 refers to "any new and useful" invention, the term "new" is construed in conjunction with the § 102 requirement of novelty. Graham v. John Deere Co., 383 U.S. 1, 12 (1966). *See* Federico, *supra* note 10, at 56. The term "useful" implies that the invention is capable of performing its intended function and also that it "may be applied to a beneficial use in society, in contradistinction to an invention injurious to the morals, health, or good order of society." Brenner v. Manson, 383 U.S. 519, 533 (1966) (quoting Bedford v. Hunt, 3 F. Cas. 37 (C.C.D. Mass. 1817) (No. 1217)). *See also* Rickard v. DuBon, 97 F. 96 (D. Conn. 1899), *aff'd*, 103 F. 868 (2d Cir. 1900) (patent for method of artifically spotting inferior tobacco leaves to resemble leaves of superior quality held invalid as against public policy). *But see* Denton v. Fulda, 225 F. 537 (2d Cir. 1915) (patent upheld for method of producing simulated precious stones). *See generally* Federico, *supra* note 10, at 56-57.

The Patent Act of 1952 also codified the judicial requirement of nonobviousness, and provides:

> A patent may not be obtained . . . 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.

35 U.S.C. § 103 (1976). Prior to 1952, the courts had recognized the concept of nonobviousness and used it to invalidate patents on the ground of lack of invention. *See* Hotchkiss v. Greenwood, 52 U.S. 615, 11 How. 248 (1851). The codification of nonobviousness as a statutory requirement was an attempt to codify the judicial precedents of the day. Graham v. John Deere Co., 383 U.S. 1, 3 (1966). The term "prior art" refers to that which is deemed to be within the public's knowledge, even if as yet undiscovered. *See generally* Woodcock, *What Is Prior Art*, in THE LAW OF CHEMICAL, METALLURGICAL AND PHARMACEU-

Act of 1952, the Plant Patent Act was revised and incorporated under a new chapter heading.[38] At present section 161 provides:

> Whoever invents or discovers and asexually reproduces any distinct and new variety of plant, including cultivated sports, mutants, hybrids, and newly found seedlings, other than a tuberpropagated plant or a plant found in an uncultivated state, may obtain a patent therefor . . . , subject to the conditions and requirements of this title.[39]

More recently Congress, recognizing the possibility of breeding plants which reproduce sexually, enacted the Plant Variety Protection Act of 1970,[40] which provides, in part: "The breeder of any novel variety of sexually reproduced plant (other than fungi, bacteria, or first generation hybrids) who has so reproduced the variety . . . shall be entitled to plant variety protection therefor."[41]

Thus, as well as satisfying the additional conditions of patentability,[42] a microorganism as excluded under the Plant Acts

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TICAL PATENTS 87 (H. Forman ed. 1967).

38. 35 U.S.C. §§ 161-164 (1976).

39. *Id.* § 161. Section 161 incorporated the Plant Patent Act of 1930 into the present patent laws, and all the rules and requirements pertinent to basic patent law are applicable to plant patents. *In re* LeGrice, 301 F.2d 929, 933 (C.C.P.A. 1962). However, the strict description requirement of § 112, *see* note 24 *supra*, was relaxed to give considerable latitude to plant specifications. Section 162 provides: "No plant patent shall be declared invalid for noncompliance with section 112 of this title if the description is as complete as is reasonably possible." 35 U.S.C. § 162 (1976).

40. Pub. L. No. 91-577, tit. I, § 1, Dec. 24, 1970, 84 Stat. 1542 (codified in 7 U.S.C. §§ 2321-2583 (1976)).

41. 7 U.S.C. § 2402 (1976). Although the reason for the exclusion of fungi and bacteria is not given in the Act, a likely possibility is the fact that the term "plant" does not encompass bacteria or fungi, but rather includes only those organisms within the common dictionary meaning of the term—trees, bushes, and the like. *See In re* Arzberger, 112 F.2d 834, 837 (C.C.P.A. 1940) (holding that bacteria do not constitute patentable subject matter within the Plant Patent Act of 1930). The exclusion of bacteria may also reflect the growing trend in biology to class single-celled organisms which are not readily apparent as either plant or animal within their own kingdom—Protista. Such unicellular organisms include the bacteria, molds, fungi, and algae. *See* 11 MCGRAW-HILL ENCYCLOPEDIA OF SCIENCE AND TECHNOLOGY 47 (1977).

42. "The obligation to determine what type of discovery is sought to be patented must precede the determination of whether that discovery is, in fact,

must fit into one of the four statutory classes of subject matter within the Patent Act of 1952 in order to qualify for a patent: Process, machine, manufacture, and composition of matter.[43] These four categories can in turn be considered to embrace two types of claims: Process claims and product claims.[44]

The courts consistently have denied patent protection to certain classes of inventions on the ground that, although not expressly excluded by the patent laws, they nevertheless fall outside the scope of statutory subject matter.[45] One line of cases involves the product of nature doctrine, by which an invention is held to fall outside the scope of manufacture as used in section 101 because it exists in nature.[46] An analogous line of cases has

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new or obvious." Parker v. Flook, 437 U.S. 584, 593 (1978).

43. 35 U.S.C. § 101 (1976). "The term 'process' means process, art, or method, and includes a new use of a known process, machine, manufacture, composition of matter, or material." *Id.* § 100(b). A machine is "the conception of a mechanical force operating in a specific manner through agents of a specific character." W. ROBINSON, 1 THE LAW OF PATENTS § 173 (1890). A manufacture is "an instrument created by the exercise of mechanical forces and designed for the production of mechanical effects." *Id.* § 182. A composition of matter is "an instrument formed by the intermixture of two or more ingredients, and possessing properties which belong to none of these ingredients in their separate state." *Id.* § 192.

44. The last three categories are considered product claims. *See* Federico, *supra* note 10, at 58; 29 CATH. U.L. REV. 485 (1980).

45. There are certain inventions such as those relating to atomic weapons which have been expressly denied patent protection. For example, 42 U.S.C. § 2181(a) (1976) provides: "No patent shall hereafter be granted for any invention or discovery which is useful solely in the utilization of special nuclear material or atomic energy in an atomic weapon." For a discussion of those inventions which are excluded from patent protection in other countries as well as in the United States see Federico, *supra* note 10, at 59-60.

46. *See* General Electric Co. v. De Forest Radio Co., 28 F.2d 641 (3d Cir. 928), *cert. denied*, 278 U.S. 656 (1928) (holding invalid a patent on pure tungsten, a chemical element). "[A] patent cannot be awarded for a discovery or for a product of nature, or for a chemical element." *Id.* at 642. *See generally* Federico, *supra* note 10, at 71-74. Purified products of nature have presented a problem to the courts, although generally patents have been upheld for these products when they are found to constitute a new and useful composition of matter. *See* Merck & Co. v. Olin Mathieson Chemical Corp., 253 F.2d 156 (4th Cir. 1958) (purified B-12 active composition); Parke-Davis & Co. v. H.K. Mulford Co., 189 F. 95 (S.D.N.Y. 1911), *aff'd*, 196 F. 496 (2d Cir. 1912) (adrenalin extracted from animal glands, purified and crystallized); *accord*, Dick v. Led-

involved the principle that laws of nature[47] cannot be patented.[48] The reason given for denying patent protection to discoveries of products of nature or laws of nature is that the public owns that which exists in nature, even those phenomena yet undiscovered, and "the public must not be deprived of any rights that it theretofore freely enjoyed."[49]

In *American Fruit Growers Inc. v. Brogdex Co.*[50] the Supreme Court had to determine the validity of a patent related to the art of preparing fresh fruit for market. Plaintiff had discovered a method of impregnating the rind of fresh fruit such as

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erle Antitoxin Laboratories, 43 F.2d 628 (S.D.N.Y. 1930) (sterile toxin specific to scarlet fever and scarlet fever antitoxin). *Contra, In re* King, 107 F.2d 618 (C.C.P.A. 1939) (purified vitamin C held unpatentable).

47. The term "laws of nature" is synonymous with "phenomena of nature" and "principles of nature." *See generally* Gottschalk v. Benson, 409 U.S. 63, 67 (1972); Funk Bros. Seed Co. v. Kalo Inoculant Co., 333 U.S. 127, 130 (1948); *In re* Chatfield, 545 F.2d 152, 157 (C.C.P.A. 1976).

48. *See* Funk Bros. Seed Co. v. Kalo Inoculant Co., 333 U.S. 127 (1948) (invention which relied on discovery of mutually noninhibitory characteristics of bacterial strains held unpatentable). "A principle, in the abstract, is a fundamental truth; an original cause; a motive; these cannot be patented, as no one can claim in either of them an exclusive right." Le Roy v. Tatham, 56 U.S. 108, 112, 14 How. 156 (1852). "A patent could not issue, in other words, on the law of gravity, or the multiplication tables, or the phenomena of magnetism . . . - even though newly discovered." Parker v. Flook, 437 U.S. 584, 598 (1978) (Stewart, J., dissenting). Although a law of nature cannot be patented, a new product which results from the application of a law of nature is patentable. *See* Mackay Radio & Tel. Co. v. Radio Corp. of America, 306 U.S 86, 94 (1939) (directive antenna system which relied on radio waves); Eibel Process Co. v. Minnesota & Ont. Paper Co., 261 U.S. 45, 63 (1923) (improvement on papermaking machines utilizing law of gravity); *cf.* Schering Corp. v. Gilbert, 153 F.2d 428, 432 (2d Cir. 1946) (new molecule resulting from chemical reactions).

49. Parker v. Flook, 437 U.S. 584, 593 n.15 (1978) (quoting P. ROSENBERG, PATENT LAW FUNDAMENTALS § 4, at 13 (1975)). The concepts of "product of nature" and "law of nature" are related, yet distinct, concepts. However, the courts often refer to the two interchangeably, especially with respect to a product claim, the patent for which would result in a monopoly over a law of nature. *See* 47 MICH. L. REV. 391, 393-98 (1949). *Cf.* Funk Bros. Seed Co. v. Kalo Inoculant Co., 333 U.S. 127, 134-35 (1948) (Frankfurter, J., concurring).

50. 283 U.S. 1 (1931). *American Fruit* involved an action for patent infringement. *See* note 21 *supra*. Patents are presumed valid in actions for infringement; one defense to infringement is to attack the validity of the patent alleged to have been infringed upon any of the statutory conditions of patentability. 35 U.S.C. § 282 (1976).

oranges with a borax solution; this treatment rendered the fruit resistant to decay by blue mold.[51] The Court held that the treated fruit was not a manufacture and invalidated the patent.[52] The Court reasoned that to be a manufacture there must be a "transformation; a new and different article must emerge,"[53] and the treated fruit in the instant case did not satisfy that requirement because "[t]here is no change in the name, appearance, or general character of the fruit";[54] the fruit retained "the same beneficial uses as theretofore."[55]

In *Funk Bros. Seed Co. v. Kalo Inoculant Co.*[56] the Court was faced with determining the validity of a patent on a culture of naturally occurring bacteria. Plaintiff had discovered the existence of mutually noninhibitory strains of bacteria which, when mixed in a culture and used to inoculate[57] the seeds of leguminous plants, increased the ability of those plants to fix nitrogen.[58] The Court held the mixed culture unpatentable as an invention,[59] reasoning that plaintiff had merely discovered an unknown phenomenon of nature since he did not create the non-

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51. Blue mold is a fungus, the spores of which attack the skin of citrus fruit; it is responsible for a large percentage of the losses incurred in marketing the fruit. 283 U.S. at 7. Boric acid was known to defeat the growth of blue mold spores prior to plaintiff's discovery, but his was the first borax solution to work without corroding the fruit. *Id.* at 8-9.

52. *Id.* at 11. The Court also held that the process claim for preparing the borax solution and applying it to the fruit was invalid for want of novelty, because of a prior patent utilizing boric acid to preserve food. *Id.* at 13.

53. *Id.*

54. *Id.* at 12.

55. *Id.*

56. 333 U.S. 127 (1948).

57. Inoculation is "the introduction of . . . bacteria . . . into various . . . processes that employ the chemical reactivity of these organisms." 7 McGRAW-HILL ENCYCLOPEDIA OF SCIENCE AND TECHNOLOGY 131 (1977).

58. Leguminous plants utilize elemental nitrogen ($N_2$) taken from the soil in converting organic food. Rhizobium bacteria, which infect the roots of leguminous plants, are a necessary adjunct to this process. The bacteria transfer the $N_2$ from the air to the soil. The various strains of the bacteria each infect a particular species of leguminous plants. Prior to plaintiff's discovery it was believed that each bacterial strain inhibited the action of the other strains when mixed together. 333 U.S. at 128-32. Plaintiff's mixed culture enabled farmers to purchase only one inoculant for use on a variety of crops. *Id.* at 129.

59. *Id.* at 132.

inhibitory qualities of the bacteria.[60] The Court concluded that in order for a discovery of a law of nature to result in a patentable invention, there must be an "application of the law of nature to a new and useful end,"[61] whereas in the instant case, the bacteria "serve the ends nature originally provided and act quite independently of any effort of the patentee."[62]

In spite of the product of nature doctrine and the principle that laws of nature cannot be patented, the courts have not hesitated to uphold process patents which rely on the use of newly discovered living things.[63] In *Dick v. Lederle Antitoxin Laboratories*[64] a patent for the process of producing scarlet fever toxin using streptococci was upheld.[65] *Guaranty Trust Co. v. Union Solvents Corp.*[66] involved a patent on the process for producing acetone and butyl alcohol by the fermentation of natural substances; fermentation is a chemical change brought about by bacteria.[67] It was argued that the process was not patentable because it depended upon the "life process of a living organism."[68] The district court rejected this argument and held the patent valid.[69] In *Ex parte Prescott*[70] the Patent Office Board of Ap-

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60. *Id.* at 130.

61. *Id.*

62. *Id.* at 131.

63. Microorganisms are important tools in the making of such products as wine, cheese, and butter. They are used in the preservation of foods and in the production of chemical substances as well as vitamins and antibiotics. *See* 7 McGRAW-HILL ENCYCLOPEDIA OF SCIENCE AND TECHNOLOGY 93 (1977). For a discussion of the importance of processes utilizing microorganisms in the pharmaceutical field and the history thereof, see Robbins, *Patents for Microbiological Transformations—An International Problem*, 42 J. PAT. OFF. SOC'Y 830 (1960).

64. 43 F.2d 628 (S.D.N.Y. 1930).

65. *Id.* at 639. Streptococci are microorganisms which cause scarlet fever and which can be cultivated in a culture medium to produce the scarlet fever toxin. The toxin obtained by this method is injected into an animal, thus producing an antitoxin to scarlet fever which can be administered to humans. *Id.* at 629. The court also upheld the product claims to the scarlet fever toxin and antitoxin. *See* note 46 *supra*.

66. 54 F.2d 400 (D. Del. 1931).

67. *Id.* at 403.

68. *Id.* at 410.

69. *Id.*

70. 19 U.S.P.Q. 178 (Pat. Off. Bd. App. 1932).

peals reversed the rejection of a claim to bacteriological fermentation processes for the production of butyl and isopropyl alcohols.[71] The Board held that processes utilizing bacterial action constitute patentable subject matter[72] and observed that although fermentation "is an inherent function of the bacteria, a power given it by nature,"[73] the claim is to the process and not to the power itself.[74]

Although the principle that laws of nature are not patentable was formulated early in the patent law, it has been resurrected with force in the area of computer technology. Computer programming relies heavily on the formulation and use of algorithms[75] (mathematical formulas), which are themselves unpatentable, being phenomena of nature.[76]

In *Gottschalk v. Benson*[77] the Supreme Court denied a patent on a method for programming a general purpose digital computer that involved the use of an algorithm the patentee had discovered.[78] The Court held that "the patent would wholly preempt the mathematical formula and in practical effect would be a patent on the algorithm itself."[79] The Court based its conclu-

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71. *Id.* at 181.

72. *Id.* at 180.

73. *Id.* at 179.

74. *Id.* There have been many cases in which patents issued to bacteriological fermentation processes have been upheld. *See* Merck & Co. v. Chase Chemical Co., 273 F. Supp. 68 (D.N.J. 1967) (isolation of vitamin B-12 by cultivating strains, used in the treatment of pernicious anemia); *In re* Mancy, 499 F.2d 1289 (C.C.P.A. 1974) (production of the antibiotic daunorubicin by cultivation of *Streptomyces bifurcus*). Patents have also been issued for the use of bacteria in insecticides. Pat. no. 3,642,982, 895 Off. Gaz. Pat. Office 1090 (1972); Pat. no. 3,651,215, 896 Off. Gaz. Pat. Office 1114 (1972). In 1873 Pasteur obtained a patent, not only for the process of making alcohol using yeast, but also for "yeast, free from organic germs of disease, as an article of manufacture." Pat. no. 141,072, 4 Off. Gaz. Pat. Office 91 (1873).

75. An algorithm is a mathematical formula used to solve certain computation problems. Gottschalk v. Benson, 409 U.S. 63, 65 (1972).

76. "Phenomena of nature, though just discovered, mental processes, and abstract intellectual concepts are not patentable, as they are the basic tools of scientific and technological work." *Id.* at 67.

77. 409 U.S. 63 (1972).

78. *Id.* at 73. The patentee's algorithm enabled any digital computer to convert binary-coded decimal numerals into pure binary numerals. *Id.* at 65.

79. *Id.* at 72.

sion on the fact that "the 'process' claim is so abstract and sweeping as to cover both known and unknown uses of [the algorithm]."[80]

In *In re Chatfield*,[81] however, the C.C.P.A. reversed the rejection of a claim to a method for operating a computer more efficiently, although the use of algorithms was involved.[82] The C.C.P.A. held that, since the algorithms "do not themselves constitute the method per se,"[83] the patent on the method would not preempt the mathematical formulas.[84] The C.C.P.A. distinguished *Benson* on the ground that the claim in the instant case was "limited to the particular operation of a computing machine system as specified in the claims."[85]

*Parker v. Flook*,[86] the latest in the series of computer software[87] cases, involved a claim for a method of updating alarm limits, the only novel feature of which was an algorithm.[88] The C.C.P.A. reversed the rejection of the claim, concluding that the patent would not preempt all uses of the formula.[89] The Su-

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80. *Id.* at 68.

81. 545 F.2d 152 (C.C.P.A.), *cert. denied sub nom.* Dann v. Chatfield, 434 U.S. 875 (1976).

82. *Id.* at 159. Applicant's process claim was directed to a method of evaluating and reassigning computer program priorities by analyzing data involved in the operation of the computer. The claim described certain algorithms which could be used in analyzing the computer data. *Id.* at 154.

83. *Id.* at 158.

84. *Id.* at 159.

85. *Id.* The C.C.P.A. also found that the decision of the Supreme Court in *Benson* did not wholly preclude patent protection for computer programs in general. *Id.* at 155. The C.C.P.A. found the *Benson* holding limited to those cases in which a patent would preempt "all practical uses of . . . the algorithm." *Id.* at 156.

86. 437 U.S. 584 (1978).

87. Software refers to computer programs. *Id.* at 587 n.7.

88. *Id.* at 585-86. During catalytic conversion of hydrocarbons, an alarm will sound when operating conditions reach an abnormal level; it is necessary to update these alarm limits periodically. Flook's method of updating alarm limits differed from conventional methods in only one aspect: the use of an algorithm, which Flook had discovered, to calculate the value of updated alarm limits. *Id.*

89. The C.C.P.A. concluded that the use of the algorithm by others in the field would not constitute an infringement, and therefore there could not be a patent on the algorithm itself. *In re* Flook, 559 F.2d 21, 23 (C.C.P.A. 1977),

preme Court reversed again and held that the identification of a specific end use for a newly discovered algorithm did not make an otherwise unpatentable method patentable.[90] The Court reasoned that "the process itself, not merely the mathematical algorithm, must be new and useful."[91] By way of dicta, the Court reiterated its view that the Court should "proceed cautiously when we are asked to extend patent rights into areas wholly unforeseen by Congress"[92] and referred to its earlier warning in *Deepsouth Packing Co. v. Laitram Corp.*[93] that the Court "should not expand patent rights by overruling or modifying our prior cases construing the patent statutes."[94]

When the first patent law was enacted in 1790[95] technologies such as computer programming and genetic engineering would have been inconceivable. As new technologies have emerged and developed, the judiciary has had to determine whether the resulting discoveries constitute statutory subject matter within the patent laws.[96] In *Diamond v. Chakrabarty*[97] the issue of whether a life form, produced by a human being in a controlled laboratory setting, is a patentable product was addressed directly by the United States Supreme Court. A major-

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*rev'd sub. nom.* Parker v. Flook, 437 U.S. 584 (1978).

90. 437 U.S. at 594.

91. *Id.* at 591. For a discussion of the problems associated with software patents, see J. LANDIS, MECHANICS OF PATENT CLAIM DRAFTING 88-102 (2d ed. 1974).

92. 437 U.S. at 596. In *Benson* the Court had concluded that "[i]f [the computer] programs are to be patentable, considerable problems are raised which only committees of Congress can manage." Gottschalk v. Benson, 409 U.S. 63, 73 (1972).

93. 406 U.S. 518 (1972). *Deepsouth* involved the question whether a person found guilty of patent infringement is foreclosed from making the product in a foreign country. The Court held that making a patented product outside the United States did not constitute infringement within the meaning of 35 U.S.C. § 271. 406 U.S. at 527.

94. 437 U.S. 584, 596 (quoting Deepsouth Packing Co. v. Laitram Corp., 406 U.S. 518, 531 (1972)).

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

96. "Congress has performed its constitutional role in defining patentable subject matter in § 101; we perform ours in construing the language Congress has employed." Diamond v. Chakrabarty, 447 U.S. 303, 315 (1980).

97. 447 U.S. 303 (1980).

ity of five justices[98] answered in the affirmative.[99]

In considering whether a microorganism falls within the statutory subject matter of section 101, the Court first concluded that the patent laws are to be given wide scope[100] and noted its earlier caution that courts "should not read into the patent laws limitations and conditions which the legislature has not expressed."[101]

The Court reiterated the principle that neither laws of nature nor products of nature can be patented,[102] but found those doctrines to have no bearing on the instant case. The Court observed that Chakrabarty's claim "is not to a hitherto unknown natural phenomenon, but to a nonnaturally occurring manufacture or composition of matter—a product of human ingenuity 'having a distinctive name, character [and] use.' "[103] In reaching its conclusion the Court compared Chakrabarty's bacteria with the bacteria which had been denied a patent in *Funk Bros. Seed Co. v. Kalo Inoculant Co.*[104] and found the two cases distin-

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98. *Id.* at 318. Chief Justice Burger delivered the Court's opinion. Justice Brennan, joined by Justices White, Marshall, and Powell, filed a dissenting opinion.

99. "[R]espondent's micro-organism plainly qualifies as patentable subject matter." *Id.* at 309.

100. *Id.* at 308. "In choosing such expansive terms as 'manufacture' and 'composition of matter,' modified by the comprehensive 'any,' Congress plainly contemplated that the patent laws would be given wide scope." *Id.*

101. *Id.* (quoting United States v. Dubilier Condenser Corp., 289 U.S. 178, 199 (1933)). *Dubilier* involved the issue of whether researchers, employed by the government, had to assign their patent rights on inventions made while in the government's employ to the government; in the private sector, assignment could not be required without an express contract. The Court held the same rules apply to government employees as to private employees. 289 U.S. at 190. *Compare Dubilier* (no restrictions on patent law) *with Deepsouth*, notes 93 & 94 *supra* and accompanying text, (no expansion of patent law) *and Flook*, notes 86-91 *supra* and accompanying text (proceed cautiously when extending patent rights).

102. 447 U.S. at 309. "Thus, a new mineral discovered in the earth or a new plant found in the wild is not patentable subject matter. Likewise, Einstein could not patent his celebrated law that $E = mc^2$, nor could Newton have patented the law of gravity." *Id.*

103. *Id.* at 309-10 (quoting Hartranft v. Wiegmann, 121 U.S. 609, 615 (1887)).

104. 333 U.S. 127 (1948). *See* notes 56-62 *supra* and accompanying text.

guishable. The Court observed that in *Funk Bros.* there were "no new bacteria, no change in the six bacteria, . . . [which] perform in their natural way"[105] whereas in *Chakrabarty* "the patentee has produced a new bacterium with markedly different characteristics from any found in nature . . . . His discovery is not nature's handiwork, but his own."[106]

The Government advanced two arguments against the patentability of microorganisms, the first relying on the enactments of the Plant Patent Act of 1930[107] and the Plant Variety Protection Act of 1970[108] which specifically excluded bacteria. The Government argued that the Acts indicated Congress' intent that living things were not included within section 101 of the Patent Act, reasoning that if they were, the Plant Acts would have been unnecessary.[109] The Court rejected the applicability of the 1930 Act to microorganisms on two grounds. The Court reasoned that the Act was necessary first, to extend patent protection to plants which had previously been denied such protection under the "product of nature" doctrine;[110] and second, to relax the strict description requirements of the patent laws[111] with respect to plants.[112] The Court concluded that "Congress thus recognized that the relevant distinction was not between living and inanimate things, but between products of nature, whether living or not, and human-made inventions."[113]

Similarly, the Court concluded that the 1970 Act was simply an extension of the 1930 Act to include sexually reproduced plants which had been excluded under the latter.[114] The Court did not find the exclusion of bacteria from the 1970 Act to be persuasive, but found that Congress was concerned solely with

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105. 447 U.S. at 310 (quoting Funk Bros. Seed Co. v. Kalo Inoculant Co., 333 U.S. 127, 131 (1948)).

106. 447 U.S. at 310.

107. *See* notes 32 & 33 *supra* and accompanying text.

108. *See* note 40 & 41 *supra* and accompanying text.

109. 447 U.S. at 311.

110. *See* note 46 *supra* and accompanying text.

111. *See* note 39 *supra*.

112. 447 U.S. at 312.

113. *Id.* at 313.

114. *Id.* "There is nothing in [the 1970 Act's] language or history to suggest that it was enacted because § 101 did not include living things." *Id.*

protection for cultivated plants at the time.[115]

The Government's second argument, which relied on the holding in *Parker v. Flook*,[116] was that only Congress can authorize patent protection for human-made microorganisms, since genetic engineering was an unforeseen technology when section 101 was enacted.[117] The Court rejected the Government's contention that unforeseeable inventions are unpatentable per se, reasoning that "[t]o read that concept into *Flook* would frustrate the purposes of the patent law."[118] The Court emphasized that "Congress employed broad general language in drafting § 101 precisely because such inventions are often unforeseeable."[119] The Court limited *Flook* to its facts[120] and concluded that the decision in the instant case was not an extension of the patent law but rather a construction of "the language of § 101 as it is."[121]

The Government had supported its arguments with a recital of genetic horrors, arguing that the Court should consider the potential dangers of recombinant DNA research before deciding whether a genetically engineered microorganism is patentable.[122]

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115. *Id.* at 313-14. "[A]bsent some clear indication that Congress 'focused on [the] issues . . . directly related to the one presently before the Court,' . . . there is no basis for reading into its actions an intent to modify the plain meaning of the words found in § 101." *Id.* at 314 (quoting SEC v. Sloan, 436 U.S. 103, 120-21 (1978)).

116. 437 U.S. 584 (1977). *See* notes 86-94 *supra* and accompanying text.

117. 447 U.S. at 314.

118. *Id.* at 315.

119. *Id.* at 316. The Court emphasized its point with an abbreviated list of patented inventions which would have been unforeseeable when the patent laws were enacted, including the telegraph, the telephone, and the laser. *Id.* n.10. For a criticism of the unforeseeability-unpatentability argument, see Kiley, *Common Sense and the Uncommon Bacterium — Is "Life" Patentable?*, 60 J. PAT. OFF. SOC'Y 468 (1978).

120. 447 U.S. at 315. For a discussion of the *Flook* holding with respect to microorganisms, see 37 WASH. & LEE L. REV. 183 (1980).

121. 447 U.S. at 318.

122. *Id.* at 316-17. Since the emergence of recombinant DNA research, scientists as well as lay persons have questioned the wisdom of genetic engineering. Concern has been expressed over the possible hazards to the public health and the environment. Guidelines have been adopted in the hope of safeguarding the public interest while allowing science the greatest freedom possible. *See* 43 Fed. Reg. 60,080 (1978) (Nat'l Inst. of Health Revised Guidelines,

This the Court refused to do, stating that such a balancing of competing interests is "a matter of high policy for resolution within the legislative process after the kind of investigation, examination, and study that legislative bodies can provide and courts cannot."[123]

Although the majority of the Court found microorganisms to be patentable subject matter, four justices, in an opinion written by Justice Brennan, disagreed.[124] Justice Brennan was concerned that the decision of the majority extended patent protection further than Congress had intended, and stressed that "the only question we need decide is whether Congress, exercising its authority under Art. I, § 8, of the Constitution, intended that [Chakrabarty] be able to secure a monopoly on the living organism itself, no matter how produced or how used."[125] He felt that "the Court has misread the applicable legislation"[126] and concluded that Congress did not intend microorganisms such as Chakrabarty's to be included within section 101.

Justice Brennan supported his conclusion by referring to the Plant Patent Act of 1930[127] and the Plant Variety Protection Act of 1970,[128] reasoning that the two Acts "evidence Congress' understanding, at least since 1930, that § 101 does not include living organisms."[129] Justice Brennan observed that "[i]f newly developed living organisms not naturally occurring had been patentable under § 101, the plants included in the scope of the 1930 and 1970 Acts could have been patented without new legislation. Those plants, like the bacteria involved in this case, were

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Recombinant DNA Research). For a discussion of the history of genetic research and its implications for patent attorneys, see Kiley, *Patent and Political Shock Waves of the Biological Explosion,* 1979 PAT. L. ANN. 253.

123. 447 U.S. at 317. The Court observed that "Congress is free to amend § 101 so as to exclude from patent protection organisms produced by genetic engineering." *Id.* at 318.

124. Justice Brennan was joined in dissent by Justices White, Marshall, and Powell. *Id.* (Brennan, J., dissenting).

125. *Id.* (Brennan, J., dissenting).

126. *Id.* at 319 (Brennan, J., dissenting).

127. *See* note 32 *supra* and accompanying text.

128. *See* note 40 *supra* and accompanying text.

129. 447 U.S. at 320 (Brennan, J., dissenting).

new varieties not naturally occurring."[130]

In Justice Brennan's understanding of the applicable legislation, Congress had addressed the question of patenting living organisms, and had precluded a patent on microorganisms by choosing "carefully limited language granting protection to some kinds of discoveries, but specifically excluding others."[131] Justice Brennan found the 1970 Act particularly persuasive, and concluded the reason behind the express exclusion of bacteria to be that "Congress, assuming that animate objects as to which it had not specifically legislated could not be patented, excluded bacteria from the set of patentable organisms."[132]

In Justice Brennan's opinion, the majority, in reaching its decision, was not interpreting the patent laws, but rather legislating. He stressed that "[i]t is the role of Congress, not this Court, to broaden or narrow the reach of the patent laws. This is especially true where, as here, the composition sought to be patented uniquely implicates matters of public concern."[133]

Despite Justice Brennan's fear that the Court is usurping that power reserved to Congress alone, *Diamond v. Chakrabarty* represents another step forward for the proponents of DNA research and for industry alike. As the majority points out, it is for Congress to resolve the ethical considerations implicit in genetic engineering. However, it is for the Court to determine the scope of the patent laws and to determine whether they fairly contemplate the patentability of human-made microorganisms.[134] The

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130. *Id.* (Brennan, J., dissenting).

131. *Id.* at 319 (Brennan, J., dissenting).

132. *Id.* at 321 (Brennan, J., dissenting). Justice Brennan made reference to the Court's admonition in Parker v. Flook "to 'proceed cautiously when we are asked to extend patent rights into areas wholly unforeseen by Congress.' " 447 U.S. at 319-20 n.2 (Brennan, J., dissenting) (quoting Parker v. Flook, 437 U.S. 584, 596 (1978)). He further stressed that "the necessity for caution is that much greater when we are asked to extend patent rights into areas Congress has foreseen and considered but has not resolved." 447 U.S. at 319-20 n.2 (Brennan, J., dissenting).

133. 447 U.S. at 322 (Brennan, J., dissenting).

134. The true policy and ends of the patent laws enacted under this Government are disclosed in that article of the Constitution, the source of all these laws, viz: "to promote the progress of science and the useful arts," contemplating and necessarily implying their extension, and increasing adaptation to the uses of society.

field of microbiological technology is rapidly expanding, and the majority's decision in *Chakrabarty* will intensify the efforts of those involved in genetic research to produce more and better products to the benefit of the public. However, many new questions will arise surrounding the patenting of living organisms. As in the case of plant patents, the adequacy of the written description of microorganisms will present a problem, as will the concept of novelty as applied to the various and mutant strains of a microorganism. Also, the courts will be hard pressed to assess the utility (nonharmfulness) of the organism. Many people, scientists as well as lay persons, are concerned with the prospect of a bacterium, harmful to humans, escaping from the laboratory and surviving and reproducing in the outside world.[135] There is also a great concern whether patents could and should be issued for living organisms other than bacteria, such as clones and more complex organisms.[136] These are questions which will have to be answered, if not by Congress, then by the courts, as genetic research advances further. *Diamond v. Chakrabarty* is only the first of many such cases which profoundly will affect the life of every American in the very near future.

VICKIE V. VALENTINE

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Kendall v. Winsor, 62 U.S. (21 How.) 322, 328 (1858).

135. *See generally* Robbins, *Patents for Microbiological Transformations—An International Problem*, 42 J. PAT. OFF. SOC'Y 830 (1960).

136. *See generally* Guttag, *The Patentability of Microorganisms: Statutory Subject Matter and Other Living Things*, 11 INTELL. PROP. L. REV. 17, 43-48 (1979).

# Taxation—Corporate Reorganizations—Section 368(a)(1)(B) of the Internal Revenue Code—Requirement of Exchange Solely for Voting Stock

*Heverly v. Commissioner*, 621 F.2d 1227 (3d Cir. 1980)

International Telephone and Telegraph Company (ITT) approached the management of the Hartford Insurance Company (Hartford) in October 1968 concerning a possible acquisition of Hartford by ITT through either an outright stock purchase or a merger. After these initial proposals were rejected by Hartford, ITT during 1968 and 1969 made cash purchases of Hartford stock totaling approximately eight percent of the outstanding shares. Thereafter, a tentative agreement of merger was negotiated.[1]

Pursuant to a request from ITT, the Internal Revenue Service (IRS) issued a private letter ruling[2] that the proposed transaction would be a reorganization under section 368(a)(1)(B) of the Internal Revenue Code of 1954.[3] The recognition of any gain

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1. After ITT had made the small cash purchases of stock, it assured Hartford that no attempt would be made to acquire Hartford against the wishes of its management. The tentative merger agreement entered into between the two companies was made subject to the approval of the shareholders of each corporation and of the Connecticut Insurance Commissioner. Heverly v. Commissioner, 621 F.2d 1227, 1229 (3d Cir. 1980).

2. The Internal Revenue Service reveals its official position on tax controversies through administrative rulings including both public rulings, which are published in the Internal Revenue Bulletins and private rulings, which are issued in response to letter requests from taxpayers. *See generally* Rogovin, *The Four R's: Regulations, Rulings, Reliance, and Retroactivity—A View From Within*, 43 TAXES 756 (1965).

3. To qualify as a nontaxable acquisition, the mode of acquisition and terms of payment must adhere strictly to certain standards specified in the Internal Revenue Code of 1954. A nontaxable acquisition allows the seller to defer recognition of any gain and allows the purchaser to obtain the seller's basis for the stock or assets acquired. The major methods of accomplishing a nontaxable acquisition are (1) the statutory merger or consolidation, I.R.C.

realized on the transaction, therefore, could be deferred under section 354(a)(1).[4] The IRS did stipulate that to meet the requirements of section 368(a)(1)(B), ITT must divest itself unconditionally of the Hartford stock already purchased for cash. When the IRS ruled[5] that this requirement would be satisfied by ITT's proposed sale of the stock to an Italian bank, ITT proceeded with the sale. Although the shareholders of each corporation approved the merger, the Connecticut Insurance Commissioner refused to approve the transaction, apparently because of concern for the rights of dissenting shareholders.[6] In an alterna-

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§ 368(a)(1)(A); (2) the stock-for-stock acquisition, I.R.C. § 368(a)(1)(B); or (3) the stock-for-assets acquisition, I.R.C. § 368(a)(1)(C). In a stock-for-stock acquisition a corporation exchanges only its voting stock, or the voting stock of its parent, for the stock of another corporation. I.R.C. § 368(a)(1)(B). I.R.C. § 368 provides in part:

> (a) Reorganization
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> (1) In General. For purposes of . . . this part, the term "reorganization" means—
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> . . . .
>
> (B) the acquisition by one corporation, in exchange solely for all or a part of its voting stock (or in exchange solely for all or a part of the voting stock of a corporation which is in control of the acquiring corporation), of stock of another corporation if, immediately after the acquisition, the acquiring corporation has control of such other corporation (whether or not such acquiring corporation had control immediately before the acquisition);

Control as used above is defined as "the ownership of stock possessing at least 80 percent of the total combined voting power of all classes of stock entitled to vote and at least 80 percent of the total number of shares of all other classes of stock of the corporation." I.R.C. § 368(c). Control may be obtained in a single transaction or in a series of transactions, the latter method being commonly known as a creeping acquisition. Where prior acquisitions of stock were made for consideration other than voting stock, however, the IRS may invoke the so-called step transaction doctrine, consider all transactions as parts of a related plan, and treat the exchange as taxable to the shareholders. *See generally* B. BITTKER & J. EUSTICE, FEDERAL INCOME TAXATION OF CORPORATIONS AND SHAREHOLDERS ¶14.51, at 14-130 (4th ed. 1979).

4. "No gain or loss shall be recognized if stock or securities in a corporation a party to a reorganization are, in pursuance of the plan of reorganization, exchanged solely for the stock or securities in such corporation or in another corporation a party to the reorganization." I.R.C. § 354(a)(1).

5. The IRS issued a supplemental ruling on October 21, 1969. 621 F.2d 1227, 1229 (3d Cir. 1980).

6. Under state law the agreement was conditioned upon approval by the

tive plan that was acceptable to the Connecticut Insurance Commissioner,[7] ITT and Hartford were able to accomplish their desired result by an exchange offer whereby Hartford shareholders would receive ITT shares. Pursuant to this plan ITT was able to acquire more than ninety-five percent of Hartford's outstanding shares.[8] Complications arose in March 1974 when the IRS retroactively revoked its earlier private letter ruling and declared that any gain realized by the Hartford shareholders on their exchange for ITT stock was currently taxable. The IRS stated that since the only consideration allowed under a section 368(a)(1)(B) reorganization was voting stock, the prior purchase for cash of eight percent of Hartford's stock violated this limitation.[9] The IRS assessed tax deficiencies against the former Hartford shareholders, who then filed petitions in the Tax Court and the United States District Court for the District of Delaware.[10] Both courts held that the transaction met the requirements of section 368(a)(1)(B).[11] On consolidated appeal to the United

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shareholders of the two corporations and by the Connecticut Insurance Commissioner. *See* CONN. GEN. STAT. ANN. §§ 38-36, 38-42 (West 1969).

7. Pierson v. United States, 472 F. Supp. 957, 959 (D. Del. 1979).

8. Included in those shareholders who tendered shares was the Italian bank to which ITT previously had sold its 8% of Hartford stock. Heverly v. Commissioner, 621 F.2d 1227, 1229 (3d Cir. 1980).

9. *But see* Rev. Rul. 72-354, 1972-2 C.B. 216. This ruling states the IRS position that where an acquiring company unconditionally sells its previously purchased stock in the acquired corporation prior to making the stock-for-stock exchange offer, the exchange qualifies as a reorganization under section 368(a)(1)(B). The transfer to the Italian bank of the Hartford shares purchased for cash presumably was to come within the coverage of Rev. Rul. 72-354. Since the bank was subsequently one of the Hartford shareholders who tendered their shares, the IRS apparently felt that this was all part of a prearranged plan and that ITT had not unconditionally sold its Hartford shares originally purchased for cash prior to making the exchange offer.

10. Reeves v. Commissioner, 71 T.C. 727 (1979). The cases of 15 shareholders were consolidated in a single Tax Court action. Cocounsel for taxpayers was James S. Eustice, coauthor of a leading treatise concerning taxation of corporate transactions. *See* BITTKER & EUSTICE, *supra* note 3. A separate refund action was brought in the federal district court of Delaware by another shareholder. Pierson v. United States, 472 F. Supp. 957 (D. Del. 1979).

11. Pierson v. United States, 472 F. Supp. 957 (D. Del. 1979); Reeves v. Commissioner, 71 T.C. 727 (1979). Transactions meeting the statutory requirements of section 368 (a)(1)(B) colloquially are referred to as (B)

States Court of Appeals for the Third Circuit, *held,* reversed and remanded.[12] In a stock-for-stock acquisition, absolutely no consideration other than voting stock may be exchanged if the transaction is to be accorded reorganization status under section 368(a)(1)(B), even though over eighty percent of the acquired company's stock is acquired for voting stock. Heverly v. Commissioner, 621 F.2d 1227 (3d Cir. 1980).

Generally, gains on dealings in property are includable in gross income in the year they are realized.[13] In some instances, however, the gain that has been realized economically in one year may be recognized in a different year for tax purposes. Transactions of this type are governed generally by section 1001 of the Internal Revenue Code.[14] Section 354(a) provides for non-recognition of gain where securities of a corporation that is a

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reorganizations.

12. Heverly v. Commissioner, 621 F.2d 1227 (3d Cir. 1980). Taxpayers had asserted two theories of recovery. First, they argued that the cash purchases in 1968 were not part of the plan of reorganization, which actually occurred with ITT's acquisition of 95% of Hartford's stock in 1970. Since the 1970 transaction was solely for voting stock, the requirements of clause (B) were met. Alternatively, taxpayers asserted that even if both transactions were part of the same plan of reorganization, clause (B) was still satisfied since control (80%) of the Hartford stock was actually acquired for voting stock. The lower courts' rulings were based on findings for the taxpayers regarding the second argument. The question whether the 1968 cash purchases were part of the plan of reorganization was not, therefore, determined at trial. The IRS appealed to four circuits. The First Circuit reversed *Reeves.* Chapman v. Commissioner, 80 U.S. TAX CAS. ¶ 9330 (1st Cir. 1980). Appeals are pending in two other circuits, 71 T.C. 727 (1979), *appeals docketed sub nom.* Reeves v. Commissioner, No. 79-1438 (4th Cir. 1979); Coffen v. Commissioner, No. 79-7278 (9th Cir. 1979). Should the remaining two circuits not hold in accord with *Heverly* and *Chapman,* appeal to the United States Supreme Court would seem imminent.

13. I.R.C. § 1001(c).

14. I.R.C. § 1001(c) provides: "Except as otherwise provided in this subtitle, the entire amount of the gain or loss, determined under this section, on the sale or exchange of property shall be recognized." Section 1001 also provides in pertinent part:

> (a) Computation Of Gain Or Loss. The gain from the sale or other disposition of property shall be the excess of the amount realized therefrom over the adjusted basis provided in section 1011 for determining gain, and the loss shall be the excess of the adjusted basis provided in such section for determining loss over the amount realized.

party to a reorganization are exchanged for securities of another such corporation.[15] The term "reorganization" is defined in section 368(a)(1) of the Code.[16] Courts historically have interpreted the phrase "solely for . . . voting stock" in section 368(a)(1)(B) literally and have allowed no other consideration to be exchanged.[17] The lower courts in *Reeves v. Commissioner*[18] and *Pierson v. United States*[19] were the first to hold that some non-stock consideration could be exchanged, so long as control was acquired "solely for . . . voting stock" of the acquiring corporation.[20] The issue in *Heverly* was whether section 368(a)(1)(B) allowed a corporation to acquire some stock for consideration other than voting stock, so long as at least eighty percent of the acquired company's stock was exchanged solely for voting stock of the acquiring corporation.

Section 202(b) of the Revenue Act of 1918 expressed the embryonic concept of tax deferral for reorganizations:

> [W]hen in connection with the reorganization, merger, or consolidation of a corporation a person receives in place of stock or securities owned by him new stock or securities of no greater aggregate par face value, no gain or loss shall be deemed to occur from the exchange, and the new stock or securities received shall be treated as taking the place of the stock, securities, or property exchanged . . . .[21]

Section 202 of the Revenue Act of 1921 attempted to specify more elaborately the types of transactions included under the

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15. I.R.C. § 354(a)(1).

16. *See* note 3 *supra*.

17. Turnbow v. Commissioner, 368 U.S. 337 (1961), *aff'g* 286 F.2d 669 (9th Cir. 1960); Helvering v. Southwest Consolidated Corp., 315 U.S. 194 (1942); Lutkins v. United States, 312 F.2d 803 (Ct. Cl.), *cert. denied*, 375 U.S. 825 (1963); Commissioner v. Air Reduction Co., 130 F.2d 145 (2d Cir.), *cert. denied*, 317 U.S. 681 (1942); Mills v. Commissioner, 39 T.C. 393 (1962), *rev'd on other grounds*, 331 F.2d 321 (5th Cir. 1964); Howard v. Commissioner, 24 T.C. 792 (1955), *rev'd on other grounds*, 238 F.2d 943 (7th Cir. 1956).

18. 71 T.C. 727 (1979).

19. 472 F. Supp. 957 (D. Del. 1979).

20. *See* note 3 *supra*.

21. *See* H.R. REP. No. 1037, 65th Cong., 3d Sess. 44-45 (1918), *reprinted in* 1939-1 C.B. (pt. 2) 130, 132.

rubric of reorganization.[22]

The courts soon found the statutory framework inadequate to prevent abuse and thus developed their own additional requirements for tax deferral in reorganizations. The intent of the reorganization statute was to afford relief where the financial situation of the shareholders had not changed sufficiently to warrant taxing the transaction currently.[23] Some corporations, however, were structuring transactions to effectuate through the reorganization statutes what otherwise would have been outright cash purchases. By requiring a continuity of interest of shareholders immediately before and after the transaction, the courts attempted to eliminate tax deferral where the shareholders re-

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22. Revenue Act of 1921, ch. 136, 42 Stat. 230. Section 202(c)(2) provided in part:

> (c) . . . no gain or loss shall be recognized . . .
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> (2) When in the reorganization of one or more corporations a person receives in place of any stock or securities owned by him, stock or securities in a corporation a party to or resulting from such reorganization. The word "reorganization" as used in this paragraph, includes a merger or consolidation (including the acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation, or of substantially all the properties of another corporation), recapitalization, or mere change in identity, form, or place of organization of a corporation, (however effected) . . . .

In the early cases interpreting the new statute courts were cautious not to allow corporate earnings to be distributed to shareholders tax free. Thus, in United States v. Phellis, 257 U.S. 156 (1921), the Court stated, "[the distribution] received by claimant was a gain, a profit, derived from his capital interest in the old company, . . . in distribution of accumulated profits of the company; something of exchangeable value produced by and proceeding from his investment therein, severed from it and drawn by him for his separate use." *Id.* at 175. In Weiss v. Stern, 264 U.S. 249 (1924), however, the Court also realized that some transactions clearly did not justify the imposition of an income tax:

> [W]e can not conclude that mere change for purposes of reorganization in the technical ownership of an enterprise, under circumstances like those here disclosed, followed by issuance of new certificates, constitutes gain separated from the original capital interest. Something more is necessary—something which gives the stockholder a thing really different from what he theretofore had. . . .

*Id.* at 254.

23. *See* Bazley v. Commissioner, 331 U.S. 737 (1947).

ally had sold their ownership interests and had become creditors.[24] The interest maintained had to be "definite and substantial"[25] and had to be proprietary in nature.[26]

Congress also recognized these abuses and began refining the statutory language. In the Revenue Act of 1934 Congress attempted to limit the variety of forms that a reorganization could take without incurring a present tax liability. Section 112(g)(1)(B) of that Act provided that the acquiring company must obtain at least eighty percent of the stock or substantially all the properties of the acquired company in exchange solely for its voting stock.[27] The stock-for-stock type reorganization,

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24. Cortland Specialty Co. v. Commissioner, 60 F.2d 937 (2d Cir. 1932), *cert. denied*, 288 U.S. 599 (1933). Moreover, a "literal compliance with the reorganization provisions is not enough; a transaction will be governed by the statutory provisions only if it comes within their presuppositions as well as their language." BITTKER & EUSTICE, *supra* note 3, ¶ 14.03, at 14-11. The court required a continuance of interest on the part of the transferor in the properties transferred. 60 F.2d at 940.

25. John A. Nelson Co. v. Helvering, 296 U.S. 374, 377 (1935). The term "substantial" has not been defined exactly. The Supreme Court, however, in Helvering v. Minnesota Tea Co., 296 U.S. 378 (1935), added that "this interest must be definite and material; it must represent a substantial part of the value of the thing transferred. This much is necessary in order that the result accomplished may genuinely partake of the nature of merger or consolidation." *Id.* at 385.

26. LeTulle v. Scofield, 308 U.S. 415 (1940). Though courts have differed on exactly what must be retained, there does seem to be a dividing line between stock and debt.

> [T]he only type of consideration that carried the requisite continuity "genes" was an equity interest, evidenced by common or preferred stock, whether voting or nonvoting. Cash or its equivalent (e.g., short-term purchase money notes), long term debt securities, and the assumption of liabilities all failed to meet the test of continuity, since the transferors, by the receipt of such consideration, were either cashing in their investment interest in the property or switching to a creditor status with respect thereto, rather than retaining a proprietary interest. BITTKER & EUSTICE, *supra* note 3, ¶ 14.11, at 14-20.

27. Section 112(g)(1) of the Revenue Act of 1934 provided in part:

> (1) The term "reorganization" means . . .
>
> (B) the acquisition by one corporation in exchange solely for all or a part of its voting stock: of at least 80 per centum of the voting stock and at least 80 per centum of the total number of shares of all other classes of stock of another corporation; or of

though not provided for in the House Appropriations Committee original report,[28] was added in the Senate version because it was felt that such transactions were "sufficiently similar to mergers and consolidations as to be entitled to similar treatment."[29] The Senate report, however, also noted that "the acquisition, whether of stock or of substantially all the properties, must be in exchange solely for the voting stock of the acquiring corporation."[30]

When separating the assets and stock acquisition clauses of section 112(g) in the Revenue Act of 1939, Congress broadened the assets acquisition definition somewhat to allow the acquiring company to assume some of the liabilities of the acquired company without violating the solely for voting stock requirement.[31] The stock acquisition clause was not similarly altered; rather, the clause continued to be phrased strictly in terms of solely for voting stock.

The United States Supreme Court first interpreted the solely for voting stock provision of the 1934 Act in *Helvering v. Southwest Consolidated Corp.*[32] Southwest Gas Utilities Corporation, which was in default on its bonds, went through a plan of reorganization to satisfy its creditors and bondholders. An assets

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substantially all the properties of another corporation . . . .

Revenue Act of 1934, ch. 277, § 112(g)(1)(B), 48 Stat. 705.

28. The House Report originally provided only for "(1) statutory mergers and consolidations, (2) transfers to a controlled corporation, 'control' being defined as an 80 percent ownership, and (3) changes in the capital structure or form of organization." H.R. REP. No. 704, 73d Cong., 2d Sess. 14 (1934), *reprinted in* 1939-1 C.B. (pt. 2) 554, 564.

29. S. REP. No. 558, 73d Cong., 2d Sess. 16-17 (1934), *reprinted in* 1939-1 C.B. (pt. 2) 586, 598.

30. *Id.* at 598-99.

31. Congress realized that in assets acquisitions the assumption of related liabilities sometimes was inevitable. In the House Report it was recognized that the proposed change would allow relief by providing:

> [I]f the corporation acquiring the properties assumes liabilities of the corporation from whom the properties are acquired, or takes the property subject to a liability, such assumption of liabilities, or taking subject to a liability, shall be disregarded in determining whether the properties are received in exchange solely for voting stock.

H.R. REP. No. 855, 76th Cong., 1st Sess. 19 (1939), *reprinted in* 1939-2 C.B. 504, 519.

32. 315 U.S. 194 (1942).

for stock acquisition was accomplished utilizing class A warrants,[33] class B warrants, and cash. The Court held that the statutory requirement of solely for voting stock had not been satisfied. The decision noted that warrants were *not* stock and that, in addition, cash consideration was involved for the payment of creditors. The Court declared that the word " '[s]olely' leaves no leeway."[34] Since the *Southwest Consolidated* case, courts have tended to interpret strictly the "solely for . . . voting stock" language of section 368(a)(1)(B) and to allow no other consideration in such reorganizations.[35]

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33. Certificates known as stock warrants are sometimes issued to shareholders, thereby enabling them to subscribe for stock in proportion to the holdings on which they are issued.

34. 315 U.S. at 198.

35. In Commissioner v. Air Reduction Co., 130 F.2d 145 (2d Cir. 1942), the Second Circuit considered a transaction in which the acquiring company obtained the target company's stock in two steps partially for stock and partially for cash. In the initial transaction 66% of the target's stock was obtained for stock and 6% for cash. Subsequently another 17% was acquired in exchange for stock and 11% for cash. The taxpayer contended that since it obtained over 80% of the stock through the exchange of voting stock, the statutory requirement was met. The court adhered to the "solely" test of *Southwest Consolidated* and held the transaction was not a (B) reorganization. *Id.* at 148. In Howard v. Commissioner, 24 T.C. 792 (1955), *rev'd on other grounds*, 238 F.2d 943 (7th Cir. 1956), the Tax Court was confronted with a situation in which a company acquired one corporation by an exchange of voting stock but acquired control of that corporation's subsidiary by an exchange of cash and stock. Viewing the transaction as a whole, the court held that the acquisition was not "solely for . . . voting stock." *Id.* at 806. In Lutkins v. United States, 312 F.2d 803 (Ct. Cl. 1963), the Court of Claims considered a situation in which a corporation had acquired 95% of another company's stock in 2 stock-for-stock exchanges 40 years apart. The acquiring company also had purchased a small number of shares for cash during the interim period. Neither stock-for-stock exchange alone resulted in a transfer of 80% control. The court concluded that the interim cash purchases had to be considered along with the stock-for-stock acquisitions and the transaction could not therefore qualify as a (B) reorganization. *Id.* at 806. In Commissioner v. Turnbow, 286 F.2d 669 (9th Cir. 1960), *aff'd in part*, 368 U.S. 337 (1961), the Ninth Circuit referred to the legislative history to reiterate the soundness of *Southwest Consolidated.* Addressing the addition of the "solely for . . . voting stock" requirement in the 1934 Act, the court found that the provision was specifically aimed at eliminating tax deferral treatment for sales structured under the cloak of the reorganization statutes. *Id.* at 672.

Similarly, in *Mills v. Commissioner*[36] the Tax Court held that there was no de minimis rule in force and that the receipt of any consideration other than voting stock would take a transaction outside section 368(a)(1)(B). Taxpayer had received a small amount of cash in lieu of fractional shares in an otherwise stock-for-stock exchange. Although the Fifth Circuit reversed on the ground that the cash in lieu of fractional shares was not consideration, the court stated that a similarly small amount of cash would have disqualified the transaction had it been an independently bargained-for part of the consideration received for the stock.[37]

In 1979, on the facts of the instant case, the lower courts in *Reeves v. Commissioner*[38] and *Pierson v. United States*[39] were the first to depart from the strict construction of section 368(a)(1)(B) originated in *Southwest Consolidated*.[40] In *Reeves* the Tax Court distinguished *Southwest Consolidated* on the grounds that it involved an assets acquisition rather than a stock acquisition.[41] The subsequent cases in accord with *Southwest Consolidated* were distinguished as being either situations where control was established only by considering prior purchases[42] or situations where, although more than eighty percent of the acquired company's stock was acquired for stock in a single transaction, other consideration was also present.[43] The court determined that where *control*[44] was gained solely by acquisition of voting stock in a transaction separate from cash purchases, the provisions of section 368(a)(1)(B) should apply. In short, the

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36. 39 T.C. 393 (1962), *rev'd*, 331 F.2d 321 (5th Cir. 1964).

37. 331 F.2d at 324.

38. 71 T.C. 727 (1979).

39. 472 F. Supp. 957 (D. Del. 1979).

40. *See* text accompanying note 34 *supra*.

41. 71 T.C. at 734-35.

42. The cases distinguished by the court were Lutkins v. United States, 312 F.2d 803 (Ct. Cl. 1963); Commissioner v. Air Reduction Co., 130 F.2d 145 (2d Cir. 1942); and Pulfer v. Commissioner, 43 B.T.A. 677 (1941), *aff'd per curiam*, 128 F.2d 742 (6th Cir. 1942). 71 T.C. at 736.

43. The cases distinguished by the court were Turnbow v. Commissioner, 368 U.S. 337 (1961); Mills v. Commissioner, 39 T.C. 393 (1962), *rev'd*, 331 F.2d 321 (5th Cir. 1964); and Howard v. Commissioner, 24 T.C. 792 (1955), *rev'd on other grounds*, 238 F.2d 943 (7th Cir. 1956). 71 T.C. at 736.

44. *See* note 3 *supra*.

court felt that prior cash purchases were irrelevant.[45] The court noted that while *Southwest Consolidated* "may well require that 'solely' be literally construed . . . we do not feel compelled to give that word a pervasive rigidity in determining whether . . . the transaction constituted a (B) reorganization."[46]

The *Reeves* decision seemed to interpret the "solely" requirement to apply only to the eighty percent required to obtain control. Under this reading, the requirements of section 368(a)(1)(B) would be met when eighty percent, or control, of the acquired company's stock was obtained in exchange for voting stock.[47] At least one commentator quickly criticized the holding in *Reeves* as "inconsistent with prior case law, unwarranted by the legislative history of the B reorganization definition, and irreconcilable with the language of section 368(a)(1)(B)."[48]

In *Pierson v. United States*[49] the United States District Court for the District of Delaware felt that other opinions reaching the same issue had placed too much emphasis on *Southwest Consolidated*.[50] By reviewing the "ambiguous legislative history" of the reorganization provisions, the court concluded that Congress had "never squarely considered the question whether the presence of boot would vitiate a (B) reorganization."[51] Moreover, the court felt that the holdings in *Mills, Turnbow v. Commissioner*,[52] and *Howard v. Commissioner*[53] "were in some respects

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45. 71 T.C. at 741.

46. *Id.* at 735.

47. It should be noted that five judges dissented in the *Reeves* case. Judge Wilbur, who wrote the main dissenting opinion, argued that prior cases had already established that even where 80% of a corporation's stock is acquired in exchange for voting stock, cash purchases of additional shares, as part of the same transaction, take the acquisition outside the scope of section 368(a)(1)(B). *Id.* at 749 (Wilbur, J., dissenting).

48. Comment, *The "Solely For Voting Stock" Requirement of B Reorganizations: Reeves v. Commissioner*, 79 COLUM. L. REV. 774, 803 (1979).

49. 472 F. Supp. 957 (D. Del. 1979).

50. *Id.* at 967.

51. *Id.* at 969. As used in this Note, the term "boot" refers to money or other property received which is not specifically noted in the reorganization provisions as allowable consideration in a nontaxable transaction (for example, property other than stock or securities of parties to the reorganization).

52. 286 F.2d 669 (9th Cir. 1960), *aff'd*, 368 U.S. 337 (1961).

faulty" and that their results were not necessarily compelled by the statutory scheme of the reoganization sections.[54] The *Pierson* court concluded that "where eighty percent of the stock of an acquired corporation is exchanged in a single transaction for voting stock in the acquiring corporation, the payment within the same transaction of cash or other nonstock consideration for additional shares in the acquired corporation will not preclude the transaction's qualification as a tax-free reorganization under Section 368(a)(1)(B) of the Internal Revenue Code."[55]

While the *Pierson* court reached the same result as the *Reeves* court, the basis for its holding was quite different. The *Pierson* opinion did not treat the cash and stock acquisitions as separate transactions; rather, the court recognized that they were part of the same plan of reorganization.[56] Most importantly, however, the *Pierson* court adopted an eighty-percent-for-voting-stock test rather than the more narrow eighty-percent-solely-for-voting-stock approach taken in *Reeves*. The *Pierson* court would, therefore, find a (B) reorganization where eighty percent of the acquired company's stock is acquired for stock, even though some shareholders might receive both stock and cash. Arguably, this approach ignores the "solely" requirement of the statute. Even though this approach finds no basis in the language of the statutes, various commentators have urged its adoption.[57]

In *Heverly v. Commissioner*[58] the Third Circuit returned to the narrow reading of section 368(a)(1)(B) that had prevailed up until the time of *Reeves* and *Pierson* and held that no consideration other than voting stock could be received in a (B) reorganization.[59] The court, beginning with *Helvering v. Southwest Con-*

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53. 39 T.C. 393 (1962), *rev'd*, 331 F.2d 321 (5th Cir. 1964).

54. 457 F. Supp. at 967.

55. *Id.* at 975.

56. For a general discussion of what constitutes a "plan of reorganization," see BITTKER & EUSTICE, *supra* note 3, ¶ 14.11, at 14-30, 31.

57. *See* Silverman & Trow, *Cash Consideration in a B Reorganization: Where are Reeves and Pierson Taking Us?*, 51 J. TAX. 2 (1979); Ayers & Repetti, *Boot Distributions Under the '54 Tax Code*, 32 NOTRE DAME LAW. 414 (1957).

58. 621 F.2d 1227 (3d Cir. 1980).

59. *Id.* at 1228.

*solidated Corp.*,[60] first reviewed the judicial history of this issue. Taxpayer had tried to distinguish *Southwest Consolidated* on the bases that it involved an assets acquisition, and that the nonstock consideration involved there was thirty-seven percent of the total whereas the ITT transaction involved only eight percent. In rejecting these arguments the court concluded that the 1934 Act, which covered both assets and stock acquisitions, had been construed by the United States Supreme Court in *Southwest Consolidated* so that the word "solely" was equally applicable to both.[61] The court also felt that the "[s]olely leaves no leeway"[62] language of *Southwest Consolidated* was sufficiently compelling to dispose fully of taxpayer's argument based on the percentage differential.[63] Of the cases subsequent to *Southwest Consolidated*, the court found *Commissioner v. Turnbow*[64] to be revealing of congressional intent.[65]

The *Heverly* court also undertook an independent analysis of the legislative history of the reorganization provisions. After considering the various changes made in the statute since its original appearance in the Revenue Act of 1918,[66] the court concluded that the use of "solely for . . . voting stock" in clause (B) of section 368(a)(1) in unaltered form was a manifest expression of the intent of Congress to disallow any other consideration in such transactions.[67]

The statutory language before 1954 required the acquiring corporation only to obtain eighty percent of the stock of the acquired company "solely for . . . voting stock."[68] Under the old statute, it had been unclear whether the "solely" requirement

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60. 315 U.S. 194 (1942).

61. 621 F.2d at 1234.

62. *See* note 29 *supra*.

63. 621 F.2d at 1235.

64. 286 F.2d 669 (9th Cir. 1960), *aff'd*, 368 U.S. 337 (1961).

65. In *Turnbow* the Ninth Circuit had interpreted the use of solely voting stock to be an alternative to the complete elimination of tax deferred treatment in situations which closely resembled sales but were, in form, reorganizations. *See* note 35 *supra*.

66. *See* text accompanying note 21 *supra*.

67. 621 F.2d at 1240.

68. Int. Rev. Code of 1939, ch. 1, § 112(g)(1)(B), 53 Stat. 40 (now I.R.C. § 368(a)(1)(B)).

was meant to apply only to the eighty percent required to establish control or to all stock acquired in the transaction. When the statute was amended in 1954, however, its terminology was altered to require that the acquiring company must acquire "solely for . . . voting stock . . . [the] stock of another corporation" so that the acquiring company possessed "control" after the transaction.[69] The new wording suggested that the "solely" requirement extended to *all* stock involved in the transaction, not just to the eighty percent required for control. Indeed, as previously noted,[70] this was the interpretation given the statute by *Southwest Consolidated* and its progeny. In the absence of a more specific mandate, however, it still would be possible to interpret the statute to require stock in exchange for only the eighty percent of stock necessary to establish control. In that case, instead of viewing the *entire* transaction as the acquisition, the acquisition would be viewed as pertaining only to that stock of the acquired company that is actually acquired solely for stock.[71]

The *Heverly* court supported its conclusion with an examination of various policy considerations. It first noted that tax deferral in the reorganization statutes exists purely as a matter of legislative grace. The court, therefore, felt that "strict compliance with the statute is necessary regardless of our agreement or disagreement with the conditions imposed."[72] Taxpayers had argued that the primary reason for the solely for voting stock requirement was to codify the continuity of interest doctrine.[73] The *Heverly* court concluded that while continuity of interest was necessary for a valid (B) reorganization, this element was preserved by requiring that stock be exchanged in the transaction.[74] The continuity of interest doctrine originated from the

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69. *See* note 3 *supra*.

70. *See* text accompanying note 32 *supra*.

71. *See* Silverman & Trow, *Cash Consideration in a B Reorganization: Where are Reeves and Pierson Taking Us?*, 51 J. TAX. 2 (1979).

72. 621 F.2d at 1241.

73. *See* note 24 *supra*.

74. The *Heverly* court recognized that the nature of the interest maintained must be proprietary, but the court arguably oversimplified the question by stating that the requirement of "solely for voting stock incorporates the continuity of interest doctrine." 621 F.2d at 1243.

necessity to confine the reorganization provisions to those transactions in which the shareholders' investments actually had remained in corporate solution.[75] In making the determination whether the shareholders' interests have changed sufficiently to justify taxing the transaction, both the character of the consideration involved (that is, debt versus equity) and the relative amounts received must be considered.[76]

The *Heverly* court viewed the eighty percent control requirement as aimed at requiring at least some modification of corporate form.[77] Without obtaining the requisite eighty percent ownership through such an acquisition, the transaction reverts to a mere purchase and is taxed accordingly. In the court's words, "the modification of the corporate structure would have been insufficient to allow tax deferred treatment."[78]

Taxpayers also had urged that limiting (B) reorganizations to voting stock was inconsistent with the other clauses of section 368(a)(1) which allow some nonstock consideration. The court responded by noting that the nonstock consideration in other clauses was justified because of the inherent differences in the types of transactions contemplated under those clauses and the types of transactions contemplated under clause (B).[79] Clause (A) involves statutory mergers or consolidations.[80] The court noted that while such mergers and consolidations effected "complete change[s] in corporate structure," stock acquisitions usually would "only effect a structural change if the acquiring corporation obtains sufficient stock."[81] The court noted four aspects of mergers and consolidations that it felt distinguished them from stock-for-stock transactions: (1) Substantial corporate formalities, (2) judicial application of a limited continuity of interest requirement, (3) radical change in corporate structure, and (4) automatic conversion of shares. Because of these characteristics of mergers and consolidations, the court felt that stock-for-

75. *See* text accompanying note 24 *supra*.
76. *See* BITTKER & EUSTICE, *supra* note 3, ¶ 14.11, at 14-17.
77. 621 F.2d at 1243.
78. *Id.*
79. *Id.* at 1244.
80. I.R.C. § 368(a)(1)(A).
81. 621 F.2d at 1244.

stock acquisitions generally entailed less severe modifications in corporate forms than did mergers or consolidations; hence there was less justification for allowing more liberal nonstock consideration.[82] The soundness of this conclusion is at least questionable since such transactions vary widely based upon the facts and circumstances present.

The court in discussing clause (C) reorganizations[83] felt that assets acquisitions by their very nature demanded more flexibility in terms of consideration exchanged. Congress made a conscious decision to provide for creditors of the acquired corporation in assets acquisitions by allowing the acquiring corporation to assume the liabilities of the transferor. The court felt that this dispensation was necessary if, as a practical matter, assets acquisitions were to be available as a viable alternative form of reorganization.[84] Allowance of such nonstock consideration in (B) reorganizations apparently was not deemed necessary by Congress, and the court therefore concluded that this was not really an inconsistency within the reorganization statutes. Rather, it was a conscious legislative decision that voting stock be the only consideration allowable in stock-for-stock acquisitions.[85]

The court did not comment on the apparent willingness of the IRS to allow taxpayers to circumvent the "solely" requirement in some of its rulings. Certain situations have been recognized where reorganization treatment will not be denied by the

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82. *Id.*

83. I.R.C. § 368 provides in pertinent part:

(a) Reorganization.

(1) In General. For purposes of . . . this part, the term "reorganization" means —

. . . .

(C) the acquisition by one corporation, in exchange solely for all or a part of its voting stock (or in exchange solely for all or a part of the voting stock of a corporation which is in control of the acquiring corporation), of substantially all of the properties of another corporation, but in determining whether the exchange is solely for stock the assumption by the acquiring corporation of a liability of the other, or the fact that property acquired is subject to a liability, shall be disregarded . . . .

84. 621 F.2d at 1244.

85. *Id.*

mere presence of nonstock consideration.[86] If "solely . . . leaves no leeway," a strict adherence to the rule of *Southwest Consolidated* would dictate that such rulings are invalid. Conversely, if the rulings are supported by sound policy reasons for allowing consideration other than voting stock in the named circumstances, a blind allegiance to *Southwest Consolidated* may not be justified, as the courts in *Reeves* and *Pierson* suggested. Indeed, the *Reeves* opinion effectively overruled prior decisions[87] when it held that prior purchases for cash are irrelevant for purposes of section 368(a)(1)(B) so long as at least eighty percent of a corporation's stock is acquired solely for voting stock. Perhaps the very fact that the Tax Court's decisions in *Howard* and *Mills* were reversed, albeit on other grounds, reflected a concern on the part of the Seventh and Fifth Circuits that the interpretation of section 368(a)(1)(B) had become overly strict. The United States Supreme Court in *Turnbow* had the opportunity to state that absolutely no consideration other than voting stock would be allowed in a (B) reorganization. Instead, the decision more narrowly held that an acquisition of seventy percent for cash and thirty percent for stock did not qualify as a (B) reorganization.[88]

In *Heverly* the court felt constrained to follow a strict statutory interpretation which evidenced a return to the *Southwest Consolidated* reasoning. Whereas the lower courts had been willing to extend the meaning of section 368(a)(1)(B) to arrive at an arguably common sense approach, the Third Circuit made it clear that any such change should come from the legislature. Congress had amended the reorganization statutes many times

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86. Rev. Rul. 76-365, 1976-2 C.B. 110 (payment of acquired corporation's reorganization expenses by the acquiring corporations); Rev. Rul. 72-354, 1972-2 C.B. 216 (purging of transaction by transferring stock acquired for cash to an unrelated third party); Rev. Rul. 68-285, 1968-1 C.B. 147 (redemption of dissenters' shares for cash by acquired corporation); Rev. Rul. 66-365, 1966-2 C.B. 116 (acquiring corporation paid cash for fractional shares of its stock to shareholders of the acquired corporation).

87. The decision is directly in conflict with the opinions in Howard v. Commissioner, 24 T.C. 792 (1955), *rev'd on other grounds*, 238 F.2d 943 (7th Cir. 1956), and Mills v. Commissioner, 39 T.C. 393 (1962), *rev'd*, 331 F.2d 321 (5th Cir. 1964).

88. 368 U.S. 337, 344 (1961).

without disturbing the "solely for . . . voting stock" wording of clause (B).[89] The changes in clause (C) allowing nonstock consideration attest to the fact that Congress knows how to make the provisions less restrictive when it so desires. Although at least one commentator has advocated reform in the reorganization provisions,[90] such change clearly is the duty of the legislature, not of the courts. Perhaps the protracted litigation in this and other cases will result in either a more definitive statement from the United States Supreme Court or a response from Congress in the form of more clearly written statutes.

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89. *See* text accompanying notes 27-31 & 67 *supra*.

90. *See* Steines, *Policy Considerations in the Taxation of B Reorganizations*, 31 HASTINGS L.J. 993, 1016 n.92 (1980).

# Torts—Wrongful Life—Infant's Right to Sue for Negligent Genetic Counseling

*Curlender v. Bio-Science Laboratories*, 106 Cal. App. 3d 811, 165 Cal. Rptr. 477 (1980).

Plaintiff, an infant born with a hereditary condition[1] known as Tay-Sachs disease,[2] brought a wrongful life action against defendant—medical testing laboratories.[3] The infant's parents pre-

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1. A hereditary disease is one passed from the parents to the offspring through the genes. J. SCHMIDT, 2 ATTORNEYS' DICTIONARY OF MEDICINE AND WORD FINDER H-39 (1980). Because the diseased condition is carried by the genes, hereditary diseases also may be referred to as genetic diseases. However, genetic abnormalities also can occur in infants with no hereditary basis (for example, x-ray irradiation can alter the genetic material in a previously healthy fetus and produce a genetic abnormality). W. ANDERSON & T. SCOTTI, SYNOPSIS OF PATHOLOGY 10-28 (9th ed. 1976).

2. Tay-Sachs disease, or amaurotic familial idiocy, is "[a] familial disease affecting children . . . from four months to twelve years. It is characterized by partial or complete loss of vision, mental underdevelopment, softness of the muscles, convulsions . . . . [The disease is] [k]nown as *Tay-Sachs disease, cerebromacular degeneration,* and *Batten-Mayou's disease.*" 1 J. SCHMIDT, *supra* note 1, at A-141. Since this is a recessive, or hidden, genetic defect, ostensibly healthy individuals may carry the defect. When two carriers of this hidden defect reproduce, however, their offspring may display the clinical manifestations of the disease. W. ANDERSON & T. SCOTTI, *supra* note 1, at 23. Carriers of Tay-Sachs can be detected by a simple blood test. Tay-Sachs disease, as well as several other genetic conditions, can also be diagnosed in the fetus by performing amniocentesis. In this procedure a needle is inserted through the mother's uterus into the amniotic sac surrounding the fetus and a small quantity of amniotic fluid containing fetal cells is removed. Examination of these fetal cells will reveal the presence of genetic abnormalities. Friedmann, *Prenatal Diagnosis of Genetic Disease*, SCIENTIFIC AMERICAN 34 (Nov. 1971). For a review of fetal conditions detectable by amniocentesis, see Golbus, Loughman, Epstein, Halbasch, Stephens & Hall, *Prenatal Genetic Diagnosis in 3000 Amniocenteses*, 300 NEW ENGLAND JOURNAL OF MEDICINE 157 (Jan. 1979).

3. The plaintiff sought damages for emotional distress, cost of her care, and deprivation of her normal life span. Punitive damages were also sought by plaintiff. Curlender v. Bio-Science Labs, 106 Cal. App. 3d 811, 816, 165 Cal. Rptr. 477, 481 (1980).

viously had undergone testing procedures by the laboratories to detect carriers of this disease. Because of the alleged negligence of the laboratories, however, the infant's parents were not informed of their status as carriers of this genetic condition and the plaintiff subsequently was born with Tay-Sachs. The trial court sustained defendant's demurrer to the complaint on the ground that plaintiff-infant had failed to state a cause of action and therefore ordered dismissal.[4] On appeal to the California Court of Appeals, *held,* reversed. In California, an infant born with a severely disabling hereditary disease has a cause of action for any physical and mental deformities related to detectable genetic abnormalities against those who have assumed a duty to counsel the infant's parents about their genetic health. *Curlender v. Bio-Science Laboratories,* 106 Cal. App. 3d 811, 165 Cal. Rptr. 477 (1980).

The term "wrongful life" has been applied to a variety of tort actions by both infants and their parents for social,[5] economic,[6] physical,[7] and mental[8] damages associated with the birth

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4. *Id.* at 814, 165 Cal. Rptr. at 479. Defendant had argued at trial that plaintiff-infant essentially was seeking damages for negligence that resulted in her birth, an action termed "wrongful life" that was barred almost universally in other jurisdictions and rejected in California concerning damages for illegitimate birth. *Id.* at 817, 165 Cal. Rptr. at 481.

5. Cases involving social damages have dealt primarily with the social stigma of being born illegitimately. Stills v. Gratton, 55 Cal. App. 3d 698, 127 Cal. Rptr. 652 (1976) (allowing recovery for parent, denying recovery to infant); Pinkney v. Pinkney, 198 So. 2d 52 (Fla. Dist. Ct. App. 1967) (denying recovery to infant); Zepeda v. Zepeda, 41 Ill. App. 2d 240, 190 N.E.2d 849 (denying recovery to infant), *cert. denied,* 379 U.S. 945 (1963); Williams v. State, 18 N.Y.2d 481, 223 N.E.2d 343, 276 N.Y.S.2d 885 (1966) (denying recovery to infant).

6. Cases involving economic damages have dealt with expenses caused by the birth of the infant, as well as expenses for continued care and maintenance of the child. Berman v. Allan, 80 N.J. 421, 404 A.2d 8 (1979) (denying recovery to parents for expenses); Gildiner v. Thomas Jefferson Univ. Hosp., 451 F. Supp. 692 (E.D. Pa. 1978) (allowing recovery to parents for expenses); Becker v. Schwartz, 46 N.Y.2d 401, 386 N.E.2d 807, 413 N.Y.S.2d 895 (1978) (allowing recovery to parents for expenses and maintenance); Park v. Chessin, 88 Misc. 2d 222, 387 N.Y.S.2d 204 (Sup. Ct. 1976), *modified,* 60 A.D.2d 80, 400 N.Y.S.2d 110 (1977), *modified sub nom.* Becker v. Schwartz, 46 N.Y.2d 401, 386 N.E.2d 807, 413 N.Y.S.2d 895 (1978) (allowing recovery to parents for expenses and maintenance); Gleitman v. Cosgrove, 49 N.J. 22, 227 A.2d 689 (1967) (denying

of the infant. The central theme of all of these actions has been an allegation by the plaintiffs that, because some injury has occurred by the very fact of the infant's birth, the infant's existence is wrongful.[9] While some courts have allowed these actions when brought by the parents, there has been an almost universal denial of these actions when brought by the infants themselves.[10] California courts have followed this pattern of denying recovery to infants while allowing recovery to their parents in two cases involving the births of unwanted but healthy infants.[11] In *Curlender*, however, a California court was faced for the first

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recovery to parents for maintenance); Jacobs v. Theiner, 519 S.W.2d 846 (Tex. 1975) (allowing recovery to parents for expenses and maintenance); Dumer v. St. Michael's Hosp., 69 Wis. 2d 766, 233 N.W.2d 372 (1975) (allowing recovery to parents for expenses and maintenance).

7. Cases involving physical damages have dealt with all congenital abnormalities of the infant and physical injuries of the mother as a consequence of the delivery. Gildiner v. Thomas Jefferson Univ. Hosp., 451 F. Supp. 692 (E.D. Pa. 1978) (infant with hereditary disease denied recovery); Berman v. Allan, 80 N.J. 421, 404 A.2d 8 (1979) (infant with genetic disease denied recovery); Becker v. Schwartz, 46 N.Y.2d 401, 386 N.E.2d 807, 413 N.Y.S.2d 895 (1978) (infant with genetic disease denied recovery); Karlsons v. Guerinot, 57 A.D.2d 73, 394 N.Y.S.2d 933 (1977) (infant with genetic disease denied recovery, mother allowed recovery); Dumer v. St. Michael's Hosp., 69 Wis. 2d 766, 233 N.W.2d 372 (1975) (infant with congenital abnormality denied recovery).

8. Cases involving mental damages have dealt primarily with the emotional trauma of the parents occasioned by the birth of the infant. Berman v. Allan, 80 N.J. 421, 404 A.2d 8 (1979) (allowing parents' claim for mental distress); Gleitman v. Cosgrove, 49 N.J. 22, 227 A.2d 689 (1967) (denying mother's claim for mental distress); Becker v. Schwartz, 46 N.Y.2d 401, 386 N.E.2d 807, 413 N.Y.S.2d 895 (1978) (denying parents' claim for mental distress); Howard v. Lecher, 42 N.Y.2d 109, 366 N.E.2d 64, 397 N.Y.S.2d 363 (1977) (denying parents' claim for mental distress); Karlsons v. Guerinot, 57 A.D.2d 73, 394 N.Y.S.2d 933 (1977) (allowing parents' claim for mental distress).

9. *See, e.g.*, Tedeschi, *On Tort Liability for "Wrongful Life,"* 1 ISRAEL L. REV. 513 (1966); 55 MINN. L. REV. 58 (1970); 56 NEB. L. REV. 706 (1977); 8 ST. MARY'S L.J. 140 (1976); 4 AM. J.L. & MED. 211 (1978); Annot., 91 A.L.R.3d 316 (1979); Annot., 83 A.L.R.3d 15 (1978); Annot., 27 A.L.R.3d 906 (1969).

10. *See* note 7 *supra*.

11. Stills v. Gratton, 55 Cal. App. 3d 698, 127 Cal. Rptr. 652 (1976) (allowing recovery for parent, denying recovery to infant in a case involving illegitimate birth of a normal infant following negligently performed abortion); Custodio v. Bauer, 251 Cal. App. 2d 303, 59 Cal. Rptr. 463 (1967) (allowing recovery for parents in a case involving the unwanted birth of a normal infant following negligently performed sterilization).

time with the issue whether a congenitally deformed infant suffering from a detectable hereditary disease could state a cause of action based on a claim of wrongful life.

At least six distinct factual situations have been classified as actionable under a wrongful life theory. The first situation allows actions by parents for negligent sterilization operations that resulted in the birth of an unwanted infant.[12] In the second type of action, parents may sue for failure to diagnose a pregnancy within the time period allowed for a legal abortion if the failure results in the birth of an unwanted infant.[13] In the third type of wrongful life action, parents may sue for the negligent performance of abortion procedures when such negligence results in the birth of an unwanted infant.[14] In a fourth type of action healthy infants base tort claims upon their status as illegitimates.[15] Fifth, infants may seek redress for preconception negligence involving their mothers when that negligence results in congenital abnormalities in the infants.[16] The sixth situation involves actions by both infants and their parents for negligent genetic

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12. The following cases allowed recovery for negligent sterilization procedures: Bishop v. Byrne, 265 F. Supp. 460 (S.D. W. Va. 1967); Bushman v. Burns Clinic Med. Center, 83 Mich. App. 453, 268 N.W.2d 683 (1978); Riviera v. State, 94 Misc. 2d 157, 404 N.Y.S.2d 950 (Ct. Cl. 1978); Bowman v. Davis, 48 Ohio St. 2d 41, 356 N.E.2d 496 (1976); Speck v. Finegold, 408 A.2d 496 (Pa. Super. Ct. 1979); Vaughn v. Shelton, 514 S.W.2d 870 (Tenn. Ct. App.), *cert. denied, id.* (Tenn. 1974); Hays v. Hall, 488 S.W.2d 412 (Tex. 1973).

The following cases denied recovery for negligent sterilization: Sala v. Tomlinson, 73 A.D.2d 724, 422 N.Y.S.2d 506 (1979); Terrell v. Garcia, 496 S.W.2d 124 (Tex. Civ. App. 1973).

13. Ziemba v. Sternberg, 45 A.D.2d 230, 357 N.Y.S.2d 265 (1974) (allowing recovery for malpractice); Rieck v. Medical Protective Co., 64 Wis. 2d 514, 219 N.W.2d 242 (1974) (denying recovery for failing to detect pregnancy).

14. Recovery was allowed for negligent abortion procedure in the following cases: Stills v. Gratton, 55 Cal. App. 3d 698, 127 Cal. Rptr. 652 (1976); Wilczynski v. Goodman, 73 Ill. App. 3d 51, 391 N.E.2d 479 (1979).

15. The infant was denied recovery in the following cases: Stills v. Gratton, 55 Cal. App. 3d 698, 127 Cal. Rptr. 652 (1976); Zepeda v. Zepeda, 41 Ill. App. 2d 240, 190 N.E.2d 849, *cert. denied,* 379 U.S. 945 (1963); Williams v. State, 18 N.Y.2d 481, 223 N.E.2d 343, 276 N.Y.S.2d 885 (1966).

16. Jorgensen v. Meade Johnson Labs, Inc., 483 F.2d 237 (10th Cir. 1973) (allowing recovery for preconception negligence against infant's mother); Renslow v. Mennonite Hosp., 67 Ill. 2d 348, 367 N.E.2d 1250 (1977) (allowing recovery).

counseling resulting in the birth of congenitally deformed infants.[17] Actions by parents involving negligent sterilization,[18] negligent diagnosis,[19] or negligent abortion procedures[20] have been treated as classical medical malpractice actions, and parents in those cases have been allowed recovery. Actions by infants alleging preconception negligence involving the mother and resulting in defects in the infant also have been treated as basic medical malpractice actions; infants in these cases have been allowed recovery for their injuries.[21] Actions by illegitimate infants seeking recovery for having been born in a socially stigmatized condition, however, consistently have been dismissed by the courts.[22] Although many courts also have refused to recognize actions brought by infants or their parents for negligent genetic counseling, there has been a recent trend toward allowing recovery by the parents in such cases.[23]

The term "wrongful life" first appeared in an Illinois case, *Zepeda v. Zepeda*,[24] in which an illegitimate infant brought an action against his father to recover for damages against "his person, property and reputation by causing him to be born an adulterine bastard."[25] The *Zepeda* court concluded that to recognize

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17. The infant was denied recovery in the following cases: Gildiner v. Thomas Jefferson Univ. Hosp., 451 F. Supp. 692 (E.D. Pa. 1978); Berman v. Allan, 80 N.J. 421, 404 A.2d 8 (1979); Gleitman v. Cosgrove, 49 N.J. 22, 227 A.2d 689 (1967); Karlsons v. Guerinot, 57 A.D.2d 73, 394 N.Y.S.2d 993 (1977); Park v. Chessin, 60 A.D.2d 80, 400 N.Y.S.2d 110 (1977), *modified sub nom.* Becker v. Schwartz, 46 N.Y.2d 401, 386 N.E.2d 807, 413 N.Y.S.2d 895 (1978).

18. *See* note 12 *supra*.

19. *See* note 13 *supra*.

20. *See* note 14 *supra*.

21. *See* note 16 *supra*.

22. *See* note 15 *supra*.

23. Karlsons v. Guerinot, 57 A.D.2d 73, 394 N.Y.S.2d 933 (1977); Howard v. Lecher, 53 A.D.2d 420, 386 N.Y.S.2d 460 (1976), *aff'd*, 42 N.Y.2d 109, 366 N.E.2d 64, 397 N.Y.S.2d 363 (1977); Park v. Chessin, 88 Misc. 2d 222, 387 N.Y.S.2d 204 (Sup. Ct. 1976), *modified*, 60 A.D.2d 80, 400 N.Y.S.2d 110 (1977), *modified sub nom.* Becker v. Schwartz, 46 N.Y.2d 401, 386 N.E.2d 807, 413 N.Y.S.2d 895 (1978).

24. 41 Ill. App. 2d 240, 190 N.E.2d 849, *cert. denied*, 379 U.S. 945 (1963).

25. *Id.* at 246, 190 N.E.2d at 851. In *Zepeda* defendant had induced plaintiff's mother to have sexual relations with him by promising to marry her. Defendant's promise was not kept, and infant plaintiff was subsequently born illegitimately.

such a claim by plaintiff would be to create a new tort—a tort for wrongful life.[26] Although the court readily admitted that the wrong committed was a tort, it refused to recognize plaintiff's cause of action for wrongful life because of public policy considerations.[27] Those public policy considerations recognized by the *Zepeda* court included the fear that this new cause of action would result in a flood of litigation by other illegitimates and would open the courts to a variety of novel claims involving such new scientific techniques as *in vitro* fertilization and genetic manipulations.[28] In affirming dismissal of the wrongful life action, the court suggested that a decision to recognize a new tort with such far-reaching consequences should come from the legislature.[29]

In the New Jersey case of *Gleitman v. Cosgrove*[30] the wrongful life phrase coined in *Zepeda* was extended to include actions based on congenital mental and physical deformities of the infant.[31] In *Gleitman* the parents and their congenitally de-

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26. *Id.* at 259, 190 N.E.2d at 858.

27. *Id.* at 262-63, 190 N.E.2d at 859. A New York court in Williams v. State, 18 N.Y.2d 481, 223 N.E.2d 343, 276 N.Y.S.2d 885 (1966), also denied a claim for wrongful life made by a healthy infant based upon illegitimacy. In the *Williams* case, infant plaintiff alleged that an assault against his mother was the direct result of negligence by a mental institution under a duty to care for and supervise his mother, and that as a result of this negligence, infant was conceived and born with the stigma and related deprivations of illegitimacy. *Id.* The *Williams* court refused to recognize the infant's condition as an injury cognizable at law for policy and social reasons and suggested that the legislature should be the entity to fashion appropriate relief for illegitimates. *Id.* at 484, 223 N.E.2d at 344, 276 N.Y.S.2d at 887.

28. 41 Ill. App. 2d at 259-60, 190 N.E.2d at 858. *In vitro* fertilization is the technique used to produce so-called test-tube babies. The court feared that recognition of the tort action of the Zepeda infant might eventually lead to judicial consideration of liability for a host of new scientific procedures dealing with human reproduction. *Id.* at 261, 190 N.E.2d at 859. The court determined that the legislature was the proper place for consideration of these new areas of technological advancement. *Id.* at 262-63, 190 N.E.2d at 859.

29. *Id.* at 262, 190 N.E.2d at 859.

30. 49 N.J. 22, 227 A.2d 689 (1967).

31. Congenital conditions are present or exist at birth. 1 J. SCHMIDT, *supra* note 1, at C-210. Congenital conditions are not necessarily hereditary conditions, as the term congenital refers to the time aspect rather than the causative aspect of the condition.

formed infant brought a malpractice action against the mother's physician. The parents alleged that the physician had negligently failed to inform the mother, in time for her to have obtained an abortion, that rubella during pregnancy could result in serious defects in her developing fetus.[32] The *Gleitman* court denied recovery to both the parents and the infant for public policy reasons and because the court felt that it was impossible to measure damages. The majority in the *Gleitman* case reasoned that the defendant's conduct actually had not caused the infant's injuries, but merely had prevented the infant's mother from obtaining an abortion: "The infant plaintiff is therefore required to say not that he should have been born without defects but that he should not have been born at all . . . [and] that his very life is 'wrongful.' "[33] Viewing the normal measure of tort damages as compensatory, the majority determined that the infant's measure of damages would be the difference between his condition because of the negligence of the defendant—that is, life with physical and mental defects—and his condition had the defendant not been negligent—that is, nonexistence. The majority maintained that it was impossible to make such a determination and found a similar difficulty in weighing the injuries claimed by the parents for the birth of a defective child against the joy and benefits derived from parenthood.[34] The majority held, however, that even if these damage assessments could have been made it would have been against public policy to allow tort damages for a denial of the opportunity to obtain an abortion.[35]

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32. 49 N.J. at 26, 227 A.2d at 691. The lower court had dismissed actions by the parents because the suggested abortion would have been a crime under New Jersey law and actions by the infant for failure to show that defendant-physician's acts had been the proximate cause of the infant's injuries. *Id.* On appeal to the Supreme Court of New Jersey, this dismissal was affirmed in a four to three vote. *Id.*

33. 49 N.J. at 28, 227 A.2d at 692.

34. In order to determine their [the parents'] compensatory damages a court would have to evaluate the denial to them of the intangible, unmeasurable, and complex human benefits of motherhood and fatherhood and weigh these against the alleged emotional and money injuries. Such a proposed weighing is similar to that which we have found impossible to perform for the infant plaintiff.

*Id.* at 29, 227 A.2d at 693.

35. *Id.* at 31, 227 A.2d at 693. "The sanctity of the single human life is

The dissent in *Gleitman* presented a different view of the plaintiffs' claims. Although the dissent would have dismissed the infant's claim on the basis of the existence with defects versus nonexistence evaluation advanced by the majority, the dissent would have allowed the parents' cause of action as a case of medical malpractice.[36] The dissent maintained that when the mother told her physicians of her rubella during the early stages of her pregnancy, the physicians were placed under a legal duty to inform her of the increased incidence of birth defects caused by this disease.[37] The breach of this duty resulted in emotional distress and medical expenses related to the birth of a deformed infant who would have been aborted but for the negligence of the defendant. Although these injuries to the parents might be difficult to measure, especially when weighed against the intangible value of the parent-child relationship, the dissent maintained that difficulty in evaluating damages was not a valid basis for denying recovery.[38]

The New York courts initially adopted the analysis of the *Gleitman* majority and denied recovery to both infants and their parents in wrongful life actions. In *Stewart v. Long Island College Hospital*[39] recovery was denied to an infant plaintiff in an action for failure to perform an abortion after the infant's mother had contracted rubella during early pregnancy.[40] As a re-

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the decisive factor in this suit in tort. . . . [T]he right of their child to live is greater than and precludes [the parents'] right not to endure emotional and financial injury." *Id.* at 30-31, 227 A.2d at 693.

36. *Id.* at 63, 227 A.2d at 711 (Weintraub, C.J., dissenting).

37. *Id.* at 49, 227 A.2d at 703 (Jacobs, J., dissenting).

38. *Id.* at 50, 227 A.2d at 704 (Jacobs, J., dissenting) (citing Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555 (1931)).

39. 58 Misc. 2d 432, 296 N.Y.S.2d 41 (Sup. Ct. 1968), *modified and aff'd*, 35 A.D.2d 531, 313 N.Y.S.2d 502, *appeal dismissed*, 27 N.Y.2d 804, 264 N.E.2d 354, 315 N.Y.S.2d 863, *aff'd*, 30 N.Y.2d 695, 283 N.E.2d 616, 332 N.Y.S.2d 640 (1970).

40. At the time of this case therapeutic abortions were obtainable only upon petition to a hospital abortion committee. This committee would consider pertinent medical history and determine if, under the anti-abortion statute, the petitioner could qualify for the procedure on the basis of medical necessity. N.Y. PENAL LAW § 80 (McKinney 1909). The hospital's abortion committee had denied the mother's request in *Stewart* by a split decision, and the hospital staff had advised her not to seek an abortion elsewhere. 58 Misc.

sult, the infant was born with substantial physical defects related to the rubella infection. The infant's action was dismissed in *Stewart* because the court found that "there [was] no remedy for having been born under a handicap, whether physical or psychological, when the alternative to being born in a handicapped condition [was] not to have been born at all."[41] In denying the infant's action the court articulated the position that life, regardless of its handicaps, is always better than the alternative of nonexistence.[42] The parents' action also was dismissed, following the *Gleitman* rationale, based on both the public policy against abortion and the impossibility of evaluating the parents' suffering against the benefits of parenthood.[43]

The New York courts retreated from their earlier denial of recovery for wrongful life actions in *Ziemba v. Sternberg*[44] by recognizing the parents' cause of action in a negligent diagnosis case. In *Ziemba* defendant physician had failed to diagnose the wife's pregnancy within the medically approved time period for an abortion. After delivering a healthy infant, the parents brought an action for pain and suffering and expenses associated with the birth and rearing of the infant. The court held that the parents' cause of action could be considered a natural consequence of the defendant physician's "failure to exercise ordinary and reasonable care in diagnosis or treatment of a patient."[45] Specifically referring to the earlier denial of the parents' cause of action in *Stewart*, the *Ziemba* court held that changes in the statutory prohibition against abortions, and the United States Supreme Court ruling in *Roe v. Wade*,[46] which established the constitutional right of a woman to seek this procedure, had negated the public policy against abortion.[47] The *Ziemba* court also held that the difficulty of evaluating damages was no reason to deny the sufficiency of the parents' complaint; rather, this

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2d at 438-39, 296 N.Y.S.2d at 48.

41. 58 Misc. 2d at 436, 296 N.Y.S.2d at 46.
42. *Id.*, 296 N.Y.S.2d at 46.
43. 35 A.D.2d at 532, 313 N.Y.S.2d at 503-04.
44. 45 A.D.2d 230, 357 N.Y.S.2d 265 (1974).
45. *Id.* at 231, 357 N.Y.S.2d at 267.
46. 410 U.S. 113 (1973).
47. *Id.* at 232, 357 N.Y.S.2d at 268.

evaluation was a question of fact to be determined at trial.[48]

New York's allocation of recovery in wrongful life actions, however, has been limited specifically to actions by the parents and has been coupled consistently with a refusal by the judiciary to allow infants' causes of action for wrongful life.[49] In *Karlsons v. Gueinot*[50] plaintiff mother consulted defendant physician for prenatal care and informed him of a medical history indicative of possible fetal complications;[51] however, the physician failed to inform the parents of the risks of fetal deformities or the existence of amniocentesis.[52] The infant subsequently was born with Down's syndrome.[53] The *Karlsons* court dismissed the infant's claim for damages on the basis of the *Gleitman* existence-versus-nonexistence evaluation. The court stated that

> recognition of the infant's cause of action would necessitate a finding that she has been injured by defendants' negligence, i.e., that she has been placed in a worse position than she would have been in had defendants not been negligent. Thus, the threshold question here is not whether life with deformities, however severe, is less preferable than death, but rather whether it is less preferable than the utter void of nonexistence . . . .[54]

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48. 45 A.D.2d at 233, 357 N.Y.S.2d at 269. The dissent maintained that because plaintiff based her claim upon an unwanted child, she must put the child up for adoption in order to recover damages. "If the parents chose to retain the custody and companionship of their infant, they have no damages and, consequently, state no cause of action." *Id.* at 235, 357 N.Y.S.2d at 271 (Cardamore, J., dissenting).

49. Becker v. Schwartz, 46 N.Y.2d 401, 386 N.E.2d 807, 413 N.Y.S.2d 895 (1978) (denying recovery to a genetically defective infant); Karlsons v. Guerinot, 57 A.D.2d 73, 394 N.Y.S.2d 933 (1977) (denying recovery to a genetically defective infant).

50. 57 A.D.2d 73, 394 N.Y.S.2d 933 (1977).

51. The mother previously had given birth to a deformed child and at the age of 37 was in a high-risk group for Down's syndrome. *Id.* at 75, 394 N.Y.S.2d at 934. Down's syndrome is one of the most common chromosomal disorders. In women under 25, less than 1 in 2000 births display this condition. The chances of having an affected infant, however, rises progressively to 2% in women over 45. These infants are severely retarded and 60% of them die before reaching the age of 10. S. ROBBINS, PATHOLOGICAL BASIS OF DISEASE 187 (1974).

52. *See* note 2 *supra*.

53. *See* note 51 *supra*.

54. 57 A.D.2d at 81, 394 N.Y.S.2d at 938 (footnotes omitted).

The *Karlsons* court, however, allowed the claims by the parents for pain and suffering and mental distress occasioned by the birth of the deformed infant as a direct result of the defendant's medical malpractice.[55] Furthermore, in *Howard v. Lecher*,[56] involving an action by the parents for mental distress based upon the failure of the defendant physician to inform them of their possible condition as carriers of a hereditary disease or of tests designed to detect such carriers, recovery for expenses of the parents in connection with the deformed infant's medical, hospital, nursing, and funeral expenses was not challenged by the defendant. Similarly, in the companion cases of *Park v. Chessin*[57] and *Becker v. Schwartz*,[58] both of which involved negligent genetic counseling, the parents of infants suffering from detectable genetic conditions were allowed recovery for expenses associated with the birth of the child; these expenses included the costs of long-term institutionalization of the mentally defective infant.[59] The court held that

> [u]nlike the causes of action brought on behalf of their infants for wrongful life, plaintiffs' causes of action, also founded essentially upon a theory of negligence or medical malpractice, do allege ascertainable damages: the pecuniary expense which they have borne, and in *Becker* must continue to bear, for the care and treatment of their infants. . . . Plaintiffs state causes of action in their own right predicated upon a breach of a duty flowing from defendants to themselves, as prospective parents, resulting in damage to plaintiffs for which compensation may be readily fixed.[60]

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55. *Id.* at 78, 394 N.Y.S.2d at 936.

56. 53 A.D.2d 420, 386 N.Y.S.2d 460 (1976), *aff'd*, 42 N.Y.2d 109, 366 N.E.2d 64, 397 N.Y.S.2d 363 (1977).

57. 88 Misc. 2d 222, 387 N.Y.S.2d 204 (Sup. Ct. 1976), *modified*, 60 A.D.2d 80, 400 N.Y.S.2d 110 (1977), *modified sub nom.* Becker v. Schwartz, 46 N.Y.2d 401, 386 N.E.2d 807, 413 N.Y.S.2d 895 (1978).

58. 46 N.Y.2d 401, 386 N.E.2d 807, 413 N.Y.S.2d 895 (1978).

59. Similar recoveries were allowed in Gildiner v. Thomas Jefferson Univ. Hosp., 451 F. Supp. 692 (E.D. Pa. 1978) and Speck v. Finegold, 408 A.2d 496 (Pa. Super. Ct. 1979).

60. 46 N.Y.2d at 413, 386 N.E.2d at 813, 413 N.Y.S.2d at 901.

Although in *Park* the infant also was allowed to bring an action, this initial recovery was rejected on review with the companion case of *Becker* because of the judicial inability to weigh existence with defects against nonexistence in the computation of damages. The court stated that the infant's cause of action demanded "a comparison between the Hobson's choice of life in an impaired state and nonexistence. This comparison the law is not equipped to make."[61]

The New Jersey court that initially decided *Gleitman* recently has reviewed its position on wrongful life actions in *Berman v. Allan.*[62] In *Berman* an infant born with Down's syndrome and her parents brought an action against a physician for failure to inform the parents of the amniocentesis procedure.[63] Like the New York courts, the *Berman* court suggested that the infant's claim could not be denied on the basis of either the abortion arguments that had been mooted by *Roe v. Wade*[64] or the argument that damages were too uncertain. The *Berman* court, however, refused to recognize the infant's wrongful life claim because of the court's determination that life, regardless of one's handicaps or deformities, is more valuable than nonexistence. Based upon this evaluation, the court held that an infant could suffer no legally cognizable damage by being brought into existence, since existence was preferable to nonexistence.[65] The

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61. *Id.* at 412, 386 N.E.2d at 812, 413 N.Y.S.2d at 900.

62. 80 N.J. 421, 404 A.2d 8 (1979).

63. *See* note 2 *supra.*

64. 410 U.S. 113 (1973).

65. The *Berman* court stated:

> No man is perfect. Each of us suffers from some ailments or defects, whether major or minor, which make impossible participation in all the activities the world has to offer. But our lives are not thereby rendered less precious than those of others whose defects are less pervasive or less severe.
>
> We recognize that as a mongoloid child, Sharon's abilities will be more circumscribed than those of normal, healthy children and that she, unlike them, will experience a great deal of physical and emotional pain and anguish. We sympathize with her plight. We cannot, however, say that she would have been better off had she never been brought into the world. Notwithstanding her affliction with Down's Syndrome, Sharon, by virtue of her birth, will be able to love and be loved and to experience happiness and pleasure—emotions which are

*Berman* court did allow the parents' cause of action as one for negligent deprivation of a right to obtain an abortion. The court stated that

> a physician whose negligence has deprived a mother of this opportunity [to obtain an abortion] should be required to make amends for the damage which he has proximately caused. Any other ruling would in effect immunize from liability those in the medical field providing inadequate guidance to persons who would choose to exercise their constitutional right to abort fetuses which if born, would suffer from genetic defects.[66]

In determining the parents' damages, the *Berman* court dismissed claims for medical and other expenses required to rear, educate, and supervise the deformed infant because the claims were deemed disproportionate to the defendants' culpability. The court stated that "[i]n essence, Mr. and Mrs. Berman desire to retain all the benefits inhering in the birth of the child—i.e., the love and joy they will experience as parents—while saddling defendants with the enormous expenses attendant upon her rearing."[67] The *Berman* court, however, did allow the parents to recover for the emotional damages occasioned by the defendants' negligent deprivation of their right to abort the fetus.[68]

In California recovery in wrongful life cases for negligent abortion and negligent sterilization situations has been allowed for parents but not for infants. In *Custodio v. Bauer*[69] parents of an unwanted but healthy infant brought an action against defendant surgeons for the negligent performance of a sterilization procedure on the mother. Although the *Custodio* court did not allow specifically a recovery by the parents for the expenses of rearing a normal child, the court indicated that, if a change in the family status occasioned by the birth of an unwanted child

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> truly the essence of life and which are far more valuable than the suffering she may endure. To rule otherwise would require us to disavow the basic assumption upon which our society is based. This we cannot do.

80 N.J. at 430, 404 A.2d at 13.

66. *Id.* at 432, 404 A.2d at 14.

67. *Id.*, 404 A.2d at 14.

68. *Id.* at 433, 404 A.2d at 14.

69. 251 Cal. App. 2d 303, 59 Cal. Rptr. 463 (1967).

because of defendant's negligence could be measured economically, recovery should be allowed to the extent of the measurable economic detriment.[70] In *Stills v. Gratton*[71] a mother and her healthy, illegitimate infant brought an action against defendant surgeons for negligent performance of an abortion procedure. The *Stills* court, citing the *Zepeda* hesitancy to create a new tort with such far reaching consequences and the *Gleitman* existence-versus-nonexistence problem of determining compensatory damages, denied the infant's cause of action for wrongful life based upon his illegitimacy.[72] The mother's cause of action for medical malpractice was allowed by the *Stills* court.[73]

In *Curlender v. Bio-Science Laboratories*[74] the California Court of Appeals essentially redefined the tort of wrongful life and, basing its rationale upon this redefinition, allowed an infant to bring a cause of action for wrongful life. The *Curlender* court traced the history of wrongful life actions and noted a judicial progression in these actions from an initial barring of all recovery in such actions to an allowance of recovery by the parents of the infant for emotional or pecuniary damages.[75] The court also traced the tort concept of duty in California and found that the expansive concept could include a legal obligation on the part of the genetic testing laboratory to both the parents and the infant. This obligation required the laboratory to use requisite care in the administration of tests designed to inform the parents of potential genetic defects in their unborn children.[76] In considering

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70. *Id.* at 324, 59 Cal. Rptr. at 476.

71. 55 Cal. App. 2d 698, 127 Cal. Rptr. 652 (1976).

72. *Id.* at 705-06, 127 Cal. Rptr. at 656-57.

73. *Id.* at 703-05, 127 Cal. Rptr. at 655-56.

74. 106 Cal. App. 3d 811, 165 Cal. Rptr. 477 (1980).

75. The court noted (1) the retreat from the *Gleitman* impossibility of computing damages criteria, (2) the change in public policy based on the *Roe v. Wade* ruling, (3) the regard for care in genetic counseling, and (4) the great number of wrongful life actions as indicative of the need for judicial recognition of this cause of action. *Id.* at 825-27, 165 Cal. Rptr. at 486-87.

76. The court stated that

> [t]he public policy considerations with respect to the individuals involved and to society as a whole dictate recognition of such a duty, and it is of significance that in no decision that has come to our attention which has dealt with the "wrongful-life" concept has it been suggested that public policy considerations negate the existence of such a

the nature of the infant plaintiff's claim based on an hereditary disease, the court held that the tort element of injury from defendant's negligence could not be negated by questions concerning the value of nonexistence versus existence with defects;[77] rather, the element of injury should be recognized judicially as the logical consequence of a genetic condition which, because of defendant's negligence, resulted not only in the infant's birth but also in his suffering.[78] Finally, considering the question of damages, the court indicated that recovery by the infant should not be based upon the expenses associated with rearing an average child over an actuarially determined normal life span; instead, recovery should be based upon those costs specifically incurred as a result of the abnormal condition of the infant and should be limited to the statistically shorter life span associated with such deformed infants.[79]

In fashioning a remedy for a congenitally deformed infant in a wrongful life case involving negligent genetic counseling, the *Curlender* decision suggests several conceptual problems in allowing recovery to the infant. The most obvious problem is judicial precedent; courts in other jurisdictions previously have denied a wrongful life cause of action to the infant.[80] While these

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duty.

*Id.* at 828, 165 Cal. Rptr. at 488.

77. The primary reason for denying the infant recovery in *Berman* was the speculative nature of the claim that existence was preferable to nonexistence. *See* note 65 *supra* and accompanying text.

78. [T]he circumstances that the birth and injury have come hand in hand has caused other courts to deal with the problem by barring recovery. The reality of the "wrongful-life" concept is that such a plaintiff both *exists* and *suffers*, due to the negligence of others. It is neither necessary nor just to retreat into meditation on the mysteries of life. We need not be concerned with the fact that had defendants not been negligent, the plaintiff might not have come into existence at all. The certainty of genetic impairment is no longer a mystery.

106 Cal. App. 3d at 829, 165 Cal. Rptr. at 488.

79. *See* text accompanying note 93 *infra*. The infant had based the damages claim upon the actuarial life expectancy of a healthy infant of her sex (more than 70 years). The court held that in keeping with its redefinition of the wrongful life paradigm, damages were limited to the infant's actual condition at birth and the life expectancy of an infant in her condition (approximately 4 years). *Id.* at 830, 165 Cal. Rtpr. at 489.

80. *See* note 17 *supra*.

prior decisions were not controlling authority for the *Curlender* court, they represented a consistent judicial response to these actions. In dealing with this problem, the *Curlender* court traced the progression of the parents' action from the initial denial of recovery to the eventual recoveries by the parents for injuries based on basic medical malpractice criteria and suggested that this progression should include a recognition of the infant's cause of action. Some of the rationales used to deny recovery to both parents and infants in earlier cases, such as public policy considerations and the impossibility of computing damages, have been rejected in recent decisions allowing the parents' cause of action.[81] In these recent decisions the courts have utilized the new public policy argument of discouraging medical malpractice by establishing the liability of health care professionals to the parents for inadequate or inaccurate medical advice or services. By analogy, rejection of these earlier rationales and substitution of the new argument could serve as the basis for prospective recognition of the infant's cause of action.[82]

Similarly, the types of recovery allowed to the parents could indicate a basis for recovery by the infant. This is especially true when the parental recoveries are allocated to such expenses as cost of long-term care.[83] This expense is in reality an expense of the deformed infant himself. While society traditionally has placed the burden of caring for an infant or young child on the parents, the circumstances associated with the birth of a severely deformed child may alter this allocation of responsibility. Parents may not be able to cope with the economic or emotional pressures associated with an abnormal child and may put the deformed child up for adoption.[84] Alternatively, the deformed

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81. Berman v. Allan, 80 N.J. 421, 404 A.2d 8 (1979); Ziemba v. Sternberg, 45 A.D.2d 230, 357 N.Y.S.2d 265 (1974).

82. Judge Handler in Berman v. Allan, 80 N.J. 421, 404 A.2d 8 (1979) (Handler, J., concurring), maintained that the physician caring for the infant's mother also had a duty of reasonable care to the infant during its gestation and that this duty to the infant, to give complete and competent medical advice, was breached, resulting in injury for which the infant could seek recovery. *Id.* at 434-35, 404 A.2d at 15.

83. Becker v. Schwartz, 46 N.Y.2d 401, 386 N.E.2d 807, 413 N.Y.S.2d 895 (1978), *modifying* Park v. Chessin, 60 A.D.2d 80, 400 N.Y.S.2d 110 (1977).

84. The concept of recovery following the infant after an adoption has

child eventually may outlive his parents and yet still require constant care and supervision. In both of these cases, the recovery for the costs of the infant's continued care more appropriately would be directed, albeit in trust, to the infant rather than to his parents.

Another problem in allowing an infant to bring a cause of action for wrongful life in a negligent genetic counseling case is the concept of extending a legal duty to a person not in being, a concept advocated by the *Curlender* court. Especially with reference to the new medical field of genetic counseling, negligence of health care providers in assessing the genetic health of the parents may occur years before the infant claiming recovery for this negligence even has been conceived. In other areas of tort law, such as products liability, recovery is allowed routinely for injuries resulting from negligence prior to conception.[86] Considering the nature and goals of genetic counseling, extension of a duty from these health care professionals to the infant seems justified and comparable to the duty requirements of professionals in other health care specialties.[86] Viewing the status of genetic counselors as professionals engaged in a medical specialty area is also consistent with the definition of their negligence in terms of medical malpractice, rather than in terms of the judicially created action for wrongful life. Although extension of this duty to health care professionals also could dictate an extension of a duty of the parents to the infant concerning his genetic health, with a corresponding parental liability for the infant's injuries, this extension to intrafamily actions is neither a necessary logical conclusion nor a socially desirable alternative.[87]

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had at least one potential application in Becker v. Schwartz, 46 N.Y.2d 401, 386 N.E.2d 8, 413 N.Y.S.2d 895 (1978), *modifying* Park v. Chessin, 60 A.D.2d 80, 400 N.Y.S.2d 110 (1977). Subsequent to their action for wrongful life, the parents of the Becker infant put their child up for adoption. N.Y. Times, Feb. 17, 1979, at 23, col. 1.

85. An example is prior manufacture of defective articles. This analogy was drawn by the court in Jorgensen v. Meade Johnson Labs, Inc., 483 F.2d 237 (10th Cir. 1973), with citations to numerous authorities in that jurisdiction.

86. *See* Capron, *Tort Liability in Genetic Counseling*, 79 COLUM. L. REV. 619 (1979).

87. As indicated in the text, the basis of liability for a wrongful life action resulting from negligent genetic counseling by health care professionals is

The concept of actual injury to the infant is another troublesome aspect of negligent genetic counseling cases such as *Curlender*. The *Curlender* court rejected prior analyses of the infant's claim and interpreted the infant's action as a medical malpractice claim for pain and suffering. Although this distinction is not articulated clearly in the *Curlender* decision, the rationale appears to be that there are actually two results of the defendant's negligence: the birth of the infant and the pain and suffering of the infant. These two results of the defendant's negligence are temporally identical but conceptually distinguishable. It is only the latter result, pain and suffering, for which the infant seeks recovery. This latter interpretation effectively sidesteps the obstacle of evaluating nonexistence versus existence with deformities.[88]

Even the existence-versus-nonexistence evaluation, however, should not serve to bar an infant's cause of action. Courts frequently are faced with evaluations of life versus nonlife in cases

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an extension of the basic tort duty of physicians to use reasonable care in the practice of their specialties. Parental liability in such a wrongful life action, however, rests upon a different basis—the duty of a parent to his child. This parental duty is limited and in many instances is subject to parental immunity or privilege. Although recent court decisions have restricted parental immunity, parents may still have immunity in exercising their own discretion with respect to basic care of their children. *See* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 122, at 866-68 (4th ed. 1971). This basic care immunity includes decisions about medical and health care, similar to those decisions involved in genetic health decisions. Furthermore, the parents' actions regarding genetic counseling decisions could be privileged as an exercise of their constitutionally protected right to privacy in procreative matters, as articulated in Roe v. Wade, 410 U.S. 113 (1973). Finally, the genetic health field is still a developing area of science with an unperfected technology. While in many cases the certainty of infantile deformities has been established, in other cases only a statistical possibility exists that some abnormal condition will be inherited by the offspring. It is evident in these latter cases that parental liability will be determined in part by the reasonableness with which the parents evaluate these possibilities. This subjective standard of reasonableness necessarily would allow a wide range of parental discretion, effectively immunizing many parental actions.

88. Gleitman v. Cosgrove, 49 N.J. 22, 227 A.2d 689 (1976); Becker v. Schwartz, 46 N.Y.2d 401, 386 N.E.2d 807, 413 N.Y.S.2d 895 (1978), *modifying* Park v. Chessin, 60 A.D.2d 80, 400 N.Y.S.2d 110 (1977); Karlsons v. Guerinot, 57 A.D.2d 73, 394 N.Y.S.2d 933 (1977).

such as wrongful death actions,[89] and although these determinations may be difficult to make, they are not impossible.[90] Moreover, the determination whether existence with defects is to be preferred to nonexistence more properly should be determined by the jury as a question of fact rather than dictated as a matter of law by judicial perceptions of public policy.[91] While in most cases life with imperfections will be evaluated as more preferable than nonexistence, as advocated by prior courts, there could be situations in which nonexistence would be the preferable alternative.[92]

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89. There has been a progression in wrongful death actions from initial denial of an unborn infant's claim, Dietrich v. Inhabitants of Northampton, 138 Mass. 14 (1884), to eventual judicial and statutory recognition of prenatal injuries resulting in the death of the infant, Bonbrest v. Kotz, 65 F. Supp. 138 (D.D.C. 1946). *See* note 90 *infra*. *See generally* 45 TENN. L. REV. 545 (1978).

90. Some authorities have noted a distinct difference between the life-versus-nonlife evaluation involved in a wrongful death action and the existence-versus-nonexistence evaluation involved in a wrongful life action. *See* 27 BUFF. L. REV. 537 (1978). The evaluations, however, both depend upon the relative value judicially attributed to each state. In wrongful death actions, life has a positive value, and the status of the plaintiff after the tortious act—dead—is evaluated with reference to this positive value (if before the tort the decendent was in a more favorable position than after the tort, his estate may recover to the extent of his measurable detriment). W. PROSSER, *supra* note 87, § 127, at 905-08. In wrongful life actions courts previously have held as a matter of public policy that the status of the plaintiff without the tortious conduct—nonexistence—has a negative value. The status of the plaintiff after the tortious conduct—existence with defects—is evaluated as having both positive and negative aspects. Given this evaluation, no relative damage can result from the tortious conduct since the plaintiff is always in a more favorable position after the tortious act. If nonexistence, however, is evaluated as a neutral condition, then there could be cases of existence with defects where the negative component of this state exceeds the positive component and the plaintiff would be entitled to recover for his net detriment. *See* notes 92 & 95 *infra* and accompanying text. *See generally* 55 MINN. L. REV. 58, 65-66 (1970).

91. As indicated in Ziemba v. Sternberg, 45 A.D.2d 230, 357 N.Y.S.2d 265 (1974), this determination is not pertinent to the question of the sufficiency of an action for wrongful life by the infant.

92. One hereditary condition that may illustrate how nonexistence could be preferable to life with defects is Lesch-Nyhan Syndrome. This hereditary disease involves a metabolic defect resulting in large build-ups of uric acid in the body. None of the patients can walk nor can they sit upright except when supported. They are managed best by being strapped securely in a chair with arm and leg rests. Victims of this syndrome have abnormalities in their muscle

Assuming that an infant can bring a cause of action for wrongful life based upon some injury resulting from defendant's negligence, the issue of appropriate damages recoverable by the infant must be addressed. This question was not addressed directly in *Curlender* since the court indicated only that recovery for pain and suffering, losses occasioned by the infant's impaired condition, cost of care, and punitive damages could be considered on remand.[93] Conceivably, liability could extend to include all expenses associated with the birth, care, and rearing of a child. Given the concept that the only actual injury to the infant is his deformed condition and not his actual existence, however, recovery should be limited to the extraordinary expenses associated with the infant's impaired condition and his special pain and suffering. This limited liability is consistent with the tort law concept of mitigation of damages[94] and would allow the defendant to reduce the infant's claim by the amount of any benefit that the defendant has conferred upon the infant.[95] Such lia-

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tone which causes sudden muscle spasms and muscular contractures that in some cases have resulted in dislocation of the hips. They have difficulty swallowing and vomit frequently and dramatically, leading in some cases to aspiration pneumonia or death by choking. Self-mutilating behavior is the hallmark of this syndrome. Most patients bite their lips and fingers. This behavior often causes partial amputation of their own fingers. Because sensation is still intact, these patients may be screaming in pain as they bite themselves. Some of the patients learn to call for help and often are seen screaming for assistance while tearing at their own flesh. Nyhan, *Clinical Manifestations of the Lesch-Nyhan Syndrome*, 130 ARCHIVES INTERNAL MED. 186 (1972).

93. 106 Cal. App. 3d at 831-32, 165 Cal. Rptr. at 489-90.

94. RESTATEMENT (SECOND) OF TORTS § 920 (1977).

> When the defendant's tortious conduct has caused harm to the plaintiff or to his property and in so doing has conferred a special benefit to the interest of the plaintiff that was harmed, the value of the benefit conferred is considered in mitigation of damages, to the extent that this is equitable.

95. If nonexistence is given a neutral value and existence with defects is given a positive-negative value, then under some fact situations the benefit that has been conferred by the defendant's tortious conduct—life—quantitatively may be equal to the detriment experienced by the infant as a result of his deformity. In these situations the defendant may offset the claimed detriment by the associated benefit for a zero recovery. Alternatively, the infant could maintain that he has suffered a net detriment. Such evaluations seem particularly likely in cases where a panel of twelve normal, healthy

bility is also consistent with the parental recoveries allowed in previous wrongful life actions.[96] Allocation to the infant, rather than to his parents, of that portion of the recovery allowed for the pain and suffering of the infant and for the expenses associated with his long-term care is preferable in these actions even though prior courts have been reluctant to award any damages to the infant.[97] The physical or mental deformity and its subsequent burden must be borne by the infant throughout his life. By compensating the infant, the recovery essentially follows the infant wherever he may go in later life, whether he is cared for by his parents, whether he is institutionalized, or whether he is adopted.[98]

The *Curlender* court ruling may necessitate a reappraisal of that area of tort law generically referred to as wrongful life actions. Particularly in cases involving mental or physical injury to the infant, courts must reevaluate concepts of duty, injury, and compensation in light of the emergence of such new medical specialties as genetic counseling and such new scientific techniques as genetic engineering. Although some judicial resistance to the

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jurors is faced with a small child with a genetic abnormality such as Lesch-Nyhan Syndrome—a child who continually is racked with pain, is unable to respond to his environment, and has no hope for improvement for the rest of his life. In these cases, a jury would not base its evaluation upon a strict construction of § 920 of the Restatement (Second) of Torts, but rather upon a mental image of themselves or of their own children in the place of the hopelessly deformed plaintiff.

96. Howard v. Lecher, 53 A.D.2d 420, 386 N.Y.S.2d 460 (1976), *aff'd*, 42 N.Y.2d 109, 366 N.E.2d 64, 397 N.Y.S.2d 363 (1977) (allowing parental recovery for medical, hospital, nursing, and funeral expenses); Becker v. Schwartz, 46 N.Y.2d 401, 386 N.E.2d 807, 413 N.Y.S.2d 895 (1978), *modifying* Park v. Chessin, 60 A.D.2d 80, 400 N.Y.S.2d 110 (1977) (allowing parental recovery for long-term institutionalization of infant).

97. The parents still may recover for their own injuries resulting from breach of the defendant's duty to exercise reasonable care in genetic counseling. Such damages could include physical or mental pain and suffering by the mother in the birth of the deformed infant, hospital costs associated with the birth of an infant that would have been aborted but for the negligence of the defendant, and costs incurred as a result of the pregnancy beyond the point at which an abortion would have been obtained. The defendant could offset such benefits as the joy of parenthood and parental pride in the offspring's achievements against these damage claims.

98. *See* note 84 *supra*.

application of traditional medical malpractice principles in cases dealing with new medical advances is inevitable, this approach is preferred to the judicial creation of new causes of action based on systems of classification and nomenclature such as wrongful life. In making this transition, the stigma of judicial precedent against infant recovery in fact situations similar to *Curlender* should yield to a more orthodox medical malpractice analysis of these cases. At the very least *Curlender* represents a watershed in this transition; in the future the decision should inspire a more just evaluation of claims by infants who have been injured coincidental with their birth.

KELLY L. FREY

# Workers' Compensation—"Arising Out of Employment" Defined—Assault Injury

*Bell v. Kelso Oil Co.*, 597 S.W.2d 731 (Tenn. 1980).

Plaintiff, an employee of defendant, suffered injuries when he was stabbed without provocation by the boy friend of a coemployee during a break in defendant's company dinner meeting. The stabbing occurred in the parking lot of the motel where the meeting was held. Plaintiff had gone to the parking lot with another salesman to discuss overlapping sales territories. The altercation was initiated by the boy friend of a female coemployee. The boy friend became angry upon learning that plaintiff was part of the company gathering from which he had been barred and in which he, without apparent basis, thought the participants were "trying to mess with" his girl friend. Plaintiff thereafter sought benefits under the Tennessee Workers' Compensation Law.[1] The statute requires that an injury, to be compensable, must be the result of an accident "arising out of and in the course of employment."[2] The trial court concluded that the plaintiff's injury occurred during the course of his employment, but that it did not arise out of his employment, and dismissed the plaintiff's action. Plaintiff, contending the injury did arise out of his employment, appealed. On direct appeal[3] to the Tennessee Supreme Court, *held*, reversed and remanded. An injury resulting from an assault upon an employee by a third party has a rational causal connection to the work, and therefore arises out of the employment, when the employment subjects

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1. TENN. CODE ANN. §§ 50-901 to -1211 (1977 & Supp. 1980). Chapter 534 of the 1980 Tennessee Public Acts amended the Tennessee Code Annotated by changing the words "workmen's compensation" to "workers' compensation." TENN. CODE ANN. § 50-902(b) (Supp. 1980) provides that the two terms shall be used interchangeably until all references have been changed to "workers' compensation."

2. TENN. CODE ANN. § 50-902(a)(4) (Supp. 1980).

3. Cases arising under the Workers' Compensation Law have a right of direct appeal to the Tennessee Supreme Court. TENN. CODE ANN. § 50-1018 (1977).

the employee to the hazard of the assault and provides the motive for the assailant to make the assault. *Bell v. Kelso Oil Co.*, 597 S.W.2d 731 (Tenn. 1980).

The coverage formula is the heart of every workers' compensation act, since it determines who receives the benefits provided by the act.[4] Tennessee has adopted the almost-universal formula that encompasses injuries "arising out of and in the course of employment."[5] This deceptively simple formula has spawned endless litigation because of the difficulty courts have faced in applying it to an infinite variety of factual situations.[6] It is well settled by prior Tennessee judicial decisions, however, that for constructional purposes the phrase "arising out of" refers to the causal origin of the accident, and the phrase "in the course of" refers to the time, place, and circumstances of the accident in relation to the employment.[7] Therefore, the two phrases are not synonymous; each must be satisfied independently since they are connected with the conjunction *"and."*[8] The *Bell* court was faced with the issue whether plaintiff's assault

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4. 1 LARSON, LARSON'S WORKMEN'S COMPENSATION § 6.10, at 3-1 (1978).

5. " 'Injury' and 'personal injury' shall mean an injury by accident arising out of and in the course of employment which causes either disablement or death of the employee . . . ." TENN. CODE ANN. § 50-902(a)(4) (Supp. 1980).

Tennessee and forty-one other states have adopted the British Compensation Act formula: injury "arising out of and in the course of employment." West Virginia preferred the variant "resulting from," while Wyoming substituted the phrase "injuries sustained . . . as a result of their employment." Five states—North Dakota, Pennsylvania, Texas, Washington, and Wisconsin—omitted the "arising out of" wording completely. 1 LARSON, *supra* note 4, § 6.10, at 3-1, 3-2.

6. "Few groups of statutory words in the history of law have had to bear the weight of such a mountain of interpretation as has been heaped upon this slender foundation." *Id.* at 3-2. *See* Cardillo v. Liberty Mut. Ins. Co., 330 U.S. 469 (1947).

7. *E.g.*, Travelers Ins. Co. v. Googe, 217 Tenn. 272, 279, 397 S.W.2d 368, 371 (1965); Shubert v. Steelman, 214 Tenn. 102, 107-08, 377 S.W.2d 940, 942 (1964); White v. Whiteway Pharmacy, Inc., 210 Tenn. 449, 455, 360 S.W.2d 12, 13 (1962); United States Fidelity & Guar. Co. v. Barnes, 182 Tenn. 400, 403, 187 S.W.2d 610, 611 (1945).

8. *E.g.*, Knox v. Batson, 217 Tenn. 620, 630, 399 S.W.2d 765, 770 (1966); Thornton v. RCA Serv. Co., 188 Tenn. 644, 646, 221 S.W.2d 954, 955 (1949); S. STONE & R. WILLIAMS, TENNESSEE WORKMEN'S COMPENSATION § 19, at 26-27 (1957 & Supp. 1965).

injury *arose out of* his employment and was therefore compensable, since it was conceded that plaintiff's injury occurred *in the course of* his employment.

Since the enactment of the Tennessee Workers' Compensation Law,[9] the often-cited case of *In re McNicol*[10] has furnished the standard definition of the phrase "arising out of employment":

> [An injury] "arises out of" the employment, when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. . . . [This test] excludes an injury which cannot fairly be traced to the employment as a contributing proximate cause and which comes from a hazard to which the workmen would have been equally exposed apart from the employment. The causative danger must be peculiar to the work and not common to the neighborhood. . . . It need not have been foreseen or expected, but after the event it must appear to have had its origin in a risk connected with the employment, and to have flowed from that source as a rational consequence.[11]

This definition delineates one of several tests used by courts to interpret the phrase "arising out of employment."[12] These interpretational tests include the peculiar-risk doctrine, the foreseeability test, the proximate-cause test, the increased-risk doctrine, the actual-risk doctrine, the street-risk doctrine, and the positional-risk doctrine.

The *McNicol* language defines the peculiar-risk doctrine, which was the dominant rule in early workers' compensation cases, and which required a claimant to show that the source of harm was peculiar to the occupation.[13] The foreseeability test,

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9. Act of Apr. 12, ch. 123, 1919 Tenn. Pub. Acts 369.

10. 215 Mass. 497, 102 N.E. 697 (1913).

11. *Id.* at 499, 102 N.E. at 697, *quoted in* United States Fidelity & Guar. Co. v. Barnes, 182 Tenn. 400, 404, 187 S.W.2d 610, 612 (1945); Scott v. Shinn, 171 Tenn. 478, 482-83, 105 S.W.2d 103, 104-05 (1937); 28 TENN. L. REV. 367, 368 (1961).

12. *See* 1 LARSON, LARSON'S WORKMEN'S COMPENSATION, DESK EDITION §§ 6.20-9.50, at 3-3 to 3-30 (1978) [hereinafter cited as 1 LARSON, DESK EDITION].

13. *Id.* § 6.20, at 3-3. *See* Thornton v. RCA Serv. Co., 188 Tenn. 644, 221

another approach courts have used to aid in determining whether an injury arises out of employment, requires that the injury be foreseeable as a hazard of the employment.[14] The proximate-cause test, which now is largely obsolete, incorporates the foreseeability test and also requires that "the chain of causation not be broken by an independent intervening cause."[15] The increased-risk doctrine allows recovery when the employment increases the exposure to a risk, even when that risk is not peculiar to the employment.[16] Under the actual-risk doctrine, recovery is allowed when the employment subjected the claimant to the actual risk that resulted in injury, regardless of whether the employment increased exposure to that risk.[17] Under the street-risk doctrine, risks of the street are considered risks of the employment when the work requires the use of the street.[18] Courts have reached different conclusions on the question whether the street-risk doctrine requires that the type of work increase the exposure to street risks beyond those which the general public face.[19] Under the most liberal approach, the positional-risk doctrine, an injury *arises out of* employment if the obligations of the job placed the claimant in the particular place at the particular time the injury occurred.[20]

The preceding tests measure the degree of work connection between the employment and the risk from which the injury arose. If there is no degree of work connection between the risk and the employment, the injury is universally noncompensable.[21]

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S.W.2d 954 (1949); Scott v. Shinn, 171 Tenn. 478, 483, 105 S.W.2d 103, 105 (1937).

14. Hudson v. Thurston Motor Lines, Inc., 583 S.W.2d 597, 601 (Tenn. 1979); Jackson v. Clark & Fay, Inc., 197 Tenn. 135, 140, 270 S.W.2d 389, 391 (1954). The foreseeability approach has been severely criticized as being inherently intertwined with the law of negligence, thereby obscuring the nonfault character of worker's compensation legislation. *See* 1 LARSON, DESK EDITION, *supra* note 12, § 6.60, at 3-6 to 3-8.

15. 1 LARSON, DESK EDITION, *supra* note 12, at § 6.60, at 3-4, 3-5.

16. *Id.* § 6.30, at 3-3, 3-4.

17. *Id.* § 6.40, at 3-4.

18. Hudson v. Thurston Motor Lines, Inc., 583 S.W.2d 597, 602 (Tenn. 1979).

19. 1 LARSON, DESK EDITION, *supra* note 12, §§ 9.10-9.50, at 3-26 to 3-31.

20. *Id.* § 6.50, at 3-4.

21. *See id.* § 7.00, at 3-9.

This situation occurs when an injury arises from a risk solely personal to the employee, such as from a domestic dispute or from a hired assassin.[22] Risks that are distinctly employment related, such as those arising from the use of instrumentalities provided by the employer, are universally compensable.[23] It is the broad category of risks in between these two extremes that creates most controversy in compensation law,[24] and to which the doctrines and tests apply.

Only recently in the historical development of Tennessee workers' compensation cases did the Tennessee Supreme Court begin to reason in terms of various tests and doctrines. The conclusions reached in early decisions were justified primarily by using language from the *McNicol* definition.[25] In *Carmichael v. J.C. Mahan Motor Co.*[26] plaintiff, while engaged in his work, was shot in the eye by children of a customer who were playing with an air rifle.[27] The court focused on the causal connection between the working environment and the injury and held that the injury arose out of the employment.[28] The court reasoned that the hazard was one peculiar to the employment, not one of the street, and concluded that the injury could be "fairly traced to the employment as the contributing proximate cause."[29] Lest the proximate cause language be misconstrued, the court made it clear that "[t]he Compensation Act cannot be considered as a statute intended to . . . fix a liability by adherence to rules of the common law applicable in negligence cases."[30] This qualifi-

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22. *Id.* § 7.20, at 3-10.

23. *Id.* § 7.10, at 3-9.

24. *Id.* § 7.00, at 3-9.

25. *See* text accompanying note 11 *supra*.

26. 157 Tenn. 613, 11 S.W.2d 672 (1928).

27. *Id.* at 614, 11 S.W.2d at 672. The customer had brought her car into the defendant's garage for repairs and had left the children there while she went shopping. The children had been left at the garage unattended on previous occasions and had engaged in horseplay such as throwing things at other employees. *Id.* at 615, 11 S.W.2d at 672.

28. *Id.* at 617, 11 S.W.2d at 673.

29. *Id. See* Tapp v. Tapp, 192 Tenn. 1, 6, 236 S.W.2d 977, 979 (1951) (proximate cause as used in law of negligence not same as "causal connection").

30. 157 Tenn. at 617, 11 S.W.2d at 673. *See* W.S. Dickey Mfg. Co. v. Moore, 208 Tenn. 576, 347 S.W.2d 493 (1961).

cation indicated a rejection of the proximate-cause test.

The restrictive nature of the peculiar-risk doctrine becomes apparent in the two most famous Tennessee Supreme Court decisions involving assault injuries that utilized this approach—*Scott v. Shinn*[31] and *Thornton v. RCA Service Co.*[32] In *Scott,* plaintiff's deceased husband was delivering soft drinks on his route and was shot when, in the course of his employment, he surprised a would-be robber as he entered a lunchroom.[33] Relying on the fact that the deceased was not carrying any soft drink bottles that would identify him with his employment,[34] the court held that the death did not arise out of the employment.[35] The court reasoned that no causal connection between the employee's death and his employment existed, since "[w]alking in on a holdup cannot be said to have been a peculiar danger to which his work exposed him."[36] In *Thornton* plaintiff traveled in the course of his employment for defendant. Plaintiff was attacked without provocation by a drunk, crazy, or otherwise irresponsible person while eating at a restaurant on his way to a job in another town.[37] Plaintiff, like the deceased in *Scott,* had nothing to identify him with his work.[38] The court specifically rejected a positional-risk approach, but indirectly hinted approval of the increased-risk doctrine.[39] In holding that the injury did not arise out of the employment, the court relied on

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31. 171 Tenn. 478, 105 S.W.2d 103 (1937).
32. 188 Tenn. 644, 221 S.W.2d 954 (1949).
33. 171 Tenn. at 479-81, 105 S.W.2d at 103.
34. *Id.* at 481, 105 S.W.2d at 104.
35. *Id.* at 484, 105 S.W.2d at 105.
36. *Id.*, 105 S.W.2d at 105.
37. 188 Tenn. at 645-46, 221 S.W.2d at 955.
38. *Id.* at 649-50, 221 S.W.2d at 956-57.
39. The court recognized that plaintiff "would not have been in that particular restaurant on [that] occasion if he had not been [engaged in] the duties of his employment," but stated that "[t]he mere presence at the place of injury because of employment will not result in the injury being considered as arising out of the employment." *Id.* at 646, 221 S.W.2d at 955 (citing Scott v. Shinn, 171 Tenn. 478, 483, 105 S.W.2d 103, 105 (1937)). *See* note 20 *supra* and accompanying text. The court reasoned, in denying compensation to plaintiff, that "[h]e was not subjected to any *more* or different risk from that of any other member of the public." 188 Tenn. at 649, 221 S.W.2d at 956 (emphasis added). *See* note 16 *supra* and accompanying text.

*Scott* and other peculiar-risk cases.[40] Both *Scott* and *Thornton* involved risks not solely personal or distinctly employment related, and both illustrate how application of the peculiar-risk test to such factual situations usually results in denial of compensation.

The Tennessee Supreme Court frequently has focused upon the motive of an assailant when determining whether an assault injury has arisen out of the employment.[41] In the 1947 decision of *Whaley v. Patent Button Co.*,[42] the court for the first time allowed the motive of an assailant to establish rather than defeat the requisite causal connection between the work and the assault.[43] In *Whaley* a former button machine operator returned to defendant's plant and shot several button machine operators, including plaintiff.[44] The court stated that there was no evidence that the assaulting party bore any personal ill will toward the victims.[45] The court inferred that plaintiff was selected because he operated one of the machines, and therefore "the [employ-

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40. 188 Tenn. at 647-49, 221 S.W.2d at 954-55.

41. *See, e.g.*, W.S. Dickey Mfg. Co. v. Moore, 208 Tenn. 576, 347 S.W.2d 493 (1961); Kinkead v. Holliston Mills, 170 Tenn. 684, 98 S.W.2d 1066 (1936); Forbess v. Starnes, 169 Tenn. 594, 89 S.W.2d 886 (1936); McConnell v. Lancaster Bros., 163 Tenn. 194, 42 S.W.2d 206 (1931).

42. 184 Tenn. 700, 202 S.W.2d 649 (1947).

43. *See* Kinkead v. Holliston Mills, 170 Tenn. 684, 98 S.W.2d 1066 (1936); Forbess v. Starnes, 169 Tenn. 594, 89 S.W.2d 886 (1936); McConnell v. Lancaster Bros., 163 Tenn. 194, 42 S.W.2d 206 (1931). *McConnell, Forbess,* and *Kinkead* all involved assault motivated by personal animosity. They collectively stood for the proposition that injuries arising from assaults are not compensable if they arose from hostilities generated by employee interaction with others in a nonauthoritative capacity. This restrictive motivational approach was discarded in W.S. Dickey Mfg. Co. v. Moore, 208 Tenn. 576, 347 S.W.2d 493 (1961), where the requisite degree of work connection was found and compensation was granted to a worker hurt as a result of an assault arising from personal conversation concerning the performance of work. The court stated: "[C]ausal connection is supplied when there is a showing of an environment that increases the likelihood of assault. . . . [W]orkmen . . . carry their personal qualities, weaknesses, emotions and tempers with them to work, and the risk of having these tempers flare up is comparable in a way to overstrained machinery." *Id.* at 582-83, 347 S.W.2d at 496.

44. 184 Tenn. at 701, 202 S.W.2d at 649-50.

45. *Id.*, 202 S.W.2d at 650.

ment] was causally connected with the shooting."[46] Relying on *Carmichael*, the court held that the injury arose out of the employment.[47] The *Whaley* court, when quoting the *McNicol* definition of causal connection,[48] omitted the language stating that the risk must be peculiar to the job.[49] The court then was able to take advantage of the greater flexibility afforded by the motivational approach. The motivational approach used by *Whaley* provided a way of determining the degree, if any, of work connection between the risk and the employment without resorting to any particular test.

In *White v. Whiteway Pharmacy, Inc.*,[50] a more recent Tennessee Supreme Court decision involving an assault by a nonemployee, the court again focused on the motive of the assailant. In *White* plaintiff's mother was stabbed to death by her husband while she worked in defendant's pharmacy. Alleged infidelity of the deceased motivated the attack. The court concluded that "[s]he was not stabbed because of any hazard or peril of her employment but solely because of the action of her angry and enraged husband."[51] The court found that there was no causal connection[52] between the death and the employment, and affirmed the trial court's denial of compensation.[53] *White* buttressed the proposition that harm from solely personal risks or from solely personal motivation is not compensable.[54]

After *White* the Tennessee Supreme Court in scattered nonassault cases struggled with unusual factual situations and began to apply more liberal tests in determining whether inju-

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46. *Id.* at 702, 202 S.W.2d at 650.

47. *Id.* at 702-03, 202 S.W.2d at 650.

48. *See* text accompanying note 11 *supra*.

49. 184 Tenn. at 703, 202 S.W.2d at 650.

50. 210 Tenn. 449, 360 S.W.2d 12 (1962).

51. *Id.* at 454, 360 S.W.2d at 14-15.

52. The court pointed out that causal connection does not mean proximate cause as used in negligence cases, "but causal in the sense that the accident has its origin in the hazards to which the employment exposed the employee while [working]." *Id.* at 455, 360 S.W.2d at 15. *See* Tapp v. Tapp, 192 Tenn. 1, 6, 236 S.W.2d 977, 979 (1951).

53. 210 Tenn. at 455, 360 S.W.2d at 15.

54. *See* note 22 *supra* and accompanying text.

ries arose from hazards of the employment.[55] Although the street-risk doctrine was applied in some of these decisions,[56] it was not until 1979 that the Tennessee Supreme Court in *Hudson v. Thurston Motor Lines*[57] applied the street-risk doctrine and the foreseeability test to an assault injury case, and thereby cast doubt on the precedential value of strict peculiar-risk decisions such as *Thornton* and *Scott* in assault injury cases.

In *Hudson* defendant's truck driver, while making a delivery run, stopped at a convenient fast-food establishment near his next scheduled stop. After getting his order plaintiff was shot by several unknown assailants as he was entering the cab of his tractor-trailer; he was paralyzed from the waist down. The motive for the attack was unknown,[58] as in the *Thornton* lunchroom assault.[59] The trial court found that plaintiff was in the course of his employment, but that the injury did not arise out

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55. *See* Electro-Voice, Inc. v. O'Dell, 519 S.W.2d 395 (Tenn. 1975). In *Electro-Voice* efforts to exterminate bees in the walls of defendant's plant were unsuccessful, and plaintiff suffered allergic reactions when she was stung. *Id.* at 396. The court concluded that the bees in the plant were part of the working environment and therefore were a risk or hazard of plaintiff's employment. *Id.* at 397. The court held that the injury arose out of the employment and granted compensation. *Id.* at 398. The court did not articulate the test or doctrine upon which its conclusions were based. It seems, however, that the court was applying an increased-risk test, since members of the general public are subject to bee stings. Here the employment increased that general risk. This assumption is supported by the court's citation to Oman Constr. Co. v. Hodge, 205 Tenn. 627, 329 S.W.2d 842 (1959), where compensation was granted because the work environment increased the risk of being struck by lightning. *Id.* at 397.

56. *See* Crane Rental Serv. v. Rutledge, 219 Tenn. 433, 410 S.W.2d 418 (1966). In *Crane* the court relied on Central Sur. & Ins. Corp. v. Court, 162 Tenn. 477, 36 S.W.2d 907 (1930), in recognizing that "if the employment occasions the employee's use of the street the risk of the street is the risk of the employment." 219 Tenn. at 441, 410 S.W.2d at 422. The plaintiff in *Crane* was employed in a nontraveling job. The court accepted the majority rule that it is immaterial whether the degree of exposure to street risks is increased by the employment. *Id.* at 441-42, 410 S.W.2d at 422-23. *See* 1 LARSON, *supra* note 4, § 9.00, at 3-51.

57. 583 S.W.2d 597 (Tenn. 1979).

58. *Id.* at 599.

59. *See* notes 37-40 *supra* and accompanying text.

of his employment.[60] The court reasoned that "plaintiff was exposed only to the risks common to all members of the community in going to eat lunch."[61] The only issue on appeal was whether the injury arose out of plaintiff's employment.[62] The court thoroughly analyzed the issue in light of previous assault injury cases,[63] but the court's reasoning was somewhat inconsistent. The court cited authority indicating that the peculiar-risk test employed by the trial court and the proximate-cause test were considered obsolete.[64] Yet the court proceeded to use a foreseeability test from a 1954 nonassault decision to justify an award of compensation.[65] Although the court acknowledged that many jurisdictions were adopting the positional-risk test,[66] the court criticized such classifications as overly simplistic and stated: "[T]he result we reach in this case is not to be construed

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60. 583 S.W.2d at 598.

61. *Id.* at 599.

62. *Id.* at 598.

63. The following cases (in order of discussion) were among those analyzed by the court: Carmichael v. J.C. Mahan Motor Co., 517 Tenn. 613, 11 S.W.2d 672 (1928), *see* text accompanying notes 27-30 *supra;* Scott v. Shinn, 171 Tenn. 478, 105 S.W.2d 103 (1937), *see* text accompanying notes 33-36 *supra;* Whaley v. Patent Button Co., 184 Tenn. 700, 202 S.W.2d 649 (1947), *see* text accompanying notes 43-47 *supra;* Thornton v. RCA Serv. Co., 188 Tenn. 644, 221 S.W.2d 954 (1949), *see* text accompanying notes 37-40 *supra.*

64. 583 S.W.2d at 599-600 (quoting 1 LARSON, *supra* note 4, § 6.00, at 3-1).

65. The court used language from Jackson v. Clark & Fay, Inc., 197 Tenn. 136, 270 S.W.2d 389 (1954), that explained Carter v. Hodges, 175 Tenn. 96, 132 S.W.2d 211 (1939), and other cases on grounds of foreseeability. In *Carter* the court held that the death of a traveling salesman in a hotel fire of undetermined origin arose out of his employment. *Jackson* pointed out that because of the rigid laws aimed at prevention of fires in hotels, a fire was a foreseeable hazard of any employment that required employees to stay at hotels. 197 Tenn. at 139, 270 S.W.2d at 391. The *Hudson* court stated:

> With that new light shed upon [*Carter*], it would appear that the instant case falls squarely within its scope. Assaults and shootings and armed robberies are as much a danger in the 1970's as a hotel fire, occur with far greater frequency, and have laws aimed at their prevention, so we are justified in reaching the same conclusion, to wit, that what happened to [plaintiff] . . . was a foreseeable hazard incident to the employment . . . .

583 S.W.2d at 601-02.

66. 583 S.W.2d at 600 (quoting 1 LARSON, *supra* note 4, § 6.00, at 3-1).

as an adoption of the positional-risk test, or an abandonment of the peculiar-risk test."[67] This statement, when compared to what the court actually did in *Hudson*, makes the impact of the decision on these doctrines unclear.

The *Hudson* court rejected the motivational approach and stated: "[T]he correct resolution of this case involves a consideration of the risks and dangers inherent in a truck driver's employment, rather than the objective of the assailants."[68] In considering those risks, the court concluded that "a truck driver . . . is exposed to the hazards of the streets . . . to a . . . greater extent than is common to the public" and therefore "is within the scope of the street-risk doctrine under the most restrictive test."[69] The court did not reach the question whether, in street-risk cases involving assault, the employment must increase the degree of risk exposure beyond that faced by the general public. While the *Hudson* court broadened the category of street risks beyond accidents to include assaults and highway robbery,[70] the court was unwilling to extend the scope of the doctrine to encompass all assault injuries sustained while traveling in performance of employment duties. The court distinguished *Thornton* and *Scott*[71] because in those cases the assaults "both occurred *inside* eating establishments"[72] and because nothing identified the victims with their work at the time and place of each assault.

After *Hudson*, the determination whether an assault injury sustained in the course of employment arose out of employment posed a confusing dilemma. The outcome could hinge on a number of considerations drawn from the maze of interpretive cases; such factors included (1) the motive of the assailant,[73] (2) the

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67. 583 S.W.2d at 600.

68. *Id.* at 602.

69. *Id.*

70. Two prior Tennessee Supreme Court decisions—Crane Rental Serv. v. Rutledge, 219 Tenn. 433, 410 S.W.2d 418 (1966) and Central Sur. & Ins. Corp. v. Court, 162 Tenn. 477, 36 S.W.2d 907 (1930)—sanctioned the application of the street-risk doctrine in compensation awards for accidental injury. *See* note 56 *supra*.

71. *See* notes 31-40 *supra* and accompanying text.

72. 583 S.W.2d at 603 (emphasis added).

73. *See, e.g.*, Hudson v. Thurston Motor Lines, Inc., 583 S.W.2d 597 (Tenn. 1979) (rejected motive approach in awarding compensation); White v.

foreseeability of assault as a risk incident to employment,[74] (3) the nature and extent of the risk from which the assault occurred,[75] (4) the work environment and its inherent hazards,[76] and, (5) the claimant's role in any provocation of the assault.[77] The Tennessee Supreme Court had never overruled expressly any prior interpretive decisions; instead, the court distinguished or ignored decisions that did not support a holding in a particu-

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Whiteway Pharmacy, Inc., 210 Tenn. 449, 360 S.W.2d 12 (1962) (motive was solely personal and compensation not allowed); Whaley v. Patent Button Co., 184 Tenn. 700, 202 S.W.2d 649 (1947) (presence at machine motivated assault); Kinkead v. Holliston Mills, 170 Tenn. 684, 98 S.W.2d 1066 (1936) (personal motive defeated recovery); Forbess v. Starnes, 169 Tenn. 594, 89 S.W.2d 886 (1936) (motives of vengeance defeated recovery); McConnell v. Lancaster Bros., 163 Tenn. 194, 42 S.W.2d 206 (1931) (motive defeated recovery).

74. *See, e.g.*, Hudson v. Thurston Motor Lines, Inc., 583 S.W.2d 597 (Tenn. 1979) (foreseeable nature of assault used to justify compensation); Jackson v. Clark & Fay, Inc., 197 Tenn. 135, 270 S.W.2d 389 (1954) (foreseeability used to deny compensation); Jim Reed Chevrolet Co. v. Watson, 194 Tenn. 617, 254 S.W.2d 733 (1953) (foreseeability used to justify award of compensation).

75. *See, e.g.*, Hudson v. Thurston Motor Lines, Inc. 583 S.W.2d 597 (Tenn. 1979) (adopted street-risk doctrine to justify compensation, discredited peculiar-risk doctrine, and rejected positional-risk doctrine); Oman Constr. Co. v. Hodge, 205 Tenn. 627, 329 S.W.2d 842 (1959) (applied increased-risk test to grant compensation); Thornton v. RCA Serv. Co., 188 Tenn. 644, 221 S.W.2d 954 (1949) (rigidly adhered to peculiar-risk doctrine and rejected positional-risk doctrine); Scott v. Shinn, 171 Tenn. 478, 105 S.W.2d 103 (1937) (strictly applied peculiar-risk test).

76. *See* Electro-Voice, Inc. v. O'Dell, 519 S.W.2d 395 (Tenn. 1975) (hazard part of work environment and compensation allowed); W.S. Dickey Mfg. Co. v. Moore, 208 Tenn. 576, 347 S.W.2d 493 (1961) (work environment increased risk of assault and compensation awarded).

77. *See, e.g.*, W.S. Dickey Mfg. Co. v. Moore, 208 Tenn. 576, 347 S.W.2d 493 (1961) (dictum) (compensation cannot be recovered if injury is caused by claimant's own aggression); Turner v. Bluff City Lumber Co., 189 Tenn. 621, 227 S.W.2d 1 (1950) (distinguishing Kinkead v. Holliston Mills, 170 Tenn. 684, 98 S.W.2d 1066 (1936), on basis that plaintiff was aggressor and struck first blow).

Section 50-910 of the Tennessee Code Annotated states: "No compensation shall be allowed for an injury or death due to the employee's willful misconduct . . . ." TENN. CODE ANN. § 50-910 (1977). But a judicial question still arises whether the aggression in assault injury cases amounts to "willful misconduct," which precludes compensation under the statute. *See* 1 LARSON, DESK EDITION, *supra* note 12, § 11.15, at 3-59.

lar case. The result was that "counsel [could], in most cases, cite what [seemed] to be an authority for resolving in his favour, on whichever side he [happened to be], the question in dispute."[78]

The Tennessee Supreme Court confronted this problem and had an opportunity to clarify the uncertain state of the law in *Bell v. Kelso Oil Co.*[79] In determining whether plaintiff's injury arose out of his employment, the *Bell* court focused on the motive of the assailant[80]—an approach rejected in *Hudson.*[81] In *Bell,* unlike *Hudson,* there was a known motive for the assault. Perhaps this fact indicates that the court in both cases first decided that compensation was warranted, then developed reasoning to support that intuitive conclusion. The court, however, also focused on the hazards incident to plaintiff's employment,[82] as did the *Hudson* court.[83] After concluding that *Hudson* was instructive but not controlling,[84] and after distinguishing some inconsistent Tennessee Supreme Court decisions,[85] the *Bell* court held that there was a rational causal connection between the plaintiff's injury and employment sufficient to entitle plaintiff to compensation.[86]

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78. Jackson v. Clark & Fay, Inc., 197 Tenn. 135, 148, 270 S.W.2d 389, 395 (1954) (Burnett, J., dissenting) (quoting Herbert v. Foxx & Co., [1916] 1 A.C. 405, 419).

79. 597 S.W.2d 731 (Tenn. 1980).

80. *Id.* at 737.

81. *Id. See* note 68 *supra* and accompanying text.

82. 597 S.W.2d at 737.

83. *Id. See* note 68 *supra* and accompanying text.

84. 597 S.W.2d at 735.

85. The court distinguished Thornton v. RCA Serv. Co., 188 Tenn. 644, 221 S.W.2d 954 (1949), and White v. Whiteway Pharmacy, Inc., 210 Tenn. 449, 360 S.W.2d 12 (1962). *See* text accompanying notes 33-36 & 50-54 *supra.* In dictum, the court stated that *Thornton*'s precedential value after *Hudson* was debatable. The only basis given for distinction, however, was a quote from *Hudson* stating that " 'there was nothing to identify the employee [in *Thornton*] with his employment at the time and place of the assault.' " 597 S.W.2d at 735 (quoting Hudson v. Thurston Motor Lines, Inc., 583 S.W.2d 597, 603 (Tenn. 1979)). The court distinguished *White* because "[o]bviously, no causal connection existed between the employment and the employee's death; the employment did not subject her to the assault nor did the irate husband act from any motive in anywise connected to her employment." *Id.*

86. The court relied primarily on Whaley v. Patent Button Co., 184 Tenn. 700, 202 S.W.2d 649 (1947), Carmichael v. J.C. Mahan Motor Co., 157

In reaching its conclusions, the court first pointed out that plaintiff did not "[make] any statement or [do] anything to provoke the attack."[87] The court thereby implicitly recognized and removed from contention the general rule that an aggressor who is injured because of his conduct is not entitled to compensation.[88] The court then freed itself from the constraints of the various judicial tests and doctrines by reasoning:

> It is difficult, perhaps impossible, to compose a formula which will clearly define the line between accidents and injuries which arise out of . . . employment to those which do not; hence, in determining whether an accident arose out of . . . employment, each case must be decided with respect to its own attendant circumstances and not by resort to some formula.[89]

The court advised that, in deciding each case, "the relation of the employment to the injury [should be] the essential point of inquiry."[90] The court offered two definitions of "arising out of" to aid in this inquiry. One definition focused on whether the injury was caused by a hazard incident to the employment.[91] For the other definition, the court relied on *McNicol* language requiring a rational causal connection between the conditions of the work and the resulting injury.[92] Arguably, there is no logical difference between the two definitions. If an injury arose from a hazard incident to the employment, it inevitably would be causally connected to it.

One result of the *Bell* decision was to weaken further the peculiar-risk doctrine. The court acknowledged that *Thornton*

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Tenn. 613, 11 S.W.2d 672 (1928), and persuasive authority in holding that a rational causal connection between the injury and employment was present. 597 S.W.2d at 736-37.

87. 597 S.W.2d at 733.

88. *See* note 77 *supra*.

89. 597 S.W.2d at 734.

90. *Id.*

91. *Id.*

92. *Id.* "[A]n injury arises out of the employment 'when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work [was] required to be performed and the resulting injury.' " *Id.* (quoting T.J. Moss Tie Co. v. Rollins, 191 Tenn. 577, 581, 235 S.W.2d 585, 586 (1951)).

may no longer be a viable precedent.[93] This admission casts a shadow over the entire line of strict peculiar-risk cases. In addition, the court cited, with approval, cases supporting increased-risk[94] and positional-risk[95] doctrines, and thereby further undermined the viability of rigid peculiar-risk decisions. The reference to past Tennessee decisions applying increased-risk concepts to naturally caused injuries also indicates an extension of the increased-risk doctrine beyond the act-of-God case category to the assault case category.

The impact of the *Bell* decision on the line of foreseeability cases culminating with *Hudson* is unclear. The court avoided a foreseeability approach, probably because the result in *Bell* would have been more difficult to justify under this doctrine. Since *Bell* did not address the foreseeability issue, and since the court instead stated that the plaintiff in the *Hudson* case was held to recover under the street-risk doctrine,[96] the status of the foreseeability test arguably was diminished.

The impact of the *Bell* decision on the street-risk doctrine is also uncertain and arguments can be summoned to show that the doctrine was strengthened as well as weakened.[97] Read nar-

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93. 597 S.W.2d at 735.

94. *Id.* at 736-37. The cases cited were Electro-Voice, Inc. v. O'Dell, 519 S.W.2d 395 (Tenn. 1975) and Oman Constr. Co. v. Hodge, 205 Tenn. 627, 329 S.W.2d 842 (1952). *Electro-Voice* involved severe allergic reactions to a bee sting. *Oman* involved death by lightning. *See* note 55 *supra*.

95. 597 S.W.2d at 736. The cited decision was Hartford Accident & Indem. Co. v. Cardillo, 112 F.2d 11 (D.C. Cir.), *cert. denied*, 310 U.S. 649 (1940). The *Bell* court stated that in *Hartford*

> it was reasoned that an injury to an employee who was merely the victim of, not a participant in, a quarrel resulting in the injury might be compensable as arising out of and in the course of the employment, irrespective of whether the fighting is by fellow employees or by strangers, or whether the fighting is over work or about something else, *it being sufficient that the work brings the injured employee within the range of peril requiring his presence there when it strikes.*

597 S.W.2d at 736 (emphasis added).

96. 597 S.W.2d at 735.

97. Arguably, *Bell* strengthened the street-risk doctrine by approving in dictum the *Hudson* decision and the street-risk basis of its holding. On the other hand, it could be argued that *Bell* weakened the street-risk doctrine because the court chose to base its holding on other grounds when the street-risk doctrine alone might have justified compensation.

rowly in conjunction with *Hudson*, *Bell* does indicate that the employment must increase exposure to risk of assault for the street-risk doctrine to be satisfied in an assault injury case.[98]

The *Bell* court utilized the actual-risk doctrine in its rationale by stating that "the employment . . . subjected the employee to the hazard of the assault."[99] The court further reasoned that in *Whaley* and *Carmichael* "it was the plaintiff's work environment which *subjected him to the assault.*"[100] The court did not note the difference between its focus on the injury as the result of a *hazard incident to the employment* and its focus on *subjection to a hazard by the employment*. The latter phraseology seems to sanction going beyond the more restrictive peculiar-risk and increased-risk approaches to the actual-risk approach.

The *Bell* decision reestablishes emphasis on the motive of an assailant.[101] The court cited a decision that liberally construed the motive requirement and allowed compensation for an assault injury where the work environment increased the probability of quarrels.[102] *Bell* thereby enhanced the status of prior cases in which the assailant's motive was related to the employment and in which compensation was granted. The decision also strengthened the proposition that where the sole motive for the assault is entirely personal, compensation will not be awarded.[103] If the motive is not entirely personal, it is still unclear, however, what elements of an assailant's overall motive must be employment induced to provide the proper degree of work connection between the risk and the employment.

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98. Both *Bell* and *Hudson* involved situations where the nature of the work increased exposure to the risk of assault. In *Hudson* the employment entailed increased use of the street, and in *Bell* the employment required working with females in an environment conducive to inciting jealousy and anger in boyfriends or spouses.

99. 597 S.W.2d at 737.

100. *Id.* (emphasis added).

101. *See* note 81 *supra* and accompanying text.

102. 597 S.W.2d at 736. The cited decision was W.S. Dickey Mfg. Co. v. Moore, 208 Tenn. 576, 347 S.W.2d 493 (1961). In *Dickey* plaintiff was carrying a broken piece of pipe when a coworker remarked that plaintiff was "mighty weak." Plaintiff told the coworker to mind his own business, and later, the coworker hit plaintiff in the head with a shovel handle. *Id.* at 578-79, 347 S.W.2d at 494-95.

103. *See* note 22 *supra* and accompanying text.

The court's holding at first blush seems to indicate that the employment must subject the employee to the assault *and also* motivate the assault for an assault injury to be compensable.[104] On closer analysis, however, it seems that the court was attempting to state that *either* motivation from the employment *or* subjection to the risk by the employment could indicate that an injury arose out of employment. When the employment motivates the assault *and also* subjects the employee to the risk, however, there is no doubt that the injury is compensable. This would appear to be the only logical conclusion, since both approaches are ways of determining the same thing—the degree of work connection (or causal connection) between the employment and the risk from which the injury arose. If this is not the court's intent, the emphasis on motive in the court's holding may lead to inequitable consequences in future assault injury cases. If the employment motivated the assault, it follows that the employment subjected the employee to the assault. It does not follow, however, that if the employment subjects the employee to the assault, the employment motivated the assault. When a hypothetical plaintiff in the course of his employment is injured by a lunatic, drunk, or potential robber not known to be motivated by the employment, then recovery theoretically could turn on such trivial facts as which side of an entrance door plaintiff was on, or whether plaintiff was wearing a company hat, button, or uniform identifying the employer. Going inside a business establishment would remove plaintiff from the *Hudson* street-risk doctrine.[105] If "there was nothing to identify the employee . . . with his employment at the time and place of the assault,"[106] recovery could be denied under the principles of strict peculiar-risk cases which were not overruled by the *Bell* court.[107] Such a result would conflict with the liberal spirit of *Bell*, but does illustrate possible inconsistencies in a logical ex-

104. The fact that the court distinguished Thornton v. RCA Serv. Co., 188 Tenn. 644, 221 S.W.2d 954 (1949), because there was no identifiable motivating factor present in that case, adds weight to this conclusion. 597 S.W.2d at 735.

105. *See* note 72 *supra* and accompanying text.

106. 597 S.W.2d at 735 (quoting Hudson v. Thurston Motor Lines, Inc., 583 S.W.2d 597, 603 (Tenn. 1979)).

107. 597 S.W.2d at 735.

tension of the court's holding and rationale.

The primary effects of the *Bell* decision were to hamper the definitional development of "arising out of" and to perpetuate the uncertainty of the law regarding the application of this all important phrase. The court virtually assured continued unpredictability in future assault cases by (1) rejecting the use of formulas such as the positional-risk test, (2) stating that each case should be decided on its own circumstances, (3) failing to overrule strict peculiar-risk cases such as *Thornton*, and (4) failing to discuss the precedential value to be accorded cases following other tests and doctrines. The decision does, however, provide cogent support for more liberal positions in future Tennessee Supreme Court decisions. The rationale of *Bell* and the increased-risk principles implicitly adopted by that decision indicate an application of the more liberal actual-risk doctrine. Although *Bell* significantly diminished the importance of the *McNicol* peculiar-risk doctrine, the uncertain focus on motive, combined with a failure to overrule strict peculiar-risk cases, might result in denials of compensation to some worthy claimants.

While the result reached in *Bell* was just, the court could have eliminated the confusion in interpretation of the coverage formula by adopting the positional-risk doctrine, as so many other jurisdictions have done.[108] Adoption of the positional-risk doctrine was the next logical step from the "half-way house"[109] of the street-risk doctrine established by *Hudson*. Perhaps the reason why the court did not adopt such a well-reasoned doctrine lies in the historical reluctance of the judiciary to break new ground when a desired result can be reached through some older, more established justification. "[T]he kind of fact situation that forces a court to take a stand on this principle is relatively rare."[110] Such a situation usually involves an unexplained assault, or some neutral-risk injury where the employment does

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108. *See* 1 LARSON, DESK EDITION, *supra* note 12, § 11.40, at 3-83.

109. *Id.*, at 3-90. This phrase indicates that the street-risk approach provides a convenient middle ground for courts not willing to adopt the peculiar-risk doctrine but wanting to broaden the scope of compensable injuries.

110. *Id.*

not increase the risk of injury.[111] The time is ripe for the Tennessee Supreme Court to comply with the statutory command[112] and the historical trend[113] of liberal interpretation that *Bell* and many previous decisions have acknowledged. While more awards probably would be granted under a positional-risk approach, the extra cost to employers and insurers should be substantially, if not completely, offset by the tremendous reduction in litigation expenses. In addition, the backlog of cases in the Tennessee Supreme Court might be reduced by this approach, and thereby allow a more efficient use of judicial resources.

Another possible way to clarify the uncertain state of the law is a legislative change of the coverage formula. A positional-risk doctrine effect could be achieved by eliminating the words "arising out of" altogether, as five states have done.[114] Another option would be to replace the present coverage formula with "resulting from."[115] The latter approach would have its own attendant definitional problems. These specific suggestions aside, the possibility of a change in the formula is remote. Legislatures seldom modify statutory phrases that are commonly accepted and that have survived so long. Uncertainty probably will reign in this area until there arises a factual situation that compels the

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111. *Id.*, at 3-80, 3-90.

112. The rule of common law requiring strict construction of statutes in derogation of common law shall not be applicable to the provisions of the Workmen's Compensation Law, but the same is declared to be a remedial statute which shall be given an equitable construction by the courts to the end that the objects and purposes of this law may be realized and attained.

TENN. CODE ANN. § 50-918 (1977).

113. [C]ourts do not today follow the very early compensation cases, because those early cases tended to be extremely strict; after the first few years of this strict interpretation, however, the trend, which continues in Tennessee until today, is to construe workmen's compensation statutes quite broadly in favor of the injured employee and his dependents.

S. STONE & R. WILLIAMS, TENNESSEE WORKMEN'S COMPENSATION § 5 (1957 & Supp. 1965); "The Courts of Tennessee, taking their cue from the legislative mandate—the command of liberal construction—continue . . . [to give] a liberal construction to the Compensation Act . . . ." Cate, *Workmen's Compensation*, 6 VAND. L. REV. 1012, 1020 (1953).

114. *See* note 5 *supra*.

115. *Id.*

Tennessee Supreme Court either to take a firm stand on the peculiar-risk doctrine or to overrule prior cases and take a definite stand on the acceptability of other doctrines.

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# PUNISHMENT OR CURE: THE FUNCTION OF CRIMINAL LAW

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## I. INTRODUCTION

A rising crime rate, the prevailing distrust of government's ability to deal effectively with crime, and a concern for individual rights have initiated a reform movement in the sentencing and treatment of persons convicted of crime. For example, California has replaced a system that gave wide discretion to parole authorities with a system of fixed or determinate sentencing;[1]

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1. Determinate sentencing involves a legislative determination of the "general range of imprisonment for a given crime." THE TWENTIETH CENTURY FUND TASK FORCE ON CRIMINAL SENTENCING, FAIR AND CERTAIN PUNISHMENT 80 (1976) (hereinafter cited as FAIR AND CERTAIN PUNISHMENT).

The California law states:

> The Legislature finds and declares that the purposes [*sic*] of imprisonment for crime is punishment. This purpose is best served by terms proportionate to the seriousness of the offense with provision for uniformity in the sentences of offenders committing the same offense under similar circumstances. The Legislature further finds and declares that the elimination of disparity and the provision of uniformity of sentences can best be achieved by determinate sentences fixed by statute in proportion to the seriousness of the offense as determined by the Legislature to be imposed by the court with specified discretion.

Maine[2] and Indiana[3] have also adopted determinate sentencing acts; and the Twentieth Century Fund has proposed presumptive sentencing.[4] Other forms of determinate sentencing are being considered in a number of state legislatures.[5] Moreover, the Commissioners on Uniform State Laws have recently adopted a Model Sentencing and Corrections Act that features determinate and presumptive sentencing.[6] Even the federal government is considering a move toward determinate sentencing, and the federal parole authorities have already adopted rules that limit their discretion in parole decisions.[7]

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CAL. PENAL CODE § 1170(a)(1) (West Supp. 1981). The prior California law provided for complete indeterminancy under a statutory maximum limit. The adult authority could release immediately without any time being served. CAL. PENAL CODE § 1168 (West 1970).

2. ME. REV. STAT. ANN. tit. 17-A, §§ 1253-54 (Supp. 1979).

3. IND. CODE ANN. §§ 35-50-2-4 to -8 (Burns 1979).

4. Presumptive sentencing involves an "underlying presumption . . . that a finding of guilty . . . would predictably incur a particular sentence unless specific mitigating or aggravating factors are established." FAIR AND CERTAIN PUNISHMENT, *supra* note 1, at 19-20.

5. These states include Minnesota, Illinois, Ohio, Alaska, and New Jersey. *See* NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, UNIFORM LAW COMMISSIONERS' MODEL SENTENCING AND CORRECTIONS ACT art. 3, Prefatory note, at 91 (1979) (hereinafter cited as MODEL ACT).

6. MODEL ACT, *supra* note 5, art. 3, at 95-213. A review of this Act is found in Perlman & Potuto, *The Uniform Law Commissioners' Model Sentencing and Corrections Act: An Overview*, 58 NEB. L. REV. 925 (1979). For a discussion of the sentencing sections of the Act, see Perlman & Stebbins, *Implementing an Equitable Sentencing System: The Uniform Law Commissioners' Model Sentencing and Corrections Act*, 65 VA. L. REV. 1175 (1979).

7. Senate Bill 1437, passed on January 31, 1978, offered "Congress its first opportunity in nearly 200 years to restructure Federal criminal law so as to better serve the ends of justice in their broadest sense — justice to the individual and justice to society as a whole." REPORT OF THE COMMITTEE ON THE JUDICIARY UNITED STATES SENATE TO ACCOMPANY S. 1437, S. REP. No. 95-605, 95th Cong. 1st Sess. 15 (Nov. 15, 1977). According to the Subcommittee on Criminal Laws and Procedures, "the major reforms proposed in the sentencing area include[d] adoption of a sentencing guideline system and a partial move toward determinate sentencing." *Hearings Before the Subcommittee on Criminal Laws and Procedures of the Committee of the Judiciary United States Senate*, 95th Cong., 1st Sess. 8576 (June 7, 1977) (statement of John L. McClellan, Subcommittee Chairman, summarizing the Act). *See also* Federal Parole Commission and Reorganization Act of 1976, 18 U.S.C. §§ 4201-4218 (1976).

This reform has been supported by conservatives, liberals, and radicals who attack the existing "medical model"[8] as ineffectual, arbitrary, and socially repressive.[9] The sole defenders of the present system are found within the corrections profession. They justify the medical model of indeterminate sentencing by arguing that offenders are individually or socially maladjusted and that the basic purpose of the criminal law is not to punish such individuals but to adjust their behavior so that they can become useful and productive members of society.[10] Underlying this rehabilitation theory is the view that criminal activity is not freely willed by the individual, but is caused by individual and societal maladjustment. This theory, which has its philosophical basis in determinism, was articulated by Clarence

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8. The medical model of sentencing views crime as a result of psychological and environmental factors largely beyond the control of the individual, rather than as the manifestation of personal moral shortcomings. It is, therefore, no more rational to punish the "disease" of crime than it is to punish the mentally or physically ill. *See* K. MENNINGER, THE CRIME OF PUNISHMENT (1968).

9. *See* R. SINGER, JUST DESERTS (1979). The author, after reviewing the history of American corrections from 1950 to 1970, states:

> By the early 1970s, then, the hope of criminologists that science, in the form of medicine, psychiatry, social work, and so forth, would find a solution to the crime problem — a solution that was both compatible with our belief in liberty and our visions of the perfectibility of mankind — stood in tatters, dealt blow after merciless blow from all sides for an entire decade and more. The criticism was for the most part deserved and needed telling. But the rehabilitationist theory, which had for so long promised salvation now appeared not only as an empty promise, but as an intentional deceit, repeated only to perpetuate jobs and power. The reaction, as any reaction to crushed hopes, was jolting — the movement to commensurate deserts drew some of its greatest energies from disillusioned rehabilitationists.

*Id.* at 8.

The just deserts philosophy requires "that the nature and severity of the sanction imposed be deserved on the basis of the offense committed and certain limited mitigating and aggravating factors relating to the offender." MODEL ACT, *supra* note 5, art. 3, Prefatory note, at 91. For a full exposition of this position, see Zalman, *The Rise and Fall of the Indeterminate Sentence*, 24 WAYNE L. REV. 45 (1977).

10. B. WOOTTON, CRIME AND PENAL POLICY 243-44 (1978). Logically, therefore, the conception of criminal procedure as preventive rather than punitive involves acceptance of indeterminate sentences.

Darrow:

> The babe is born into the world without any thoughts or inhibitions on any subject. He is equipped with a human organism, and probably a few primitive natural instincts. He has no inherent consciousness that he should not gratify his wants in any way that he can find. . . . The child is like any other animal; it sees what it wants and reaches out its hand to grasp it. He may like candy, and, as any other animal takes what he wants where he can find it. Soon he observes that money will buy candy, so he finds the money, takes it with him and buys candy. No instinctive feeling tells him that this is wrong. . . . Only after special training does the child finally feel a reaction against taking things in the way called "doing wrong," and while he is being taught there is constantly the conflict between the desire to take things in natural ways and the inhibition that teaching has cultivated. He goes one direction or the other according to the relative strength of the needs and influence of the created restraints. Nature has given him no sense that one is right and the other wrong. . . .
>
> No one chooses his own parents or early environment in the first years which are all-determining after birth. Some are born to poverty, some wealth; some are born of wise parents, more of foolish ones. . . . Nothing is truer than that "the child is father to the man. . . ." No child should go forth from school or home without the best possible mental and physical development for facing its future in the world. . . .
>
> It is perfectly plain that at birth any two children are equally good or bad, if one is so senseless as to use those words. No one is either good or bad; still, two boys may start apparently alike, and in a very few years one may be in the penitentiary and the other in Congress. What has caused this difference in results? There can be but two causes: one, natural equipment; the other, training and opportunity. . . . As a matter of fact, *most of the individual comes from training and environment*. . . .
>
> Practically all the inmates of prisons come from the homes of the poor, and have had no chance to become adjusted to conditions. Neither were they taught any occupation or trade to fit them for the stern realities of the world, when they are beyond the school age. The inmates of prisons are mostly the product of large cities, where as boys they had all sorts of companions; their playgrounds were the streets and the alleys, and such vacant spots as the poor of great cities can find. . . . They

> want the things that so many other boys get in some other way, but they do not have any other way. Their course is the straight and narrow path from the simplest misdeed to the penitentiaries and electric chairs, and as inevitable as the course of the other boys who pass from grade schools to graduate from colleges.[11]

The philosopher Bertrand Russell similarly stated,

> The view that criminals are "wicked" and "deserve" punishment is not one which a rational morality can support. Undoubtedly certain people do things which society wishes to prevent, and does right in preventing as far as possible. . . . But this problem should be treated in a purely scientific spirit. We should ask simply: What is the best method of [prevention]? Of two methods which are equally effective . . . , the one involving least harm to the [criminal] is to be preferred.[12]

Both the Marxists and the radicals believe that in a capitalistic society, crime is caused by economic oppression, whereas in a socialistic society crime derives from individual maladjustment.[13] Common to both of these views is the belief that the

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11. WASHINGTON DEPT. OF INSTITUTIONS, PERSPECTIVES 2-3 (Spr. 1970) (emphasis added).

12. B. RUSSELL, WHAT I BELIEVE 52-53 (1925). *See also* J. FLUGEL, MAN, MORALS AND SOCIETY (1955); B. SKINNER, SCIENCE AND HUMAN BEHAVIOR 115-16 (1953). Psychoanalyst Flugel noted his opinion on dealing with offenders as follows:

> Insofar as we achieve insight and understanding as to how we can deal with those who frustrate us, we tend to substitute the surer and more effective methods provided by knowledge and science for the cruder procedures based on anger and moral condemnation. . . . The difference in attitude is . . . one that involves a change from the predominance of emotion to the predominance of cognition; instead of feeling angry or indignant, we consider as calmly as we can by what means we may bring about a change in the offender's mind and conduct in the direction we desire. . . .
>
> . . . It is easy to see what an immense improvement in human relations would be brought about by the more general adoption of such an attitude, in which we substitute a cognitive and psychological approach for an emotional and moral one.

J. FLUGEL, *supra*, at 254-55.

13. *See generally* AMERICAN FRIENDS SERVICE COMMITTEE, STRUGGLE FOR JUSTICE (1971); R. QUINNEY, CLASS, STATE, AND CRIME (2d ed. 1980). While

individual is not primarily responsible for his own acts: bad acts are fostered by outside circumstances, not willed by the individual. Thus, the corollary argument is that since there is no responsibility there should be no punishment. If the objective of the law is to adjust deviates, the logical result is a system of indeterminate sentencing that adjusts persons who violate the law and then releases them. If these persons cannot be adjusted, they are never released.

Although complete determinism has not totally dominated sentencing laws, the medical model has been used as justification for indeterminate sentences. Such sentencing laws usually have both a maximum and minimum duration. Some portion of the sentence must be served before release, and generally no one is required to serve more than the maximum sentence.[14] In addition to the diversity which the minimum-maximum system creates, indeterminate sentencing becomes more indeterminate by use of the judicial devices of suspended sentences and probation.[15] Certainly such a system allows for individualized treatment, but even within its own terms, arbitrary and diverse results must occur. Thus, most persons sentenced under an indeterminate system perceive it as unfair and unjust.[16]

## II. INHERENT DIVERSITY IN INDETERMINATE SENTENCING

In the existing indeterminate sentencing system, two inde-

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*Struggle for Justice* is not ostensibly Marxist, the report espouses the same rationale for the criminal justice system in a capitalistic society as do many Marxist authors. *Compare* Gordon, *Capitalism, Class, and Crime in America* in THE ECONOMICS OF CRIME 93, 102-05 (1980) *with* STRUGGLE FOR JUSTICE, *supra*, at 22-31.

14. H. Perlman & W. Rudolph, *Handbook of Correctional Law* (1969) in COMPENDIUM OF MODEL CORRECTIONAL LEGISLATION AND STANDARDS app. E at x-81 to -126 (2d ed. 1972).

15. For example, one might be convicted of a crime in which the minimum sentence was one year and yet, through either the device of a suspended sentence or probation, never serve any time. Additionally, two individuals accused of armed robbery in different jurisdictions under similar circumstances might, for example, be given totally different sentences.

16. *See* STRUGGLE FOR JUSTICE, *supra* note 13, at 108-44. For an explanation of why a perception of unfairness is the necessary result of the discretion inherent in indeterminant sentencing, see FAIR AND CERTAIN PUNISHMENT, *supra* note 1, at 101-15.

pendent variables ensure diverse results. The first variable relates to the initial sentence; the second relates to the discretion of penal authorities to vary the sentence.

The first factor in an indeterminate sentencing system that may lead to diverse sentencing is the plea bargain. A defendant's ability to plea bargain will depend on the defense attorney's creativity in suggesting alternatives to incarceration,[17] the prosecutor's philosophy and work load,[18] and the community-based programs available.[19] The interaction of these factors provides for different treatment for different individuals.

The diversity in an indeterminate system is further compounded by the attitude of the sentencing judge. In many jurisdictions, for example, a sentencing judge will rely on a presentence report that is based on confidential information and is unavailable to the defendant.[20] Although some judges may strive to reflect the community values in the sentencing process, it is more likely that the judge's own values will be reflected in the sentence imposed. This inescapable diversity results from full judicial discretion granted without appropriate guidelines for its exercise. Although discretion may be justified as necessary to consider properly a particular defendant's case, the diversity may be a result of differences among judges rather than differences among defendants.[21]

Thus an indeterminate system providing for a variety of

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17. The alternatives available to a defendant, including treatment in private hospitals, drug or alcohol programs, family supervision, and other community-based offender programs, will also depend on the financial resources of the defendant.

18. *See* Cole, *The Decision to Prosecute*, in READINGS IN CRIMINAL JUSTICE 237-38 (Moore, Marks, Barrow 1st ed. 1976).

19. *Id.* at 235-37.

20. If the information contained in the presentence report is untrue or biased, it may lead to a more severe sentence. This is especially likely since, in general, the information is not tested, and until recently, the defendant could not even examine the report. Williams v. New York, 337 U.S. 241 (1949); United States v. Muniz, 569 F.2d 858 (5th Cir. 1978). *See also* MODEL ACT, *supra* note 5, § 3-205, at 156-57.

21. This result is especially prevalent in multi-judge districts where astute defense attorneys may jockey to have their clients sentenced by one judge rather than another. Thus, judicial discretion benefits the person who has the least excuse for creating crime, while penalizing those with the greatest excuse.

sentences in order to accommodate differences among individual offenders results in different sentences for similar individuals because of fortuities in representation, presentence reports, or sentencing judges. It is no wonder that an incarcerated person feels a great sense of injustice when persons convicted of similar offenses serve lesser sentences or receive probation. The incarcerated person believes that his sentence was not attributable to the fact that he broke the law, but rather to the fact that he failed to hire a smart "mouthpiece" or to go before an easy judge. In the offender's view, his sentence is not proper retribution for his antisocial act, but is rather another example of societal injustice toward him.

A third factor that compounds sentence diversity is the parole decision. The parole authorities generally are granted discretion regarding the release of an incarcerated person.[22] The normal exercise of parole discretion does not relate to the crime committed, but relates to factors such as prison discipline, recommendations of prison counselors, the existence of jobs on the outside, the feeling of the community where the crime was committed, and the support of the offender's family. Realistically, all of these factors relate to the offender's ability to adjust to the outside world and not to any concept of a just punishment for an offense.[23]

Because of these variables, indeterminate sentencing must by necessity be arbitrary and capricious. If the indeterminate system is to be reformed, therefore, the medical model of the deviate who can be readjusted must be discarded. In rejecting this model, however, reformers need not ignore the fact that poverty, lack of opportunity, absence of family support, and hostility toward established values do play a part in crime.[24] Reformers must remember, however, that although such circumstances may sometimes *explain* crime, they do not *excuse* crime.

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22. Thus, if two persons are sentenced to three- to six-year terms in prison, one may serve one year and the other may serve six years.

23. The author was a member of the Nebraska Parole Board in 1969. The standard operating procedure of that Board was to require the prisoner to find a job, to find a place to live, and to be acceptable to the community before being paroled. All of this information was part of the parole plan worked up by the prisoner's counselor and presented for Board approval.

24. *See* text accompanying notes 64-70 *infra*.

Furthermore, reformers must recognize that the underlying factors that breed crime cannot be reversed by courts or by correctional institutions.

## III. Criminal Justice Reform

Ironically, the present reform movement arose because of the failure of the last reform movement that was in turn the result of a perceived previous failure. The functions of the criminal law must be redefined and the inherent conflicts among the various purposes of the criminal law must be recognized in order for society to avoid similar cycles of rejection and reform.

The classic purposes of the criminal law are deterrence, both general and special, justice or fairness, and rehabilitation.[25]

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25. The Model Penal Code provides:

(2) The general purposes of the provisions governing the sentencing and treatment of offenders are:

(a) to prevent the commission of offenses;

(b) to promote the correction and rehabilitation of offenders;

(c) to safeguard offenders against excessive, disproportionate or arbitrary punishment;

(d) to give fair warning of the nature of the sentences that may be imposed on conviction of an offense;

(e) to differentiate among offenders with a view to a just individualization in their treatment;

(f) to define, coordinate and harmonize the powers, duties and functions of the courts and of administrative officers and agencies responsible for dealing with offenders;

(g) to advance the use of generally accepted scientific methods and knowledge in the sentencing and treatment of offenders;

(h) to integrate responsibility for the administration of the correctional system in a State Department of Correction [or other single department or agency].

(3) The provisions of the Code shall be construed according to the fair import of their terms but when the language is susceptible of differing constructions it shall be interpreted to further the general purposes stated in this Section and the special purposes of the particular provision involved. The discretionary powers conferred by the Code shall be exercised in accordance with the criteria stated in the Code and, insofar as such criteria are not decisive, to further the general purposes stated in this Section.

Model Penal Code § 1.02(2),(3) (1961).

The Model Act provides:

The concept of deterrence has been, and still is, the most obvious and the most easily understood of the purposes. Deterrence may exist independently of justice or rehabilitation. Historically the function of deterrence was to demonstrate the state's power over the weak and helpless criminal.[26] Deterrence exalted the sovereign's power, demeaned the criminal, and frightened the rest of the community into submission.[27]

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The purposes of this Article are to:

(1) punish a criminal defendant by assuring the imposition of a sentence he deserves in relation to the seriousness of his offense;

(2) assure the fair treatment of all defendants by eliminating unjustified disparity in sentences, providing fair warning of the nature of the sentence to be imposed, and establishing fair procedures for the imposition of sentences; and

(3) prevent crime and promote respect for law by,

(i) providing an effective deterrent to others likely to commit similar offenses;

(ii) restraining defendants with a long history of criminal conduct; and

(iii) promoting correctional programs that elicit the voluntary cooperation and participation of offenders.

MODEL ACT, *supra* note 5, § 3-101, at 95.

26. The same thinking governed punishment for lesser crimes. Adulterers were branded or mutilated in colonial America and are stoned today in modern Moslem countries. Humiliation through whipping and the use of the stocks also was used for deterrence. These punishments showed the power of the state and the weakness of the offender. *See generally* S. RUBIN, THE LAW OF CRIMINAL CORRECTION §§ 1-28 (1963). Threads of such thinking persist in the criminal justice system in the form of shaving prisoners' heads and requiring special prison clothing. A recent example has been the hunger strikes in Northern Ireland where the demands included the prisoners' right to wear their own clothes rather than prison clothes. The most extreme example was the requirement that Jews wear a yellow star as a badge of infamy in Nazi-occupied Europe.

27. M. FOUCAULT, DISCIPLINE AND PUNISHMENT (1977) (hereinafter cited as FOUCAULT).

On 2 March 1757 Damiens the regicide was condemned "to make the *amende honorable* before the main door of the Church of Paris," where he was to be "taken and conveyed in a cart, wearing nothing but a shirt, holding a torch of burning wax weighing two pounds"; then, "in the said car, to the Place de Grève, where, on a scaffold that will be erected there, the flesh will be torn from his breasts, arms, thighs and calves with red-hot pincers, his right hand, holding the knife with which he committed the said parricide, burnt with sulphur, and, on those places where the flesh will be torn away, poured molten

In cases in which extreme individual punishments would be insufficient, both the English and the Romans used collective guilt to deter through forfeiture[28] and the concept of corruption of the blood.[29] Such severe punishment was justified by the need to secure a very tenuous law and order when little sense of community existed within a nation and when each class was indeed separate. Since the reason for the sovereign's existence was to maintain law and order, an attack on law and order was an attack on the sovereign. By perceiving the criminal law as a device to protect the sovereign, terror-induced obedience was justified.[30] Although terror was the only tool available to prevent

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lead, boiling oil, burning resin, wax and sulphur melted together and then his body drawn and quartered by four horses and his limbs and body consumed by fire, reduced to ashes and his ashes thrown to the winds". . . .

*Id.* at 3.

28. BLACKSTONE'S COMMENTARIES ON THE LAW 920-25 (Gavit ed. 1941).

29. *Id.* at 925.

30. FOUCAULT, *supra* note 27, at 48-49.

> The public execution, then, has a juridico-political function. It is a ceremonial by which a momentarily injured sovereignty is reconstructed. It restores that sovereignty by manifesting it at its most spectacular. The public execution, however hasty and everyday, belongs to a whole series of great rituals in which power is eclipsed and restored (coronation, entry of the king into a conquered city, the submission of rebellious subjects); over and above the crime that has placed the sovereign in contempt, it deploys before all eyes an invincible force. Its aim is not so much to re-establish a balance as to bring into play, as its extreme point, the dissymmetry between the subject who has dared to violate the law and the all-powerful sovereign who displays his strength. Although redress of the private injury occasioned by the offence must be proportionate, although the sentence must be equitable, the punishment is carried out in such a way as to give a spectacle not of measure, but of imbalance and excess; in this liturgy of punishment, there must be an emphatic affirmation of power and of its intrinsic superiority. And this superiority is not simply that of right, but that of the physical strength of the sovereign beating down upon the body of his adversary and mastering it: by breaking the law, the offender has touched the very person of the prince; and it is the prince — or at least those to whom he has delegated his force — who seizes upon the body of the condemned man and displays it marked, beaten, broken. The ceremony of punishment, then, is an exercise of "terror." When the jurists of the eighteenth

widespread anarchy, most people were unaffected by its use because ordinary crime was seldom dealt with by such means and because a high level of proof was required for major crimes.[31] In effect, then, the criminal law dealt with open breaches of the peace, whereas less open violations were controlled by private enforcement.

With the coming of the bourgeoisie and the age of enlightenment, terror as a means of securing law and order was no longer acceptable. New concepts arose concerning the relationship between the state and the citizen, such as the contract and the community theories of government. Under the contract theory, certain limited powers were given to the state in exchange for certain benefits.[32] The essential purpose of the state under the contract theory was to secure freedom, and thus, laws were designed to benefit the whole community on a reciprocal basis. Under the community theory, the state was conceived as harbor-

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century began their polemic with the reformers, they offered a restrictive, "modernist" interpretation of the physical cruelty of the penalties imposed by the law: if severe penalties are required, it is because their example must be deeply inscribed in the hearts of men. Yet, in fact, what had hitherto maintained this practice of torture was not an economy of example, in the sense in which it was to be understood at the time of the *idéologues* (that the representation of the penalty should be greater than the interest of the crime), but a policy of terror: to make everyone aware, through the body of the criminal, of the unrestrained presence of the sovereign. The public execution did not re-establish justice; it reactivated power. In the seventeenth century, and even in the early eighteenth century, it was not, therefore, with all its theatre of terror, a lingering hang-over from an earlier age. Its ruthlessness, its spectacle, its physical violence, its unbalanced play of forces, its meticulous ceremonial, its entire apparatus were inscribed in the political functioning of the penal system.

*Id.* at 48-49.

31. Under Biblical law as well as modern Moslem law, two eye witnesses were necessary for a conviction. *See* Langbein, *Torture and Plea Bargaining*, 46 U. CHI. L. REV. 3 (1978).

32. Under Locke's contract theory, persons in the state of nature gave up their power to punish personal wrongs and to resort to self-help to protect their property. This power was given to the commonwealth created by their mutual consent which, in turn, provided more complete protection for the rights and property of the members of the commonwealth. J. LOCKE, TWO TREATISES OF GOVERNMENT 285 (Laslett 2d ed. 1967).

ing a mutuality of interests, and the law, if properly understood and properly enacted, would be mutually beneficial. Since state laws would reflect the general will, in theory no one would oppose them.[33]

These concepts, arising concurrently with, and as part of the growth of the constitutional state and of democratic participation, perpetrated two important changes in criminal law. First, the state no longer needed to show its power through the debasement of offenders since the power was assured through the popular will. Second, the criminal justice system could serve rational functions in addition to keeping the public peace.

Both of these changes were reflected clearly in eighteenth century constitutions. For example, the United States Constitution prevents the classic use of terror by prohibiting cruel and unusual punishments,[34] corruption of the blood,[35] and bills of attainder,[36] thereby denying the state the power to tear its citizens limb from limb. A republic of free people had no need to exalt the state. In fact, the United States Constitution, even without the addition of the Bill of Rights, reflects a healthy distrust of the state[37] and embodies the belief that the concepts of freedom and individual responsibility must be grounded not in terror and humiliation, but in consent and justice. The United

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33. J. ROUSSEAU, THE SOCIAL CONTRACT (Frankel ed. 1947).

> The engagements which bind us to the social body are only obligatory because they are mutual; and their nature is such that in fulfilling them we cannot labour for others without at the same time for ourselves. Wherefore is the general will always right, and wherefore do all the wills invariably seek the happiness of every individual among them . . . .

*Id.* at 28.

34. U.S. CONST. amend. VIII. "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." *Id.*

35. U.S. CONST. art. 3, § 3. "The Congress shall have power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, of Forfeiture except during the Life of the person attainted." *Id.*

36. U.S. CONST. art. 1, § 9. "No Bill of Attainder or ex post facto Law shall be passed." *Id.* U.S. CONST. art. 1, § 10. "No state shall pass any Bill of Attainder, ex post facto Law . . . ." *Id.*

37. U.S. CONST. art. 1, § 1 (limiting grant of legislative power to United States Congress); U.S. CONST. art. 1, § 8 (enumerating powers of Congress); U.S. CONST. art. 3, § 2 (specifying Supreme Court jurisdiction).

States Constitution[38] not only prohibits the imposition of humiliating and degrading punishments, but also requires that no punishment be imposed without adequate notice,[39] sufficient proof,[40] and specific language defining the crime.[41]

In the nineteenth century the contrast between the contract and the community theories of the modern state was developed further. The more limited contract theory was best articulated by Locke,[42] while the broader community theory was set out by Rousseau.[43] According to Locke's view, under the contract theory criminal law reform consisted of restricting the criminal law to the protection of life, liberty, and property.[44] The criminal law would protect the citizen from interference with his privacy by prohibiting state inquiry into matters of belief and conscience and would protect the citizen from interference with moral activities by providing procedural limitations.[45] Because the popularly elected legislature would define crimes and because the accused would be tried by a jury, no unpopular criminal laws would be enforced.[46] Thus, the citizen of the Lockean state could be assured that (1) the community would assent to all criminal laws; (2) all criminal laws would relate to the protection of life, liberty, and property; (3) criminal laws relating to

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38. For a description of the criminal justice systems in England and in Wales, see E. FRIESEN & I. SCOTT, ENGLISH CRIMINAL JUSTICE (1976); C. SHOOLBRED, THE ADMINISTRATION OF CRIMINAL JUSTICE IN ENGLAND AND WALES (1966).

39. U.S. CONST. amend. VI, XIV. *See also* note 41 *infra*.

40. U.S. CONST. amend. VI, XIV. *See* note 41 *infra*.

41. *See* text accompanying note 33 *supra*. See also Jackson v. Virginia, 443 U.S. 307 (1979), in which the Supreme Court stated:

> It is axiomatic that a conviction upon a charge not made or upon a charge not tried constitutes a denial of due process. These standards no more than reflect a broader premise that has never been doubted in our constitutional system: that a person cannot incur the loss of liberty for an offense without notice and a meaningful opportunity to defend.

*Id.* at 314 (citations omitted).

42. LOCKE, *supra* note 32.

43. ROUSSEAU, *supra* note 33.

44. LOCKE, *supra* note 32, at 371.

45. *Cf. id.* at 373-81.

46. *Cf. id.*

private actions would be difficult or impossible to enforce; (4) each citizen would have full notice of the substance of the criminal law; and (5) no citizen would be convicted without substantial proof and community acquiescence.[47]

According to Rousseau, on the other hand, the essence of the democratic state was the community.[48] In Rousseau's state, every citizen is bound to and must be protected by the state. This concept of the general will[49] rests upon the theory that appropriate rules of conduct are discernible and that every member of the community would agree that such rules are binding.[50] Hence, anyone who does not accept these rules either does not understand the general will or could agree with the rules if his special interests or prejudices were removed.[51] Thus, if a criminal were reeducated—if his prejudices were removed, his mind enlightened, and his early education corrected—he would understand that his interests and the interests of society were the same. The logical function of punishment, therefore, is not to degrade and humiliate the lawbreaker but to make the lawbreaker realize that the criminal law was established to protect him as well as to coerce him.[52] Under the community state model it was no longer necessary to degrade lawbreakers in order to exalt the power of the sovereign. Death, infamy, and mutilation as punishment for crime are replaced by prison sentences. But, as evidenced by the American correction system, the expected rehabilitation of criminals did not occur.[53] Under our Lockean constitution the question remains: If we cannot maim and mutilate as punishment for crimes and if we have failed to rehabilitate, how can we establish a system of sentencing and corrections that is consistent with our values?

## IV. Reform: Balancing Equity and Costs

The starting point is to redefine the function of the criminal

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47. *Id.*
48. Rousseau, *supra* note 32, at 15.
49. *Id.* at 26-30.
50. *Id.* at 14-16.
51. *Id.* at 26.
52. *Id.*
53. *See* Menninger, *supra* note 8, at 3-111.

justice system. If the purposes of rehabilitation and deterrence cannot be accomplished, then the aim of criminal justice should be to enhance liberty and security. Thus, in a free society the criminal justice system must balance citizen protection from arbitrary harassment by the state with protection of the citizen from criminal acts. It must be recognized that any attempt to deter crime through increased penalties, harsher prison conditions, or greater police authority will diminish every citizen's security against arbitrary state authority. Balancing freedom from arbitrary state action and protection from illegal activity is complicated by the nature of a free equalitarian society. In such a society rules cannot protect one group of people by impinging upon the rights of another group of people. In principle, the laws restricting government action and prohibiting criminal activity apply to the community as a whole. This concept of equality under the law is of recent origin[54] and has yet to be accomplished fully in practice.[55] Recent efforts to refine the laws of criminal procedure[56] and to establish prisoners' rights[57] seek to ensure that the practices of a free society are consistent with the principles of a free society.[58] While any sensible reform movement in sentencing and corrections must incorporate the values of society, full costs of implementation must be justified if the reform is to succeed.

If the concept of equality before the law is taken seriously, the law cannot grant less procedural protection to some members of our society than to others and cannot punish for the same offense some members of society more harshly than others. Hence, if the average member of the society does not wish to be

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54. *See, e.g.*, LOCKE, *supra* note 32; ROUSSEAU, *supra* note 33; U.S. DECL. OF IND.

55. *See* Furman v. Georgia, 408 U.S. 238 (1972).

56. The Federal Government and most states have enacted rules governing criminal procedure. *See, e.g.*, FED. R. CRIM. P.; TENN. R. CRIM P.

57. *See, e.g.*, Bounds v. Smith, 430 U.S. 817 (1977) (access to courts through prison law libraries); Estelle v. Gamble, 429 U.S. 97 (1976) (medical care); Procunier v. Martinez, 416 U.S. 396 (1974) (mail rights); Johnson v. Avery, 393 U.S. 483 (1969) (access to the courts through jailhouse lawyer). *See generally* J. GOBERT & N. COHEN, RIGHTS OF PRISONERS (1981).

58. *See* FAIR AND CERTAIN PUNISHMENT, *supra* note 1, at 123-24; STRUGGLE FOR JUSTICE, *supra* note 13, at 22-31.

stopped and frisked by the police or subjected to illegal searches of his home, he must assume that others who are less law-abiding will have the same protection.[59]

Since citizens in an equalitarian society wish to be free from arbitrary governmental action, any system of criminal justice cannot be expected to deter all crime or to rehabilitate all offenders. By insisting that criminal conduct be clearly delineated,[60] that the most private conduct be protected by the fourth amendment,[61] that proof in criminal cases be beyond a reasonable doubt,[62] and that no duty exists under the fifth amendment to explain suspicious behavior,[63] an equalitarian society accepts a less than perfect criminal justice system. By preserving these safeguards for all citizens, a certain percentage of illegal activities will not be punished.

Assuming that the would-be offender is a rational human being, he will commit the crime if he believes the gain outweighs the loss. He may consider his chances of being caught and punished, his skill in committing the crime, and the procedural safeguards available. Different persons will weigh these factors differently and each will reach different decisions. For some, an immediate gain is worth more than a future loss.[64] Clearly, per-

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59. By the same reasoning, if the average parent does not want his son or daughter to be jailed for illicit sex, or for drug use, or for shoplifting, then others in society must receive the same consideration for similar offenses.

60. *See* note 41 *supra* and accompanying text; *see also* Presnell v. Georgia, 439 U.S. 14 (1978); Cole v. Arkansas, 333 U.S. 196 (1948).

61. Katz v. United States, 389 U.S. 347 (1967). The fourth amendment protects individual privacy against certain kinds of governmental intrusion, but its protections go further and often have nothing to do with privacy at all. Other provisions of the Constitution protect personal privacy from other forms of governmental invasion. But the protection of a person's *general* right to privacy — his right to be let alone by other people — is, like the protection of his property and of his very life, left largely to the law of the individual states. *Id.* (footnotes omitted).

62. *See* U.S. CONST. amend VI.

63. U.S. CONST. amend. V. *See also* Miranda v. Arizona, 384 U.S. 436 (1966). *Cf.* Delaware v. Prouse, 440 U.S. 648 (1979) (Court required articulable suspicion before traffic stop).

64. The most obvious example is the father who steals food to feed his hungry children. A less sympathetic example is the unemployed teenager who steals a car for the immediate pleasure.

sons at the lowest levels of opportunity will risk more for immediate possibilities of substantial reward.[65] For some poor people, crime has this attraction, although they rationally know that the risk of loss is greater than the possible gain. The reason for the attraction is not difficult to discern: their existing situation—poverty, boredom, hopelessness—is intolerable. Moreover, the expectation of the reward and the immediate thrill of the experience are additional incentives. The risk of being caught, the danger of incarceration, and the tedium of punishment are all in the future. For many of the young and the poor, the severity of punishment discounted by the risk of being caught is not sufficient deterrence.[66]

Crime and accident statistics indicate that young people at all economic levels are willing to take risks.[67] A middle-aged person, on the other hand, who has property, position, and legal

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65. Such risk preference is evident in the popularity of numbers games among poor people in which a small investment offers a chance of a big payoff.

66. Gordon, *supra* note 13, at 103.

> Radicals therefore argue that nearly all crimes in capitalist societies represent perfectly *rational* responses to the organization of capitalist institutions, for those crimes help provide a means of survival in a society within which survival is never assured. Three different kinds of crime in the United States provide the most important examples of the rationality of crime: ghetto crime, organized crime, and corporate (or "white-collar") crime. It seems especially clear, first of all, that ghetto crime is committed by people responding quite reasonably to the structure of economic opportunities available to them. Only rarely, it appears, can ghetto criminals be regarded as raving, irrational, antisocial lunatics. The "legitimate" jobs open to many ghetto residents, especially to young black males, typically pay low wages, offer relatively demeaning assignments, and carry the constant risk of layoff. In contrast, many kinds of crime "available" in the ghetto often bring higher monetary return, offer even higher social status, and — at least in cases like numbers running — sometimes carry relatively low risk of arrest and punishment. Given those alternative opportunities, the choice between "legitimate" and "illegitimate" activites is often quite simple.

*Id.* at 103 (footnotes omitted).

67. For example, one could scarcely imagine a wave of 45-year old marines attacking Tarawa. Each middle-aged marine would believe that if anyone were killed, it would be him. Yet, in a similar group of 17-year old marines, each would believe that if anyone were to survive, it would be him. *See* text accompanying note 68 *infra*.

opportunities for gain uses a risk calculation that is different from that used by a young person. His existence is pleasant and includes long-range goals. In contemplating criminal activity, the middle-aged person must calculate loss of freedom and loss of societal position. Disregarding any question of morality, the reward to such a person would have to be substantially higher than the risk in order to induce him to commit a crime. Factoring in a psychological aversion to risk because of age, such a person would not likely commit any crime unless the chances of being caught were very low or the rewards were very high. Thus, in any system of justice where the punishment for an offense and the opportunity to commit the offense are equal, the young and the poor will commit the overwhelming number of offenses.[68]

If deterrence of crime, rather than attainment of justice, were the goal of the criminal justice system, a system which punished poor and young people more severely and disregarded their procedural rights would have to be constructed. In fact, such a system has always operated within the criminal justice system. At common law, for example, benefit of clergy allowed the educated classes to be treated differently from the uneducated.[69] Even without such direct class legislation, our system of indeterminate sentencing has led to a class and racial bias.[70]

## V. Constructing a Just Sentencing System

Since discretionary indeterminate sentencing is inherently unjust, the question becomes what sentencing system would be just. If one goal of the system is equal treatment, then the sentencing system must impose equal punishment for similar conduct. Equating punishment to conduct involves various factors that have long been used in defining crimes and defenses to crimes. These factors include the result of the criminal action, the intent of the perpetrator, and the perpetrator's mental capacity. If only these factors are used, however, *legitimate* dis-

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68. Evans, *The Labor Market and Parole Success*, in The Economics of Crime 325. *See generally* G. Nettler, Explaining Crime (1974).

69. For a discussion of the practice of benefit of clergy, see S. Rubin, *supra* note 26, at § 9.

70. Burns, *Racism and American Law*, in Criminal Justice in America 263, 271 (1974).

tinctions cannot be made among offenders; in order to make *fair* distinctions, culpability must also be considered. In determining culpability the following factors serve as mitigation: (1) the defendant's criminal conduct neither caused nor threatened serious bodily harm; (2) the defendant did not contemplate that his criminal conduct would cause or threaten serious bodily harm; (3) the defendant acted under strong provocation; (4) the defendant's criminal conduct was excused or justified by substantial grounds, though these grounds failed to establish a legal defense; (5) the defendant played a minor role in the commission of the offense; (6) the defendant, before his detection, compensated or made a good faith attempt to compensate the victim of his criminal conduct for the damage or injury the victim sustained; (7) the defendant, because of his youth or age, lacked substantial judgment in committing the offense; (8) the defendant was motivated by a desire to provide necessities for his family or himself; (9) the defendant was suffering from a mental or physical condition that significantly reduced his culpability for the offense; (10) the defendant assisted authorities in uncovering crimes committed by other persons or in detecting and apprehending other persons who had committed offenses; (11) the defendant, although guilty of the crime, committed the offense under such unusual circumstances that it is unlikely that a sustained intent to violate the law motivated his conduct. On the other hand, the following factors should be considered in aggravation: (1) the defendant has a recent history of convictions or criminal behavior; (2) the defendant was a leader of the criminal activity; (3) the offense involved more than one victim; (4) the victim was particularly vulnerable; (5) a victim was treated with cruelty during the perpetration of the offense; (6) the harm inflicted upon the victim was particularly great; (7) the offense was committed to gratify the defendant's desire for pleasure or excitement; (8) the defendant has a recent history of unwillingness to comply with the conditions of a sentence involving supervision in the community.

All of these factors relate to the offender's personal culpability and not to the need of the society to deter crime. Therefore, a consideration of these factors in sentencing is consistent

with the concept of equal punishment for similar conduct.[71]

Although balancing these factors to achieve equal treatment is important, it does not establish a just sentence. In addition to the need for equal treatment, the punishment must be a fair one for the offense.[72] In our society, the punishment must be perceived as just by both the victim and the offender. If the punishment is equivalent[73] to the offense, it will be perceived as just. If equivalence is the hallmark of a just sentence, the issue becomes whether this equivalence can be measured.

Basic to the concept of equivalence is the general equitable doctrine that no one should benefit from his own unlawful acts.[74] A criminal penalty, therefore, should, at a minimum, equal the gains that the criminal offender expects to receive. Since crime is a continuing event and since many crimes are never solved and even more crimes go unreported, criminal punishment should exceed the anticipated gain from the crime. If the punishment functioned only to recapture the gains from a particular crime, the offender would in all probability come out ahead. Therefore, to avoid unjust enrichment, the punishment must realistically include punishment for crimes other than the one with which the offender is charged.[75] Thus, for example, should

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71. The proposal is from the Model Sentencing and Corrections Act §§ 108-09. Each section also contains a provision that allows for the consideration of "[a]ny other factor consistent with the purposes of this article and the principles of sentencing." MODEL ACT, *supra* note 9, §§ 3-108 to -109, at 123-27. This provision is omitted from the proposal because the inclusion of such "other factors" would lead to less uniformity and more desertion in sentencing.

72. For a blatant example of disparate punishment, see Rummel v. Estelle, 445 U.S. 263 (1980) (mandatory life sentence for petitioner who obtained approximately $220 by false pretenses and fraudulent credit card use in three separate offenses did not constitute cruel and unusual punishment).

73. The concept of equivalence has been present in our society since the Biblical injunction of an eye for an eye and a tooth for a tooth. Although in recent years some have perceived this injunction as punitive rather than as just, the concept actually seeks to prohibit an escalation of punishment and to impose a limit on punishment.

74. See, for example, H. MCCLINTOCK, HANDBOOK OF THE PRINCIPLES OF EQUITY 52-69 (1st ed. 1948), for a discussion of equitable maxims disallowing profit from bad acts.

75. *See* Thurow, *Equity v. Efficiency in Law Enforcement*, in THE ECONOMICS OF CRIME 88, 88-90 (1980).

a study show that persons generally commit six burglaries before being caught, then the punishment should be based upon the previous gains rather than upon the one offense. Furthermore, to the extent that actual victims of crime can be determined, punishment should include payments to such victims. In addition to considering the gain to the offender and the loss to the victim in setting the punishment, the loss to society as a whole should be considered. Crime imposes substantial costs on the society in addition to actual financial losses. Crime requires that people safeguard their property, hire guards, maintain public police forces, and walk about in fear.[76] The latter cost—that of fear in society—justifies severe sentences for persons who abuse their victims or who engage in violent crimes. In such cases, the gain to the offender is not an adequate measure of the cost of the crime; the appropriate measure is instead the loss to the actual victim and to the potential victims of violent crime. When such considerations are used in establishing punishments, substantial punishments for repeat offenders, violent offenders, and persons who abuse their victims can be justified.[77]

Using the principles of equality, fairness, and economics to establish punishment is consistent with the concept of equivalence and avoids the necessity of justifying long sentences by considering deterrence or rehabilitation potential. Yet, using these principles does not resolve the question of the amount of punishment that can be considered just. The classic and proper response is that the legislature must answer that question. But the problem is whether the legislature can be trusted to determine a just punishment for an offense. Except in unusual circumstances, the courts have trusted the legislature to do so.[78]

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76. For a graphic description of such costs, see C. SILBERMAN, CRIMINAL VIOLENCE, CRIMINAL JUSTICE (1978).

77. MODEL ACT, *supra* note 9, at §§ 3-105 -06, at 115-19.

78. But in Weems v. United States, 217 U.S. 349 (1910), a case heard under American jurisdiction but arising in the Philippines, the Court rejected a legislative determination of a just sentence. The legislation in that case was not enacted by a democratic legislature that expected to be bound by its own decisions. Instead, the legislation was the Philippine penal code, which was derived from the Spanish Civil Code. Under the Spanish Penal Code, there were "only two degrees of punishment higher in scale than *cadena temporal*, death, and *cadena perpetua*. The punishment of *cadena temporal* is from twelve

The Supreme Court's most recent rejection of a legislative sentence determination involved the death penalty. In *Coker v. Georgia*,[79] a case involving the Georgia death penalty for rape, the Court held that death was a disproportionate penalty for rape. By so holding, the Court amended the legislative determination.[80] The Court felt free to amend the determination because the justices were aware that the death penalty is imposed by a jury only when a black man has raped a white woman. In establishing such a punishment the legislature could assume

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years and one day to twenty years . . . which 'shall be served' in certain 'penal institutions.' " 217 U.S. at 363-64 (quoting SPANISH PENAL CODE arts. 28 & 96). The Court further explained:

> And it is provided that "those sentenced to *cadena temporal* and *cadena perpetua* shall labor for the benefit of the state. They shall always carry a chain at the ankle, hanging from the wrists; they shall be employed at hard and painful labor, and shall receive no assistance whatsoever from without the institution." Arts. 105, 106. There are, besides, certain accessory penalties imposed, which are defined to be (1) civil interdiction; (2) perpetual absolute disqualification; (3) subjection to surveillance during life. These penalties are defined as follows:
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> Art. 42. Civil interdiction shall deprive the person punished as long as he suffers it, of the rights of parental authority, guardianship of person or property, participation in the family council, marital authority, the administration of property, and the right to dispose of his own property by acts inter vivos. Those cases are excepted in which the law explicitly limits its effects.
>
> "Art. 43. Subjection to the surveillance of the authorities imposes the following obligations on the persons punished:
>
> "1. That of fixing his domicil and giving notice thereof to the authority immediately in charge of his surveillance, not being allowed to change it without the knowledge and permission of said authority in writing.
>
> "2. To observe the rules of inspection prescribed.
>
> "3. To adopt some trade, art, industry, or profession should he not have known means of subsistence of his own.
>
> "Whenever a person punished is placed under the surveillance of the authorities, notice thereof shall be given to the government and to the governor general."

217 U.S. at 364 (quoting SPANISH PENAL CODE arts. 42 & 43).

79. 433 U.S. 584 (1977).

80. GA. CODE ANN. § 26-2001 (1972). The Georgia law also contained a provision listing aggravating and mitigating factors to be considered in capital cases. *Id.* §27-2534.1 (1977).

that, notwithstanding the general statement of the law, the local prosecutors, juries, and judges would restrict its application to cases such as *Coker*. If the law had been drafted explicitly to accomplish the desired end, it would have been unconstitutional.

The landmark case of *Furman v. Georgia*[81] involved a similar situation. In that case the plurality decision was based upon the fact that under a completely discretionary system only the poor and the black received the death penalty. The case illustrates how the reform that required juror concurrence for the death penalty caused an unequal application of the law. The case also illustrates why the legislature must be subject to its own laws in order to act responsibly. Legislators can easily authorize terror and oppression if the terror and oppression do not affect them or the constituents who elect them. In a democratic system, the persons who make the laws must be subject to them so that the *actual* punishment set for a crime will be an *equivalent* punishment for that crime. If the legislature could be assured that the judge or jury would impose indiscriminately the harshest punishment upon the least powerful persons in the community, the legislature would be free to prescribe heavy punishments without fear that they generally would be imposed. The reason for this is clear: greater deterrence would be possible but without risk to legislators or constituents. If there is little or no discretion in sentencing, the punishment prescribed will be no harsher than the community is willing to impose upon itself. The result will be a just sentence that is equivalent to the crime.

If we have a just and equivalent system of punishments and proper procedural safeguards, the criminal law still will not deter certain segments of the population. The poor and risk-prone still will find it profitable to commit crime. Because of this dilemma, the system tends to modify sentencing and procedural guarantees. If the society makes these modifications, the young, the black, and the poor will be punished more harshly than the remainder of the society. The solution to the problem of inevitable crime is not to abandon a just system of punishment, but to

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81. 408 U.S. 238 (1972). The Court held that the "imposition and carrying out of the death penalty in these cases [convictions for murder and rape] constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments." *Id.* at 240.

change the calculations by the most risk-prone segment of the population. Devising a just system of punishment is the first step. Everyone who is punished must believe that his sentence is just and that he has been treated fairly.

Another significant step would be the development of a corrections system that is consistent with a just system of punishment. The corrections system must recognize that the offender is a responsible person and must give him an opportunity within the prison to account for his own actions as he must do on the outside. Our present system, in contrast, is a testing ground for deciding when a person should be released. If a person is well behaved and adjusted to the system, he can earn "good-time credit" and be granted an early parole. Prison authorities can use the tool of early release to enforce discipline and to manipulate future behavior. Since the fairness of the punishment is not considered, the system is perceived by both the prisoner and the authorities as a method of mutual manipulation. Prisoners attend school or therapy sessions not to learn or be cured, but to obtain an early release. The system has no relation to the culpability of the prisoner and is clearly skewed to the benefit of the prisoner who can manipulate it. The authorities like the system because it makes control easier; the offenders like the system because they are assured of a lighter punishment if they cooperate. Despite these biased preferences, the system has no relation to justice or to making the offenders less likely to commit crimes in the future.[82]

A corrections system should incorporate the values of the society in which it exists. If the society wishes to establish an obedient underclass, the existing system of behavior modification would be appropriate. If the society believes in freedom and responsibility, the corrections system must reflect that belief and urge prisoners to develop responsibility, to learn to make choices, and not simply to outmaneuver the system. While prisoners must be protected from arbitrary rules or the arbitrary enforcement of legitimate rules within the system, the protection must be limited by the institution's legitimate need to secure the offenders from escape and to protect other offenders from illegal

82. *See* notes 59-70 *supra* and accompanying text.

acts.

Depersonalizing an individual reduces that person to a thing. Replacing a name with a number is symbolic of that act. Further, stripping a person of all resources and making him dependent upon his captor is the basis of brainwashing. Use of such devices makes the prisoner easier to control, but it destroys the prisoner as an individual and reduces his ability to be a responsible person when he leaves prison. If one wishes to promote responsible behavior, the opportunities for choice, responsibility, and decision-making on the part of the prisoner ought to be enhanced rather than limited in the prison environment. Prison rules must recognize the prisoner's basic right to privacy.[83] Any restrictions on this basic right must be limited or directed to specific needs of the institution. Thus, for example, perishable food could be restricted for sanitary reasons, and metal objects could be restricted if the objects could be used for weapons. The claim that the mere existence of property would induce theft and violence is specious. It is only when property is scarce that the chance of theft and violence increase.

Together with the need for privacy, the offender has the need to learn responsibility through work. But on the whole, prisons deprive inmates of an opportunity to work. In a free society one must be able to support himself by work in order not to be dependent upon or controlled by other people. In the ordinary prison, work is scarce and remunerative work almost nonexistent. Without work, however, the prisoner can never learn

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83. *See* MODEL ACT, *supra* note 9, §§ 4-101 to -1005, at 218-429.

While on first examination the requirement of privacy for offenders in institutions may seem quite radical, this requirement is basic to the treatment of the offender as an individual. The requirement of privacy includes the right to communicate by telephone and letter, the right to have some amount of private property, the right to have private quarters and not to be harassed with unreasonable searches of one's person and one's quarters, and finally, the right to have family or conjugal visits either within or outside of the prison.

Institutional needs, of course, restrict such privacy. Prison officials point out that communication without censorship could lead to escape plans as well as to plans for carrying out illegal business in prison. Ownership of private property could lead to feelings of inequality and danger of theft. A restriction on searches again could also lead to escapes, concealment of narcotics or liquor, and to the possibility of greater use of weapons. Despite these possibilities, the offender must have privacy if he is to be treated as an individual.

responsibility. While incarcerated, the prisoner should learn to support himself and his family, to pay for his incarceration, and to pay damages to his victims. If working while in prison has enabled a prisoner to make these payments, he will believe himself to be a responsible individual and will act as such.[84]

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84. Evans, *The Labor Market and Parole Success*, in THE ECONOMICS OF CRIME 325 (1980); Potuto, *An Operational Plan for Realistic Prison Employment*, 1980 WIS. L. REV. 291, 294.

In addition to allowing the prisoner to accumulate property, he will have something to lose in committing further offenses, and thus, he will change his calculation concerning crime. Even within the prison, the existence of property will change the attitude of the prisoners toward authority since the enforcement of some rules will be perceived to benefit the prisoners rather than to benefit the authorities.

Allowing the prisoners to make decisions as to property, training, and therapy will prepare them for the real world rather than for the institutional world. Offenders with such experience, a work record, and an increased age may, in leaving the prison, make a different calculation of whether crime is in their own interest.

For those who are professional criminals there is little hope of change. The sentencing structure will have to deal with them severely in the bases of just deserts for second or third offenses. For others, the additional age, the ability to earn money legally, and the added experience of being responsible for one's own destiny may be enough to help them make a different calculation of their own interests. What is clear, however, is that even without such a change both the society and the offender will know that his sentence and his punishment are just and that the decision to commit the crime and endure the punishment was that of the offender.

It is incredible that we allow as many obstacles as we do to hinder real work in prison. A realistic policy would require the repeal of state and federal laws preventing the sale of prison-made goods along with providing incentives to private enterprise to develop the potential of prison labor. The fear that lower wages in prison would undercut wage rates or destroy jobs is part of the same economic ignorance that believes tariffs protect jobs. A more productive prison population with a nonscarce economy would generally improve the standard of living for everyone while ensuring a just system of punishment. Again, the society must choose the course of action it believes in. If it believes that work, incentives, and responsibilities are basic to a free society, it cannot have a prison system that denies each of these values. If an offender works he must be allowed to keep the fruits of his labor. We must assume that people work to benefit themselves. Thus, work has to result in tangible rewards for the worker.

## VI. CONCLUSION

Even under the best circumstances, some persons who leave prison will find it in their best interests to commit crimes. In this group will be professional criminals who can earn more at their trade than through any legal business, persons for whom the thrill of criminal activity is still a great attraction, and persons who for psychological or economic reasons wish to continue the criminal life. For such persons a just deserts system can be used to increase punishment and to incapacitate them for the duration of their projected criminal careers. Since the criminal should bear the full costs of his crime, it is appropriate to insist on substantial sentences for second and third offenders. If imposed early enough, such sentences would, in most instances, cover the actual period during which repeat offenders commit their crimes.

No matter how successful our corrections system becomes, a new crop of risk-prone individuals will always be waiting to take an illegal chance. This problem is endemic to a free society and must be borne, to some extent, by society in exchange for its freedom.[85]

85. Thurow, *Equity v. Efficiency in Law Enforcement*, in THE ECONOMICS OF CRIME 85 (1980).

# CRIMINAL LAW IN TENNESSEE IN 1980 — A CRITICAL SURVEY

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## I. INTRODUCTION

In substantive criminal law in 1980 the Tennessee Supreme Court allowed inferences drawn from surrounding circumstances to sustain charges of homicide[1] and of fraudulent drawing of bad checks.[2] In the law of defenses, the court in *Kennamore v. State*[3] rejected the "true man" rule of self-defense and in *State v. Jones*[4] declared entrapment to be a defense in Tennessee. In procedural matters, the Tennessee Supreme Court applied the right to counsel to preliminary hearings,[5] clarified the State's burden of proof after a showing that jury separation was potentially prejudicial,[6] and discussed various constitutional issues arising in the fair cross-section requirement,[7] the multiple offender rule,[8] the right to counsel aspects of confessions,[9] and the Tennessee Habitual Criminal Act.[10]

During the same period the United States Supreme Court

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1. *See* text accompanying notes 21-33 *supra*.
2. *See* text accompanying notes 39-42 *supra*.
3. 604 S.W.2d 856 (Tenn. 1980). *See* text accompanying notes 43-53 *supra*.
4. 598 S.W.2d 209 (Tenn. 1980). *See* text accompanying notes 54-62 *supra*.
5. *See* text accompanying notes 125-37 *supra*.
6. *See* text accompanying notes 221-30 *supra*.
7. *See* text accompanying notes 205-20 *supra*.
8. *See* text accompanying notes 256-62 *supra*.
9. *See* text accompanying notes 158-62 *supra*.
10. *See* text accompanying notes 236-39 *supra*.

struggled to clarify seizure under the rule in *Terry v. Ohio*[11] and interrogation under the rule in *Miranda v. Arizona*.[12] The high Court also addressed the exigent circumstances exception to the warrant requirement,[13] the propriety of searching individuals found on premises for which a search warrant had been issued,[14] the admissibility of suppressed evidence for cross-examination impeachment purposes,[15] the conflict of interest problems raised by representing multiple defendants,[16] and the constitutional standard of effectiveness for retained counsel.[17] The United States Supreme Court reaffirmed the reasonableness limits of electronic surveillance orders,[18] disapproved government action that appeared to retaliate against an accused who was exercising his constitutional rights,[19] and sustained the power of the legislature to establish criminal punishments.[20]

## II. Offenses

### *A. Homicide*

#### 1. Murder

A conviction for first degree murder requires proof of premeditation, except when the prosecution relies on the felony murder theory.[21] Premeditation may be difficult to prove, however, when there are no witnesses to the crime. This difficulty is illustrated in the case of *Houston v. State*.[22] The defendant in *Houston* was accused of the first degree murder of a service station operator, who was shot three times during an attempted robbery. Instead of using the felony murder theory and avoiding the need to prove premeditation, the prosecution had elected to

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11. 392 U.S. 1 (1968). *See* text accompanying notes 63-89 *supra*.
12. 384 U.S. 436 (1966). *See* text accompanying notes 163-77 *supra*.
13. *See* text accompanying notes 90-99 *supra*.
14. *See* text accompanying notes 100-09 *supra*.
15. *See* text accompanying notes 114-24 *supra*.
16. *See* text accompanying notes 143-47 *supra*.
17. *See* text accompanying notes 138-42 *supra*.
18. *See* text accompanying notes 148-52 *supra*.
19. *See* text accompanying notes 187-204 *supra*.
20. *See* text accompanying notes 231-35 *supra*.
21. Tenn. Code Ann. § 39-2402 (Supp. 1980).
22. 593 S.W.2d 267 (Tenn. 1980).

*nolle prosequi* the felony murder count and to proceed on the remaining counts of common-law murder and armed robbery.[23] The defendant in *Houston* was convicted, and his conviction was sustained on the authority of prior cases that inferred premeditation from repeated blows.[24] Justice Henry, dissenting, conceded that while evidence of repeated blows normally could satisfy the premeditation requirement, the only other evidence of the manner of the killing in this case came from the defendant's confession.[25] If the defendant's testimony that the pistol had fired when he and the victim were wrestling was believed, a finding of premeditation was excluded. The jury could separate the defendant's statement and choose to believe the accused's confession to the crime, but disbelieve his rendition of the details as self-serving. Since the confession was the *only* direct evidence of murder[26] and since presumably a conviction could not have resulted without the confession, the dissent found "it difficult . . . to give full faith and credit to [defendant's] admission that he killed and robbed the victim and simultaneously to reject out-of-hand his explanation of all details favorable to him"[27] especially since the defendant had received the death penalty. The dissent preferred to reduce the conviction to second degree murder and the sentence to life imprisonment.[28]

Malice, an essential element of second degree murder, has been implied more freely in vehicular homicide cases in Tennessee than in other jurisdictions.[29] In *Farr v. State*[30] the accused had driven his truck across a bridge at a speed of twenty-five to thirty miles per hour. While attempting a necessary ninety-degree turn at the end of the bridge, defendant's door flew open

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23. State v. Bullington, 532 S.W.2d 556 (Tenn. 1976); Franks v. State, 187 Tenn. 174, 213 S.W.2d 105 (1948).

24. 593 S.W.2d at 279 (Henry, J., dissenting).

25. *Id.* (Henry, J., dissenting).

26. *Id.* (Henry, J., dissenting).

27. *Id.* at 280 (Henry, J., dissenting).

28. *Id.* (Henry, J., dissenting).

29. *See, e.g.*, State v. Johnson, 541 S.W.2d 417 (Tenn. 1976); Staggs v. State, 210 Tenn. 175, 357 S.W.2d 52 (1962); Eager v. State, 205 Tenn. 156, 325 S.W.2d 815 (1959); Edwards v. State, 202 Tenn. 393, 304 S.W.2d 500 (1957); Tarvers v. State, 90 Tenn. 45, 16 S.W. 1041 (1891).

30. 591 S.W.2d 449 (Tenn. Crim. App. 1979).

and he fell from the truck. The passenger in the vehicle was unable to regain control, and the vehicle ran over and killed a bystander.[31] The accused was arrested for driving while intoxicated and for reckless driving.[32] The evidence included testimony from the investigating officer and from the defendant's ex-wife that he had been intoxicated, that his truck was in poor condition, and that he was aware that the doors were likely to come open. The court of criminal appeals found sufficient evidence of malice, even without considering defendant's intoxication. The court concluded that defendant's operation of the truck "implied such a high degree of conscious and wilful recklessness as to amount to that malignity of heart constituting malice."[33]

### 2. Involuntary Manslaughter

Involuntary manslaughter, an unintentional killing caused by an unlawful act,[34] was the crime involved in *Hemby v. State*.[35] The defendant was convicted of involuntary manslaughter in the death of his infant child under the theory that, while in a drunken stupor, he fell asleep on a bed with the child, rolled over, and smothered the child to death. The county medical examiner testified that his findings would be consistent with death resulting either from smothering or from "sudden infant death syndrome—or 'crib death'—wherein a previously healthy baby, with perhaps at most a history of the sniffles, dies suddenly and unexpectedly, and the autopsy reveals nothing more than hypoxia."[36] The defendant contended that when two causes of death are equally possible, and the defendant would not be responsible under one cause, then he cannot be found guilty.[37] The court responded that the inconclusiveness of the clinical evidence could be eliminated by evidence of the case history and the circumstances surrounding the infant's death. Thus, the

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31. *Id.* at 450.
32. *Id.*
33. *Id.* at 451.
34. TENN. CODE ANN. § 39-2409 (1975).
35. 589 S.W.2d 922 (Tenn. Crim. App. 1978), *cert. denied, id.* (Tenn. 1979).
36. *Id.* at 926.
37. *Id.* at 927.

court in *Hemby* found sufficient evidence from which the jury could conclude "that this infant's death was caused by smothering brought about by the defendant overlaying its tiny body."[38]

### B. *Bad Check Law*

The use of computer technology to perpetrate fraud arose in the case of *State v. Denami*.[39] The accused was convicted of two counts of drawing a check with insufficient funds.[40] He had requested a branch bank official to cash a check for $15,500 drawn on his account. Because of the large amount of money involved and because he did not know the accused, the bank official dialed the bank's computer and requested a mark-up of the check, which resulted in a hold for the amount against the contingent balance of the account.[41] Although the computer accepted the hold, the bank official remained suspicious and requested the book balance—the balance at the end of the previous day—which was zero. The official declined to cash the check and suggested that the accused go to the bank's main office to check on his account. Minutes later, the accused was successful in similar efforts at a different branch bank where he received $5,000 in cash and a $10,500 cashier's check. On the third attempt at another branch bank, the accused was taken into custody.

The accused had worked at the bank in its data programming department, and prior to the date of the fraudulent transactions, he had instructed tellers on the use of the computer. While the computer indicated an excess of $78,000 in contingent funds, the account actually had no balance. The accused's be-

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38. *Id.*

39. 594 S.W.2d 747 (Tenn. Crim. App. 1979), *appeal denied, id.* (Tenn. 1980).

40. TENN. CODE ANN. § 39-1959 (Supp. 1980).

41. The contingent balance shows the amount in the account at a particular time during the day, including any deposit the customer has made during that day, if he requested that it be "marked up," so that those funds are available for withdrawal during the same day. This contingent balance survives only until the end of the banking day, when it is superseded by the book balance—an amount ascertained by the bank's bookkeeping department from actual physical records of transactions. In other words, the contingent balance is valid beyond one day only if the bank receives proof that funds were deposited to match the amount shown in the contingent balance. 595 S.W.2d at 748.

havior afforded sufficient proof that he was aware of that fact,[42] and thus, the court concluded that the jury was warranted in finding that the checks were delivered with fraudulent intent.

## III. DEFENSES

### *A. Self-Defense*

In *State v. Kennamore*[43] the court addressed the issue whether the victim of an unprovoked assault was obliged to retreat before resorting to self-defense, or, in the unfortunate language used by the court, "whether the so-called 'true man' rule of self-defense should be adopted in this state."[44] The accused was kneeling to add fuel to a campfire when the deceased struck him on the head with a soft drink bottle and caused him serious injury.[45] A witness testified that the accused immediately attacked the deceased and that the witness had pulled the two apart. The accused then ran to his truck, took a shotgun from it, and shot the deceased who, some twenty to twenty-five feet away, was suffering the effects of the beating. The accused testified that the deceased had kicked him after hitting him with the bottle and that his pleas for help to the witness went unanswered. Fearing further attack, the accused seized the shotgun and fired in self-defense. The accused was convicted of voluntary manslaughter. On appeal, the accused challenged the trial court's refusal to give a requested jury instruction regarding circumstances that do not require retreat when one is threatened by a deadly assault.[46]

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42. Additionally, a search of the accused's automobile had turned up some 15 or 20 checks, cut by a check protector, each in the amount of $15,500, and a page from the telephone directory listing all the branch offices of the bank. *Id.* at 749.

43. 604 S.W.2d 856 (Tenn. 1980).

44. *Id.* at 857.

45. "Appellant sustained a scalp laceration three or four inches in length, which required extensive sutures, and he was hospitalized for about four days following the incident." *Id.*

46. The requested instruction stated:

> "If the defendant when assaulted was without fault and in a place where he had a right to be and was placed in reasonable apparent danger of losing his life or of receiving great bodily harm, he need not retreat, but may stand his ground, and repel force by force, and if, in

At common law the victim of such an assault was required to retreat if it was reasonable to do so, except when the assault occurred in the victim's own home[47] or when the victim was executing an official duty.[48] A minority of jurisdictions, however, hold that as a general rule there is no obligation to retreat from a deadly assault.[49] The Tennessee Supreme Court concluded that this minority rule should not be adopted; rather, "the availability of an avenue of retreat and the practicability of using it"[50] were *factors* to be considered in determining if self-defense was asserted legitimately. The court proposed the following instruction on the issue of retreat:

> The law of excusable homicide requires that the defendant must have employed all means reasonably in his power, consistent with his own safety, to avoid danger and avert the necessity of taking another's life. This requirement includes the duty to retreat, if, and, to the extent, that it can be done in safety.[51]

While the instruction would appear to have no exception, the *Kennamore* opinion noted *Morrison v. State*,[52] a case that recognized no duty to retreat. Thus, the *Kennamore* court concluded that the decision should be limited "to the defense of one's house or habitation,"[53] a caveat that presumably will be added

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the reasonable exercise of his right of self-defense, he kills his assailant, he is justified and should be acquitted."

*Id.* at 858.

47. State v. Foutch, 96 Tenn. (12 Pickle) 242, 247, 34 S.W. 1, 2 (1896); Fitzgerald v. State, 1 Tenn. Cases (Shannon) 505, 510 (1875).

48. 2 WHARTON'S CRIMINAL LAW AND PROCEDURE § 126 (14th ed. 1979).

49. *See generally* R. MORELAND, LAW OF HOMICIDE 259 (1952). *See also* Runyan v. State, 57 Ind. 80 (1877); State v. Bartlett, 170 Mo. 658, 71 S.W. 148 (1902); Erwin v. Ohio, 29 Ohio St. 187 (1876).

50. 604 S.W.2d at 859.

51. *Id.* at 860.

52. 212 Tenn. 633, 371 S.W.2d 441 (1963).

53. 604 S.W.2d at 859.

Justice Henry, dissenting, noted that in the present case the court of criminal appeals had correctly noted that *Morrison* "does not limit the application of the retreat doctrine to the home. It adopts the broad general proposition that one who is where he has a lawful right to be is under no duty to retreat and then treats the particular proposition of a specific place." *Id.* at 860-61 (Henry, J., dissenting). *See also* Kendrick, *Criminal Law and Procedure—1963*

to the above instruction when appropriate.

### B. *Entrapment*

> Tennessee is the only jurisdiction in the United States that does not recognize the defense of entrapment. More accurately, it is the only jurisdiction that professes that the defense is not recognized. With this opinion we bring our secession to a close and reconstruct our decisional law so as to bring it into harmony with that of our sister states and of the federal system.
>
> From this day forward entrapment is a defense to a Tennessee criminal prosecution.[54]

Thus Justice Henry, speaking for a unanimous court, parted from precedent in *State v. Jones*.[55] The court tentatively adopted the subjective test[56] for entrapment:

> [E]ntrapment occurs when law enforcement officials, acting either directly or through an agent, induce or persuade an otherwise unwilling person to commit an unlawful act; however, where a person is predisposed to commit an offense, the fact that the law enforcement officials or their agents merely afford

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*Tennessee Survey*, 17 VAND. L. REV. 977, 979 (1964). While not arguing against the retreat rule, Justice Henry maintained that the accused was entitled to an explication of the law regarding retreat, even without a special request:

> The jury should have been charged that there must be an available, safe and effective avenue of retreat; that there must have been ample time; that defendant's physical and mental condition were factors that should be taken into consideration; that consideration must be given to all the circumstances as they reasonably and honestly appeared to the defendant; and that the whole transaction should be looked to as a series of events. Moreover, the jury should have been instructed that all factors should be considered in the light of the fact that failure to retreat is a circumstance to be considered, along with all others, in order to determine whether the defendant went further than he was justified in doing and that a failure to retreat is not categorical proof of guilt. This is a fair resume of the holdings of our courts.

*Id.* at 862 (Henry, J., dissenting).

54. State v. Jones, 598 S.W.2d 209, 212 (Tenn. 1980).

55. *Id.* at 209.

56. *See id.* at 220.

an opportunity does not constitute entrapment.[57]

This subjective standard was qualified to the extent that "outrageous police behavior" or "over-involvement" could render predisposition irrelevant.[58]

Because entrapment is an affirmative defense, the burden of proof rests upon the accused to establish a prima facie case.[59] Once entrapment is shown, the burden shifts to the prosecution to prove predisposition beyond a reasonable doubt.[60] Predisposition may be shown by evidence of prior crimes of a similar character and by the reputation of the accused.[61]

Ironically, the *Jones* court concluded that the defense of entrapment was unavailing in the case at hand, which involved solicitation to commit robbery. The court reasoned that entrapment was logically impossible when the charge was solicitation since the gist of solicitation is the volitional act of the accused. Therefore, "[o]ne may not be solicited into soliciting. He is either the solicitor or the solicitee. If the former, he may not be the latter."[62]

## IV. PROCEDURE

### *A. Arrest*

#### 1. What Constitutes a Seizure

A fourth amendment liberty interest is not implicated unless the party raising the issue is detained against his or her will.[63] If, for example, a suspect voluntarily accompanies an officer to the stationhouse, no arrest occurs.[64] Whether the actions

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57. *Id.*

58. *Id.* (citing Hampton v. United States, 425 U.S. 484, 492-93 (1976) (Powell, J., concurring) and United States v. Russell, 411 U.S. 423, 431-33 (1973)).

59. *Id.* at 220.

60. *Id.*

61. *Id.*

62. *Id.* at 221.

63. *See generally* J. COOK, CONSTITUTIONAL RIGHTS OF THE ACCUSED—PRE-TRIAL RIGHTS § 12 (1972) [hereinafter cited as COOK, PRE-TRIAL RIGHTS].

64. See Morales v. New York, 396 U.S. 102 (1969), remanding for a determination, *inter alia*, whether an arrest had in fact occurred.

of the suspect were actually voluntary may be difficult to determine if the suspect claims an absence of any real choice.[65] In *United States v. Mendenhall*[66] federal narcotics agents observed the accused disembark from an airplane. After noting that her behavior fit the "drug courier profile"[67]—"an informally compiled abstract of characteristics thought typical of persons carrying illicit drugs"[68]—one agent approached the accused and requested to see her identification and airline ticket. The identification and ticket bore different names, and the accused's only explanation for the difference was that she "just felt like using that name."[69] When the agent declared his official identity, the accused became very nervous. Her ticket and identification were retained, and she was asked to accompany the agent to the airport Drug Enforcement Administration office about fifty feet away for further questioning. There, the agent asked if the accused would allow a search of her person and handbag, but advised her that she could refuse permission. The accused responded, "Go ahead,"[70] and a female police officer, after being assured by the accused of her consent, carried out the body search. In the course of this search, two packages of heroin were found in the accused's undergarments. The accused was convicted of possession with intent to distribute heroin.

The district court denied a motion to suppress the evidence by reasoning that the initial detention was a permissible investigative stop under the standard articulated in *Terry v. Ohio*[71] and that the accused's subsequent conduct was voluntary and consensual. The Court of Appeals for the Sixth Circuit re-

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65. *See* Cook, *Subjective Attitudes of Arrester and Arrestee as Affecting Occurrence of Arrest*, 19 KAN. L. REV. 173 (1971).

66. 446 U.S. 544 (1980).

67. The United States Court of Appeals for the Sixth Circuit has previously wrestled with the legitimacy of the profile. *See* United States v. McCaleb, 552 F.2d 717 (6th Cir. 1977).

68. 446 U.S. at 547 n.1. The factors impressing the agents were (1) arrival from Los Angeles, from which came much of the heroin to Detroit; (2) last off the plane and nervous appearance; (3) no baggage claimed; and (4) a change of airlines for a flight out of Detroit. *Id.*

69. *Id.* at 548.

70. *Id.*

71. 392 U.S. 1 (1968).

versed[72] finding its decision in *United States v. McCaleb*[73] to be controlling. In the *McCaleb* case the court had disapproved the use of the drug courier profile and had characterized a similar confrontation as an arrest without probable cause. Thus, the *McCaleb* court invalidated the subsequent consent search as the fruit of an illegal detention.[74]

In an opinion written by Justice Stewart, the Supreme Court reversed the Sixth Circuit's opinion in *Mendenhall*. Justice Stewart, joined by Justice Rehnquist, first concluded that under *Terry* and its progeny "a person is 'seized' only when by means of physical force or a show of authority, his freedom of movement is restrained;"[75] further, the fourth amendment is implicated "only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave."[76] Applying this standard, no seizure of the accused had occurred: "[N]othing in the record suggests that the respondent had any objective reason to believe that she was not free to end the conversation in the concourse and proceed on her way . . . ."[77] It was not essential that the accused be told expressly that she need not cooperate,[78] nor did her behavior, although it was inconsistent with her self-interest, imply that she had acted under compulsion.[79]

Notably, not only did the four dissenting justices[80] take issue with this reasoning, but an additional three justices,[81] while concurring with the result in *Mendenhall*, declined to join this portion of the opinion. The concurrence instead preferred to as-

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72. United States v. Mendenhall, 596 F.2d 706 (6th Cir. 1979).

73. 552 F.2d 717 (6th Cir. 1977).

74. *Id.*

75. 446 U.S. at 553.

76. *Id.* at 554.

77. *Id.* at 555.

78. *Compare* Schneckloth v. Bustamonte, 412 U.S. 218 (1973).

79. 446 U.S. at 557-58. The Court stated: "It may happen that a person makes statements to law enforcement officials that he later regrets, but the issue in such cases is not whether the statement was self-protective, but rather whether it was made voluntarily." *Id.* at 555-56.

80. *Id.* at 566 (White, J., dissenting). Justice White was joined by Justices Brennan, Marshall, and Stevens. *Id.* (White, J., dissenting).

81. *Id.* at 560 (Powell, J., concurring). Justice Powell was joined by Chief Justice Burger and Justice Blackmun. *Id.* (Powell, J., concurring).

sume that, while there was a seizure, the circumstances were sufficiently suspicious to justify it.[82] Justice Powell, speaking for the concurring Justices, noted that he did "not necessarily disagree with the views expressed" in this portion of the opinion, but that "the question whether the respondent in this case reasonably could have thought she was free to 'walk away' when asked by two government agents for her driver's license and ticket is extremely close."[83] Thus, this portion of the opinion would appear to be dubious precedent.

The Court then turned to the contention that, irrespective of the impropriety of the initial confrontation, the accused's fourth amendment rights were violated when she was accompanied to the Drug Enforcement Administration office. On this contention the Court found adequate support for the district court's conclusion that the accused voluntarily consented to the further detention. Because the detention was not unlawful, the Court only needed to determine whether the search was consensual. Again, the Court found ample support for the district court's conclusion. First, the Court noted that the accused, a twenty-two year old with an eleventh grade education, was capable of giving a knowing consent. Second, the accused had been advised twice by the officers of her right to decline consent; this "substantially lessened the probability that their conduct could reasonably have appeared to her to be coercive."[84]

The *Mendenhall* issue was again presented in *Reid v. Georgia*,[85] in which narcotics agents in an airport observed the accused carrying a shoulder bag and occasionally looking back at another man who was carrying a similar shoulder bag. The two met in the lobby, spoke briefly, and left the terminal together. The agent approached them outside, asked to see their ticket stubs and identifications, and requested them to consent to a search. The accused initially agreed to the search but then broke and ran, dropping the shoulder bag, which contained heroin.

The state appellate court held that the initial detention was reasonable, because the suspect fit the agent's "drug courier pro-

82. *Id.* at 561-66 (Powell, J., concurring).
83. *Id.* at 560 n.1. (Powell, J., concurring).
84. *Id.* at 559.
85. 448 U.S. 438 (1980).

file."[86] This profile did not satisfy a majority of the Supreme Court, who found that the observed behavior was insufficiently suspicious and that "[t]he other circumstances describe a very large category of presumably innocent travellers, who would be subject to virtually random seizures were the Court to conclude that as little foundation as there was in this case could justify a seizure."[87]

In a concurring opinion Justice Powell, joined by Chief Justice Burger and Justice Blackmun, agreed that the seizure was not justified but noted that, as in *Mendenhall,* the question whether there was a seizure at all had not been addressed;[88] that issue remained open for consideration by the lower court on remand. Justice Rehnquist, relying upon his position in *Mendenhall,* maintained that there had been no seizure, and therefore no fourth amendment rights were implicated.[89]

### 2. Warrant Requirement

The United States Supreme Court has long held that a warrant is not required for a felony arrest when the arresting officer has probable cause.[90] In recent years, however, the Court has suggested that a warrant might be required if officers entered residential premises to make the arrest and no exigent circumstances were present.[91] In *United States v. Watson*[92] the Court

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86. State v. Reid, 149 Ga. App. 85, 255 S.E.2d 71 (1979).

> Specifically, the court thought it relevant that (1) the petitioner had arrived from Fort Lauderdale, which the agent testified is a principal place of origin of cocaine sold elsewhere in the country, (2) the petitioner arrived in the early morning, when law enforcement activity is diminished, (3) he and his companion appeared to the agent to be trying to conceal the fact that they were travelling together, and (4) they apparently had no luggage other than their shoulder bags.

448 U.S. at 440-41.

87. *Id.* at 441.

88. *Id.* at 442-43 (Powell, J., concurring).

89. *Id.* at 442 (Rehnquist, J., dissenting).

90. *See* Carroll v. United States, 267 U.S. 132 (1925).

91. *See* Coolidge v. New Hampshire, 403 U.S. 443 (1971). The Court noted that

> It is clear . . . that the notion that the warrantless entry of a man's house in order to arrest him on probable cause is *per se* legitimate is in fundamental conflict with the basic principle of Fourth

rejected defendant's contention that officers should have obtained an arrest warrant since they had ample opportunity to do so, emphasizing the fact that the arrest was made in a public place.[93] The following year in *United States v. Santana*[94] the Supreme Court sustained a warrantless arrest within a dwelling, but only because the arrestee had retreated when the officers approached, and thus, the entry was made in hot pursuit.[95] The issue of warrantless arrests in residential premises finally was addressed directly in *Payton v. New York*.[96] Having assembled ample evidence to establish probable cause, six officers went to defendant Payton's house early in the morning. When no one answered the door, the officers sought additional assistance and used crowbars to break into and enter the apartment. The officers found no one on the premises, but did locate and seize a shell casing that was in plain view. The shell casing was admitted into evidence at the defendant's trial.[97] The Supreme Court held that the evidence was illegally seized because the entry had not been made pursuant to a warrant and because no exigent circumstances justified forgoing the warrant requirement.[98] The Court added that since an arrest warrant would be a sufficient authorization to enter the suspect's dwelling when there is reason to believe he or she is within, a search warrant would not be required.[99]

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Amendment law that searches and seizures inside a man's house without warrants are *per se* unreasonable in the absence of some one of a number of well defined "exigent circumstances."

*Id.* at 477-78.

92. 423 U.S. 411 (1976).

93. *Id.* at 424.

94. 427 U.S. 38 (1976).

95. *Id.* at 42-43.

96. 445 U.S. 573 (1980). Justice White, joined by Chief Justice Burger and Justice Rehnquist, dissented. *Id.* at 603 (White, J., dissenting). Justice Rehnquist also dissented separately. *Id.* at 620 (Rehnquist, J., dissenting).

97. *Id.* at 576-77.

98. *Id.* at 602.

99. In *Carroll* the Court stated the general rule to be that "a police officer may arrest without warrant one believed by the officer upon reasonable cause to have been guilty of a felony. . . ." *Id.* at 156.

### B. Search and Seizure

#### 1. Execution of Search Warrants

In *Ybarra v. Illinois*[100] the propriety of searching individuals who were on premises for which a search warrant had been issued came before the Supreme Court. A warrant authorized the search of a tavern and of its bartender for heroin and related evidence. In executing the warrant, nine of the thirteen customers were frisked, ostensibly for weapons. During the frisks what was described by an officer as "a cigarette pack with objects in it"[101] was detected, removed from defendant's pocket, and found to contain packets of heroin.[102] The defendant was convicted for possession.

The Supreme Court reversed the conviction on the ground that the search violated the fourth amendment.[103] Nothing in the complaint on which the warrant was issued suggested that patrons of the tavern might be in possession of seizable evidence. Furthermore, nothing observed at the tavern when the officers arrived to execute the warrant provided probable cause to believe that the defendant held seizable items. Therefore, the Court concluded, the warrant gave the officers "no authority whatever to invade the constitutional protections possessed individually by the tavern's customers."[104]

The prosecution alternatively argued that the defendant was legitimately subject to a *Terry* frisk and that the risk provided probable cause to believe he was in possession of narcotics.[105] Because the Court found no basis for suspecting that the defendant was armed, the frisk was improper from the outset.[106] The Court was unimpressed by the argument that the *Terry* power should be expanded to permit evidence searches of individuals found on premises subject to a search warrant when the police had suspected those individuals of involvement in drug

100. 444 U.S. 85 (1979).
101. *Id.* at 88.
102. People v. Ybarra, 58 Ill. App. 3d 57, 373 N.E.2d 1013 (1978).
103. 444 U.S. at 96.
104. *Id.* at 92.
105. *Id.*
106. *Id.* at 92-93.

trafficking.[107] The Court cited *United States v. Di Re*,[108] which held that an individual who was seated in an automobile with a suspect who was believed to possess illegal contraband did not forfeit his fourth amendment protection.[109] An even stronger argument could be made in *Ybarra* that the presence of the accused in a public tavern carried no implication of suspicion.

### 2. Incident to Arrest

The power to carry out a warrantless search incident to an arrest was limited significantly in *United States v. Chadwick*.[110] The *Chadwick* Court precluded the search of a locked foot locker which was seized within the parameters of *Chimel v. California*.[111] Although *Chimel* allowed the search of an arrested person and items within his immediate control, the Court reasoned that a greater privacy interest attached to the closed container in *Chadwick*. In *United States v. Montano*[112] the accused was arrested in a motel room for a narcotics offense. During the arrest a suitcase was observed protruding from under the bed. An officer opened the suitcase and found $40,000 and several bags of cocaine. The Sixth Circuit, finding no probability that the suitcase might have been opened by one of the suspects to procure a weapon or to destroy evidence, concluded that the search was unreasonable under *Chadwick*. Judge Weick, dissenting, maintained that the officers "justifiably feared a potentially dangerous situation as they entered the motel room," and it was therefore "reasonable for the agents to act quickly to secure the premises and eliminate any opportunity for either escape or for the use of weapons."[113]

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107. *Id.* at 94.
108. 332 U.S. 581 (1948).
109. *Id.* at 587.
110. 433 U.S. 1 (1977).
111. Chimel v. California, 395 U.S. 752, 763 (1969).
112. 613 F.2d 147 (6th Cir. 1980).
113. *Id.* at 159 (Weick, J., dissenting).

The majority charged the dissent with attempting to alter the rules for a valid search by reference to the crime under investigation and the common use of weapons in connection therewith. It noted that the Supreme Court had declined a similar opportunity in Mincey v. Arizona, 437 U.S. 385 (1978), in which a so-called murder scene exception to the warrant requirement was in-

### 3. Illegally Seized Evidence as Impeachment

Although *Mapp v. Ohio*[114] prohibits the introduction of illegally seized evidence and its fruits, the Supreme Court has held that such evidence is admissible for the limited purpose of impeaching the testimony of the accused.[115] In *Walder v. United States*[116] the accused asserted on direct examination that he had never dealt in or possessed any narcotics. For impeachment purposes the prosecution introduced narcotics that were illegally seized from the premises of the accused. The *Walder* Court noted first that since the evidence introduced was not substantively relevant to the pending charges, the question whether the jury could limit its consideration of the evidence to the question of credibility was logically, though perhaps not actually, absent.[117] The Court also noted that since the accused had made the challenged statement on direct examination, the prosecution had not intentionally created an opportunity to introduce otherwise inadmissible evidence.[118]

Both of these qualifications noted in *Walder* were repudiated by the Court in subsequent decisions. In *Harris v. New York*,[119] a case involving the introduction of a confession obtained in violation of *Miranda*, the Court dismissed the collateral evidence aspect of *Walder* as immaterial to the holding. Likewise, the significance of the second factor was repudiated in *United States v. Havens*.[120] Havens had accompanied McLeroth on a flight from Peru to Miami. At the end of the flight a customs officer found cocaine sewed into makeshift pockets in McLeroth's t-shirt. McLeroth implicated the defendant, and thereafter a search of defendant's luggage revealed a t-shirt from which pieces had been cut that matched those sewn into McLeroth's shirt. This evidence was suppressed prior to the defendant's trial. McLeroth pleaded guilty and alleged in his testi-

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validated. 613 F.2d at 150.

114. 367 U.S. 643 (1961).

115. *See* COOK, PRE-TRIAL RIGHTS, *supra* note 63, § 73.

116. 347 U.S. 62 (1954).

117. *Id.* at 65.

118. *Id.* at 65-66.

119. 401 U.S. 222 (1971).

120. 446 U.S. 620 (1980). *See generally* 48 TENN. L. REV. 721 (1981).

mony that the defendant had devised the means for transporting the cocaine and had sewn the pockets shut. The defendant denied any involvement and was asked on cross-examination if he had anything to do with the makeshift pockets in McLeroth's t-shirt. He denied that he had and further denied that the t-shirt from which the pieces were cut was in his luggage. The t-shirt taken from defendant's luggage subsequently was admitted for purposes of impeaching the defendant's credibility. While conceding that the precedents had not involved false testimony first given on cross-examination, a majority of the Court held nevertheless that "the reasoning of those cases controls this one."[121] Four Justices dissented[122] and noted that prior to *Walder* the Court had held in *Agnello v. United States*[123] that it was constitutionally impermissible to use illegally seized evidence to rebut statements of the accused made during cross-examination.[124]

### 4. Electronic Surveillance

Beginning with *Katz v. United States*[125] the Supreme Court required prior judicial authorization in virtually all electronic interceptions of conversations. Whether this authority applied to the use of electronic tracking devices was the issue in *United States v. Bailey*.[126] Undercover narcotics agents had arranged to sell an ingredient for a controlled substance to a suspect. Prior to delivery, the agents obtained a warrant from a federal magistrate which authorized the installation of an electronic beeper in one of the drums of chemicals to aid in tracking the container to the manufacturer. Sometime after the location of the drum was confirmed by the emitted radio signals, the agents obtained a second warrant for the seizure of the device and the chemicals.

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121. *Id.* at 626.

122. Justice Brennan, joined by Justices Marshall, Stewart, and Stevens dissented. *Id.* at 629 (Brennan, J., dissenting).

123. 269 U.S. 20 (1925).

124. The majority sought to explain away *Agnello* as "a case of cross-examination having too tenuous a connection with any subject opened upon direct examination to permit impeachment by tainted evidence." United States v. Havens, 446 U.S. at 625.

125. 389 U.S. 347 (1967).

126. 628 F.2d 938 (6th Cir. 1980).

At the trial for conspiracy to manufacture narcotics, evidence obtained by use of the electronic tracking device was excluded because the warrant contained no time limitation.

In affirming the ruling, the court of appeals found that installing the device in the container, which was then in the lawful possession of the government, did not violate the fourth amendment since no reasonable privacy interest of the accused was violated. A different result was reached, however, with regard to the monitoring of the beeper's signal since that occurred after ownership and possession had been transferred to the accused. The court concluded that "[b]eeper surveillance of non-contraband personal property in private areas trenches upon legitimate expectations of privacy . . . ."[127]

While a warrant had been obtained for the surveillance, thus raising a presumption of validity, the question remained whether the warrant was itself adequate. The court of appeals agreed with the district court that, under the authority of *Berger v. New York*,[128] an electronic surveillance order must contain reasonable time limitations, and that absent such specifications, the warrant was rendered invalid.[129]

### *C. Right to Counsel*

#### 1. Preliminary Hearing

In the 1974 decision of *McKeldin v. State*[130] the Tennessee Supreme Court held that the right to counsel applied to preliminary hearings and that the state must provide counsel for an accused indigent at the preliminary hearing.[131] The court recognized, however, that the failure to provide counsel might be harmless error.[132] When the error *was* determined in subsequent

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127. *Id.* at 944.

128. 388 U.S. 41 (1967).

129. In a concurring opinion, Judge Keith favored an explicit recognition by the court "that privacy of movement is protected by the Fourth Amendment." 628 F.2d at 949 (Keith, J., concurring).

130. 516 S.W.2d 82 (Tenn. 1974).

131. *See* Cook, *Criminal Law in Tennessee in 1974: A Critical Survey*, 42 TENN. L. REV. 187, 220-22 (1975).

132. 516 S.W.2d at 87.

proceedings to be harmless,[133] the accused petitioned for a federal writ of habeas corpus.[134] McKeldin, charged with armed robbery, had been represented at his preliminary hearing by court-appointed counsel who was not a licensed attorney. Thereafter, he retained a licensed attorney to represent him at trial and was convicted and sentenced to twenty years. Three issues were raised on appeal: (1) whether the accused was entitled to counsel at his preliminary hearing; (2) if so, whether a court-appointed nonlawyer satisfied that entitlement; and (3) if not, whether the error was harmless.

The federal constitutional standard, established in *Coleman v. Alabama*,[135] made the dispositive factor whether under state law the preliminary hearing was regarded as a critical stage of the prosecution. While the Sixth Circuit Court of Appeals had held that *Coleman* would not apply to a preliminary hearing in Tennessee,[136] in *McKeldin v. Rose*, the habeas corpus proceeding, the federal district court found that precedent dubious for two reasons:[137] first, the case would have required a retrospective application of *Coleman*, and second, the preliminary hearing statute had been replaced, and unlike the old statute, the new one required a preliminary hearing in all cases upon the request of the accused.[138] Because of the change in the law, the Sixth Circuit accepted the Tennessee Supreme Court decision in *McKeldin v. State* that the preliminary hearing was a critical stage in the prosecution. Having determined that the right to counsel applied, the court had no difficulty in concluding that the right was not satisfied by the appointment of a nonlawyer.[139]

The court then turned to the harmless error issue and

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133. McKeldin v. State, 534 S.W.2d 131 (Tenn. Crim. App. 1975).

134. McKeldin v. Rose, 482 F. Supp. 1093 (E.D. Tenn. 1980).

135. 399 U.S. 1 (1970).

136. Harris v. Neil, 437 F.2d 63 (6th Cir. 1971).

137. 482 F. Supp. at 1096.

138. TENN. CODE ANN. § 40-1131 (1971). Under the old law, the right to a preliminary hearing attached only when the grand jury was not in session. 482 F. Supp. at 1096.

139. The court, in reaching its conclusion, relied on Harrison v. United States, 387 F.2d 203 (D.C. Cir. 1967), *rev'd on other grounds*, 392 U.S. 219 (1968). 482 F. Supp. at 1096.

looked for guidance to *Holloway v. Arkansas*,[140] a case decided subsequent to *McKeldin v. State*. In *Holloway* the court said that

> the assistance of counsel is among those "constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error." . . . Accordingly, when a defendant is deprived of the presence and assistance of his attorney, either throughout the prosecution or during a critical stage in, at least, the prosecution of a capital offense, reversal is automatic.[141]

In *McKeldin v. Rose* the district court expanded the reasoning of *Holloway* to hold that "when a defendant is denied assistance of counsel at a critical stage of the prosecution it cannot be treated as harmless error."[142] Thus, at least in the United States District Court for the Eastern District of Tennessee, the harmless error exception to the *McKeldin* rule is inapplicable.

### 2. Effective Assistance of Retained Counsel

Lower courts often have disagreed on whether the standard for effective assistance of counsel is affected by whether counsel is appointed or retained. Many courts took the view that the same standard should apply in all cases.[143] Other courts, however, concluded that greater deference must be shown to retained counsel since by selecting the attorney, the defendant, to a degree, has endorsed the work of counsel.[144] Still other courts held that retained counsel could never be incompetent for sixth amendment purposes, because there was no governmental action.[145] The question finally was answered in *Cuyler v. Sulli-*

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140. 435 U.S. 475 (1978).

141. *Id.* at 489 (quoting Chapman v. California, 386 U.S. 18, 23 (1967)) (citation omitted).

142. 482 F. Supp. at 1098.

143. *E.g.*, Moore v. United States, 432 F.2d 730 (3d Cir. 1979); Goodwin v. Cardwell, 432 F.2d 521 (6th Cir. 1970); McLaughlin v. Royster, 346 F. Supp. 297 (E.D. Va. 1972).

144. *E.g.*, Root v. Cunningham, 344 F.2d 1 (4th Cir.), *cert. denied*, 382 U.S. 866 (1965); Stewart v. Wainwright, 309 F. Supp. 1023 (M.D. Fla. 1969); Williams v. United States, 304 F. Supp. 691 (E.D. Mo. 1969).

145. *E.g.*, Plaskett v. Page, 439 F.2d 770 (10th Cir. 1971); United States

*van*,[146] in which the United States Supreme Court concluded that defendants who retain counsel are entitled to the same degree of constitutional protection against ineffective assistance as are those defendants who are represented by appointed counsel.[147]

### 3. Conflict of Interest

Two other issues before the Supreme Court in *Cuyler v. Sullivan*[148] were issues that were expressly reserved in *Holloway v. Arkansas*.[149] The Court had to decide whether a state judge must inquire into the propriety of multiple representation when the question has not been raised by one of the parties and whether the mere possibility of a conflict of interest is sufficient to find a deprivation of the right to counsel. On the first issue, the Court held that the sixth amendment does not require that trial courts consider the propriety of multiple representations in every case. Given the ethical obligation of the attorney to avoid conflicts of interest and to advise the court whenever they arise, trial courts could assume that no conflict existed or that the parties affected had waived any objection absent the existence of special circumstances.[150] On the second issue, the Court concluded that except in cases in which a defendant was not given an opportunity to show the potential conflict, a reviewing court should not presume that a possible conflict resulted in ineffective assistance of counsel.[151] If the issue is raised at trial, the

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*ex rel.* O'Brien v. Maroney, 423 F.2d 865 (3d Cir. 1970); Shaw v. Henderson, 303 F. Supp. 183 (E.D. La. 1969), *aff'd*, 430 F.2d 1116 (5th Cir. 1970).

146. 446 U.S. 335 (1980).

147. The vital guarantee of the Sixth Amendment would stand for little if the often uninformed decision to retain a particular lawyer could reduce or forfeit the defendant's entitlement to constitutional protection. Since the State's conduct of a criminal trial itself implicates the state in the defendant's conviction, we see no basis for drawing a distinction between retained and appointed counsel that would deny equal justice to defendants who must choose their own lawyers.

*Id.* at 344-45 (footnotes omitted).

148. 435 U.S. 475 (1978).

149. 446 U.S. 335 (1980).

150. *Id.* at 346-47.

151. *Id.* at 348.

defendant should be afforded the opportunity to demonstrate the conflict. If no objection is made at trial, then on appeal the defendant "must demonstrate that an actual conflict of interest adversely affected his lawyer's performance."[152]

### *D. Identifications*

In *Summitt v. Bordenkircher*[153] the issue for the Sixth Circuit Court of Appeals was whether due process required a hearing outside the presence of the jury to determine the admissibility of identification evidence. While acknowledging that such a procedure would be preferable, the court was persuaded that there was no such constitutional requirement.[154] Although the Supreme Court had held that a trial judge must find a confession to be voluntary before submitting it to a jury,[155] it subsequently held that the issue of voluntariness need not be resolved outside of the presence of the jury.[156] The *Summitt* court found that holding to be pertinent and thus allowed the admissibility of identification evidence to be determined in the jury's presence.[157]

### *E. Confessions*

#### 1. Right to Counsel

In *Massiah v. United States*,[158] a decision predating *Miranda*, the Supreme Court held that the sixth amendment right to counsel had been violated when government agents surreptitiously recorded a conversation between an indicted defendant and a coconspirator, with the consent of the coconspirator. A

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152. *Id.*

153. 608 F.2d 247 (6th Cir. 1979).

154. *Id.* at 250-51.

155. Jackson v. Denno, 378 U.S. 368 (1964).

156. Pinto v. Pierce, 389 U.S. 31 (1967).

157. Judge Merritt, dissenting, preferred to follow United States v. Driber, 546 F.2d 18 (3d Cir. 1976), and suggested requiring a hearing on the admissibility of identification evidence outside the presence of the jury, unless the request for a hearing was frivolous. 608 F.2d at 254 (Merritt, J., dissenting).

158. 377 U.S. 201 (1964).

substantially similar issue arose in *State v. Berry*,[159] in which a law enforcement officer was covertly placed in jail with the accused, who had been indicted for first degree murder. Counsel for the accused had contacted the sheriff who, with full knowledge of the arrangements that had been made, promised that the accused would not be interrogated in the absence of counsel. Ostensibly, the undercover operation was intended to determine whether the accused intended to kill a particular law enforcement agent who had played a major role in the investigation. At the murder trial the undercover agent testified regarding numerous incriminating statements made by the accused. While the statements had been made in the course of a voluntary conversation with a "tough character" whom the defendant sought to hire to kill the investigator, the appellate court saw "no essential difference between this and a normal interrogation wherein a police officer takes a statement from one accused of crime."[160] Under the authority of *Massiah* and its recent application in *Brewer v. Williams*,[161] the court concluded that the accused had been denied the right to counsel[162] and that the conviction therefore must be reversed.

### 2. Interrogation

The *Miranda* requirements are only pertinent to incriminating statements elicited by interrogation.[163] A frequently recognized exception to *Miranda* is the voluntary statement rule.[164]

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159. 592 S.W.2d 553 (Tenn. 1980).

160. *Id.* at 556.

161. 430 U.S. 387 (1977).

162. 592 S.W.2d at 561.

> All will agree that had the officer entered the cell, identified himself, and asked questions which produced incriminating information, such information would not have been admissible. The law will not permit law enforcement officials to do by ruse, trickery, deceit and deception that which it is not permitted to do openly and honestly. Nor will the law permit the State to dishonor its commitment and renege on its promise to defendant's counsel.

*Id.*

163. Miranda v. Arizona, 384 U.S. 436, 444 (1966).

164. "Any statement given freely and voluntarily without any compelling influences is . . . admissible in evidence." *Id.* at 478. *See, e.g.*, People v. Mer-

Interrogation is not confined, however, to dialogues between officials and defendants in which the officials' statements are followed by question marks; interrogation may be subtle as well as explicit.[165]

Whether an exchange amounted to interrogation was the dispositive issue before the Supreme Court in *Rhode Island v. Innis*.[166] Innis had been arrested, unarmed, shortly after he had purportedly robbed a taxicab driver with a sawed-off shotgun. After receiving his *Miranda* rights, Innis indicated that he wished to speak to an attorney. On the way to the stationhouse, two of the officers accompanying the accused expressed concern about the missing shotgun, particularly because a school for handicapped children was located near the scene of the alleged crime. One officer expressed the fear that " 'there's a lot of handicapped children running around in this area, and God forbid one of them might find a weapon with shells and . . . might hurt themselves.' "[167] The accused interrupted the conversation and told the officers to turn the car around so that he could direct them to the place where he had hidden the shotgun. At trial the accused sought to suppress the shotgun and his statements about its location as products of a violation of his *Miranda* rights. The trial court, without addressing the question whether an interrogation had occurred, ruled that the accused had waived his right to remain silent. The Rhode Island Supreme Court set aside the conviction, relying in part on *Brewer v. Williams*[168] for the conclusion that the accused had invoked his right to counsel and thereafter had been interrogated without first waiving the right to counsel.[169]

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cer, 257 Cal. App. 2d 244, 246, 64 Cal. Rptr. 861, 863 (1967) (escaping prisoner's statement "I did it. No one else was involved" when stopped by officer was voluntary); People v. Leffew, 58 Mich. App. 533, 536, 228 N.W.2d 449, 451 (1975) (suspect's statement about rings he was wearing when stopped by officer was voluntary); Commonwealth v. Whitman, 252 Pa. Super. 66, 71-72, 380 A.2d 1284, 1287 (1977) (suspect's statement that he committed the robbery but did not shoot anyone held to be voluntary).

165. Commonwealth v. Simala, 434 Pa. 219, 252 P.2d 575 (1969).

166. 446 U.S. 291 (1980). *See generally* 48 TENN. L. REV. 785 (1981).

167. *Id.* at 294 (quoting the trial transcript).

168. 430 U.S. 387 (1977).

169. The Supreme Court's summary of the lower court's proceedings can

The Supreme Court vacated the judgment of the state court and remanded the case. The Court acknowledged that interrogation was not limited to express questioning of an accused. "[T]he term 'interrogation' under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect."[170] Applying this standard, the Court concluded that no interrogation occurred in the present case, because the "conversation was, at least in form, nothing more than a dialogue between the two officers to which no response from the respondent was invited."[171] The Court also found that there was no reason for the officers to believe that their conversation would likely elicit an incriminating response.

The facts surrounding the incriminating statement in *Innis* are remarkably similar to those in *Brewer*. In *Brewer* officers transporting an accused who was suspected of murdering a child expressed regrets that the body might not be found prior to an impending snowfall, and, therefore, might not receive a "Christian burial."[172] The accused, known to be vulnerable to such religious appeals, directed the officers to the place where he had hidden the body. The Court in *Brewer* held that the statements of the accused were inadmissible because they were obtained in violation of the sixth amendment right to counsel. The *Brewer* decision was dismissed as irrelevant in a footnote in *Innis* on the ground that in *Brewer* formal charges had been brought and therefore the right to counsel had attached and had been invoked.[173] By contrast, in *Innis* formal charges had not yet been instigated, and what right to counsel the accused had was derivative of the fifth amendment protection accorded by *Miranda*.

Justice Marshall, joined by Justice Brennan, dissented, expressing agreement with the Court's definition of "interrogation" but disagreeing with the application of the definition in

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be found in 446 U.S. at 296-97.

170. *Id.* at 301 (footnotes omitted).

171. *Id.* at 302.

172. 430 U.S. at 392-93.

173. 446 U.S. at 300 n.4.

the *Innis* case.[174] Justice Stevens' dissent suggested three ways in which the officer might have expressed his apprehension:

> He could have:
>
> (1) directly asked Innis:
>
> Will you please tell me where the shotgun is so we can protect handicapped school children from danger?
>
> (2) announced to the other officers in the wagon:
>
> If the man sitting in the back seat with me should decide to tell us where the gun is, we can protect handicapped children from danger.
>
> or
>
> (3) stated to the other officers:
>
> It would be too bad if a little handicapped girl would pick up the gun that this man left in the area and maybe kill herself.[175]

The dissent viewed the first statement clearly to be interrogation. The third statement—essentially what had occurred—was not interrogation according to the majority. Justice Marshall was persuaded that the second statement also would not satisfy the definition as interpreted by the majority since it was not a direct question and it would not be reasonably likely to elicit an incriminating response.[176] Such diverse results, in the view of Stevens' dissent, are arbitrary "because all three [statements] appear to be designed to elicit a response from anyone who in fact knew where the gun was located."[177]

### 3. Silence as Impeachment

The silence of the accused following the *Miranda* warnings may not be used to impeach his testimony, because the warnings inform him of his right not to speak.[178] This principle is not applicable, however, to prearrest silence. In *Jenkins v. Anderson*[179] the accused, charged with first degree murder, maintained that he had acted in self-defense. At trial the prosecution established

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174. *Id.* at 305 (Marshall, J., dissenting).
175. *Id.* at 312 (Stevens, J., dissenting).
176. *Id.* at 313 (Stevens, J., dissenting).
177. *Id.* at 312 (Stevens, J., dissenting) (footnote omitted).
178. Doyle v. Ohio, 426 U.S. 610 (1976).
179. 447 U.S. 231 (1980).

that the accused was not apprehended until two weeks following the killing and suggested, in closing argument, that the accused would have spoken out sooner if he had killed in self-defense. The Supreme Court held that the use of the accused's prearrest silence for purposes of impeachment did not violate the privilege against self-incrimination protected by the fifth amendment or fundamental fairness protected by the due process clause. Unlike silence following the *Miranda* warnings, "[i]n this case, no governmental action induced petitioner to remain silent before arrest."[180]

### 4. Inconsistent Statements as Impeachment

The United States Supreme Court held in *Doyle v. Ohio*[181] that the silence of the accused at the time of his arrest and after receipt of his *Miranda* warnings could not be used to impeach his trial testimony. The accused had given an exculpatory story on direct examination and on cross-examination was asked why he had not offered this explanation to the arresting officer. In *Charles v. Anderson*[182] the Sixth Circuit Court of Appeals was concerned with the application of *Doyle* to an accused who did not remain silent but made a statement inconsistent with his trial testimony. The prosecution maintained that since the accused had not asserted the privilege against self-incrimination, the cross-examination was "a legitimate attempt to explore this inconsistency."[183] The court concluded that *Doyle* applied and then distinguished several cases in which prior statements had been used to demonstrate inconsistency with trial testimony.[184] In *Charles* the court viewed the cross-examination as focusing upon the silence of the accused—the failure to offer the explanation testified to on direct examination.[185] Judge Merritt, dissenting, found nothing in *Doyle* to suggest that the Supreme Court

180. *Id.* at 240.

181. 426 U.S. 610 (1976).

182. 610 F.2d 417 (6th Cir. 1979).

183. *Id.* at 420.

184. United States v. Mireles, 570 F.2d 1287 (5th Cir. 1978); Twyman v. Oklahoma, 560 F.2d 422 (10th Cir. 1977), *cert. denied*, 434 U.S. 1071 (1978); United States v. Mitchell, 558 F.2d 1332 (8th Cir. 1977).

185. 610 F.2d at 421-22.

would have reached the same result had the accused made an inconsistent statement at the time of the arrest.[186]

### *F. Prosecutorial Vindictiveness*

In a series of cases the United States Supreme Court has disapproved governmental action that was apparent retaliation for the exercise of constitutionally protected rights. In *North Carolina v. Pearce*[187] the Court found that imposing a greater sentence on retrial when a conviction has been overturned and when no legitimate reason for the increase existed was a deprivation of due process. In *Blackledge v. Perry*[188] the *Pearce* principle was applied to a prosecutor's increase in the severity of the charges after the accused demanded a trial *de novo* on appeal. Conversely, in *Bordenkircher v. Hayes*[189] the Court found nothing inappropriate when the prosecution obtained an additional indictment against the accused after he refused to plead guilty, viewing this as part of the " 'give-and-take' "[190] of plea bargaining.

In *United States v. Andrews*[191] the accused were indicted for narcotics and firearms offenses and, at the request of the prosecution, were denied bail. The ruling was appealed, and the accused were admitted to bail. Thereafter, the prosecution obtained additional indictments for conspiracy. The accused sought to have these charges dismissed on the ground that they represented a retaliation to the exercise of their constitutional right to bail. The federal district court granted the motion and dismissed the conspiracy count[192] because of the appearance of vindictiveness. The court ruled that a superseding indictment would be legitimate only if, without fault of the Government, changed circumstances or newly discovered evidence were present.

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186. *Id.* at 424 (Merritt, J., dissenting).
187. 395 U.S. 711 (1969).
188. 417 U.S. 21 (1974).
189. 434 U.S. 357 (1978).
190. *Id.* at 362 (quoting Parker v. North Carolina, 397 U.S. 790, 809 (1970)).
191. 612 F.2d 235 (6th Cir. 1979).
192. 444 F. Supp. 1238 (E.D. Mich. 1978).

The Fifth Circuit Court of Appeals vacated the judgment and concluded that the "appearance of vindictiveness" standard was not compelled by the United States Supreme Court decisions.[193] The court noted that in both *Pearce* and *Blackledge* "there was a substitution of charges—the same conduct on the part of the defendant was the basis for the diverse sentences imposed in *Pearce* and underlie both the misdemeanor and felony charges in *Blackledge*."[194] In *Andrews* the conspiracy charge was separate and distinct from the original charges on the substantive crimes. Thus, the court noted that in *Pearce* "the sentencing court [had] made a final decision as to the appropriate punishment for the offense of which the defendant was convicted;"[195] in *Blackledge*, the conduct would "support only a single charge, with the prosecution having the option of charging the defendant under different provisions of the law carrying varying penalties."[196] Under either of those circumstances and absent any explanation, the more punitive action smacked of vindictiveness. In *Andrews*, however, as in *Bordenkircher*, "when the defendants were charged with the two substantive offenses the full extent of prosecutorial judgment and/or discretion had not been exercised."[197]

Relying primarily upon decisions from the Fifth Circuit Court of Appeals that addressed the issue of prosecutorial vindictiveness,[198] the court indicated that its concern was with "the realistic likelihood of vindictiveness in the prosecutor's conduct, . . . bearing in mind that resolution of such issue must take into account a reasonable apprehension of retaliatory motivation on the part of the defendant."[199] The *Andrews* court envisioned three possibilities: (1) If the prosecution substitutes charges, thereby increasing the severity of the potential punishment, a prima facie case of vindictiveness is presented that may be rebutted by proof that intervening circumstances, of which the

193. 612 F.2d at 238.
194. *Id.* at 240-41.
195. *Id.* at 241.
196. *Id.*
197. *Id.*
198. Jackson v. Walker, 585 F.2d 139 (5th Cir. 1978); Hardwick v. Doolittle, 558 F.2d 292 (5th Cir. 1977).
199. 612 F.2d at 244 (citation omitted).

prosecution could not reasonably have been aware, warranted the charge;[200] (2) if new charges relatively distinct from the original charges are added, then the accused must show actual vindictiveness even though "a prima facie case may be made out of the mere fact of the added charge if no plausible explanation is offered by the prosecution";[201] and (3) if a new charge is added "for a different and distinct offense which was a different and distinct consequence of the same basic conduct underlying the original charge,"[202] a prima facie case of vindictiveness would arise "subject to rebuttal by the prosecution offering evidence of facts that reasonably explain or justify the action taken and negate any inference of vindictiveness in fact."[203] The court noted that the standard placed primary emphasis on the apprehension of retaliatory motivation in the first example, the intent of the prosecutor in the second, and both in the third.[204]

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200. *Id.*

201. *Id.*

202. *Id.* at 245.

203. *Id.* (footnote omitted).

204. *Id.* at 244-45.

Judge Merritt, concurring, found the vindictiveness concept "unmanageable" and concluded that, in light of *Bordenkircher*, "the kind of vindictive behavior proscribed by the due process clause relates to double jeopardy values and . . . the concept is limited to prosecutorial vindictiveness after the first trial is over." *Id.* at 247 (Merritt, J., concurring).

Judge Keith, dissenting, favored a balancing approach:

> A court should first decide as a threshold matter whether a prosecutor's action in seeking a heavier second indictment appears to be vindictive. If so, the court should examine the facts and weigh the extent to which allowing the second indictment will chill defendant's exercise of the right in question with the extent to which forbidding the second indictment infringes on the prosecutor's charging authority. If the balance falls in favor of the defendant, then the government would have a heavy burden of offsetting the appearance of vindictiveness. If the balance favors the government then there would arise a prima-facie case of vindictiveness, but all the government need do is provide neutral explanations to demonstrate that it did not, in fact, act vindictively.

*Id.* at 252 (Keith, J., dissenting).

### G. Trial by Jury

#### 1. Discrimination in Selection

The sixth amendment right to trial by jury requires that juries "be drawn from a source fairly representative of the community."[205] While the issue of a fair cross-section usually has arisen in cases involving claims of exclusion on the basis of race[206] or national origin,[207] the constitutional requirement is not so limited. The test was articulated in *Duren v. Missouri*:[208]

> In order to establish a prima facie violation of the fair-cross-section requirement, the defendant must show (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process.[209]

In *State v. Nelson*[210] the accused sought a reversal of his conviction on the ground that members of a local group known as "The Farm" were not included on the master jury list and therefore were not included in the grand jury that indicted him or in the panel from which his trial jury was selected. The Farm was a religious commune that previously had been involved in a criminal prosecution for the propagation of marijuana. The conviction of its leader for the manufacture of marijuana had been sustained by the Tennessee Supreme Court.[211] By the time of the trial in *Nelson*, approximately 1,100 people including 700 adults were living on the Farm. The court described the group as a

> religious community of people dedicated to a common set of spiritual beliefs. The Farm is substantially autonomous, in that it is agriculturally self-sufficient and maintains its own school for the education of Farm children. The Farm also controls the

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205. Taylor v. Louisiana, 419 U.S. 522, 538 (1975).
206. *See* Strauder v. West Virginia, 100 U.S. 303 (1880).
207. *See* Hernandez v. Texas, 347 U.S. 475 (1954).
208. 439 U.S. 357 (1979).
209. *Id.* at 364.
210. 603 S.W.2d 158 (Tenn. Crim. App. 1980).
211. Gaskin v. State, 490 S.W.2d 521 (Tenn. 1973).

> ingress and egress of all outsiders, as well as that of its own members. In this sense, the group is somewhat self segregated from the mainstream of Lewis County life.[212]

Many of the members of the sect worked outside the commune, and more than half of those eligible had registered to vote. Nevertheless, the trial judge had concluded that the group " 'walled themselves away from the mainstream of socio-economic political structure and activity' " of the county and therefore " 'were not part of a viable or even a prima facie cross section of Lewis County.' "[213]

The question under the *Duren* test, however, was, first, whether those excluded formed a "distinctive group,"[214] a point conceded by the trial court. The second *Duren* requirement, under-representation in venires, was easily satisfied in *Nelson* by the absolute exclusion of the Farm members from jury service, even though they constituted approximately twelve percent of the population of the county.[215] The statistical disparity also was sufficient to satisfy the third requirement—systematic exclusion from jury selection.[216] Moreover, the court found direct evidence of systematic exclusion. The statutory requirement that potential jurors be "known for their integrity, fair character and sound judgment"[217] was misinterpreted to require jurors to be personally known by the jury commissioners.[218] Such practice had been held explicitly unconstitutional forty years earlier in *Smith v. Texas*.[219]

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212. 603 S.W.2d at 162 (footnote omitted).

213. *Id.* at 163 (quoting the trial judge's holding).

214. The court adopted the criteria for cognizable groups articulated in United States v. Guzman, 337 F. Supp. 140, 143-44 (S.D.N.Y.), *aff'd*, 468 F.2d 1245 (2d Cir. 1972), *cert. denied*, 410 U.S. 937 (1973): "(1) the presence of some quality or attribute which defines and limits the group; (2) a cohesiveness of attitudes or ideas or experience which distinguishes the group from the general social milieu; and (3) a community of interests which may not be represented by other segments of society." 603 S.W.2d at 163.

215. *Id.* at 164.

216. *Id.* at 165.

217. TENN. CODE ANN. § 22-228(a) (1955) (currently codified as TENN. CODE ANN. § 22-2-302(a) (1980 Repl.)).

218. 603 S.W.2d at 166.

219. 311 U.S. 128 (1940). "Where jury commissioners limit those from

A prima facie case of discrimination thus established, the burden in *Nelson* shifted to the prosecution to prove that a significant state interest was served by the exclusion. In the absence of any proof the court concluded that the indictments should have been dismissed and the jury venire quashed. Finally, the court recommended the adoption of the key number system in order to avoid the constitutional vulnerability of subjective criteria in the selection process.[220]

### 2. Separation of Jury

From an early date, Tennessee courts have held it improper to separate the jurors during the course of a felony trial. When the jurors are separated, the burden of proof rests with the prosecution to show an absence of prejudice.[221]

The law on jury separation was summarized in *Hines v. State*:[222]

> The principles laid down in these cases are, 1. That the fact of separation having been established by the prisoner, the possibility that the juror has been tampered with, and has received other impressions than those derived from the testimony in court, exists, and prima facie, the verdict is vicious; but 2nd this separation may be explained by the prosecution, showing that the juror had no communication with other persons, or that such communication was upon subjects foreign to the trial, and that in fact, no impressions, other than those drawn from the testimony, were made upon his mind. But 3. In the absence of such explanation, the mere fact of separation is sufficient ground for a new trial.[223]

Given the presumption favoring the defense on this issue, a

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whom grand juries are selected to their own personal acquaintance, discrimination can arise from commissioners who know no negroes as well as from commissioners who know but eliminate them." *Id.* at 132.

220. 603 S.W.2d at 167.

221. Hickerson v. State, 141 Tenn. 502, 213 S.W. 917 (1919); Long v. State, 132 Tenn. 649, 179 S.W. 315 (1915); Sherman v. State, 125 Tenn. 19, 140 S.W. 209 (1911); Cartwright v. State, 80 Tenn. 620 (1883); Hines v. State, 27 Tenn. 597 (1848); M'Lain v. State, 18 Tenn. 241 (1837).

222. 27 Tenn. 597 (1848).

223. *Id.* at 602.

new trial would appear to be unavoidable whenever potentially prejudicial influence is shown. Such was the case in *Gonzales v. State*.[224] The *Gonzales* defendants were charged with felonious child abuse.[225] The jury had been sequestered the first evening of the trial, and seven members expressed an interest in voting in an election held the second day of the trial. It was clear that the case could not be completed before the polls closed, so the judge informed counsel that he intended to permit the jury to return to their homes for the evening after instructing them in a strong admonition to avoid all newspaper, radio, and television accounts of the trial. Both defendants opposed jury separation in light of the widespread publicity given the case. Nevertheless, the trial judge permitted the jurors to return to their homes. The following morning the trial judge asked the jurors if any of them had read or heard anything that would affect their ability to render an impartial verdict in the case. Defense counsel was permitted to question the jurors regarding their exposure to any information through the media or through personal contacts regarding the case. None of the jury confessed to any untoward events.[226]

After their conviction for felonious child abuse, the defendants moved for a new trial, contending that on the evening the jury was separated, a motion picture entitled "Sybil," which depicted child abuse, was aired on a local television station. According to a witness for the defense, "the movie depicted vivid scenes of abuse administered by a mother upon her daughter of tender years and the resulting adverse affect [*sic*] upon the child's personality in later years."[227] There was, however, no evidence that any of the jurors had actually viewed the movie.[228]

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224. 573 S.W.2d 288 (Tenn. 1980). *See generally* 48 TENN. L. REV. 146 (1980).

225. The statute under which the defendants were charged was Tennessee Code Annotated § 39-601(b)(4) (Supp. 1978).

226. 593 S.W.2d at 289-90.

227. *Id.* at 290.

228. At the reconvening of the trial, "neither the trial judge nor defense counsel asked any specific questions about what the jurors saw on television, if anything." *Id.* At the hearing on the motion for a new trial, defense counsel had told the court that they had not learned about the airing of the motion picture until after the trial. *Id.*

Nevertheless, the supreme court concluded that the possibility of prejudice clearly was established,[229] and "[w]hen the evidence of that possibility for prejudicial impressions was presented the burden was imposed upon the State to show that the jurors were not exposed to the movie 'Sybil', or if exposed that it had no prejudicial effect upon them."[230] In the absence of such proof by the State, the decision was reversed and the case was remanded for a new trial.

### *H. Punishment*

#### 1. Disproportionality

Courts traditionally have been reluctant to examine claims of disproportionality between punishment and offense.[231] The conventional view has been that a sentence falling within the statutory limits is constitutional.[232] In *Rummel v. Estelle*[233] the United States Supreme Court sustained the application of the Texas recidivist statute that imposed a mandatory sentence of life imprisonment upon an accused convicted of three nonviolent theft offenses in which the total amount stolen was $229.[234] The majority simply held that "the point at which a recidivist will be deemed to have demonstrated the necessary propensities and the amount of time that the recidivist will be isolated from society are matters largely within the discretion of the punishing jurisdiction."[235]

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229. "It is beyond question that 'Sybil' conveyed impressions potentially prejudicial to defendants in this case and that the nature of the charges were such as were 'likely to excite the commuunity against them.' " *Id.* at 293.

230. *Id.*

231. *See generally* J. COOK, CONSTITUTIONAL RIGHTS OF THE ACCUSED—POST-TRIAL RIGHTS § 6 (1976).

232. *See* Hardin v. State, 210 Tenn. 116, 355 S.W.2d 105 (1962); French v. State, 489 S.W.2d 57 (Tenn. Crim. App.), *cert. denied, id.* (Tenn. 1972).

233. 100 S. Ct. 1133 (1980).

234. *Id.* at 1134-35. The defendant had been convicted of fraudulent use of a credit card to obtain $80 in goods and services, passing a forged check for $28.36, and obtaining $120.75 by false pretenses. *Id.*

235. *Id.* at 1145. Justice Powell, joined by Justices Brennan, Marshall, and Stevens, dissented.

### 2. Habitual Criminal

The Tennessee Habitual Criminal Statute enhances punishment for an offense to life imprisonment upon proof of three prior convictions "for separate offenses, committed at different times, and on separate occasions."[236] In *Clayborne v. State*[237] the accused and a companion used a gun to take two leather jackets from a shop. From the shop, they ran to an apartment complex and, again at gunpoint, deprived another individual of his automobile. The prosecution maintained that the two offenses were not committed simultaneously and were not directly related; therefore, they should qualify as separate offenses for purposes of the habitual criminal statute. The court disagreed and concluded that "[t]he two felonies were committed on one occasion";[238] thus, the statutory requirement that separate offenses be committed at different *times* was not met.[239]

## *I. Probation*

In *State v. King*[240] the accused pleaded guilty to public drunkenness and to carrying a dangerous weapon with intent to go armed. The trial court sentenced him to two six-month sentences to run concurrently, but credited him with time already served[241] and suspended the remainder of the sentence. The state appealed, contending that suspension of the sentence was improper, because the trial judge had failed, as required by statute,[242] to order and consider a probation report and to state reasons for granting probation. The Tennessee Court of Crimi-

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236. TENN. CODE ANN. § 40-2801 (1975).

237. 596 S.W.2d 820 (Tenn. 1980).

238. *Id.* at 821.

239. *Id.* at 821-22. The supreme court noted that the court of criminal appeals, in reaching the same conclusion, had relied upon Frazier v. State, 485 S.W.2d 877 (Tenn. 1972), in which five burglaries committed against separate tenants in the same building on the same day were counted as one offense for purposes of the habitual criminal act. *Id.* at 821.

240. 603 S.W.2d 721 (Tenn. 1980).

241. The trial court gave the credit in accordance with Tennessee Code Annotated § 40-3102 (1975), which provides that "[t]he trial court shall . . . allow the defendant credit on his sentence for any period of time for which he was committed and held . . . pending his arraignment and trial."

242. *Id.* § 40-2904.

nal Appeals ruled that these statutory requirements did not apply to a subsequent statute that granted trial judges wide discretion in suspending sentences without imposing probation.[243] The Tennessee Supreme Court disagreed, concluding that the provisions must be read *in pari materia*, and that the subsequent statute was only concerned "with the time frame within which trial judges may exercise the power to suspend sentences,"[244] and not with the manner in which eligibility for suspension was to be determined. The court further held that, contrary to the judgment of the trial court, under the pertinent statute[245] "there can be no suspension of a sentence without probation."[246] While the appellate court had concluded that it would be absurd to require a probation report in every case in which sentence was suspended,[247] the supreme court responded, first, that this was simply what the statutes required, and second, that it previously had held that a probation report was not required if a probation officer was unavailable.[248] In such cases, "the relevant factors to be considered in granting or denying suspension of sentence and probation . . . should be fully developed at the hearing."[249]

An abuse of discretion in the denial of probation may constitute reversible error.[250] For such a result, the appellate court must find "that the record contains no substantial evidence to support the conclusion of the trial court that the defendant is not entitled to probation or suspended sentence."[251] In *State v. Barber*[252] the accused was convicted of selling one ounce of marijuana to an undercover agent. Because of the continuing undercover investigation, he was not arrested for the offense until twenty months later. The record indicated that the accused had "ceased his unlawful activities within days of the sale, and [had]

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243. *Id.* § 40-2903.
244. 603 S.W.2d at 724.
245. TENN. CODE ANN. §§ 40-2901 & -2902 (1975).
246. 603 S.W.2d at 725.
247. *Id.*
248. *Id.* The court referred to an earlier case, State v. Welch, 565 S.W.2d 492 (Tenn. 1978), to support its conclusion.
249. 603 S.W.2d at 725 (citation omitted).
250. State v. Grear, 568 S.W.2d 285 (Tenn. 1978).
251. *Id.* at 286.
252. 595 S.W.2d 809 (Tenn. 1980).

lived the life of an example citizen in the twenty months between the sale and his arrest."[253] Finding that the accused's record was in all other respects honorable,[254] the court concluded that his rehabilitation without incarceration made him an "ideal prospect for probation,"[255] and the denial of the request for probation was, therefore, an abuse of discretion.

### *J. Double Jeopardy*

#### 1. Multiple Offenses

In a long line of cases Tennessee courts have held that only one conviction may result when an accused simultaneously injures more than one person with a single act.[256] In the leading case, *Smith v. State*,[257] the accused struck two people with his automobile, killing one and injuring the other. The court held that convictions of both manslaughter and assault and battery could not stand, because the facts showed "a single transaction, involving a single criminal intent."[258]

*Smith* was overruled in *State v. Irvin*.[259] The court concluded that the analysis in the prior decisions "improperly focuse[d] upon the fictional 'intent' of the accused rather than upon the elements of the criminal offense with which he is charged."[260] While all the cases reviewed by the court that had applied the *Smith* rule involved assaults with motor vehicles,[261]

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253. *Id.* at 810.

254. He has no prior criminal record, his military service was honorable, his social history is without blemish other than the conviction under consideration, he is working and supporting his wife and her four children . . . his work record is good, and there is no adverse reference in the record to either his mental or physical condition.

*Id.* at 810-11.

255. *Id.* at 811.

256. Crocker v. State, 204 Tenn. 615, 325 S.W.2d 234 (1959); Huffman v. State, 200 Tenn. 487, 292 S.W.2d 738 (1956); Smith v. State, 159 Tenn. 674, 21 S.W.2d 400 (1929).

257. 159 Tenn. 674, 21 S.W.2d 400 (1929).

258. *Id.* at 681, 21 S.W.2d at 402.

259. 603 S.W.2d 121 (Tenn. 1980).

260. *Id.* at 123.

261. *Id.* The specific overruling of *Smith* was narrow: "It is overruled insofar as it purports to hold that there can be only one conviction when there

the *Irvin* holding would appear to be applicable to all instances of multiple criminal results from a single act.[262]

### 2. Guilty Plea

In *Rivers v. Lucas*[263] the Court of Appeals for the Sixth Circuit held that a defendant indicted for first degree murder who pleaded guilty to manslaughter could not be prosecuted for murder after the manslaughter conviction was set aside without violating the prohibition against double jeopardy. The court reasoned that by accepting a guilty plea to a lesser included offense, the trial court made a determination equivalent to a jury's refusal to convict for the greater offense.[264]

The court concluded in *Hawk v. Berkemer*[265] that the Supreme Court's holding in *United States v. Scott*[266] required that *Rivers* be overruled. In *Scott* the trial court erroneously had dismissed two of three counts of an indictment at the end of the proof on the ground of prejudicial preindictment delay. The jury acquitted on the third count. The Supreme Court held that the accused could be retried on the counts that were dismissed erroneously. The Court reasoned that "a defendant is acquitted only when 'the ruling of a judge, whatever its label, actually represents a resolution . . ., correct or not, of some or all of the factual elements of the offense charged.' "[267] In *Hawk* the court concluded that "[t]his [reasoning] flatly conflicts with *Rivers'* idea of an implicit acquittal,"[268] and therefore that the *Rivers* holding must be disregarded.

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are multiple victims of a vehicular accident involving criminal conduct." *Id.*

262. "It seems illogical to us, as a general proposition, to hold that when two persons have been killed by an accused, he has committed only one homicide." *Id.* at 123. Clearly, the decision is not limited to multiple homicides, for such a holding would not have necessitated the overruling of *Smith.*

263. 477 F.2d 199 (6th Cir. 1973), *vacated on other grounds,* 414 U.S. 896 (1976).

264. 477 F.2d at 202.

265. 610 F.2d 445 (6th Cir. 1979).

266. 437 U.S. 82 (1978).

267. *Id.* at 97 (quoting United States v. Martin Linen Supply Co., 430 U.S. 564, 571 (1977)).

268. 610 F.2d at 447.

# POST-CONVICTION RELIEF IN TENNESSEE — FOURTEEN YEARS OF JUDICIAL ADMINISTRATION UNDER THE POST-CONVICTION PROCEDURE ACT

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"The desirability of minimizing the necessity for resort by state prisoners to federal habeas corpus is not to be denied. Our federal system entrusts the states with primary responsibility for the administration of their criminal laws."[1]

## I. INTRODUCTION

By the mid-1960s it was clear that Tennessee post-conviction procedures needed to be revised. Federal courts frequently

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1. Case v. Nebraska, 381 U.S. 336, 344 (1965) (Brennan, J., concurring). Justice Brennan outlined the type of state reform needed to minimize state prisoner resort to federal habeas corpus:

> If adequate state procedures, presently all too scarce, were generally adopted, much would be done to remove the irritant of participation by the federal district courts in state criminal procedure. . . .
>
> . . . The procedure should be swift and simple and easily invoked. It should be sufficiently comprehensive to embrace all federal constitutional claims. . . . [I]t should eschew rigid and technical doctrines of forfeiture, waiver, or default. . . . It should provide for full fact hearings to resolve disputed factual issues, and for compilation of a record to enable federal courts to determine the sufficiency of those hearings. . . . It should provide for decisions supported by opinions, or fact findings and conclusions of law, which disclose the grounds of decision and the resolution of disputed facts. Provision for counsel to represent prisoners, . . . would enhance the probability of effective presentation and a proper disposition of prisoners' claims.

*Id.* at 345-47 (Brennan, J., concurring) (footnote omitted).

heard post-conviction claims of Tennessee prisoners that had been considered inadequately or had never been considered at all in the Tennessee court system. Tennessee habeas corpus law and procedures permitting limited collateral attack on convictions[2] did not provide collateral hearings and relief equivalent to the federal habeas corpus relief mandated by a 1963 trilogy of United States Supreme Court cases.[3] The 1965 Supreme Court decision in *Case v. Nebraska*[4] highlighted the need for better post-conviction procedures and gave impetus to a movement for reform in Tennessee.

The legislature took its first limited steps toward reform in 1965 by passing amendments to the Tennessee Habeas Corpus Act.[5] In 1966 the Tennessee Supreme Court cited this legislation as the basis for expanding the scope of relief available through habeas corpus to include convictions "void because of . . . denial of constitutional rights, Federal or State."[6] These early legislative and judicial efforts, however, served merely to adapt the traditional common-law writ of habeas corpus in such a way that state prisoners had less need to resort to federal habeas corpus.

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2. TENN. CODE ANN. §§ 23-1801 to -1839 (1955) (current version at TENN. CODE ANN. §§ 39-21-101 to -130 (1980)).

3. Townsend v. Sain, 372 U.S. 293 (1963); Fay v. Noia, 372 U.S. 391 (1963); Sanders v. United States, 373 U.S. 1 (1963).

4. 381 U.S. 336 (1965).

5. Act of Mar. 20, 1965, ch. 234, §§ 1-9, 1965 Tenn. Pub. Acts 703 (codified at TENN. CODE ANN. §§ 23-1840 to -1848 (Supp. 1966)) (repealed 1967). The 1965 Act authorized the Chief Justice of the Tennessee Supreme Court to fix the venue and assign for hearing all habeas corpus cases filed in Tennessee courts by inmates of penitentiaries. In practice this resulted in the transfer of most habeas corpus cases from "the court or judge most convenient in point of distance to the applicant," TENN. CODE ANN. § 23-1805 (1955) to the court of conviction, *see* State *ex rel.* Callahan v. Henderson, 417 S.W.2d 789 (Tenn. 1967). This authority to transfer was repealed in 1967 by the Post-Conviction Procedure Act. Act of May 26, 1967, ch. 310, § 26, 1967 Tenn. Pub. Acts 801.

6. State *ex rel.* Reed v. Heer, 403 S.W.2d 310, 312 (Tenn. 1966). The court noted the concurring opinion of Justice Brennan in Case v. Nebraska, 381 U.S. 336 (1965), *see* note 1 *supra*, and quoted extensively from the portion advocating state primacy in implementing constitutional guarantees through post-conviction procedures that "would assure not only that meritorious claims would generally be vindicated without any need for federal court intervention, but that nonmeritorious claims would be fully ventilated." 403 S.W.2d at 312 (quoting 381 U.S. at 345 (Brennan, J., concurring)).

Aware that the time was ripe for comprehensive post-conviction legislation providing adequate procedures for full and fair consideration of constitutional claims, the Tennessee Law Revision Commission studied the situation in 1965[7] and drafted a proposal for legislative reform the following year. The Commission's efforts culminated in 1967, when the Tennessee General Assembly enacted the Post-Conviction Procedure Act[8] and created the Tennessee Court of Criminal Appeals.[9] A new era of judicial administration of collateral attacks on convictions had begun.

During the intervening years a number of important developments have occurred. The United States Supreme Court has restricted substantially the scope of federal habeas corpus relief available to state prisoners.[10] The Tennessee legislature has amended several sections of the Post-Conviction Procedure Act,[11] and state appellate courts have construed its provisions in 169 published decisions.[12] Thus, it is an appropriate time to examine the availability of relief under the Post-Conviction Procedure Act and to determine whether the Act is being construed

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7. Letter from Henry C. Foutch, Assistant Attorney General, to Val Sanford, Chairman of the Law Revision Comm'n (Oct. 25, 1965) (Tenn. State Archives), noting that the Commission was then making a study of post-conviction procedures and considering recommending revisions in the law. General Foutch recommended that Tennessee adopt a post-conviction remedy statute similar to the Nebraska statute approved in Case v. Nebraska, 381 U.S. 336 (1965), *see* note 1 *supra*.

8. Act of May 26, 1967, ch. 310, 1967 Tenn. Pub. Acts 801 (codified at TENN. CODE ANN. §§ 40-3801 to -3824 (1975)). Floor debate on the Act, introduced as a consensus bill, consisted of brief statements of its purpose. In the House, Representative Galbreath explained that the bill was designed to "relieve the situation we now have that causes so many of our prisoners to file habeas corpus proceedings both in state and federal court." House Floor Vote, May 18, 1975, on H.B. 717.

9. Act of May 16, 1967, ch. 226, 1967 Tenn. Pub. Acts 587 (codified at TENN. CODE ANN. §§ 16-5-101 to -113 (1980)).

10. *See* notes 225-42 *infra* and accompanying text.

11. *See* notes 39-76 *infra* and accompanying text.

12. These 169 decisions are reported in volumes 443 through 611 of the Southwestern Reporter, Second Series. Recently there have been very few published decisions under the Post-Conviction Procedure Act, suggesting that the appellate courts believe most legal issues under the Act have been resolved. *See* TENN. SUP. CT. R. 4(2) (standards for publication of cases) (effective Jan. 28, 1981).

and applied properly and whether it is fulfilling its statutory purposes. If it is not, then further steps may have to be taken to achieve those purposes and to improve judicial administration under the Act.

Part II of this Article describes the reform movement that led to the Act and to the substantial amendments in 1971 and explains how the Act has been construed and applied by the courts. Part III outlines and examines the many legislative and judicial restrictions on the availability of collateral attack under the Act, and Part IV briefly summarizes the ten-year history of federal habeas corpus cases brought by Tennessee prisoners and the current availability of federal habeas corpus relief. In the conclusion, the progress made toward achieving the basic purposes of the Post-Conviction Procedure Act is evaluated and further post-conviction reform is suggested.

## II. HISTORY OF THE ACT

Much of the historical background of the Act may be found in the Tennessee State Archives, where the records of the Tennessee Law Revision Commission are preserved.[13] In the absence of any official legislative history,[14] these records provide the best available guide to the meaning and purposes of the provisions of the 1967 Act.

### *A. The Basic Purposes of Post-Conviction Reform*

Four major purposes of the Post-Conviction Procedure Act were set out in section 102 of the first draft of the Act:[15]

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13. During 1966 and early 1967 three preliminary drafts of the Act were prepared by the Law Revision Commission. The Commission records include these draft bills and comments by Commission members and other interested persons.

14. The records of the Law Revision Commission are not considered legislative history, although the Commission functioned as "an independent, nonpolitical, yet official research agency," established by the legislature, "serving as a link between the legislature, the executive branch, the courts, practicing lawyers, the law schools, and other interested persons with regard to technical legal subjects." General Report of Law Revision Commission to the Eighty-Fifth General Assembly 1 (Tenn. State Archives).

15. F. Dennis, A Post Conviction Procedure Act for Tennessee (First Draft) § 102(2) (Tenn. State Archives). These purposes were derived from the

(a) To provide a post-conviction process at least as broad in scope as existing federal statutes under which claims of violation of constitutional right asserted by persons convicted by the state courts of Tennessee are determined in federal courts under the federal habeas corpus statutes.

(b) To provide a procedure in such cases that is swift and simple and easily invoked.

(c) To provide for full fact hearings to resolve disputed factual issues, and for compilation of a record to enable federal courts to determine the sufficiency of those hearings.

(d) To provide for decisions supported by opinions, fact findings and conclusions of law, which disclose the grounds of decision and resolution of disputed facts.[16]

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concurring opinion of Justice Brennan in Case v. Nebraska, 381 U.S. 336 (1965), *see* note 1 *supra*. The drafter, Floyd Dennis, explained why he believed a purpose provision was needed:

> The Tennessee courts have followed a strict construction of habeas corpus, much narrower than the federal habeas corpus, and the criminal coram nobis procedure (T.C.A. 40-3411) is strictly limited to questions of material facts arising in very specific ways. A narrow interpretation of the proposed Act would render its purpose impossible of fulfillment and must be avoided.

Analysis of Proposed Post Conviction Procedure Act (First Draft), Criticism and Responses, Response to Criticism (1) of § 102, at (d) (Tenn. State Archives).

16. For Tennessee courts to maintain maximum control over the administration of criminal justice, it is necessary to have post-conviction procedures that will allow the state prisoner to assert all of his federal constitutional rights in state proceedings. In 1967 this meant conforming to the requirements of the trilogy of United States Supreme Court cases, *see* note 3 *supra*. Anderson, *Post-Conviction Relief in Missouri—Five Years Under Amended Rule 27.26*, 38 MO. L. REV. 1, 42-43 (1973) [hereinafter cited as Anderson].

The drafters of the Act wisely rejected proposing an act written in generic terms like the Nebraska Post-Conviction Procedure Act, set out in Case v. Nebraska, 381 U.S. 336, 341-42 n.4 (1965). Instead, they proposed an act which outlines basic procedures, written in specific terms, in an effort to achieve "clarity and simplicity," "greater control" over construction, and "less need for adjudication to clarify the [statute's] meaning." F. Dennis, Memorandum to Law Revision Commission State of Tennessee Relating to A Post-Conviction Procedure Act for Tennessee 45-46 (Tenn. State Archives).

Under 28 U.S.C. § 2254(d) (1976), if a state court makes a fact finding in writing after a hearing on a factual issue, the finding "shall be presumed to be correct" by a federal court, unless one or more of eight exceptional problems is found in the state fact finding procedure. Unless one of these problems is

The Tennessee Law Revision Commission concentrated on drafting provisions that would pursue systematically each of these four goals. The proposed Act was designed to achieve finality through one post-conviction hearing in which all grounds for challenging the validity of a conviction would be considered,[17] thereby eliminating subsequent petitions for relief in state and federal courts.[18] By proposing that the petitioner be required to take a stand on all of the most common grounds for relief in the first post-conviction proceeding,[19] the Commission

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found, the federal habeas corpus applicant has the burden of establishing by convincing evidence that the state court fact determination was erroneous. *Id.*

17. The Commission drafters relied on language in Sanders v. United States, 373 U.S. 1 (1963):

> Finally, we remark that the imaginative handling of a prisoner's first motion would in general do much to anticipate and avoid the problem of a hearing on a second or successive motion. The judge is not required to limit his decision on the first motion to the grounds narrowly alleged, or to deny the motion out of hand because the allegations are vague, conclusional, or inartistically expressed. He is free to adopt any appropriate means for inquiry into the legality of the prisoner's detention in order to ascertain all possible grounds upon which the prisoner might claim to be entitled to relief.

*Id.* at 22, *as quoted in* F. Dennis, Memorandum to Law Revision Commission State of Tennessee Relating to A Post-Conviction Procedure Act for Tennessee 4 n.8 (Tenn. State Archives).

18. G. Gray, Memorandum to Tennessee Judicial Council re Post Conviction Procedure Act (Oct. 22, 1970) (Tenn. State Archives), outlining the purposes of the Act:

> The problem of frivolous petitions and repeated petitions alleging new grounds time after time which have vexed the Federal courts were sought to be avoided under the P.C.P.A. by providing for liberal amendment, appointment of counsel, and no dismissal for technical defects, and the provision for rule making by the State Supreme Court authorizing petition forms.

*Id.* at 1-2.

19. All three preliminary drafts of the proposed Act prepared by the Law Revision Commission contained a list of eleven common grounds for relief. F. Dennis, A Post Conviction Procedure Act for Tennessee (First Draft) § 105(3) (Tenn. State Archives); A Draft Act: A Post-Conviction Procedure Act for Tennessee (Second Revision) § 4(4) (Tenn. State Archives); An Act to establish post-conviction procedures . . . (Third Draft) § 4(4) (Tenn. State Archives). The final two drafts would have required that each petition filed set forth each of these grounds,

> accompanied by a statement of the petitioner claiming he is entitled

drafters believed that they had developed a method to curb repetitious applications.[20] In the final revision of the proposed Act submitted to the General Assembly, however, this innovative provision, which effectively would have limited petitioners to one post-conviction hearing, was omitted.[21] The Commission hoped that the Tennessee Supreme Court would compensate for this major omission by making available to prisoners a standard post-conviction petition form that would include a list of the most common grounds for relief;[22] they also hoped that the courts and counsel for the petitioner would apply liberally several other provisions of the Act that were designed to achieve finality through one collateral attack proceeding.[23]

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> to relief upon that ground along with the basic reasons for his claim; or that he has considered that ground for relief and after advising with counsel, has knowingly and understandingly elected not to claim a right to relief on that ground; . . .

A Draft Act: A Post-Conviction Procedure Act for Tennessee (Second Revision) § 3(10) (Tenn. State Archives); An Act to establish post-conviction procedures . . . (Third Draft) § 3(10) (Tenn. State Archives).

20. F. Dennis, Analysis of Proposed Post Conviction Procedure Act (First Draft), Criticism and Responses, Response to Criticism (5) of § 105 (Tenn. State Archives).

21. The omission resulted primarily from various criticisms of this approach to achieving early finality. Some objectors contended that the "common grounds" provision would be a drafting manual for jailhouse lawyers. This criticism predated the United States Supreme Court decision of Johnson v. Avery, 393 U.S. 483 (1969), which held that prohibiting assistance by jailhouse lawyers unconstitutionally restricts inmates' right of access to the courts. F. Dennis, Analysis of Proposed Post Conviction Procedure Act (First Draft), Criticism and Responses, Criticism (5) of § 105 (Tenn. State Archives).

The Tennessee Attorney General's criticism of the first draft of the Act also contributed to the omission decision. See Letter from Edgar P. Calhoun, Assistant Attorney General, to Law Revision Commission (Jan. 25, 1967) (Tenn. State Archives), suggesting that it is better to be general rather than specific in this "rapidly changing area of law" and criticizing the specific language of some of the grounds listed. Mr. Calhoun also objected that there are many other legal issues which arise fairly frequently that were unlisted in the proposed "common grounds" section. *Id.* at 2, 4.

22. F. Dennis, Analysis of Proposed Post Conviction Procedure Act (First Draft), Criticism and Responses, Response to Criticism (5) of § 105 (Tenn. State Archives). *See* note 34 *infra*.

23. *See* notes 18 *supra* & 25-27 *infra* and accompanying text. Although these provisions supporting one comprehensive hearing and less technical

The Law Revision Commission drafters knew that it would be difficult to overcome a tradition of judicial conservatism in Tennessee collateral attack decisions, a tendency clearly demonstrated by the narrow scope of relief previously available in habeas corpus proceedings.[24] Section 102(1) in the first draft of the Act, the purpose section, provided: "This Act shall be liberally construed and applied to promote its underlying purposes and policies."[25] While the drafters believed that it would be advantageous to include such a provision,[26] they deleted it from later drafts in the hope that this would give the courts greater freedom to work out problems that might develop under the Act.[27]

### *B. Early Problems of Judicial Administration*

Although the Act became effective on July 1, 1967,[28] the newly formed Tennessee Court of Criminal Appeals did not begin to publish decisions construing the Act's provisions until March 1969.[29] The court of criminal appeals initially relied upon

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pleading requirements for the petitioner remained in the Act, omission of the proposed common grounds provision from the Act, *see* notes 19-21 *supra* and accompanying text, and the failure of the Tennessee Supreme Court to provide a standard petition form to aid prisoners, *see* note 34 *infra* and accompanying text, opened the door for convenient constructions and judicial practices that prevented determination of all grounds for relief in one hearing and permitted many early dismissals of poorly drafted *pro se* petitions without appointment of counsel.

24. F. Dennis, Memorandum to Law Revision Commission State of Tennessee Relating to A Post-Conviction Procedure Act for Tennessee 7-11, 48-49 (Tenn. State Archives).

25. F. Dennis, A Post Conviction Procedure Act for Tennessee (First Draft) § 102(1) (Tenn. State Archives).

26. F. Dennis, Memorandum to Law Revision Commission State of Tennessee Relating to A Post-Conviction Procedure Act for Tennessee 49 (Tenn. State Archives).

27. *See id.* at 48. However, the drafters also recognized that leaving out the liberal construction provision would permit judicial interpretations of the Act that "may be sufficiently restrictive to render the Act an inadequate remedy." *Id.*

28. Act of May 26, 1967, ch. 310, § 28, 1967 Tenn. Pub. Acts 801.

29. The first reported appellate decision in a Post-Conviction Procedure Act case was Hunter v. State, 443 S.W.2d 532 (Tenn. Crim. App.), *cert. denied, id.* (Tenn. 1969).

habeas corpus decisions of the Tennessee Supreme Court as a guide to construction.[30] The Tennessee Supreme Court, in the meantime, continued to hear appeals in habeas corpus cases[31] and, despite numerous opportunities to clarify the Act, did not hand down a decision construing its provisions until almost five years after it became effective.[32] Furthermore, the supreme court did not exercise its authority under the Act to promulgate rules of practice and procedure[33] or rules pertaining to a standard petition form that might be made available to prisoners.[34]

With no legislative history or rules of practice and proce-

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30. *Id.* at 532. The absence of official legislative history was in part responsible for this and other problems of interpretation of the Act. *See* note 14 *supra*.

31. During the period from July 1, 1967—the effective date of the Post-Conviction Procedure Act—to March of 1969, when the Tennessee Court of Criminal Appeals handed down Hunter v. State, 443 S.W.2d 532 (Tenn. Crim. App.), *cert. denied, id.* (Tenn. 1969), its first decision under the Act, there were 14 reported habeas corpus appeals decided by the Tennessee Supreme Court. These 14 decisions are reported in volumes 417 through 439 of the Southwestern Reporter, Second Series.

32. Prior to its first published Post-Conviction Procedure Act decision in State v. Wright, 475 S.W.2d 546 (Tenn. 1972), in January of 1972, the Tennessee Supreme Court had denied certiorari in 76 reported cases decided by the Tennessee Court of Criminal Appeals under the Act. These 76 denials of certiorari are reported in volumes 443 through 475 of the Southwestern Reporter, Second Series. Thus the newly formed Tennessee Court of Criminal Appeals, *see* note 9 *supra* and accompanying text, was responsible for developing all case law under the Act from 1967 until after the 1971 amendments to the Act.

33. TENN. CODE ANN. § 40-3823 (1975). The 1967 legislature simply provided that the Tennessee Supreme Court *"may* promulgate rules of practice and procedure." Act of May 26, 1967, ch. 310, § 22, 1967 Tenn. Pub. Acts 801 (emphasis added). The court did not adopt any rule relating to post-conviction cases until 1975, when Tennessee Supreme Court Rule 44 on the right to counsel in post-conviction and habeas corpus proceedings was adopted. No other rules of practice and procedure have been proposed or adopted by the court for post-conviction proceedings.

34. Tennessee Code Annotated § 40-3823 (1975) states that the Tennessee Supreme Court *"may* promulgate . . . rules prescribing the form and contents of the petition . . . and *may* make petition forms available for use by petitioners." (emphasis added). The clear intent of the drafters of the Act and the Law Revision Commission members who commented on the purposes of the Act was that the Tennessee Supreme Court would take action to make a standard petition form available to prisoners. *See* note 22 *supra*.

dure to guide them, many trial court judges, encouraged by Tennessee Court of Criminal Appeals decisions citing habeas decisions as authoritative relied on Tennessee habeas corpus decisions and practices in construing and applying the Act.[35] Thus, courts often continued to apply traditional habeas corpus restrictions and technical requirements in determining the scope of proceedings and relief available under the Act.[36] In the absence of a standard post-conviction petition form, petitioners continued to file worthless handwritten petitions, many of which were designated petitions for habeas corpus.[37] Trial courts often summarily dismissed *pro se* post-conviction and habeas corpus petitions without appointing counsel to assist indigent petitioners to allege properly all available grounds for relief.[38] It soon became clear, therefore, that judicial administration under the 1967 Act often was incompatible with the basic purposes of post-conviction reform legislation and that changes were needed if these purposes were to be fully achieved.

### *C. The 1971 Amendments to the Act*

In 1970 the Tennessee Judicial Council asked the Law Revision Commission to conduct a study of the operation of the Post-Conviction Procedure Act.[39] The Commission requested comments from hundreds of judges, district attorneys general, lawyers, and legislators, but received very few responses.[40] Problems identified by the survey[41] included the statutory policy

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35. *Compare* State *ex rel.* Reed v. Heer, 403 S.W.2d 310, 312 (Tenn. 1966) (in state habeas corpus proceeding, evidentiary hearing required only if petition alleges "sufficient facts" to show conviction void) *with* Crumley v. Tollett, 474 S.W.2d 148, 149 (Tenn. Crim. App.) (in Post-Conviction Procedure Act proceeding, trial court properly held that "unsupported conclusions" do not require a hearing), *cert. denied, id.* (Tenn. 1971).

36. *See* notes 35 *supra* & notes 131, 141 & 178 *supra* and accompanying text.

37. *See, e.g.*, Arthur v. State, 483 S.W.2d 95, 96 (Tenn. 1972); Crumley v. Tollett, 474 S.W.2d 148, 148 (Tenn. Crim. App.), *cert. denied, id.* (Tenn. 1971).

38. *See* note 131 *infra* and accompanying text.

39. G. Gray, Memorandum to Tennessee Judicial Council re Post Conviction Procedure Act 1 (Oct. 22, 1970) (Tenn. State Archives).

40. Only 21 replies were received by the Law Revision Commission. *Id.*

41. *Id.* The memorandum contained a six-page summary by Mr. Gray of

of assigning all post-conviction cases to judges other than the original trial judge,[42] the continuing tendency of many prisoners to file successive petitions raising new grounds for relief,[43] and

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the various complaints, with commentary. Some of the complaining letters are in the Tennessee State Archives.

42. Under the 1967 Act post-conviction cases were heard by the original trial court judge unless he was the subject of the prisoner's claim. Act of May 26, 1967, ch. 310, § 2, 1967 Tenn. Pub. Acts 801 (codified at TENN. CODE ANN. § 40-3803 (1975)). In 1969 the legislature amended the Act to bar the original trial judge from hearing the case and to require the Tennessee Supreme Court to appoint any chancellor or criminal or circuit court judge to hear the case. Act of May 8, 1969, ch. 242, § 1, 1969 Tenn. Pub. Acts 661 (codified at TENN. CODE ANN. § 40-3803 (1975)). Apparently this amendment was adopted to ensure that the post-conviction petition would be heard before an impartial judge. *See* Leighton v. Henderson, 414 S.W.2d 419, 421 (Tenn. 1967).

One judge complained,

> I am extremely uncomfortable passing judgment on the judgments of my colleagues [in a post-conviction hearing] . . . I believe that I could be more objective in passing on my own [judgments] than those of my colleagues . . . . I think it is manifestly unfair to have my judgments rendered void without my having a chance to be heard or represented.

Letter from Russell C. Hinson, Judge of the Criminal Court, Third Division, Hamilton County, to Grayfred B. Gray, Executive Director, Law Revision Comm'n (May 22, 1970) (Tenn. State Archives).

Under the repealed habeas corpus transfer provisions, *see* note 5 *supra*, the trial judge to whom a case had been transferred frequently would recuse himself for various reasons, including a charge made against him in the habeas corpus petition, and the Chief Justice of the Tennessee Supreme Court would appoint a special judge to hear the petition. Leighton v. Henderson, 414 S.W.2d at 421.

43. G. Gray, Memorandum to Tennessee Judicial Council re Post Conviction Procedure Act 2 (Oct. 22, 1970) (Tenn. State Archives). Causes of this problem included the failure of both the courts and counsel to make sure that all available grounds for relief were raised in the first petition, which was aggravated by the failure of the Tennessee Supreme Court to adopt rules requiring the assertion of all grounds in the first petition, *see* notes 19-22 & 34 *supra* and accompanying text; the use of repetitious petitions by prisoners as a tactic to obtain several trips away from the penitentiary; the omission of a common grounds provision from the Act, *see* notes 19-22 *supra* and accompanying text; and the lack of any express waiver provision in the Act. *Id.*

A waiver definition similar to the second paragraph of Tennessee Code Annotated § 40-3812 (1975), but which did not contain a rebuttable presumption of waiver provision, was found in the second draft of the Act. A Draft Act: A Post-Conviction Procedure Act for Tennessee (Second Revision) § 8 (Tenn. State Archives). The waiver definition was excluded from later drafts of the

the failure of the state supreme court to prepare or make available to prisoners a standard post-conviction form.[44] In view of these and other complaints[45] demonstrating the need for further reform, the Law Revision Commission in 1971 proposed various amendments to the Act[46] to incorporate suggestions made by interest groups.[47] The resulting amendment bill was adopted by the legislature without opposition in April 1971.[48] Its primary

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1967 Act, probably on the theory that no express waiver provision was needed. See Arthur v. State, 483 S.W.2d 95 (Tenn. 1972), where the Tennessee Supreme Court concluded:

> We consider the 1971 amendment to Section 40-3812 to be but a legislative declaration of the construction that the courts would give to the Post-Conviction Procedure Act, even had this amendment not been enacted. We hold . . . that since the record does not show that the petitioner presented, or had sufficient grounds for not presenting, to the court that convicted him, the facts of which he now complains, he waived them and is precluded from relying on them.

*Id.* at 97.

44. *See* note 34 *supra* and accompanying text. Handwritten *pro se* petitions often were considered useless in determining whether grounds for relief had been stated. G. Gray, Memorandum to Tennessee Judicial Council re Post Conviction Procedure Act 5 (Oct. 22, 1970) (Tenn. State Archives).

45. Other complaints made in the survey included insufficient compensation for appointed attorneys, the practice of some trial courts under Tennessee Code Annotated § 40-3818 of providing transcripts before petitions were filed, the lack of a definition of "previously determined" under Tennessee Code Annotated § 40-3811, the failure of perjury sanctions to deter the filing of frivolous petitions, the courts' failure to appoint counsel in some cases, and the practice of some petitioners of filing another petition while they had a post-conviction appeal pending. *Id.* at 5-6.

46. Early versions of the final proposals of the Law Revision Commission are found in G. Gray, Memorandum to Tennessee Judicial Council re Post Conviction Procedure Act 3-4 (Oct. 22, 1970) (Tenn. State Archives). The language of the proposed Law Revision Commission amendments to Tennessee Code Annotated §§ 40-3812, -3818, & -3823 is identical to the language of the amendments subsequently adopted by the legislature. Act of Apr. 28, 1971, ch. 96, 1971 Tenn. Pub. Acts 173.

47. Apparently, the Law Revision Commission, in preparing the 1971 proposed amendments, took into account amendments suggested by the Tennessee Bar Association, attorneys general, Judge Andrew Taylor, and members of the drafting committee of the Commission working on early drafts of the Tennessee Criminal Code and Code of Criminal Procedure (Proposed Final Draft 1973). House Floor Vote, Apr. 21, 1971, on S. 157.

48. *Id.* Senate Floor Vote, Apr. 8, 1971, on S. 157. Act of Apr. 28, 1971,

purpose, according to the limited legislative history, was to stop repetitious filings of petitions for post-conviction relief.[49]

The key amendment that was adopted in order to deal with this problem, on the recommendation of the Law Revision Commission and the Tennessee Attorney General, was the addition of a waiver provision to Tennessee Code Annotated section 40-3811[50] and a definition of waiver in the second paragraph of section 40-3812.[51] Advocates of the proposed amendments recognized that the legislature could not waive constitutional rights on behalf of convicted prisoners. They apparently believed that the proposed definition of waiver, with its "rebuttable presumption that a ground for relief not raised in any such proceeding which was held was waived," would simply reduce the number of *repetitious* post-conviction petitions.[52] Under the waiver amendment, as it was explained to the 1971 legislators, a prisoner who fails to include all possible grounds for relief in his first petition

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ch. 96, 1971 Tenn. Pub. Acts 173.

49. *Id.* House Floor Vote, Apr. 21, 1971, on S. 157. During the brief House debate, Representative Holcomb explained:

> The general thrust of the bill is to try to stop repetitious filings of petitions for relief. Basically the bill provides that grounds for relief are waived if the petitioner knowingly fails to present such grounds at a previous hearing. In other words, this is to stop the piecemeal determinations.

50. Act of Apr. 28, 1971, ch. 96, § 3, 1971 Tenn. Pub. Acts 173.

51. *Id.* § 4. A similar waiver definition, including the rebuttable presumption provision, was included in the first draft of the Act. F. Dennis, A Post-Conviction Procedure Act for Tennessee (First Draft) § 106(3) (Tenn. State Archives). The presumption of waiver provision was deleted in the second draft because of criticism that the state should have the burden of proving waiver. F. Dennis, Analysis of Proposed Post Conviction Procedure Act (First Draft), Criticism and Responses, Criticism (4) of § 106 (Tenn. State Archives).

52. *See* note 49 *supra*. Apparently little or no legislative consideration was given to the fact that under the amendment to Tennessee Code Annotated § 40-3812, a rebuttable presumption of waiver was created if the petitioner "failed to present [the ground] for determination in *any proceeding* before a court of competent jurisdiction in which the ground could have been presented." *Id.* (emphasis added). This presumption, when applied to all pre-conviction proceedings and to any appeal from a conviction, often permits courts to dismiss summarily most or all grounds for post-conviction relief that otherwise would be available in the first post-conviction proceeding. *See* notes 82-90 *infra* and accompanying text.

must explain in any subsequent petition why the current claim was not presented for determination in the first petition.[53]

The drafters of the 1971 amendments did not believe that the waiver provison alone would solve the problem of repetitious petitions, for they realized that a prisoner who did not have counsel appointed to advise him about other potential grounds[54] could claim legitimately in a second petition that he did not "knowingly and understandingly" fail to present a ground for relief in the first petition.[55]

The drafters hoped that adoption of the amendments would induce the Tennessee Supreme Court to promulgate rules of practice and procedure consistent with the Act, especially rules prescribing the form and content of a standard post-conviction petition that should have been made available to prisoners prior to 1971.[56] The standard petition form that the drafters expected

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53. Tennessee Code Annotated § 40-3804(10) (1975), when read in conjunction with Tennessee Code Annotated § 40-3812, as amended in 1971, makes clear that the petitioner must at least offer a good explanation in the petition for failing to present any ground for relief in the first petition, in order to rebut the presumption of waiver. However, § 40-3804(10) also has been interpreted to require an explanation for failing to present the ground to "any court" in "any proceeding." *See* notes 43 *supra* & 92-94 *infra* and accompanying text.

54. Although Tennessee Supreme Court Rule 44 (1975) provides for a right to counsel after a petition is filed, *see* notes 153-68 *infra* and accompanying text, an indigent petitioner is not entitled to appointment of counsel until a post-conviction petition listing the grounds for relief is prepared and filed by the petitioner and determined by the court to allege sufficiently facts which would entitle him to relief. *See, e.g.*, Baxter v. Rose, 523 S.W.2d 930 (Tenn. 1975); May v. State, 589 S.W.2d 933 (Tenn. Crim. App. 1979); Crumley v. Tollett, 474 S.W.2d 148 (Tenn. Crim. App.), *cert. denied, id.* (Tenn. 1971).

55. This was the primary reason for inclusion of the common grounds provisions, notes 19-20 *supra*, in preliminary drafts of the Post-Conviction Procedure Act. In view of the absence of any court rules on post-conviction petitions, notes 33-34 *supra*, one initial proposal for inclusion in the 1971 amendments was a common grounds section based on the Law Revision Commission's third draft of the Act. G. Gray, Memorandum to Tennessee Judicial Council re Post Conviction Procedure Act 3-4 (Oct. 22, 1970) (Tenn. State Archives).

56. *See* notes 22 & 34 *supra*. The 1971 amendments required the state attorney general to prepare petition forms "including a list of the most common grounds upon which post-conviction procedure relief is granted," if the Tennessee Supreme Court did not adopt rules "prescribing the form and con-

the supreme court to adopt would contain a list of the most common grounds upon which post-conviction relief is granted[57] so that petitioners would be better informed and would be forced to take a stand on all the usual grounds for relief in the first post-conviction petition. This would provide a more sound basis for ruling on the merits of grounds raised and for finding the waiver of most other grounds for relief.[58]

The 1971 amendments adopted by the legislature do not require the appointment of counsel for all indigent post-conviction petitioners[59] or the taking of a stand by the petitioner on each of the "most common grounds upon which post-conviction procedure relief is granted."[60] Such an innovative approach to achiev-

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tents of the petition." Act of Apr. 28, 1971, ch. 96, § 6, 1971 Tenn. Pub. Acts 173. Letter from Grayfred B. Gray, Executive Director of Law Revision Comm'n, to James G. Hall, Assistant Attorney General (Oct. 29, 1970) (Tenn. State Archives).

57. F. Dennis, Analysis of Proposed Post Conviction Procedure Act (First Draft), Criticism and Responses, Response to Criticism (5) of § 105 (Tenn. State Archives). *See* TENN. CODE ANN. § 40-3823 (1975); notes 19 *supra* & 66-68 *infra* and accompanying text.

58. F. Dennis, Analysis of Proposed Post Conviction Procedure Act (First Draft), Criticism and Responses, Response to Criticism (5) of § 105 (Tenn. State Archives).

59. The following language recommended by the Law Revision Commission was deleted from the final proposed draft of the 1971 amendment to Tennessee Code Annotated § 40-3804(10):

> and each ground shall be accompanied by a statement of the petitioner claiming that he is entitled to relief upon that ground along with the basic reasons for his claim or stating that he has considered that ground for relief, and, *after advising with counsel,* has knowingly and understandingly elected not to claim a right to relief upon that ground.

An Act to amend the Post-Conviction Procedure Act . . . (Third Draft) § 2 (Tenn. State Archives) (emphasis added).

60. Tennessee Code Annotated § 40-3823 (1975), as amended, requires the attorney general to draft a standard post-conviction petition form, including a list of the "most common grounds" and Tennessee Code Annotated § 40-3804(10) (1975), as amended, requires the petitioner in the first petition to "set forth each of the individual grounds, if any, *required* by the rules of the Supreme Court [there are no rules] *or* by any post-conviction procedure petition form provided under this chapter [the form the attorney general was required to prepare if the supreme court did not draft a form]." *Id.* (emphasis added). The form prepared by the attorney general, note 67 *infra,* does not require the

ing finality through one collateral attack proceeding would produce a recorded basis for a statutory presumption of waiver after disposition of the first post-conviction petition, but neither provision has yet been included in the Act. On occasion, a judge mindful of his duty to "require amendments needed to achieve substantial justice and a full and fair hearing of all available grounds for relief"[61] will make sure that all of the most common grounds have been considered in the preparation of the first petition.[62] Moreover, any appointed or retained attorney has a duty to aid the court by preparing amendments to the first petition which will assure a full and fair hearing of all available grounds for relief.[63] If the judge and counsel cooperate in fulfilling their statutory duties, there will be a sound basis in the record for a later finding of waiver of all other grounds. In many cases, however, Tennessee courts have limited judicial consideration of post-conviction petitions to the grounds and facts initially stated *pro se* by the petitioner.[64] As a result, too often even the first petition is dismissed without a hearing and without appointment of counsel, so that the opportunity to make sure that all available grounds for relief are included is lost.[65]

The standard post-conviction petition form prepared and furnished by the attorney general pursuant to another of the 1971 amendments[66] provides very little assistance to prisoners or the courts in ascertaining whether all available grounds for relief have been included in the first petition. The brief form contains a common grounds provision which gives *examples* of common grounds for relief, but it does not emphasize the prisoner's obli-

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petitioner to set forth any individual grounds.

61. TENN. CODE ANN. § 40-3815 (1975) (language included in the 1967 Act). Act of May 26, 1967, ch. 310, § 14, 1967 Tenn. Pub. Acts 801.

62. *See* note 17 *supra*.

63. *See* TENN. CODE ANN. §§ 40-3804(10), -3807, -3811, -3815 (1975) (role of counsel in post-conviction proceedings). In many states the primary burden of making sure that the prisoner has included all grounds for relief has been expressly assigned to counsel. See, for example, MO. SUP. CT. R. 27.26(h) (Vernon Supp. 1975-1979).

64. *See* notes 131-43 *infra* and accompanying text.

65. *See* note 75 *infra*.

66. Act of Apr. 28, 1971, ch. 96, § 6, 1971 Tenn. Pub. Acts 173 (codified at second paragraph of TENN. CODE ANN. § 40-3823 (1975)).

gation to include *all* available grounds for relief; the form language, "clear and concise statement of *the* grounds" forming the basis for the *"present* petition,"[67] suggests that the petitioner may assert other grounds in a later petition. An improvement in the wording of the form would make it easier to establish a record with regard to waiver of grounds not included in the first petition.[68]

To alleviate the complaint that post-conviction cases were not being heard by the original trial judge, the 1971 amendments included a provision which deleted a 1969 amendment forbidding the practice.[69] In 1972, however, the Act was amended again to restore the 1969 "different judge" requirement, with the proviso that if an issue is raised by the petitioner concerning the competency of counsel in the trial court proceedings, the original trial judge, when available, must be designated to hear the case.[70] As a result, a substantial percentage of post-conviction cases now are assigned to the original trial judge, since one of the most common allegations made by prisoners is that they were denied effective assistance of counsel.[71] If a pris-

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67. Paragraph 13 of the form prepared by the attorney general and supplied to prisoners pursuant to the 1971 amendments, *id.*, is the common grounds portion of the petition. It contains this statement, followed by four lines on which to answer the question:

> State clearly and concisely *the* grounds on which you base your *present* petition. *For example,* common grounds on which relief is granted are illegal search and seizure, ineffective assistance of counsel, failure to grant a change of venue, illegally obtained confession, improper lineup, prosecutorial misconduct, or an involuntary guilty plea.

*Id.* (emphasis added).

68. But see note 21 *supra* for a possible explanation for the very general description of the grounds of relief in the attorney general's form. The current approach aggravates the problems faced by the ignorant prisoner, which may include the lack of adequate prison law libraries and the unavailability of competent legal assistance. Because the prisoner will likely not be able to prepare a sufficient petition—one which will not be dismissed before appointment of counsel—the ignorant prisoner may be unable to take even the first step toward obtaining post-conviction relief.

69. Act of Apr. 28, 1971, ch. 96, § 1, 1971 Tenn. Pub. Acts 173 (amending TENN. CODE ANN. § 40-3803 (1975)). *See* note 42 *supra* and accompanying text.

70. Act of Apr. 11, 1972, ch. 792, § 1, 1972 Tenn. Pub. Acts 1297 (codified at last sentence of TENN. CODE ANN. § 40-3803 (1975)).

71. Petitioners made a claim of denial of effective assistance of counsel in

oner feels that the judge who presided at his original trial cannot be impartial in considering his post-conviction petition, he would be well advised to omit a claim of ineffective assistance of counsel from his petition unless he believes it to be essential.[72]

Another significant 1971 amendment provides that a petition must be filed under the Act before the judge is authorized to supply the petitioner with the necessary transcript of the trial or other proceedings.[73] Some judges previously had construed Tennessee Code Annotated section 40-3818 to permit them to order a transcript for an indigent prisoner before he filed a post-conviction petition.[74] Now a prisoner must file a petition that sufficiently alleges a basis for post-conviction relief by stating "[f]acts establishing the grounds on which the claim for relief is based"[75] before he is entitled to free "certified copies of such documents or parts of the record on file . . . as may be required."[76]

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75 of 169, or 44%, of the appeals under the Act decided in the past 12 years, *see* note 12 *supra*. In 29 of these 75 appeals, the petitioner was also attacking the voluntariness of a guilty plea. These and the following statistics are based on all of the published opinions of the Tennessee Supreme Court and Tennessee Court of Criminal Appeals. Many post-conviction opinions in recent years have not been considered important enough to be published. See standards for publication in TENN. SUP. CT. R. 4(2) (1981).

72. Under Baxter v. Rose, 523 S.W.2d 930 (Tenn. 1975), a landmark case changing the test for determining whether there was a denial of the constitutional right to effective assistance of counsel, the Tennessee criminal defense attorney, retained or appointed, must give advice and render services within the range of competence demanded of attorneys in criminal cases, guided by the ABA STANDARDS FOR PROVIDING DEFENSE SERVICES (1968).

73. Act of Apr. 28, 1971, ch. 96, § 5, 1971 Tenn. Pub. Acts 173 (adding the words "After a petition has been filed," to the beginning of Tennessee Code Annotated § 40-3813 (1975)).

74. G. Gray, Memorandum to Tennessee Judicial Council re Post Conviction Procedure Act 6 (Oct. 22, 1970) (Tenn. State Archives).

75. TENN. CODE ANN. § 40-3804(10) (1975). Unless this statutory requirement is met, courts often will summarily dismiss post-conviction petitions without appointing counsel to help in amending the petition to sufficiently state facts establishing grounds for relief. *See, e.g.*, Arthur v. State, 483 S.W.2d 95 (Tenn. 1972); Carter v. State, 600 S.W.2d 750 (Tenn. Crim. App. 1980); Crumley v. Tollett, 474 S.W.2d 148 (Tenn. Crim. App.), *cert. denied, id.* (Tenn. 1971). *See* notes 131-33 *infra* and accompanying text.

76. TENN. CODE ANN. § 40-3813 (1975).

## III. Restrictions on the Availability of Collateral Attack

Very little post-conviction relief has in fact been granted to Tennessee prisoners by Tennessee appellate courts during the years following the Post-Conviction Procedure Act.[77] In only twenty-six of the 169 reported post-conviction appeals was some type of relief granted either to the petitioner or to the state.[78] The relief granted to petitioners in eight of the appeals was limited to a remand for further lower court proceedings, usually an evidentiary hearing.[79] In six cases the relief was based on unconstitutional denial of the right to direct appellate review from the conviction, and thus the remedy was limited to reinstating appeal rights.[80] Tennessee petitioners obtained major relief on appeal in only five reported post-conviction cases during the twelve-year period after the first decision was published.[81] In no case did the Tennessee appellate courts hold that the petitioner

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77. *See* note 12 *supra*.

78. *See also* Anderson, *supra* note 16, at 3-4 (Missouri post-conviction statistics).

79. Baxter v. Rose, 523 S.W.2d 930 (Tenn. 1975); State v. Gilley, 517 S.W.2d 7 (Tenn. 1974); Pruett v. State, 501 S.W.2d 807 (Tenn. 1973); Donovan v. State, 580 S.W.2d 795 (Tenn. Crim. App. 1978); Monroe v. State, 569 S.W.2d 860 (Tenn. Crim. App.), *cert. denied, id.* (Tenn. 1978); Harris v. State, 539 S.W.2d 138 (Tenn. Crim. App.), *cert. denied, id.* (Tenn. 1976); Skinner v. State, 472 S.W.2d 903 (Tenn. Crim. App.), *cert. denied, id.* (Tenn. 1971); Moran v. State, 457 S.W.2d 886 (Tenn. Crim. App.), *cert. denied, id.* (Tenn. 1970). *See also* Anderson, *supra* note 16, at 3.

80. State v. Wilson, 530 S.W.2d 766 (Tenn. 1975); State v. Williams, 529 S.W.2d 714 (Tenn. 1975); Hutchins v. State, 504 S.W.2d 758 (Tenn. 1974); State v. Hopson, 589 S.W.2d 952 (Tenn. Crim. App.), *appeal denied, id.* (Tenn. 1979); Campbell v. State, 576 S.W.2d 591 (Tenn. Crim. App.), *cert. denied, id.* (Tenn. 1978); Moultrie v. State, 542 S.W.2d 835 (Tenn. Crim. App.), *cert. denied, id.* (Tenn. 1976). In all these cases except *Wilson*, the relief was limited to reinstatement of the statutory period for filing a petition for certiorari, relief which only the court of criminal appeals can grant. State v. Hopson, 589 S.W.2d 952 (Tenn. Crim. App.), *appeal denied, id.* (Tenn. 1979).

81. State v. Alley, 594 S.W.2d 381 (Tenn. 1980) (remand to juvenile court); Howell v. State, 569 S.W.2d 428 (Tenn. 1978) (plea involuntary, new trial or new sentence); Tinker v. State, 579 S.W.2d 905 (Tenn. Crim. App. 1979) (sentence modification); Beaver v. State, 475 S.W.2d 557 (Tenn. Crim. App. 1971) (new trial on punishment only), *cert. denied, id.* (Tenn. 1972); Moran v. State, 472 S.W.2d 238 (Tenn. Crim. App.) (ineffective counsel, new trial), *cert. denied, id.* (Tenn. 1971). *See also* Anderson, *supra* note 16, at 3.

was entitled to be released from custody. On the other hand, the state prevailed in seven post-conviction appeals.[82]

During this same twelve-year period a small percentage of Teenessee prisoners filed state habeas corpus petitions seeking post-conviction relief, and a few reported habeas appeals were taken.[83] In four out of twenty-six habeas appeals some type of relief was granted. In one appeal the petitioner obtained limited relief in the form of reinstated appeal rights.[84] In another, the habeas petitioner obtained major relief in the form of a trial,[85] and in two appeals, the state prevailed.[86]

Considering the comprehensive constitutional grounds for collateral attack of Tennessee convictions,[87] the paucity of post-conviction relief on appeal is surprising. Certain provisions of the Post-Conviction Procedure Act have been interpreted and applied in a manner that severely restricts the availability of collateral attack on convictions. Indeed, the statistics and the appellate decisions suggest very few situations in which post-con-

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82. State v. Williams, 490 S.W.2d 519 (Tenn. 1973); Gross v. Neil, 483 S.W.2d 584 (Tenn. 1972); State v. Wright, 475 S.W.2d 546 (Tenn. 1972); State v. Cook, 479 S.W.2d 823 (Tenn. Crim. App. 1971), *cert. denied, id.* (Tenn. 1972); Janow v. State, 470 S.W.2d 19 (Tenn. Crim. App.), *cert. denied, id.* (Tenn. 1971); State v. Davis, 466 S.W.2d 237 (Tenn. Crim. App. 1970), *cert. denied, id.* (Tenn. 1971); Winrow v. State, 460 S.W.2d 379 (Tenn. Crim. App.), *cert. denied, id.* (Tenn. 1970).

83. These 26 decisions are reported in volumes 440 through 611 of the Southwestern Reporter, Second Series, and are in addition to the 14 decisions prior to the first post-conviction decision in 1969, *see* note 31 *supra*.

84. Moultrie v. State, 584 S.W.2d 217 (Tenn. Crim. App. 1978) (denial of effective assistance of counsel), *cert. denied, id.* (Tenn. 1979).

85. Solomon v. State, 529 S.W.2d 743 (Tenn. Crim. App. 1975) (no jurisdiction of general sessions court judge to reduce charge to misdemeanor and to impose sentence).

86. State *ex rel.* Roberts v. Henderson, 442 S.W.2d 629 (Tenn. 1969) (petitioner waived disqualification of judge); State v. Graham, 544 S.W.2d 921 (Tenn. Crim. App.) (sentence consecutive as matter of law, writ quashed), *cert. denied, id.* (Tenn. 1976).

87. TENN. CODE ANN. § 40-3805 (1975). A great number of federal constitutional violations occurring during the criminal process leading to conviction have been held to be grounds for relief. While the post-conviction focus usually is on federal constitutional law, "the abridgement in any way of any right guaranteed by the constitution" of Tennessee also is a ground for relief if it makes the conviction or sentence void or voidable. *Id.*

viction relief is available in Tennessee. An examination of the four basic post-conviction situations and the restrictions affecting them reveals the reasons that relief has so seldom been granted in Tennessee post-conviction appeals and that trial judges have so often been able to dismiss petitions summarily without any hearing on alleged denials of constitutional rights.

### *A. Petitioner Appealed the Conviction on a Constitutional Issue and Lost*

When a post-conviction petitioner already has raised a constitutional issue on appeal from his conviction and lost, collateral attack is barred because the issue has been "previously determined" by a "court of competent jurisdiction."[88] Although this res judicata restriction against relitigating an issue is intended to apply only when there has been a "full and fair hearing" before any ruling on the merits of the issue,[89] Tennessee courts considering post-conviction petitions ordinarily assume that such a hearing was given when an issue previously raised in the trial court has been determined on appeal.[90]

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88. TENN. CODE ANN. §§ 40-3811 to -3812 (1975). As a result of this principle, 38 of 169 appeals of post-conviction cases were decided by affirming trial court dismissals of petitions without a hearing. In an additional 26 appeals in which a trial court hearing was held on the petition, these sections were cited as the basis for not considering one or more issues raised in the petition. *See* note 112 *supra*.

Although the addition of a waiver provision in the 1971 amendments was aimed at preventing only repetitious petitions, *see* note 49 *supra*, the amended sections have been broadly applied to prevent even a first post-conviction hearing on issues considered "previously determined" or "waived." *See* notes 52-54 *supra*.

89. TENN. CODE ANN. § 40-3812 (1975). A full and fair hearing on a constitutional issue is necessary for a final determination on factual issues. Such a determination will ordinarily foreclose a federal habeas corpus evidentiary hearing. Townsend v. Sain, 372 U.S. 293 (1963).

90. Much of the federal habeas corpus relief granted in Tennessee cases since 1967 has been granted in cases in which appeals have been rejected by the Tennessee state courts. These federal cases indicate that prisoners do not always receive full and fair hearings in the state trial courts. *E.g.*, Mitchell v. Rose, 570 F.2d 129 (6th Cir. 1978) (no findings of fact or rulings of law in trial court); Elliott v. Morford, 557 F.2d 1228 (6th Cir. 1977) (no findings of facts on voluntariness of confession, evidentiary hearing required); Marshall v. Rose,

### B. *Petitioner Failed to Raise the Issue in the Sentencing Court*

If the post-conviction petitioner is raising a constitutional issue that he failed to raise in the sentencing court, the issue almost always is considered waived, although there has been no hearing or decision on the merits. Under the Tennessee waiver rule, a constitutional ground for post-conviction relief is *presumed* waived when there has been a procedural default or a guilty plea in the sentencing court.

#### 1. Waiver by Procedural Default

The 1967 Act, as amended in 1971, defines waiver of a ground for relief that was not raised previously.[91] After stating that "a ground for relief is 'waived' if the petitioner knowingly and understandingly failed to present it for determination *in any proceeding* before a court of competent jurisdiction in which the ground could have been presented," the Act creates a "rebuttable presumption that a ground for relief not raised in any such proceeding which was held was waived."[92] Relying upon these provisions, the courts have continued their pre-1971 practice[93] of finding that a ground for relief has been waived when there was a "procedural default"—a mere failure to raise the ground in a proper and timely manner in the sentencing court.[94]

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499 F.2d 1163 (6th Cir. 1974) (lineup improper, federal district court first determined independent source issue); Walden v. Neil, 318 F. Supp. 1969 (E.D. Tenn. 1970) (inadequate fact findings and record), *aff'd*, 451 F.2d 1350 (6th Cir. 1971); Moore v. Russell, 294 F. Supp. 615 (E.D. Tenn. 1968) (no evidence in trial court on issue).

91. TENN. CODE ANN. § 40-3812 (1975).

92. *Id.* (emphasis added). *See* notes 51-53 *supra*.

93. *See* note 43 *supra*. Pre-1971 amendment cases finding waiver include Daugherty v. State, 470 S.W.2d 865 (Tenn. Crim. App.) (no valid objection made, appeal waived), *cert. denied, id.* (Tenn. 1971); Doyle v. State, 458 S.W.2d 637, 639 (Tenn. Crim. App.) (jury discrimination issue waived, no timely objection), *cert. denied, id.* (Tenn. 1970); Burt v. State, 454 S.W.2d 182, 185 (Tenn. Crim. App.) (jury discrimination issue waived), *cert. denied, id.* (Tenn. 1970).

94. *E.g.*, Arthur v. State, 483 S.W.2d 95 (Tenn. 1972) (no objection, no post-conviction hearing required); Carroll v. State, 532 S.W.2d 934 (Tenn.

While it is true that the amended Act creates only a rebuttable presumption of waiver, even a petitioner who did not knowingly and understandingly fail to present a ground for determination in the sentencing court usually is unable to allege and prove sufficient facts to rebut the presumption of waiver. When such a petitioner alleges that at his trial he did not know or understand, he generally is considered bound by the failure of his attorney to raise the issue.[95] If this failure resulted from the attorney's inadvertence or ignorance, but the petitioner is unable to prove constitutional ineffectiveness of counsel, the ground is considered waived by the procedural default of the attorney.[96]

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Crim. App.) (loss of right to be tried in civilian clothes), *cert. denied, id.* (Tenn. 1975); Helton v. State, 530 S.W.2d 781 (Tenn. Crim. App.) (incompetent juror, must raise at earliest opportunity), *cert. denied, id.* (Tenn. 1975); Holiday v. State, 512 S.W.2d 953, 957 (Tenn. Crim. App. 1972) (competent counsel, basis for finding knowing and understanding waiver in addition to procedural default), *cert. denied, id.* (Tenn. 1973).

In Burt v. State, 454 S.W.2d 182 (Tenn. Crim. App.), *cert. denied, id.* (Tenn. 1970), the court explained the basis for waiver by procedural default:

> We do not believe that one should be permitted to raise a question in a post conviction proceeding that was waived by failure upon the trial, *by design or otherwise,* to timely raise it when our procedural law prescribes that it should be raised. To permit this type procedure would make a sham of the trial itself. When the constitutional right asserted was as well recognized at the time of the trial as now, and *a procedure for asserting it was prescribed, failure to then assert the claimed right upon the trial waives it* and prohibits its subsequent assertion in a post conviction proceeding. A defendant should not be permitted to "save back his rights"; attempt to obtain an acquittal by a jury; and, failing that, then attack that same jury post conviction.

*Id.* at 185 (emphasis added).

Waiver by procedural default does "not apply to a defense, . . . which did not exist and could not have been asserted by the most diligent counsel at the time of the hearing." Pruett v. State, 501 S.W.2d 807, 809 (Tenn. 1973); TENN. CODE ANN. § 40-3805 (1975).

95. *See, e.g.,* Holiday v. State, 519 S.W.2d 597, 600 (Tenn. Crim. App. 1972) (distinguishing between decisions on a fundamental right, such as guilty plea, and trial decisions), *cert. denied, id.* (Tenn. 1973).

96. Williams v. State, 599 S.W.2d 276 (Tenn. Crim. App.), *appeal denied, id.* (Tenn. 1980). *Cf.* Tollett v. Henderson, 411 U.S. 258 (1973) (guilty plea). However, under the higher standard of competence adopted in Baxter v. Rose, 523 S.W.2d 930 (Tenn. 1975), if the petitioner alleges and can prove that the advice given or the services rendered by the attorney are not within the

On the other hand, courts applying the true waiver test, by which the client must knowingly and understandingly participate in a critical waiver decision,[97] very often add the statutory presumption of waiver to the petitioner's failure to raise the ground being claimed and then rule that he has waived the issue.[98] In summary, whenever a post-conviction petitioner appears to have waived a federal or state constitutional claim by failing to raise it in the sentencing court, the Tennessee presumption of waiver rule reinforces a judicial predisposition to avoid considering the merits of the claim and puts a heavy burden on the petitioner to allege and prove a negative—that the claim has not been knowingly and understandingly waived.[99]

### 2. Waiver by Guilty Plea

A valid plea of guilty constitutes a waiver of all defenses, including all nonjurisdictional and constitutional defects in prior proceedings.[100] A defendant who voluntarily, knowingly, and un-

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range of competence demanded of attorneys in criminal cases, the statutory presumption of waiver will be rebutted. Of course, in such cases the denial of effective assistance of counsel is in itself a ground for collateral attack on the conviction. *Id.* at 936.

97. True waiver is "an intentional relinquishment or abandonment of a known right or privilege." Johnson v. Zerbst, 304 U.S. 458, 464 (1938). *Compare* the true waiver rule *with* the federal deliberate by-pass rule articulated by the United States Supreme Court in Fay v. Noia, 372 U.S. 391, 439 (1963).

98. Consider the common post-conviction situations in which the petitioner will not be able to rebut the presumption of waiver, even though there was no knowing and understanding waiver: (1) Petitioner is not able to explain to the satisfaction of the court in his petition why he did not previously present the issue in the sentencing court, TENN. CODE ANN. § 40-3804(10) (1975); Arthur v. State, 483 S.W.2d 95 (Tenn. 1972) (dismissal without counsel or hearing, no allegation of sufficient grounds for not presenting issues); (2) Petitioner alleges sufficient grounds for not presenting issue previously but is not able to carry his burden of rebutting the presumption of waiver by proving his lack of knowledge or understanding; for the opposite federal approach, see Phillips v. Neil, 452 F.2d 337, 349 (6th Cir. 1971) (presumption against waiver of right of confrontation).

99. This result runs counter to several major purposes of post-conviction reform. *See* notes 15-16 *supra* and accompanying text.

100. Tollett v. Henderson, 411 U.S. 258, 267 (1973). Many Tennessee post-conviction decisions have followed this approach. Garrett v. State, 534 S.W.2d 325 (Tenn. Crim. App. 1975) (speedy trial right), *cert. denied, id.*

derstandingly[101] enters a plea of guilty has decided not to contest the criminal charge against him; in so doing he waives all grounds for post-conviction relief that arose prior to the making of the plea.[102] Nevertheless, the petitioner may attack the plea itself if it was not made voluntarily or knowingly and understandingly.[103] When a post-conviction attack on a guilty plea is successful, the conviction and plea will be set aside; ordinarily the successful petitioner will be free again, as a defendant in the trial court, to raise any defense that he waived by pleading guilty.[104]

Although appellate courts often state that a valid guilty plea does not constitute a waiver of jurisdictional grounds for attacking a conviction as void,[105] Tennessee courts have been reluctant

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(Tenn. 1976); Crum v. State, 530 S.W.2d 103 (Tenn. Crim. App.) (denial of right to subpoena), *cert. denied, id.* (Tenn. 1975); Troletti v. State, 483 S.W.2d 755 (Tenn. Crim. App.) (several grounds waived by plea), *cert. denied, id.* (Tenn. 1972); Little v. State, 469 S.W.2d 537 (Tenn. Crim. App.) (insufficient allegations of involuntary plea, no hearing on this and issues waived by plea), *cert. denied, id.* (Tenn. 1971).

101. The presumption of waiver in Tennessee Code Annotated § 40-3812 (1975) does not apply to restrict post-conviction attack on a guilty plea. "Our system of justice cannot tolerate the presumption that a defendant voluntarily relinquished such fundamental rights." State v. Mackey, 553 S.W.2d 337, 340 (Tenn. 1977). *Mackey* requires that "the record of acceptance of a defendant's plea of guilty must affirmatively demonstrate that his decision was both voluntary and knowledgeable, *i.e.*, that he has been made aware of the significant consequences of such a plea; otherwise, it will not amount to an 'intentional abandonment of a known right.' " *Id.* However, a violation of some of *Mackey's* guilty plea procedures, to the extent that they go beyond the requirements of Boykin v. Alabama, 395 U.S. 238 (1969), does not provide any constitutional basis for collateral attack. State v. Wallace, 604 S.W.2d 890, 892 (Tenn. Crim. App.), *appeal denied, id.* (Tenn. 1980).

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

103. Howell v. State, 569 S.W.2d 428 (Tenn. 1978) (mistaken advice, relief granted). *Cf.* Clenny v. State, 576 S.W.2d 12 (Tenn. Crim. App.), *cert. denied, id.* (Tenn. 1978); Garrett v. State, 530 S.W.2d 98 (Tenn. Crim. App.), *cert. denied, id.* (Tenn. 1975). *See* Anderson, *supra* note 16, at 6-14.

104. TENN. CODE ANN. § 40-3818 (1975). *See* Howell v. State, 569 S.W.2d 428, 435 (Tenn. 1978).

105. *E.g.*, Crum v. State, 530 S.W.2d 103 (Tenn. Crim. App.), *cert. denied, id.* (Tenn. 1975); Parker v. State, 492 S.W.2d 456 (Tenn. Crim. App. 1972), *cert. denied, id.* (Tenn. 1973); Little v. State, 469 S.W.2d 537 (Tenn. Crim. App.), *cert. denied, id.* (Tenn. 1971).

to classify many grounds for collateral attack as jurisdictional.[106] Almost all jurisdictional defects will be discovered and raised in the sentencing court;[107] thus, very few convictions based upon guilty pleas will be subject to jurisdictional attack in post-conviction proceedings.[108]

### C. *Petitioner Raised the Issue in the Sentencing Court But Did Not Raise That Issue on Appeal*

When the petitioner raised the issue in the sentencing court

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106. Because a valid warrant or indictment stating a criminal offense is essential to criminal jurisdiction, *see* TENN. R. CRIM. P. 12(b)(2); TENN. R. APP. P. 13(b); State v. Hughes, 212 Tenn. 644, 371 S.W.2d 445 (1963), failure of an indictment to state an offense is jurisdictional, but other defects in the charging process are considered nonjurisdictional and thus are subject to waiver. See State *ex rel.* Henderson v. Russell, 459 S.W.2d 176 (Tenn. Crim. App. 1970), in which a divided court held that constitutional defects in the grand jury selection process did not result in a void indictment subject to jurisdictional attack because the defendant waived the issue by pleading guilty. In a strong dissent, Judge Oliver argued that the indictment by an unconstitutionally selected grand jury was "so fatally defective as to deprive the court of jurisdiction." *Id.* at 187 (Oliver, J., dissenting). The petitioner sought federal habeas corpus relief, which was granted in Henderson v. Tollett, 342 F. Supp. 113 (M.D. Tenn. 1971), *aff'd*, 459 F.2d 237 (6th Cir. 1972), *rev'd*, 411 U.S. 258 (1973). The United States Supreme Court held that in order to obtain habeas relief the petitioner must establish not only unconstitutional discrimination, but also that his attorney's advice to plead guilty without making inquiry into the composition of the grand jury rendered that advice outside the range of competence demanded of attorneys in criminal cases. Otherwise, petitioner was bound by the actions of counsel. 411 U.S. at 266. Judge Oliver was not convinced; he later commented that the Court "completely overlooked that an indictment by an unconstitutionally segregated Grand Jury is void, as that Court has repeatedly held." Holiday v. State, 519 S.W.2d 597, 604 (Tenn. Crim. App. 1973) (Oliver, J., dissenting).

107. *But see* State *ex rel.* Haywood v. Superintendent, Davidson County Workhouse, 259 S.W.2d 159 (Tenn. 1953) (habeas corpus relief, no jurisdiction in Juvenile and Domestic Relations Court); Lynch v. State *ex rel.* Killebrew, 166 S.W.2d 397 (Tenn. 1942) (habeas corpus relief, adult sentenced to training school after plea).

108. Only one Tennessee collateral attack decision was found in the last fourteen years, *see* note 12 *supra*, in which a jurisdictional ground for relief was recognized. Solomon v. State, 529 S.W.2d 743 (Tenn. Crim. App. 1975) (habeas corpus relief, general sessions judge had no jurisdiction to reduce felony charge to misdemeanor, guilty plea irrelevant).

but not on appeal, the issue is deemed to have been "previously [finally] determined" by the sentencing court, a "court of competent jurisdiction,"[109] because the petitioner appealed and "failed to present [the issue] for determination" in his appeal from the conviction.[110] The issue is both previously determined and waived; collateral attack based on the issue is barred because of the prior determination and also because the petitioner appealed but did not take advantage of his right to seek appellate court review of the sentencing court's determination.[111]

Since direct appeal is the only way to raise nonconstitutional issues that directly attack the conviction or sentence, most petitioners who seek post-conviction relief in Tennessee following trial already have appealed.[112] If a defendant and his

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109. TENN. CODE ANN. §§ 40-3811 & -3812 (1975). Brown v. State, 489 S.W.2d 268 (Tenn. Crim. App. 1972), *cert. denied, id.* (Tenn. 1973); *see* Hughes v. State, 451 S.W.2d 696 (Tenn. Crim. App. 1969) (federal district court also considered "court of competent jurisdiction"), *cert. denied, id.* (Tenn. 1970).

110. TENN. CODE ANN. § 40-3812 (1975). *E.g.*, Pruett v. State, 501 S.W.2d 807, 809-10 (Tenn. 1973); Hull v. State, 589 S.W.2d 948, 950 (Tenn. Crim. App.), *cert. denied, id.* (Tenn. 1979); Roach v. Moore, 550 S.W.2d 256, 261 (Tenn. Crim. App.), *cert. denied, id.* (Tenn. 1977). *Cf.* Rudd v. State, 531 S.W.2d 117, 118 (Tenn. Crim. App. 1974) (waiver by not appealing prior post-conviction determination), *cert. denied, id.* (Tenn. 1975). The case law prior to the 1971 amendments to the Act was basically the same. Burt v. State, 454 S.W.2d 182 (Tenn. Crim. App.) (issue either determined on appeal or waived by failure to raise it), *cert. denied, id.* (Tenn. 1970).

111. TENN. CODE ANN. § 40-3812 (1975). *See* notes 50-53 & 88-90 *supra* and accompanying text; Cureton v. Tollett, 477 S.W.2d 233, 236 (Tenn. Crim. App. 1971) (counsel required to make decisions on what to include in appeal), *cert. denied, id.* (Tenn. 1972). Of course, if the petitioner deliberately and inexcusably failed to present the issue on appeal, there is an abuse of process justifying denial of relief. ABA STANDARDS RELATING TO POST-CONVICTION REMEDIES 6.2(b) (1968).

112. A post-conviction petition raising only nonconstitutional issues is subject to dismissal without a hearing, Arthur v. State, 483 S.W.2d 95, 96 (Tenn. 1972); Carter v. State, 600 S.W.2d 750, 754 (Tenn. Crim. App.), *appeal denied, id.* (Tenn. 1980); Brown v. State, 537 S.W.2d 719, 721 (Tenn. Crim. App. 1975); Parton v. State, 483 S.W.2d 753, 755 (Tenn. Crim. App.), *cert. denied, id.* (Tenn. 1972); Young v. State, 477 S.W.2d 220, 221 (Tenn. Crim. App. 1971), *cert. denied, id.* (Tenn. 1972); Wooten v. State, 477 S.W.2d 767, 768 (Tenn. Crim. App. 1971), *cert. denied, id.* (Tenn. 1972), as is a habeas corpus petition which raises no constitutional issues, State *ex rel.* Newsom v.

counsel were unable to build a sufficient record in the sentencing court for possible appellate relief on constitutional issues, these issues may be dropped from the appeal in order to focus attention on nonconstitutional issues considered likely to produce a reversal. Then, if the appeal is lost, the defendant, now a prisoner, may decide to attack the conviction collaterally by petitioning for a hearing on constitutional issues not raised on appeal, only to discover that the issues were "previously determined" by the sentencing judge.[113] Often it is the sentencing judge who decides whether the post-conviction petition alleging these grounds should be dismissed, and he is not likely to grant a hearing to relitigate issues he has already decided.[114] On the other hand, if the prisoner insists on raising these constitutional issues on appeal, notwithstanding a poor record and poor chances for success, and loses the appeal, the court considering his post-conviction petition will rule that the issues were determined previously on appeal.[115]

### *D. Petitioner Raised the Issue in the Sentencing Court But Did Not Appeal*

When the petitioner has decided not to appeal his conviction, post-conviction relief is barred because the issue has been raised and "previously determined" by the sentencing court, a "court of competent jurisdiction."[116] Prior to July 13, 1978, the effective date of Tennessee Rule of Criminal Procedure 37(d), any sentencing court determination of the issue "after a full and fair hearing" automatically became a final determination once the time for any appeal had passed.[117] Moreover, post-conviction

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Henderson, 424 S.W.2d 186 (Tenn. 1968).

113. TENN. CODE ANN. § 40-3812 (1975); Townsend v. Sain, 372 U.S. 293 (1963). Both of these authorities require a full and fair hearing before the determination will be considered final.

114. *See* notes 69-71 *supra* and accompanying text. *Cf.* note 33 *supra* and accompanying text; TENN. CODE ANN. §§ 40-3803, -3809 (1975).

115. *See* notes 79-81 *supra* and accompanying text.

116. TENN. CODE ANN. §§ 40-3811 to -3812 (1975).

117. TENN. CODE ANN. §§ 40-3811 to -3812 (1975); Brown v. State, 489 S.W.2d 268 (Tenn. Crim. App. 1972), *cert. denied, id.* (Tenn. 1973). In *Brown* the prisoner had filed a habeas corpus petition before trial, which was stricken upon motion of the State. The order striking the petition was not appealed,

relief was barred because the petitioner, by failing to take advantage of his right to appeal the previous determination, was held to have waived the issue.[118] Even when there was an express oral or written waiver of the right to appeal, proving that the decision was voluntary as well as knowing and understanding,[119] far too often no record was made in the sentencing court; thus, the only basis for presuming that the petitioner had knowingly and understandingly failed to present the issue by not appealing was that of procedural default.[120] Since the decision not to take an appeal is one that vitally affects life and liberty, the Tennessee courts should have required a written record of the waiver to make sure the defendant was aware of the consequences.[121] Until Rule 37(d) was adopted, however, petitioners who simply failed to pray for an appeal within a reasonable time were bound by the sentencing court's determination of an issue unless they could prove that they had been denied their right to appeal because of a constitutional violation.[122] There are good reasons for discouraging procrastination: if the petitioner waits very long before seeking a delayed appeal, adequate records of

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but the prisoner later filed a post-conviction petition raising the same issues that had been raised in the habeas corpus petition. The *Brown* court dismissed the petition. The court found that the issues raised had been "previously determined" by the summary disposition of the habeas corpus petition in the trial court, even though "a court of competent jurisdiction [had not] ruled on the merits after a full and fair hearing," TENN. CODE ANN. § 40-3812 (1975), because the defendant chose to accept the determination by failing to appeal.

118. Brown v. State, 489 S.W.2d 268, 270-71 (Tenn. Crim. App. 1972), *cert. denied, id.* (Tenn. 1973).

119. *E.g.*, Parker v. Russell, 451 S.W.2d 722 (Tenn. Crim. App. 1969) (oral waiver), *cert. denied, id.* (Tenn. 1970). *See* Combs v. State, 530 F.2d 695, 697-98 & n.1 (6th Cir. 1976) (written waiver of right to file motion for new trial and for appeal).

120. *See* notes 91-99 *supra* and accompanying text. In this waiver of appeal situation the deliberate by-pass rule of Fay v. Noia, 372 U.S. 391, 439 (1963), is still the test for determining whether federal habeas corpus relief is available. Wainwright v. Sykes, 433 U.S. 72, 91-92 (1977) (Burger, C.J., concurring).

121. See Gross v. Neil, 483 S.W.2d 584 (Tenn. 1972) (waiver by counsel plus knowing acquiescence), for the problems of proof encountered if there is no written record of waiver.

122. TENN. CODE ANN. § 40-3820 (1975); *see* note 22 *supra* and accompanying text.

the trial court proceedings may no longer be available, especially records based on notes that have to be transcribed. In addition, a petitioner who allows several years to pass before perfecting an appeal may be prejudiced by a judicial attitude that he should have raised the claim of deprivation of appeal at an earlier time.[123]

In proposing Rule 37(d), the Tennessee Supreme Court finally recognized the need for a properly documented record of any waiver of appeal. A post-conviction petitioner who previously has signed a Rule 37(d) "written waiver of appeal" which "clearly reflect[s] that the defendant was aware of the right and voluntarily waived it"[124] will be barred from relitigating any constitutional claim by means of collateral attack.[125] The waiver of appeal thus amounts to a waiver of any right to post-conviction relief on issues raised and determined by the sentencing court which could have been reviewed on appeal.[126] If a convicted defendant does not sign a waiver of appeal, Rule 37(d) requires his attorney to pray for an appeal before the judgment becomes final.[127] Thus, Rule 37(d) promotes early finality of convictions on all issues raised in the sentencing court by requiring defendants either to appeal or to sign a written waiver of appeal.[128]

Generally, a defendant who believes that his constitutional rights were violated will raise the constitutional issues in the trial court and again on appeal following conviction. In all likelihood such claims will have been finally determined before he is eligible to seek post-conviction relief. A defendant who chooses not to appeal and signs a written waiver—assuming, of course,

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123. *See* Gross v. Neil, 483 S.W.2d 584, 586 (Tenn. 1972).

124. TENN. R. CRIM. P. 37(d).

125. TENN. CODE ANN. §§ 40-3811 to -3812 (1975). Waiver of appeal will not prevent a defendant from raising a new issue, like denial of effective assistance of counsel at trial, which requires a post-conviction hearing. *See* notes 95-96 *supra*.

126. TENN. CODE ANN. §§ 40-3811 to -3812 (1975).

127. TENN. R. CRIM. P. 37(d).

128. *Id.* However, early finality may be defeated if defense counsel who prays for an appeal fails to meet jurisdictional requirements for perfecting the appeal. *See* Massey v. State, 592 S.W.2d 333 (Tenn. Crim. App.), *appeal denied, id.* (Tenn. 1979).

that he does so voluntarily, knowingly, and understandingly[129] — also will waive any right to post-conviction relief on issues that could have been reviewed on appeal.

### *E. Other Restrictions on the Availability of Collateral Attack*

The foregoing sections have shown that in almost all situations in which post-conviction relief is sought, there are restrictions barring collateral attack.[130] These, however, are not the only restrictions blocking access to post-conviction relief in Tennessee courts.

#### 1. Pleading Requirements and Limitations on the Right to Counsel

Tennessee judges often summarily dismiss post-conviction

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129. *See* notes 101-03 *supra* and accompanying text. Since Tennessee Rule of Criminal Procedure 37(d) does not require a knowing and understanding waiver of appeal, a written waiver of appeal under the rule might later be subject to collateral attack on this ground, resulting in a delayed appeal. To guard against this possibility, counsel for the recently convicted defendant should make certain that the waiver of appeal is a knowing and understanding one. ABA STANDARDS RELATING TO CRIMINAL APPEALS 2.2(a) (1970).

A defendant who is dissatisfied with his trial counsel may think he should waive his right to appeal since ordinarily trial counsel will represent him on appeal, TENN. R. CRIM. P. 37(3), and petition immediately for post-conviction relief on the basis of ineffective assistance of counsel. If a convicted defendant indicates to the court or to trial counsel in any way that he is dissatisfied with counsel's services, counsel should neither accept and cosign a waiver of appeal under Rule 37(d) nor represent the defendant on appeal; instead, trial counsel should withdraw, and new counsel should be employed or appointed to advise the defendant about his appeal rights. *See* ABA STANDARDS RELATING TO CRIMINAL APPEALS 2.2(c) (1970).

130. *See* notes 78-80 *supra* and accompanying text. The following are situations in which retroactively applied post-conviction relief is available: if the petition asserts a constitutional right which was not recognized at the time of trial, TENN. CODE ANN. § 40-3805 (1975); if petitioner can rebut the presumption of waiver under Tennessee Code Annotated § 40-3812 (1975), *see* notes 91-99 *supra* and accompanying text; or if the petitioner can show that his guilty plea was not knowing or voluntary, *see* note 103 *supra* and accompanying text. Apart from these situations, there are almost no circumstances in which post-conviction relief is available in Tennessee courts.

petitions that appear on their faces to have no merit.[131] A prisoner who petitions for relief under the Act is required to allege "[f]acts establishing the grounds on which the claim for relief is based."[132] In other words, the petitioner must allege facts that, if proved, would constitute a denial of his constitutional rights.[133] In addition, the petitioner must attach "affidavits, records or other evidence supporting [the] allegations" or state why they are not attached.[134] The judge examining a petition should take into account its substance rather than its form and should not dismiss the petition for "technical defects, incompleteness or lack of clarity"[135] or for "failure to follow the prescribed form or procedure"[136] without giving the petitioner reasonable opportunity, with the aid of counsel, to file amendments or an amended petition.[137] The judge "may freely allow amendments and shall require amendments needed to achieve substantial justice and a full and fair hearing of all available grounds for relief."[138] It is only after "the petition has been competently drafted and all pleadings, files and records of the case which are before the court conclusively show that the petitioner is entitled to no relief, [that] the court may order the petition dismissed."[139] In all other cases the court must grant a hearing "as soon as

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131. Many of our courts routinely dismiss petitions such as the one in this case without any notice to the petitioner or his attorney, sometimes without even a request to do so from the State, in the face of the emphatic admonitions in our statutes that no post conviction petition shall be dismissed for defects, incompleteness, lack of form, etc., without opportunity given to amend.

Hill v. State, 478 S.W.2d 923, 924-25 (Tenn. Crim. App. 1971) (Galbreath, J., concurring) (citations omitted), *cert. denied, id.* (Tenn. 1972).

132. TENN. CODE ANN. § 40-3804(10) (1975). *See* notes 54 & 75 *supra*.

133. *Id.* § 40-3805. *See* note 112 *supra*.

134. TENN. CODE ANN. § 40-3804 (1975).

135. *Id.* § 40-3815. *See* notes 17-18 *supra* and accompanying text.

136. *Id.* § 40-3807.

137. *Id.* §§ 40-3807, -3815. *See* note 54 *supra* and accompanying text. *But see* notes 59-65 *supra* & 141-97 *infra* and accompanying text.

138. *Id.* § 40-3815. *See* notes 61-63 *supra* and accompanying text. *But see* notes 141-52 *infra* and accompanying text.

139. *Id.* § 40-3809. *But see* notes 59-65 & 129-31 *supra* and accompanying text.

practicable."[140]

Despite the clear recommendations of the Act, Tennessee trial and appellate judges often have limited their treatment of post-conviction petitions to a consideration of the grounds and facts initially stated by the petitioner.[141] Trial judges prior to 1975 often summarily dismissed petitions without giving the petitioner notice of and opportunity to correct deficiencies, and without appointing counsel to guide him in making the required amendments.[142] The result was a system of fact pleading imposed on petitioners, who frequently were denied the assistance of counsel—quite the opposite of the system advocated by the drafters of post-conviction reform, namely, a simple procedure that could easily be invoked by those who might have grounds for post-conviction relief.[143]

Having finally recognized the fact-pleading problem, the

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140. *Id.*

141. *E.g.*, Gant v. State, 507 S.W.2d 133 (Tenn. Crim. App. 1973) (unsupported conclusory allegations, evidentiary hearing not required), *cert. denied, id.* (Tenn. 1974); Sykes v. State, 477 S.W.2d 254 (Tenn. Crim. App. 1971) (plea of guilty, insufficient statement of facts attacking voluntariness), *cert. denied, id.* (Tenn. 1972); Crumley v. Tollett, 474 S.W.2d 148 (Tenn. Crim. App.) (unsupported conclusions, no right to counsel or hearing), *cert. denied, id.* (Tenn. 1971); Burt v. State, 454 S.W.2d 182 (Tenn. Crim. App.) (allegations insufficient to justify personal consultation with distant counsel), *cert. denied, id.* (Tenn. 1970).

142. *See* notes 23, 54-68 & 75 *supra* and accompanying text. In Crumley v. Tollett, 474 S.W.2d 148 (Tenn. Crim. App.), *cert. denied, id.* (Tenn. 1971), the petitioner asserted that he had been denied a fair trial because of adverse publicity. Because this assertion was not supported by specific facts, the court held that the petition on its face showed no constitutional abridgment and that the trial judge properly dismissed the petition without a hearing or appointment of counsel. In a strong dissent, Judge Galbreath condemned the common practice of dismissing summarily, without opportunity for amendment, post-conviction pleadings that showed possible grounds for relief:

> Certainly it was never intended by the Legislature in broadening the accessibility to habeas corpus relief by the Post Conviction Procedure Act to hem in the indigent, often illiterate, ill-equipped petitioner by technical restrictions more complicated and devious than those encountered by the average attorney in pleadings filed in other types of civil controversies.

*Id.* at 151 (Galbreath, J., dissenting).

143. *See* notes 1 & 18 *supra* and accompanying text.

Tennessee Supreme Court in 1975 attempted to deal with it in the leading case of *Baxter v. Rose*.[144] The trial judge had ruled on Baxter's petition, which alleged denial of the right to effective assistance of counsel, without an evidentiary hearing and without appointing counsel.[145] The court of criminal appeals affirmed the summary dismissal of the petition on the ground that its allegations were "merely conclusory."[146] In reversing, the supreme court disagreed that the allegations were merely conclusory[147] and added that an indigent prisoner who files a *pro se* petition should be given the benefit of any doubt in fact pleading: "The allegations of a pro se complaint are held to less stringent standards than formal pleadings drafted by lawyers, and the test is whether it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."[148] As authority for this shift away from strict fact pleading, the supreme court cited the ABA Standards Relating to Post-Conviction Remedies[149] and the Post-Conviction Procedure Act.[150] The court has not, however, established procedures for dealing with poorly drafted petitions,[151] nor has it specifically rejected case law permitting summary dismissal, without appointment of counsel, of *pro se* petitions that contain

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144. 523 S.W.2d 930 (Tenn. 1975).

145. *Id.* at 931.

146. *Id.* at 939.

147. *Id.*

148. *Id.* (citation omitted).

149. ABA STANDARDS RELATING TO POST-CONVICTION REMEDIES 4.4(1) & 4.6(a) (1968), *quoted in* Baxter v. Rose, 523 S.W.2d 930, 939 (Tenn. 1975).

150. The court stated that the Act

> obviously contemplates an evidentiary hearing except in those cases wherein a *competently drafted* petition and all pleadings, files and records of the case, conclusively show that the petitioner is entitled to no relief. A petition *alleging sufficient facts* to establish petitioner's conviction was void because of an alleged denial of constitutional rights, state or federal, necessitates an evidentiary hearing.

523 S.W.2d at 939 (emphasis added) (citation omitted).

151. *See* notes 33-34 *supra* and accompanying text; Cureton v. Tollett, 477 S.W.2d 233, 236-37 (Tenn. Crim. App. 1971) (duties of district attorney general and trial judge), *cert. denied, id.* (Tenn. 1972). In contrast to Tennessee state courts, federal courts have rules governing the dismissal of inadequate petitions. RULES GOVERNING SECTION 2254 CASES IN THE UNITED STATES DISTRICT COURTS 2(e), 4, 5, 7(a) (1976).

no fact allegations in support of a constitutional abridgment.[152]

Two weeks after the decision in *Baxter v. Rose*, the court adopted Tennessee Supreme Court Rule 44, which provides for appointment and compensation of counsel for indigent petitioners.[153] The rule states that "where a petition for post-conviction or habeas corpus relief *has been filed*, the court shall advise the party that he has a right to be represented by counsel throughout the case . . . ."[154] Accordingly, if a *pro se* petitioner desires counsel, "[u]pon a finding of indigency, counsel *shall* be appointed."[155]

Since prospective petitioners ordinarily have no access, while in prison, to legal advice on the validity of their claims for post-conviction relief,[156] requiring the appointment of counsel for any indigent *pro se* petitioner who desires counsel and who gives the court notice of one or more cognizable claims is an effective method of tackling the problems of fact pleading and of petitions whose substantive merits are in doubt. The attorney's

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152. *See* Garrett v. State, 534 S.W.2d 325 (Tenn. Crim. App. 1975), *cert. denied, id.* (Tenn. 1976):

> While it is true less stringent standards are applicable to petitions drafted by laymen, see *Baxter v. Rose*, . . . we do not think that fact alone commands appointment of counsel or precludes the trial court from dismissing without a hearing in the absence of facts to support his allegation. We think that *Baxter* . . . teaches that to dismiss under these circumstances, there must be *no doubt* that the petition is *void of facts* to support a constitutional abridgment.

*Id.* at 328 (emphasis added).

153. TENN. SUP. CT. R. 44.

154. TENN. SUP. CT. R. 44(1) (emphasis added). The rule appears to define when counsel is "necessary" under the provisions of Tennessee Code Annotated § 40-2019 (1975). Under the rule an indigent prisoner who files a petition for post-conviction relief appears to have the same right to appointment of counsel as an indigent defendant charged with a felony, without any limitations or exceptions. TENN. SUP. CT. R. 44(1).

155. TENN. SUP. CT. R. 44(1) (emphasis added). The rule thus follows ABA STANDARDS RELATING TO POST-CONVICTION REMEDIES 4.4(a) (1968). *See* note 149 *supra* and accompanying text.

156. The need for such counseling of prisoners, recommended by ABA STANDARDS RELATING TO POST-CONVICTION REMEDIES 3.1(c) (1968), is evident in Tennessee. *See* note 68 *supra;* Gunn v. State, 509 S.W.2d 843, 844 (Tenn. Crim. App.) (comment on filing of "obviously frivolous, vexatious and groundless" petitions), *cert. denied, id.* (Tenn. 1974).

duty is to explore the prisoner's claims and allegations and to help him draft an articulate statement of any valid constitutional grounds for attacking the conviction or sentence, making sure that all possible grounds for complaint are considered by the court in one post-conviction hearing.[157] This approach is consistent with giving the *pro se* petitioner the benefit of any doubt before deciding whether he "can prove [any] set of facts in support of his claim which would entitle him to relief."[158] It also helps pave the way toward the goal of finality of convictions after one post-conviction proceeding.[159]

The right to counsel apparently established by Tennessee Supreme Court Rule 44 is not strictly enforced by lower Tennessee courts in post-conviction cases. Trial courts continue to dismiss some *pro se* petitions without appointing counsel,[160] and the Tennessee Court of Criminal Appeals occasionally has affirmed these summary dismissals without remanding the case for appointment of counsel.[161] Thus, if the issues raised in a properly drafted petition can be resolved on the basis of court records without an evidentiary hearing, the trial court is under no obligation to appoint counsel.[162] Also, if a petition is in correct form but merely raises a claim which appears to have been waived in prior proceedings,[163] or, according to court records, to have been determined previously,[164] no evidentiary hearing is required, and the court is under no duty to appoint counsel.[165] Nor

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157. *See* notes 15-18 & 63 *supra* and accompanying text.

158. Baxter v. Rose, 523 S.W.2d 930, 939 (Tenn. 1975).

159. *See* notes 15-18 *supra* and accompanying text.

160. *See, e.g.*, Baxter v. Rose, 523 S.W.2d 930, 931 (Tenn. 1975); Garrett v. State, 534 S.W.2d 325, 326 (Tenn. Crim. App. 1975), *cert. denied, id.* (Tenn. 1976).

161. *E.g.*, Garrett v. State, 534 S.W.2d 325 (Tenn. Crim. App. 1975), *cert. denied, id.* (Tenn. 1976). Most of the decisions affirming summary dismissals are unpublished.

162. May v. State, 589 S.W.2d 933, 934 (Tenn. Crim. App. 1979).

163. In Garrett v. State, 534 S.W.2d 325 (Tenn. Crim. App. 1975), *cert. denied, id.* (Tenn. 1976), the speedy trial issue raised by petitioner was held to be waived by failure to raise it prior to trial on one charge and because of a plea of guilty to another charge. *Id.* at 327-28. Thus, the mere assertion of the speedy trial issue did not entitle petitioner to counsel nor to a hearing.

164. *See* notes 88-90 & 109-11 *supra* and accompanying text.

165. Garrett v. State, 534 S.W.2d 325 (Tenn. Crim. App. 1975), *cert. de-*

is the court required to appoint counsel if the issues raised in the petition are not cognizable in a post-conviction proceeding.[166] In these situations Tennessee trial courts have not been required to appoint counsel merely to determine whether the petitioner has some other cognizable grounds for relief not stated in the original petition.[167]

In order to have counsel appointed upon the filing of a petition, a petitioner therefore must include a constitutional claim which has not been waived or determined previously and which cannot be resolved on the basis of court records alone, without an evidentiary hearing. Because most claims appear to have been determined previously or are presumed waived by the time a post-conviction petition is filed, many indigent petitioners have great difficulty overcoming this obstacle to the appointment of counsel. In fact, such petitioners often need legal advice about constitutional grounds for relief at the outset, so that they are able to draft a petition that will be sufficient to trigger the right to counsel under Rule 44.[168]

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*nied, id.* (Tenn. 1976), *see* note 163 *supra*, was the first appellate decision on the right to counsel after Tennessee Supreme Court Rule 44(1) was adopted earlier in 1975. Instead of citing Rule 44 as authoritative, the court cited the leading case of Crumley v. Tollett, 474 S.W.2d 148 (Tenn. Crim. App.), *cert. denied, id.* (Tenn. 1971), as authority for dismissing the petition without appointment of counsel. *Id.* at 328.

166. Garrett v. State, 534 S.W.2d 325, 328 (Tenn. Crim. App. 1975) (raising issues of wrongful return to state and sufficiency of State's evidence), *cert. denied, id.* (Tenn. 1976).

167. *See* Crumley v. Tollett, 474 S.W.2d 148, 149 (Tenn. Crim. App.) (approving federal practice of appointing counsel only after court determines that issues raised in post-conviction petition require evidentiary hearing), *cert. denied, id.* (Tenn. 1971). *But see* TENN. SUP. CT. R. 44(1); TENN. CODE ANN. §§ 40-3807, -3815, -3818 (1975).

168. If a Tennessee court summarily dismisses a post-conviction petition without appointing counsel, an indigent petitioner is then entitled to appointed counsel to appeal the dismissal. Recor v. State, 489 S.W.2d 64 (Tenn. Crim. App.), *cert. denied, id.* (Tenn. 1972). The time and effort of such appellate counsel often would be better spent in amending and refiling the petition so that the trial court would have a better basis for deciding whether the petitioner is entitled to a hearing on his petition.

Strangely, there appear to be no appellate decisions in which Tennessee Supreme Court Rule 44(1) is cited as authoritative on the right to counsel. Tennessee courts apparently still regard pre-1975 cases and Tennessee Code

2. Files and Records Contradict Allegations of Petition

After the petition has been "competently drafted," the court will examine "all pleadings, files and records of the case which are before the court" to see whether they "conclusively show that the petitioner is entitled to no relief."[169] Often the files and records[170] clearly contradict essential fact allegations in the petition, and in such cases a Tennessee court *may* summarily dismiss the petition.[171]

The "duly authenticated [m]inutes" of a Tennessee court of record are said to "import absolute verity and may not be contradicted or impeached by collateral attack in post-conviction proceedings . . . . 'unless attacked for fraud.' "[172] This common-law rule derived from habeas corpus cases makes the record or transcript of proceedings in a criminal court virtually unassailable evidence, because, unless fraud is alleged, the petitioner will not get a hearing to offer impeaching evidence even when the allegations of his petition directly attack the verity of court records.[173] Assuming that one of the main purposes of post-con-

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Annotated § 40-2019 (1975) as authoritative on appointment of counsel in post-conviction proceedings.

169. TENN. CODE ANN. § 40-3809 (1975). This was the ultimate statutory basis for dismissal without a hearing, affirmed on appeal, of most of the 38 petitions, note 88 *supra*. *E.g.*, Arthur v. State, 483 S.W.2d 95, 97 (Tenn. 1972); Sloan v. State, 477 S.W.2d 219, 220 (Tenn. Crim. App. 1971), *cert. denied, id.* (Tenn. 1972); Smith v. State, 458 S.W.2d 647, 648 (Tenn. Crim. App.), *cert. denied, id.* (Tenn. 1970); Hill v. State, 452 S.W.2d 661, 663 (Tenn. Crim. App. 1969), *cert. denied, id.* (Tenn. 1970).

170. Tennessee appellate courts have not explicitly defined what constitutes "files and records" in post-conviction cases. However, the cases reveal various types of evidence that have been considered in summarily dismissing post-conviction petitions without a hearing. Ingram v. State, 462 S.W.2d 259 (Tenn. Crim. App. 1970) (transcript of proceedings on first habeas corpus petition), *cert. denied, id.* (Tenn. 1971); Doyle v. State, 458 S.W.2d 637 (Tenn. Crim. App.) (previous habeas corpus proceeding in Tennessee Supreme Court), *cert. denied, id.* (Tenn. 1970).

171. Ellis v. State, 470 S.W.2d 22, 24 (Tenn. Crim. App.), *cert. denied, id.* (Tenn. 1971); Stokely v. State, 470 S.W.2d 37, 38 (Tenn. Crim. App.), *cert. denied, id.* (Tenn. 1971); TENN. CODE ANN. § 40-3809 (1975).

172. McCracken v. State, 529 S.W.2d 724, 728 (Tenn. Crim. App.) (citations omitted), *cert. denied, id.* (Tenn. 1975).

173. Judge Galbreath urged that mistake should be another ground for challenging a court record in post-conviction proceedings. *Id.* at 729 (Gal-

viction reform is to "provide for full fact hearings [in the trial court] to resolve disputed factual issues,"[174] this absolute verity rule with its limited fraud exception should be eliminated. Both the petitioner and the state should be permitted to present competent evidence that may be available to impeach trial court records and transcripts of proceedings.[175]

### 3. Burden of Proof—Corroboration Requirement

The petitioner in a Tennessee post-conviction proceeding has the burden of proving his allegations of denial of a constitutional right by a preponderance of the evidence.[176] Although this is the same burden and standard of proof normally applicable in federal habeas corpus proceedings,[177] the Tennessee courts have retained a state habeas corpus "corroboration requirement." Since a judgment of conviction is entitled to a "presumption of validity," the uncorroborated testimony of a post-conviction petitioner will not sustain his burden of proof in attacking the validity of a judgment regular on its face.[178] Such a special rule of

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breath, J., concurring). He advocated adoption of the rule that a "record or transcript . . . may be used in evidence of facts and occurrences during prior proceedings. Such record or transcript should be subject to impeachment by either party." ABA STANDARDS RELATING TO POST-CONVICTION REMEDIES 4.6(c)(i) (1968), *as quoted in* McCracken v. State, 529 S.W.2d 724, 729 (Tenn. Crim. App.) (Galbreath, J., concurring), *cert. denied, id.* (Tenn. 1975).

174. Case v. Nebraska, 381 U.S. 336, 347 (1965) (Brennan, J., concurring).

175. ABA STANDARDS RELATING TO POST-CONVICTION REMEDIES 4.6(c)(i) (1968). Missouri Supreme Court Rule 27.26(e) (Vernon Supp. 1975-1979), *discussed in* Anderson, *supra* note 16, at 8, provides that "if the allegations [of the petition] directly contradict the verity of records of the court, that issue shall be determined in the evidentiary hearing."

176. Clenny v. State, 576 S.W.2d 12, 13 (Tenn. Crim. App.), *cert. denied, id.* (Tenn. 1978); Miller v. State, 508 S.W.2d 804, 807 (Tenn. Crim. App. 1973), *cert. denied, id.* (Tenn. 1974).

177. Johnson v. Zerbst, 304 U.S. 458, 468-69 (1938). If there has been a full and fair hearing on a federal constitutional claim, a state prisoner seeking federal habeas corpus relief ordinarily must "establish by *convincing* evidence that the factual determination by the State court was erroneous." 28 U.S.C. § 2254(d) (1976) (emphasis added).

178. Swaw v. State, 457 S.W.2d 875, 876 (Tenn. Crim. App.), *cert. denied, id.* (Tenn. 1970); State *ex rel.* Wyatt v. Henderson, 453 S.W.2d 434, 436 (Tenn. Crim. App. 1969), *cert. denied, id.* (Tenn. 1970); Morgan v. State, 445

evidence is an artificial limitation on relief, not necessary to ensure that the petitioner meets his burden of proof;[179] unfortunately, since uncorroborated testimony is regarded as insufficient to establish a prima facie case, the State apparently feels relieved of the burden of coming forward with evidence in rebuttal.[180]

### 4. Forfeiture by Escape

A petitioner who escapes from custody or flees the jurisdiction pending appeal of a Tennessee conviction waives not only

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S.W.2d 477, 480 (Tenn. Crim. App.), *cert. denied, id.* (Tenn. 1969); *see* State v. Hopson, 589 S.W.2d 952, 954 (Tenn. Crim. App.), *appeal denied, id.* (Tenn. 1979). In *Morgan* the court stated:

> Manifestly, [petitioners'] unsupported testimony is not enough to invalidate their convictions. This must be so. It would be a strange and disastrous anomaly, intolerable alike in reason and law, to permit one duly convicted before a judge and jury to annul his trial by his uncorroborated testimony in a subsequent habeas corpus or post-conviction proceeding.

445 S.W.2d at 480.

179. A petitioner who properly alleges constitutional issues has an absolute right to appear and testify at a post-conviction hearing, if he has not had a prior post-conviction hearing and if "his petition raises substantial questions of fact as to events in which he participated." TENN. CODE ANN. § 40-3810 (1975). If he appears and testifies and offers no other evidence to support his contentions, it is unlikely that the court will believe the testimony and find that he has sustained the burden of proving his contentions by a preponderance of the evidence, unless the State fails to rebut the testimony.

180. In Morgan v. Neal, 325 F. Supp. 1196 (E.D. Tenn. 1970), both prisoners who petitioned for habeas corpus denied having admitted their guilt. *Id.* at 1199. Petitioners had made the same challenge in an earlier state post-conviction proceeding, Morgan v. State, 445 S.W.2d 477 (Tenn. Crim. App.), *cert. denied, id.* (Tenn. 1969), but the state court had given no weight to the uncontradicted but uncorroborated testimony of petitioners and had not even required the State to rebut the testimony, 445 S.W.2d at 480. Thus, the Tennessee proceedings produced factual determinations which were not fairly supported by the record, and which were subject to attack in federal habeas corpus under 28 U.S.C. § 2254(d)(8) (1976). 325 F. Supp. at 1200. In the subsequent federal habeas corpus hearing the state finally did present evidence contradicting the petitioners' claim that they did not confess, *id.* at 1201-03, and the federal court found that they had not sustained their burden of proving their allegations by a preponderance of the evidence, *id.* at 1204.

his right to appeal[181] but also any right he has to seek a subsequent delayed appeal or post-conviction relief.[182] This waiver is actually a forfeiture of post-conviction rights arising from the prisoner's failure "to raise [constitutional] issues at the first opportunity."[183] If he appeals and waits until the appeal is heard before escaping, he may seek post-conviction relief after he has been returned to custody.[184] Also, a petitioner who escapes before taking any steps at all to challenge his conviction does not forfeit his post-conviction rights,[185] although he does waive his right to seek a delayed appeal.[186]

The forfeiture by escape doctrine appears to be designed to punish a very limited class of petitioners who abuse the appel-

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181. *See* Bradford v. State, 184 Tenn. 694, 202 S.W.2d 647 (Tenn. 1947) (principle adopted and applied to denial of motion for new trial made by fugitive).

182. Brown v. State, 537 S.W.2d 719 (Tenn. Crim. App. 1975).

183. The court in *Brown* gave the following explanation for extending the waiver of appeal doctrine to post-conviction relief:

> A petitioner must give a valid reason for his failure to raise issues at the first opportunity. . . . He must give the trial court the opportunity to correct errors by filing a motion for new trial. Errors not raised there cannot be raised on appeal. . . .
>
> Fleeing the jurisdiction or escaping is not a valid excuse for failure to follow these rules. It follows that a petitioner who flees the jurisdiction or escapes has effectively foreclosed *any relief* for himself by his own actions.

537 S.W.2d at 720 (emphasis added) (citations omitted).

184. Campbell v. State, 576 S.W.2d 591 (Tenn. Crim. App.), *cert. denied, id.* (Tenn. 1978); Knight v. State, 190 Tenn. 326, 229 S.W.2d 501 (1950).

185. *See* Clark v. State, No. 135 (Tenn. Crim. App. Dec. 20, 1979). Petitioner, after pleading guilty to two felonies, escaped about two months after imposition of sentence and revocation of an earlier suspended sentence, apparently without taking any steps to appeal. The trial court dismissed the petition, amended after appointment of counsel, because of a finding that the petitioner's escape had waived his right to post-conviction relief. The Tennessee Court of Criminal Appeals reversed and remanded for an evidentiary hearing. The court distinguished Brown v. State, 537 S.W.2d 719 (Tenn. Crim. App. 1975), *see* notes 182-83 *supra* and accompanying text, on the ground that the petitioner in *Clark* had been returned to custody before his petition was filed. Clark v. State, No. 135 (Tenn. Crim. App. Dec. 20, 1979). The *Clark* court probably would have been willing to overrule the *Brown* decision if it could not have been distinguished.

186. Brown v. State, 537 S.W.2d 719, 720 (Tenn. Crim. App. 1975).

late process. In contrast, all other individuals who can show a present need for post-conviction relief, even petitioners who are no longer in custody because they have served their sentences,[187] or who clearly did not raise their claims for relief at the first opportunity,[188] are entitled to seek post-conviction relief. Existing sanctions against the crime of escape[189] coupled with the loss of direct appeal rights should be sufficient to deter escapes after conviction and to punish petitioners who abuse the appellate process. The very limited forfeiture by escape doctrine should therefore be eliminated from Tennessee post-conviction law.[190]

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187. A "prisoner *in custody* under sentence" may petition for post-conviction relief. TENN. CODE ANN. § 40-3802 (1975) (emphasis added). "In custody" has been so liberally construed that a petitioner may be entitled to relief even after his "sentence has expired or has been fully satisfied." State v. McCraw, 551 S.W.2d 692, 694 (Tenn. 1977) (construing TENN. CODE ANN. § 40-3802 (1975)); Holt v. State, 489 S.W.2d 845, 846-47 (Tenn. Crim. App. 1972), *cert. denied, id.* (Tenn. 1973); Daugherty v. State, 470 S.W.2d 865 (Tenn. Crim. App.), *cert. denied, id.* (Tenn. 1971). In *McCraw* the "restraint on liberty" suffered by the petitioner was the inability to vote. 551 S.W.2d at 693. The court stated that the petitioner was entitled to relief because he " 'continue[d] to suffer substantial and important collateral consequences of his conviction over and above his sentence to imprisonment.' " *Id.* (quoting opinion of the Tennessee Court of Criminal Appeals).

A petitioner in custody after escaping, who has forfeited his post-conviction rights under the rule of Brown v. State, 537 S.W.2d 719 (Tenn. Crim. App. 1975), *see* notes 182-83 *supra* and accompanying text, has a much greater need for relief from constitutional deprivations than does a petitioner who has served his sentence.

188. Brown v. State, 537 S.W.2d 719, 720 (Tenn. Crim. App. 1975), *see* note 183 *supra*. There is no statute of limitations in the Post-Conviction Procedure Act, although inexcusable delay in failing to pursue a post-conviction claim may prejudice a court against the claim. *See* Gross v. Neil, 483 S.W.2d 584, 586 (Tenn. 1972) (11 years before alleging denial of right to appeal); Bratton v. State, 477 S.W.2d 754, 758 (Tenn. Crim. App. 1971) (1945 plea of guilty presumed knowingly and voluntarily entered absent showing transcript unavailable through fault of state), *cert. denied, id.* (Tenn. 1972).

189. TENN. CODE ANN. §§ 39-3802, -3806, -3807, -3813, -3814 (1975 & Supp. 1980).

190. *See* note 211 *infra*. Apparently the Tennessee courts are in the process of doing this gradually by distinguishing Brown v. State, 537 S.W.2d 719 (Tenn. Crim. App. 1975), at every opportunity. *See* note 185 *supra*. Also, in order to reach the merits, a trial court may have discretion to refrain from

## IV. Progress Toward Achieving Basic Purposes of Reform

The Tennessee legislature enacted the Post-Conviction Procedure Act of 1967 primarily to prevent unnecessary friction between state and federal courts. Friction had resulted under prior law whenever federal courts had to consider, either initially or de novo, Tennessee prisoners' constitutional claims that had been considered inadequately in the state courts because of the limited scope of Tennessee habeas corpus law and procedures. Thus, if a Tennessee court refused to consider a federal constitutional claim in a state habeas corpus proceeding, or if the habeas petitioner did not receive a full, fair, and adequate evidentiary hearing on his claim in any state proceeding, the federal courts were required to hold an evidentiary hearing before deciding the claim on the merits.[191] The failure to hold an adequate hearing or to make an adequate record at the state level meant that there was no Tennessee record "adequate for any review that may later be sought" in a federal court, and there was no way to forestall the "spin-off of [federal] collateral proceedings that seek to probe murky memories."[192] In such cases Tennessee prisoners might obtain federal habeas corpus relief so long after their original conviction that the State would not have sufficient evidence to retry the case. Thus, it was impossible prior to 1967 to achieve finality of Tennessee convictions without unnecessary friction with the federal courts; consequently, the search for finality often extended over many years.

The question remains whether Tennessee has reached a suitable accommodation between state criminal procedure and federal post-conviction review. Has the Post-Conviction Procedure Act minimized the necessity for state prisoners to resort to federal habeas corpus review in order to obtain adequate evidentiary hearings and post-conviction relief?

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imposing the harsh sanction of forfeiture. Even in *Brown* both the trial and appellate courts ruled on the merits of petitioner Brown's contentions in addition to ruling that he had waived his post-conviction rights by escape. 537 S.W.2d at 721.

191. Townsend v. Sain, 372 U.S. 293, 312 (1963). *See* J. Cook, Constitutional Rights of the Accused—Post-Trial Rights § 119 (1976) [hereinafter cited as Cook, Post-Trial Rights].

192. Boykin v. Alabama, 395 U.S. 238, 244 (1969) (footnotes omitted).

### *A. Federal Habeas Corpus Relief for Tennessee Prisoners, 1967-1977*

A review of the extensive case history of Tennessee federal habeas corpus decisions in the first ten years under the Act—1967 to 1977—reveals 130 separate cases in which federal court decisions were published.[193] In thirty-two of these cases major federal habeas corpus relief finally was granted to Tennessee prisoners either in the district court or on appeal,[194] and in a number of other cases federal evidentiary hearings had to be held before habeas relief was denied.[195]

In most of the thirty-two reported federal cases in which habeas corpus petitioners obtained relief, Tennessee courts already had considered most federal constitutional bases for relief on the merits, first in the trial court and then on direct appeal from the conviction, rather than in post-conviction proceedings.[196] Once Tennessee trial and appellate courts had applied federal law to state findings of fact, these prisoners had exhausted their available state remedies and were able to seek federal habeas corpus relief without making the futile effort of seeking to relitigate their federal constitutional claims in Tennessee post-conviction proceedings.[197] In such cases, therefore,

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193. These 130 decisions are reported in volumes 279 through 444 of the Federal Supplement and volumes 384 through 563 of the Federal Reporter, Second Series. Many of the cases were reversed by the court of appeals. This was the critical 10-year period prior to the landmark decision of Wainwright v. Sykes, 433 U.S. 72 (1977).

194. Relief was granted on a variety of federal constitutional claims. In eight of the 32 cases relief was granted because of a double jeopardy violation, *e.g.*, Rivera v. Rose, 465 F.2d 727 (6th Cir. 1972); in five, illegal search and seizure, *e.g.*, Manning v. Jarnigan, 501 F.2d 408 (6th Cir. 1974); in three, ineffective assistance of counsel, *e.g.*, Roddy v. State, 366 F. Supp. 33 (E.D. Tenn. 1973). Other cases in which relief was granted include Martin v. Rose, 525 F.2d 111 (6th Cir. 1975) (failure to provide transcript of federal court trial on same charge), Jones v. Norvell, 472 F.2d 1185 (6th Cir. 1973) (coercive jury charge), and Jones v. Russell, 294 F. Supp. 423 (E.D. Tenn. 1968) (insufficient evidence of jurisdiction).

195. *E.g.*, Morgan v. Neal, 325 F. Supp. 1196 (E.D. Tenn. 1970).

196. *See, e.g.*, Townsend v. Henderson, 405 F.2d 324, 326-27 (6th Cir. 1968).

197. There is no right to a post-conviction hearing on grounds previously determined on the merits by a court of competent jurisdiction after a full and

there was no friction between state and federal courts resulting from inadequate post-conviction procedures, because state finality had been achieved on direct appeal. In a subsequent habeas corpus case, a federal court may produce unavoidable friction by appearing to reverse a Tennessee appellate decision, in the sense that the granting of a writ of habeas corpus usually is accompanied by an order that the prisoner be discharged from custody unless retried by the state within a reasonable time.[198]

In some cases, however, Tennessee restrictions on the availability of post-conviction relief made it necessary to hold federal habeas corpus hearings. In two such cases[199] Tennessee courts had failed to reach the merits of the defendants' constitutional claims because of findings of waiver by procedural default, namely, failure to properly present constitutional objections to inadmissible evidence in the trial court.[200] The federal courts applied the *Fay v. Noia* deliberate by-pass test of waiver of constitutional rights[201] and granted evidentiary hearings and major habeas corpus relief.[202] In a third case,[203] as a result of Tennessee's corroboration requirement,[204] state factual determinations in a post-conviction proceeding were not fairly supported by the record, so that a federal evidentiary hearing was required.[205] Unnecessary friction thus occurred because key issues of fact had to be relitigated in a federal court.

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fair hearing. TENN. CODE ANN. §§ 40-3811 to -3812 (1975). On the futility doctrine, see COOK, POST-TRIAL RIGHTS *supra* note 191, § 112.

198. *See, e.g.*, Marshall v. Rose, 499 F.2d 1163, 1168 (6th Cir. 1974).

199. Phillips v. Neil, 452 F.2d 337 (6th Cir. 1971); Hale v. Henderson, 336 F. Supp. 512 (W.D. Tenn. 1972), *aff'd in part*, 485 F.2d 266 (6th Cir. 1973).

200. Phillips v. Neil, 452 F.2d 337, 348 (6th Cir. 1971); Hale v. Henderson, 336 F. Supp. 512, 517 (W.D. Tenn. 1972), *aff'd in part*, 485 F.2d 266 (6th Cir. 1973).

201. Fay v. Noia, 372 U.S. 391, 439 (1963).

202. Phillips v. Neil, 452 F.2d 337 (6th Cir. 1971) (no waiver of right of confrontation when trial counsel acquiesced to filing of medical records as an exhibit); Hale v. Henderson, 336 F. Supp. 512 (W.D. Tenn. 1972) (no waiver of issue of unconstitutional search by failure to object to admission of illegally obtained evidence at trial), *aff'd in part*, 485 F.2d 266 (6th Cir. 1973).

203. Morgan v. Neal, 325 F. Supp. 1196 (E.D. Tenn. 1970).

204. *See* notes 176-80 *supra* and accompanying text.

205. 325 F. Supp. at 1200-01.

In two cases[206] federal courts noted, without giving further explanation, that a breakdown in Tennessee's post-conviciton corrective processes probably resulted from the failure of Tennessee courts to hold post-conviction evidentiary hearings, or to hold such hearings within a reasonable period of time.[207] In other cases federal courts have indicated that Tennessee courts sometimes are slow in hearing post-conviction cases,[208] which can result in a breakdown finding and a federal hearing. If a federal court holds that a habeas petitioner has not exhausted his state post-conviction remedies, the court may dismiss the petition without prejudice to the right to revive the federal habeas proceeding by simple motion, in the event that Tennessee fails to consider a proper post-conviction petition within a reasonable time.[209] Unnecessary friction is produced if delay or one of the restrictions on Tennessee post-conviction relief then prevents a Tennessee hearing or restricts its scope, and the petitioner has to revive his federal habeas petition in order to secure a timely or adequate hearing.[210]

There are other instances of actual or potential conflict between the state and federal systems arising from Tennessee's needless restrictions on the scope of post-conviction hearings and relief. For example, in contrast with Tennessee courts, federal appellate courts do not take the harsh position that a federal habeas petitioner, imprisoned at the time he files his petition, automatically forefits his right to relief simply by escaping from custody soon after conviction.[211] Furthermore, since Tennessee courts in post-conviction cases hold that judicial minutes "import absolute verity and may not be contradicted or im-

206. Steward v. Tollett, 323 F. Supp. 962 (E.D. Tenn. 1971); Cutshall v. Tollett, 318 F. Supp. 1330 (E.D. Tenn. 1970).

207. 323 F. Supp. at 962; 318 F. Supp. at 1330.

208. Holt v. Warden of Tenn. State Pen., 386 F. Supp. 403, 405 (E.D. Tenn. 1974) (no exhaustion but admitted long delays in state post-conviction proceedings); *see* Brown v. Rose, 362 F. Supp. 1003 (E.D. Tenn. 1973).

209. Brown v. Rose, 362 F. Supp. 1003, 1004 (E.D. Tenn. 1973).

210. *See* Frazier v. Lane, 446 F. Supp. 19 (E.D. Tenn. 1977).

211. Brinlee v. Crisp, 608 F.2d 839 (10th Cir. 1979) (escape not deliberate by-pass or waiver of habeas claims) (by implication); Ruetz v. Lash, 500 F.2d 1225 (7th Cir. 1974) (no deliberate by-pass because of manifest intention to appeal before escape).

peached by collateral attack" unless "attacked for fraud,"[212] a federal habeas petitioner may be unfairly denied the opportunity to impeach an allegedly defective state court record until a federal hearing is held.

Sometimes, however, federal hearings are necessary not because of state restrictions on the availability of post-conviction relief but because Tennessee's trial and appellate corrective processes have not provided an adequate remedy. In two federal habeas cases brought by Tennessee prisoners, hearings were needed because the trial court record did not disclose that they received "a full and fair evidentiary hearing"[213] at the time of trial.[214] In each case the petitioner had first appealed his conviction and exhausted his state appellate remedies[215]on the federal constitutional claims, which permitted him to proceed directly into federal court[216] even though Tennessee post-conviction relief might have been available.[217] Proper application of the state's new rules of criminal and appellate procedure should minimize this type of unnecessary friction between the Tennessee courts and the federal courts.[218] Moreover, this long overdue

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212. *See* notes 172-75 *supra* and accompanying text. *Cf.* Blackledge v. Allison, 431 U.S. 63 (1977) (guilty plea record not insurmountable barrier to collateral attack); Elsperman v. Wainwright, 358 F.2d 259 (5th Cir. 1966) (no absolute verity of state minutes when denial of counsel asserted).

213. Townsend v. Sain, 372 U.S. 293, 312 (1963).

214. Elliott v. Morford, 557 F.2d 1228, 1231 (6th Cir. 1977) (no state court findings of fact on voluntariness of confession, federal evidentiary hearing required); Clarke v. Henderson, 403 F.2d 687, 688 (6th Cir. 1968) (inadequate state court record, federal evidentiary hearing required).

215. Elliott v. Morford, 557 F.2d 1228, 1229 (6th Cir. 1977); Clarke v. Henderson, 403 F.2d 687, 688 (6th Cir. 1968).

216. *See* note 197 *supra* and accompanying text; COOK, POST-TRIAL RIGHTS, *supra* note 191, § 114.

217. Tennessee Code Annotated §§ 40-3811 to -3812 (1975) technically might not bar state post-conviction relief because arguably no state court had ruled on the merits of the constitutional issues "after a full and fair hearing." *But see* notes 88-90 *supra* and accompanying text.

218. Rule 2 of the Tennessee Rules of Criminal Procedure provides:

> Purpose and Construction.—These rules are intended to provide for the just determination of every criminal proceeding. They shall be construed to secure simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay.

Similarly, Rule 1 of the Tennessee Rules of Appellate Procedure provides:

modernization of trial and appellate procedures should reduce the number of cases in which state post-conviction and federal habeas corpus hearings and relief are needed.

In view of the many restrictions on post-conviction relief under the Act, one might expect to find even more instances of friction in ten years of published federal decisions. None of the federal cases specifically criticized Tennessee's post-conviction relief system.[219] It would be unwise, however, to draw any conclusions before reviewing some of the changes in federal habeas corpus law since 1967.

### *B. Changes in Federal Habeas Corpus Relief for State Prisoners Since 1967*

The Tennessee Post-Conviction Procedure Act and its 1971 amendments were in large measure a response to three well-known cases decided by the United States Supreme Court in 1963.[220] The Warren Court, in *Fay v. Noia*,[221] held that the writ of habeas corpus was available to test each substantive constitutional claim raised by a state prisoner, even those claims held to be waived under state law because of a procedural default, unless the default amounted to a deliberate by-pass of state procedures.[222] Finality of convictions could not be achieved at the state court level, because even if a federal constitutional claim had been litigated thoroughly and decided in the state courts, a prisoner was entitled to have the claim reviewed in a federal habeas proceeding once he had exhausted his presently available state remedies.[223]

A majority of the Warren Court believed that a mechanism

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"These rules shall be construed to secure the just, speedy, and inexpensive determination of every proceeding on its merits."

219. *But see* note 207 *supra* and accompanying text. A number of federal habeas decisions pointed out why relief should be available under the Act. *E.g.*, Rutter v. Wright, 439 F.2d 1002 (6th Cir. 1971) (exhaustion of available post-conviction remedy required). The *Rutter* court pointed out that for all practical purposes the Act appears to have superseded the Tennessee habeas corpus statute. *Id.* at 1003.

220. *See* notes 1-2 *supra* and accompanying text.

221. 372 U.S. 391 (1963).

222. *Id.* at 439.

223. Fay v. Noia, 372 U.S. 391; Brown v. Allen, 344 U.S. 443 (1953).

for relief such as habeas corpus should always be available to test federal constitutional claims in criminal cases; the justices evidently were reluctant to trust the ability and willingness of state courts to enforce the whole new panoply of federal rights recognized by the United States Supreme Court.[224] In recent years, however, the Burger Court has narrowed habeas corpus jurisdiction in two basic ways.

1. Procedural Limitations: The Adequate State Ground

In 1973 the Burger Court began to cast doubt on the continuing vitality of the *Fay v. Noia* deliberate by-pass standard of waiver.[225] In 1976, without explaining why the *Noia* waiver standard was not controlling, the Court in *Francis v. Henderson*[226] held that federal habeas review of a grand jury discrimination claim was foreclosed because of deference to state procedure. Francis had failed to present "not only a showing of 'cause' for [his] failure to challenge the composition of the grand jury before trial [as required by state law], but also a showing of actual prejudice."[227]

These developments culminated in 1977 with *Wainwright v. Sykes*.[228] In *Sykes* the Court extended the *Francis* rule and held that failure to comply with state rules of trial procedure which

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224. Kaufman v. United States, 394 U.S. 217 (1969). In *Kaufman* the Court emphasized the need for "federal courts [to] have the 'last say' with respect to questions of federal law, the inadequacy of state procedures to raise and preserve federal claims, [and] the concern that state judges may be unsympathetic to federally created rights." *Id.* at 225.

225. Davis v. United States, 411 U.S. 233 (1973). The Court in *Davis* did not apply the deliberate by-pass test to determine whether Davis had waived his right to collateral review by failing to raise at trial his allegation that blacks had been excluded illegally from the grand jury that indicted him. Rather, the Court held that Federal Rule of Criminal Procedure 12 applies to collateral attacks as well as to direct appeals, *id.* at 242, and thus Davis' attack was barred by his failure to raise his claim earlier, *id.* at 243.

226. 425 U.S. 536 (1976).

227. *Id.* at 542 (footnote omitted). In dissent, Justice Brennan expressed concern that since the Court did not address "the applicability of *Fay* to this situation," the holding portended "either the overruling of *Fay* or the denigration of the right to a constitutionally composed grand jury." *Id.* at 546 (Brennan, J., dissenting).

228. 433 U.S. 72 (1977).

would bar state consideration of a constitutional claim will also bar federal review absent a showing of both "cause" and "prejudice."[229] The Burger Court in *Sykes* resurrected the "adequate state ground" approach[230] that had been rejected in *Noia*,[231] ruling that when legitimate state interests in procedural rules bar state court consideration of a claim, those same interests should bar federal litigation.[232] One of those interests, often emphasized in Tennessee post-conviction decisions,[233] is promotion of the finality of criminal judgments by forcing litigation of constitutional claims in the trial court in order that a factual record on each claim can be developed in a timely proceeding.[234]

Thus, under the *Sykes* approach, the federal courts now accord presumptive validity to state procedural bars based on legitimate state interests, when the bar results from a decision " 'of the kind normally committed to counsel.' "[235] It will be recalled that, according to the general rule of waiver governing availability of post-conviction relief in Tennessee, a federal con-

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229. *Id.* at 87. The Court classified the deliberate by-pass standard of *Noia* as "sweeping language" and as dicta, *id.* at 87-88, and specifically rejected it because it would "make federal habeas review generally available to state convicts absent a knowing and deliberate waiver of the federal constitutional contention," *id.* at 87.

230. Under the adequate state ground doctrine, if a state court has an adequate nonconstitutional reason for not considering a claim, such as procedural default with a legitimate basis, the claim is nonreviewable on federal habeas corpus. Brown v. Allen, 344 U.S. 443, 458 (1953).

231. 372 U.S. 391, 398-99 (1963).

232. 433 U.S. at 88-90.

233. *E.g.*, Brown v. State, 489 S.W.2d 268, 270 (Tenn. Crim. App. 1972), *cert. denied, id.* (Tenn. 1973); *see* notes 117-18 *supra.*

234. 433 U.S. at 88 (1977).

235. Goodman & Sallet, *Wainwright v. Sykes: The Lower Federal Courts Respond*, 30 HAST. L.J. 1683, 1690 (1979) (quoting Frazier v. Czarnetsky, 439 F. Supp. 735, 737 (S.D.N.Y. 1977)). The *Sykes* Court left "open for resolution in future decisions the precise definition of the 'cause'-and-'prejudice' standard." 433 U.S. at 87. There is substantial conflict about the definition and application of those terms in lower federal courts. Goodman & Sallet, *supra*, at 1694-1707 (prejudice), 1707-24 (cause). The courts are "split sharply over whether cause is shown in cases involving attorney conduct that is in some sense 'excusable' (either because the attorney acted negligently or because he failed to raise a claim no attorney would have raised)," but which does not amount to constitutionally ineffective assistance of counsel. *Id.* at 1725.

stitutional claim is presumed waived if the petitioner "failed to present it for determination in any proceeding before a court of competent jurisdiction in which the ground could have been presented."[236] Because the *Sykes* presumption of waiver approach is very similar to the Tennessee rebuttable presumption of waiver approach,[237] after *Sykes* Tennessee courts have been able to avoid this former source of friction with federal courts. A federal court ordinarily will not now consider a federal constitutional claim that Tennessee courts have refused to hear because of a procedural default and that is based on a legitimate state procedural interest.

2. Substantive Limitation: Fourth Amendment Claims

Although the Warren Court had held that all federal constitutional claims are cognizable in federal habeas corpus proceedings brought by state prisoners, in 1976 the Burger Court imposed a substantive limitation on the scope of federal habeas corpus. In *Stone v. Powell*[238] the Court decided to terminate federal habeas corpus review of alleged fourth amendment violations, which are unrelated to the ultimate question of guilt,[239] when the petitioner had a full and fair opportunity to raise and litigate the claim in the state courts.[240] The *Stone* decision, although confined to cases involving the judicially created exclu-

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236. TENN. CODE ANN. § 40-3812 (1975); *see* notes 50-53 *supra* and accompanying text.

237. *See* notes 91-99 *supra* and accompanying text. Of course, the *Sykes* approach is more restrictive because it requires the petitioner to show not only "cause" for his procedural default, but also actual "prejudice" resulting from the constitutional violation—for example, that it was reasonably possible that the admission of unconstitutionally seized evidence influenced the verdict of the trier of fact. Thus, it may be easier for a Tennessee petitioner, who does not have to show "prejudice," to overcome the presumption that he waived the ground for relief.

238. 428 U.S. 465 (1976).

239. *Id.* at 490.

240. *Id.* at 494. While the *Stone* Court cited Townsend v. Sain, 372 U.S. 293 (1963), as one basis for determining whether the state prisoner had an "opportunity for full and fair litigation of a Fourth Amendment claim," 428 U.S. at 494 n.36, *Townsend* was concerned not with whether there was an *opportunity* for a full hearing but with whether there actually was a full hearing.

sionary rule,[241] led to predictions that the Court was laying the groundwork "for a drastic withdrawal of federal habeas jurisdiction."[242] So far, however, the Court has not broadened the *Stone* limitation to include other types of constitutional claims.

In an important 1979 decision the Court specifically refused to extend the *Stone* rationale to cases in which state prisoners allege discrimination in the selection of the grand jury that indicted them. In *Rose v. Mitchell,*[243] a case that originated in Tennessee, the Court rejected the State's contention that federal collateral review of grand jury discrimination claims should not be available.[244] In *Stone* the Court had expressed confidence in the state courts' ability to provide full and fair hearings on claims of fourth amendment violations by the police, but the Court in *Rose* doubted that state judges could fairly consider claims of grand jury discrimination, since this would require state courts to review their own grand jury selection procedures.[245] Moreover, the Court was careful to point out that in *Stone* the holding had been limited to the judicially created exclusionary rule and fourth amendment violations; the Court had "stressed that its decision to limit review was *'not* concerned with the scope of the habeas corpus statute as authority for litigating constitutional claims generally.' "[246] *Stone* involved the question whether "a judicially created remedy rather than a personal constitutional right"[247] should be enforced in federal

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241. 428 U.S. at 489.

242. *Id.* at 517 (Brennan, J., dissenting). Justice Brennan particularly feared that jurisdiction would be withdrawn from claims of violations which are not "guilt-related." *Id.* at 517-18 & n.13 (Brennan, J., dissenting).

243. 443 U.S. 545 (1979).

244. *Id.* at 560-61. The State based its argument on a dissenting opinion by Justice Powell in Castaneda v. Partida, 430 U.S. 482 (1977). Joined by three other members of the Court, Justice Powell observed that "[a] strong case may be made that claims of grand jury discrimination are not cognizable on federal habeas corpus after *Stone v. Powell,*" because a claim by a convicted prisoner of grand jury discrimination goes only to the "moot determination by the grand jury that there was sufficient cause to proceed to trial" and not to any "flaw in the trial itself." *Id.* at 508 n.1 (Powell, J., dissenting).

245. 443 U.S. at 561.

246. *Id.* at 560 (quoting Stone v. Powell, 428 U.S. 465, 495 n.37 (1976)).

247. *Id.* at 562 (quoting Stone v. Powell, 428 U.S. 465, 495 n.37 (1976)). *But see* note 242 *supra* and accompanying text.

habeas proceedings. The United States Supreme Court consistently had held, however, that discrimination in the selection of a grand jury was directly forbidden by the equal protection clause.[248]

Although the *Rose* decision tended to allay speculation generated by *Stone* that federal habeas corpus review might be denied for alleged violations of constitutional rights unrelated to the determination of guilt,[249] the critical factor distinguishing the two cases was the unwillingness of the Court to believe that a state prisoner could receive a full and fair opportunity to adjudicate a grand jury discrimination claim in state courts.[250] Thus, in spite of *Rose*, the *Stone* approach may yet be extended to other areas and may someday lead to a denial of federal habeas review of non-guilt-related claims except in cases in which the state fails to provide—or, as in *Rose*, is found to be unable to provide—an opportunity for a full and fair hearing.[251] All guilt-related claims probably will continue to receive full federal habeas review.[252]

If this extension of *Stone* ever occurs, and substantive limitations are placed on the availability of federal habeas review, it will be possible to achieve finality on certain constitutional

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248. *Id.* at 551.

249. *See* note 242 *supra* and accompanying text. However, the analysis in *Rose* is consistent with that in *Stone* and indicates that the Court is at least willing to reconsider the substantive scope of federal habeas corpus review without specifically discussing 28 U.S.C. § 2254(a) (1976), the statute upon which federal habeas corpus jurisdiction is based.

250. "Federal habeas review is necessary to ensure that constitutional defects in the state judiciary's grand jury selection procedure are not overlooked by the very state judges who operate that system." Rose v. Mitchell, 443 U.S. 545, 563 (1979).

251. Thus the Court or Congress may someday adopt the view of Justice Powell, who concurred in *Rose*, that federal collateral review should be reserved for guilt-related claims in order to "protect the innocent from incarceration." *Id.* at 587 (Powell, J., concurring). Justice Powell pointed out that "[o]nce a defendant is found guilty beyond a reasonable doubt . . . following a fair trial, he hardly can claim that it was unjust to have made him stand trial." *Id.* (Powell, J., concurring) (footnote omitted). He would rely on other remedies "to protect society's interest in eliminating racial discrimination in the selection" of grand jurors. *Id.* (Powell, J., concurring).

252. *See* Jackson v. Virginia, 443 U.S. 307, 323-24 (1979).

claims in Tennessee courts, provided that defendants are given a full and fair opportunity to raise and litigate federal constitutional claims in the state system. At present, guided by the Post-Conviction Procedure Act, Tennessee courts have placed no *substantive* limitations on the availability of post-conviction relief in cases of alleged constitutional violations; but unnecessary friction between state and federal courts still exists because of the various procedural limitations, described in this Article,[253] which often prevent a full and fair state hearing or any hearing at all. If the petitioner's constitutional claims were not fully and fairly litigated in the trial court, on direct appeal, or in state post-conviction proceedings, federal habeas corpus relief will continue to be needed.[254]

## V. Conclusion

Faced with the expansion of federal habeas corpus jurisdiction in the 1960s and the relatively narrow scope of Tennessee's habeas corpus law, the Tennessee General Assembly wisely chose to adopt the Post-Conviction Procedure Act in 1967 in an attempt to eliminate unnecessary friction between state and federal courts. The Act was designed to provide a post-conviction process as broad in scope as federal habeas corpus and to set forth the basic procedures for giving full and fair consideration to all constitutional claims not previously determined or waived. By simultaneously creating the Tennessee Court of Criminal Appeals, the legislature set the stage for a new era of judicial administration of collateral attack on Tennessee convictions. Although the Act was designed to maximize Tennessee's control over criminal convictions, to achieve finality of convictions, and to secure the federal constitutional rights of prisoners in Tennessee courts, the lack of legislative history and the failure to adopt rules of practice and procedure for courts applying the Act have produced many problems of construction and judicial administration.

Beginning in 1969, the Tennessee Court of Criminal Ap-

253. *See* notes 199-218 *supra* and accompanying text.

254. *E.g.*, Manning v. Jarnigan, 501 F.2d 408, 412 (6th Cir. 1974) (inadequate trial record and hearing on fourth amendment issue, hearing required).

peals assumed primary responsibility for construing the Act, often citing restrictive habeas corpus decisions of the Tennessee Supreme Court as a guide to interpretation. Meanwhile, the Tennessee Supreme Court was preoccupied with a backlog of habeas corpus appeals and did not begin construing the Act until 1972, after the Tennessee Court of Criminal Appeals already had published seventy-six successive decisions under the Act.[255] Moreover, to date, the Tennessee Supreme Court has not adopted the authorized and expected rules of practice and procedure under the Act and has failed to provide prisoners with a standard post-conviction petition form. Some prisoners over the years have continued to file habeas corpus petitions, and many have great difficulty securing even one post-conviction hearing in which all available constitutional grounds for challenging the validity of their convictions are considered. Until 1975 courts often did not appoint counsel for *pro se* petitioners, and petitions often were dismissed summarily without any opportunity for amendment. Under the circumstances it is not surprising that many prisoners filed a succession of petitions seeking post-conviction relief or, out of frustration, sought federal habeas corpus relief.

In 1971 the General Assembly amended the Act in an effort to stop the filing of repetitious petitions. A waiver provision was added which created a rebuttable presumption that a ground for post-conviction relief has been waived if it was available at the time of a prior proceeding but was not raised then. Although this legislation was promoted on the basis that it would minimize the filing of repetitious petitions, its primary effect was to bolster a judicially created procedural default basis for summary dismissal of *pro se* post-conviction petitions without a hearing and without appointment of counsel. An additional amendment designed to motivate the Tennessee Supreme Court to prepare a comprehensive post-conviction petition form, one that would "achieve substantial justice and a full and fair hearing of all available grounds for relief"[256] in one post-conviction proceeding, did not succeed; instead, the Tennessee Attorney General was forced to draft the form now in use, which is inadequate to

255. *See* note 32 *supra*.

256. TENN. CODE ANN. § 40-3815 (1975).

meet the needs of *pro se* petitioners seeking a hearing and appointment of counsel.

Very little post-conviction relief has been granted under the Act. This is not surprising when one considers the various provisions which, as construed, severely restrict the availability of post-conviction hearings and relief. In the four basic situations described[257] relief seldom is available, because most constitutional issues raised at the post-conviction stage are held to have been determined previously in the trial court or on appeal, or are presumed waived under the presumptive waiver definition adopted in 1971.

Tennessee's other restrictions on the availability of collateral attack are often based on unnecessary restrictions in former habeas corpus law. Fact pleading requirements continue to limit the ability of some *pro se* petitioners to secure appointment of counsel and a hearing in spite of Tennessee Supreme Court Rule 44, which appears to create an absolute right to counsel for the indigent *pro se* petitioner upon the filing of a petition. The absolute verity of Tennessee court records and the requirement that a petitioner corroborate his testimony sometimes prevent the full and fair hearing of post-conviction claims.

An examination of reported federal cases decided during the first eleven years under the Act reveals that in the vast majority of Tennessee criminal cases, state finality is achieved on direct appeal rather than through post-conviction proceedings. Federal relief has been granted in about twenty-five percent of all reported federal habeas corpus cases brought by Tennessee prisoners, but in most of those cases the federal courts were reviewing issues decided on direct appeal from convictions. In a few reported cases Tennessee restrictions on the availability of post-conviction hearings and relief have produced a need for federal habeas corpus proceedings.

Recent decisions of the United States Supreme Court have restricted the availability of federal habeas corpus review. The federal waiver standard, which now requires a showing of cause and prejudice to overcome a presumption of waiver resulting from certain procedural defaults, is very similar to the Tennes-

257. *See* notes 79-129 *supra* and accompanying text.

see presumption of waiver standard. Thus, Tennessee courts now are able to reach and decide all post-conviction claims which a federal court can consider in habeas corpus proceedings. Although this source of unnecessary friction has been eliminated, several other restrictions on the availability of Tennessee post-conviction relief will continue to produce friction in cases in which constitutional claims have not been fully and fairly litigated in the trial court or on direct appeal. The United States Supreme Court in 1976 decided to terminate federal habeas review of alleged fourth amendment violations unrelated to a finding of guilt, so long as there has been a full and fair opportunity to raise and litigate such claims in the state courts. In order to achieve a final determination of fourth amendment claims, therefore, and of other claims which the Supreme Court may someday hold are not subject to federal habeas review, the Tennessee courts or the legislature must eliminate unnecessary restrictions on post-conviction relief that remain under the Post-Conviction Procedure Act.

Every Tennessee defendant must be guaranteed a full and fair opportunity to raise and litigate all his constitutional claims in state courts. Thus, it is time for the Tennessee Supreme Court and the Tennessee Court of Criminal Appeals to eliminate all unnecessary judicial restrictions on the availability of post-conviction relief. In addition, the Tennessee Supreme Court should exercise its rulemaking power by preparing rules of practice and procedure for post-conviction proceedings. The court also should prepare and make available better petition forms for the guidance of *pro se* petitioners and should decide whether, under Tennessee Supreme Court Rule 44,[258] there are any situations in which *pro se* petitions may be dismissed summarily without appointment of counsel. The rules should be designed "to secure simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay."[259] Such expense and delay all too often have been encountered by petitioners forced to seek federal habeas corpus relief because of inadequacies in Tennessee post-conviction law and procedures.

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258. *See* notes 153-67 *supra* and accompanying text.

259. TENN. R. CRIM. P. 2, *see* note 218 *supra*.

# COMMENTS

## THE RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS ACT — RECENT JUDICIAL DEVELOPMENTS AND SUPREME COURT REVIEW

### I. INTRODUCTION

#### *A. Elements of a RICO Offense*

The Racketeer Influenced and Corrupt Organizations Act (RICO) has been part of the federal criminal law since 1970.[1] The RICO provisions are unique to the criminal law in two respects. First, the statute creates a new substantive crime, and second, it attempts to contain and destroy the growth of organized crime. The most significant activity it proscribes is the control or conduct of an enterprise in interstate commerce through a pattern of racketeering activity.[2]

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1. The Racketeer Influenced and Corrupt Organizations Act (hereinafter cited as RICO) comprises Title IX of the Organized Crime Control Act of 1970. 18 U.S.C. §§ 1961-1968 (1976). The Organized Crime Control Act contains twelve substantive titles the purpose of which is "to seek the eradication of organized crime in the United States by strengthening the legal tools in the evidence-gathering process, by establishing new penal prohibitions, and by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime." Organized Crime Control Act of 1970, Pub. L. No. 91-452, Statement of Findings and Purpose, 84 Stat. 922.

2. RICO's substantive offenses are set out in 18 U.S.C. § 1962(a)-(d) (1976):

> (a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise

A RICO offense is pyramidal in nature. It consists of three distinct elements, each of which creates the foundation upon which the next element is built. At the base of a RICO offense is the "racketeering activity." Racketeering activity is defined as any one of a carefully chosen list of state and federal crimes.[3]

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which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern of racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

3. 18 U.S.C. § 1961(1) (Supp. III 1979) provides:

(1) "racketeering activity" means (A) any act or threat involving murder, kidnaping, gambling, arson, robbery, bribery, extortion, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the

These underlying crimes are also referred to as predicate offenses, and a defendant may be tried for his predicate crimes in addition to his RICO prosecution.[4]

The second element of the pyramid consists of a "pattern of racketeering activity."[5] Commission of two or more predicate crimes within ten years establishes a presumption of the requisite pattern.

The third and crucial element in establishing a RICO offense is the proof of the existence of an "enterprise," the affairs of which are conducted through a pattern of racketeering activity. This enterprise, the apex of the pyramid, is defined as "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity."[6] The enterprise concept is at once unique in the criminal law and central to a RICO prosecution. As a result, the scope of the term "enterprise" has been the fo-

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obstruction of State or local law enforcement), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), sections 2314 and 2315 (relating to interstate transportation of stolen property), sections 2341-2346 (relating to trafficking in contraband cigarettes), sections 2421-24 (relating to white slave traffic), (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), or (D) any offense involving fraud connected with a case under title 11, fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States.

4. United States v. Aleman, 609 F.2d 298, 306 (7th Cir. 1979), *cert. denied*, 445 U.S. 946 (1980); United States v. Rone, 598 F.2d 564, 572 (9th Cir. 1979), *cert. denied sub nom.* Little v. United States 445 U.S. 946 (1980).

5. 18 U.S.C. § 1961(5) (1976) provides: "(5) 'pattern of racketeering activity' requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity."

6. 18 U.S.C. § 1961(4) (1976).

cus of much controversy and litigation.[7] The courts of appeals are divided on the issue whether an enterprise should encompass only legitimate businesses or whether it should also encompass purely illegal organizations.[8] This controversy and its proper resolution are the focus of this Comment.

### *B. The Legislative History of RICO*

The legislative history of the RICO statute covers a decade

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7. United States v. Sutton, 642 F.2d 1001 (6th Cir. 1980); United States v. Errico, 635 F.2d 152 (2d Cir. 1980); United States v. Turkette, 632 F.2d 896 (1st Cir. 1980), *cert. granted*, 101 S. Ct. 938 (1981); United States v. Anderson, 626 F.2d 1358 (8th Cir. 1980), *cert. denied*, 101 S. Ct. 1351 (1981); United States v. Provenzano, 620 F.2d 985 (3d Cir.), *cert. denied*, 101 S. Ct. 267 (1980); United States v. Whitehead, 618 F.2d 523, 525 n.1 (4th Cir. 1980) (accepted broad construction, disposition on other grounds); United States v. Aleman, 609 F.2d 298 (7th Cir. 1979), *cert. denied*, 445 U.S. 946 (1980); United States v. Diecidue, 603 F.2d 535 (5th Cir. 1979), *cert. denied sub nom.* Antone v. United States, 445 U.S. 946 (1980); United States v. Rone, 598 F.2d 564 (9th Cir. 1979), *cert. denied sub nom.* Little v. United States, 445 U.S. 946 (1980); United States v. Swiderski, 593 F.2d 1246 (D.C. Cir. 1978), *cert. denied*, 441 U.S. 933 (1979); United States v. Elliott, 571 F.2d 880 (5th Cir.), *cert. denied sub nom.* Hawkins v. United States, 439 U.S. 953 (1978); United States v. Altese, 542 F.2d 104 (2d Cir. 1976), *cert. denied sub nom.* Napoli v. United States, 429 U.S. 1039 (1977); United States v. Hawes, 529 F.2d 472 (5th Cir. 1976); United States v. Cappetto, 502 F.2d 1351 (7th Cir. 1974), *cert. denied*, 420 U.S. 925 (1975).

8. The circuits are split eight to two in favor of a broad construction. Those circuits favoring a broad construction currently are the second, United States v. Altese, 542 F.2d 104 (2d Cir. 1976), *cert. denied sub nom.* Napoli v. United States, 429 U.S. 1039 (1977), the third, United States v. Provenzano, 620 F.2d 985 (3d Cir.), *cert. denied*, 101 S. Ct. 267 (1980), the fourth, United States v. Whitehead, 618 F.2d 523, 525 n.1 (4th Cir. 1980), the fifth, United States v. Elliott, 571 F.2d 880 (5th Cir.), *cert. denied sub nom.* Hawkins v. United States, 439 U.S. 953 (1978), the sixth, United States v. Sutton, 642 F.2d 1001 (6th Cir. 1980), the seventh, United States v. Aleman, 609 F.2d 298 (7th Cir. 1979), *cert. denied*, 445 U.S. 946 (1980), the ninth, United States v. Rone, 598 F.2d 564 (9th Cir. 1979), *cert. denied sub nom.* Little v. United States, 445 U.S. 946 (1980), and the District of Columbia Circuit, United States v. Swiderski, 593 F.2d 1246 (D.C. Cir. 1978), *cert. denied*, 441 U.S. 933 (1979). The two circuits favoring a narrow construction are the first, United States v. Turkette, 632 F.2d 896 (1st Cir. 1980), *cert. granted*, 101 S. Ct. 938 (1981), and the eighth, United States v. Anderson, 626 F.2d 1358 (8th Cir. 1980), *cert. denied*, 101 S. Ct. 1351 (1981). Only the Tenth Circuit has not yet considered the issue.

of congressional investigation into the effect of organized crime on the American economy.[9] In 1969 a congressional subcommittee on criminal laws and procedure heard testimony describing the way in which organized crime operated in the economy and why a new approach was needed to eradicate this evil.

> [O]rganized crime is increasingly operating in fields of legitimate business, where it employs such illegitimate techniques as bankruptcy frauds, tax evasion, extortion, terrorism, arson, and monopolization. In so doing, it drives out lawful ownership and extracts exorbitant profits from a captive public. . . .
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> We recognize that the arrest and conviction of Cosa Nostra leaders will not in and of itself destroy organized crime unless the sources of revenue are also demolished. . . .With this realization in mind, we are developing priorities . . . that will enable us to proceed against both organized crime leaders and the principal sources of their revenue.[10]

Clearly, in enacting RICO, Congress was most concerned about the corruption of legitimate businesses by organized crime. In 1951 one of the first congressional committees to investigate organized crime noted that numerous industries such as advertising, automobiles, bowling alleys, basketball, hotels, jukebox,

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9. The legislation that eventually became the RICO statute was first introduced in 1968. RICO was the culmination of congressional and executive investigation dating from the 1950s. It "grew out of a concern first developed [in] the Kefauver Committee [about] the problem presented in a free enterprise economy by black money, the . . . proceeds of illegal endeavors." G. Blakey, *Materials on RICO: Criminal Overview*, in 1 TECHNIQUES IN THE INVESTIGATION AND PROSECUTION OF ORGANIZED CRIME 1, 9 (G. Blakey ed. 1980). Additionally, the American Bar Association and the President's Crime Commission of 1967 were conducting studies on the same problem. Both the Kefauver Committee and the Crime Commission arrived at the conclusion that "the proceeds of illegal endeavors were being invested in legitimate businesses, and that the free enterprise economy [prior to RICO] required . . . that the law sterilize that black money and prevent its objectionable influence from being felt in the legitimate economy." *Id.* For a thorough examination of the legislative history of RICO, see Bradley, *Racketeers, Congress, and the Courts: An Analysis of RICO*, 65 IOWA L. REV. 837 (1980) [hereinafter cited as Bradley].

10. *Bills Relating to Organized Crime Activities: Hearings on S.30, S.975, S.976, S.1623, S.1624, S.1961 Before the Subcomm. on Criminal Laws and Procedure*, 91st Cong., 1st Sess. 108, 112 (1969) (testimony by Attorney General John H. Mitchell).

laundry, and others had become the victims of organized crime.[11] In designing a statute to combat this evil, Congress spoke logically and consistently regarding the harm that originally sparked their concern—the infiltration of legitimate businesses. Congressional failure to speak of RICO's scope in broader terms does not necessarily restrict the statute's applicability.

The congressional desire to end the infiltration of legitimate business, the creation of a new substantive crime to eradicate organized crime, and the mandate that the new statute be construed liberally to effectuate its remedial purposes[12] result in a congressional formula for RICO. While this formula explains the existence of RICO, it does not define its scope. RICO by its statutory language should extend to infiltration of illegitimate as well as legitimate enterprises. One need only examine the definition of an enterprise[13] to realize that, while Congress was directly concerned with legitimate business, they chose to draft the statute in much broader terms to allow for prosecutions in areas not yet known to be affected by organized crime. This goal should be viewed as no less a part of congressional intent than the desire to protect legitimate businesses. One justification for relying on a literal reading of RICO is found in this statement by the United States Supreme Court: "Under our constitutional framework, federal courts do not sit as councils of revision. . . . Only when a literal construction of a statute yields results so manifestly unreasonable that they could not fairly be attributed to congressional design will an exception to statutory language be judicially implied."[14] Thus, the legislative history of RICO is only illustrative and not dispositive of the issue whether the term "enterprise" encompasses illegitimate as well as legitimate businesses.

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11. S. REP. No. 307, 82d Cong., 1st Sess. 171 (1951).

12. "The provisions of this title shall be liberally construed to effectuate its remedial purposes." Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 904, 84 Stat. 922.

13. 18 U.S.C. § 1961(4) (1976). *See* text accompanying note 6 *supra*.

14. United States v. Rutherford, 442 U.S. 544, 555 (1979).

## II. The Enterprise

### A. *Conceptual Differences Between Broad and Narrow Constructionists*

The conflict between broad and narrow constructionists on the meaning of enterprise exists on two levels. The first issue is whether courts should adopt the narrow characterization of an enterprise as set forth in the legislative history of the RICO statute[15] or whether they should read the statute broadly, relying only on a literal interpretation. The words that have fostered this conflict are found in the statute's definition of the term "enterprise."[16]

The majority of circuits considering the definitional problem with the term "enterprise" have held that an enterprise includes organizations formed strictly for illegitimate purposes.[17]

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15. 116 Cong. Rec. 35,295 (1979) (remarks of Rep. Poff). *See also* 115 Cong. Rec. 827 (1969) (remarks of Sen. Hruska).

16. *See* text accompanying note 6 *supra*.

17. United States v. Sutton, 642 F.2d 1001 (6th Cir. 1980) (enterprise engaged in heroin distribution and large-volume fencing operation); United States v. Errico, 635 F.2d 152 (2d Cir. 1980) (enterprise engaged in fixing horse races); United States v. Provenzano, 620 F.2d 985, 989 (3d Cir.), *cert. denied*, 101 S. Ct. 267 (1980) (enterprise "to extort money from trucking companies in return for 'labor peace' "); United States v. Whitehead, 618 F.2d 523, 525 (4th Cir. 1980) (enterprise to promote "an interstate prostitution ring through a bribery scheme"); United States v. Aleman, 609 F.2d 298 (7th Cir. 1979) (enterprise to commit burglaries in two states), *cert. denied*, 445 U.S. 946 (1980); United States v. Diecidue, 603 F.2d 535 (5th Cir. 1979) (enterprise to commit robbery, counterfeiting, illegal use of explosives, and murder), *cert. denied sub nom.* Antone v. United States, 445 U.S. 946 (1980); United States v. Rone, 598 F.2d 564 (9th Cir. 1979) (enterprise engaged in extortion), *cert. denied sub nom.* Little v. United States, 445 U.S. 946 (1980); United States v. Swiderski, 593 F.2d 1246 (D.C. Cir. 1978) (enterprise was restaurant operated as a front for trafficking in cocaine), *cert. denied*, 441 U.S. 933 (1979); United States v. Elliott, 571 F.2d 880, 899 (5th Cir.) (enterprise engaged in arson, theft, jury tampering, and drug trafficking: illicit enterprise described as a "myriopod criminal network, loosely connected but connected nonetheless"), *cert. denied sub nom.* Hawkins v. United States, 439 U.S. 953 (1978); United States v. Altese, 542 F.2d 104 (2d Cir. 1976) (enterprise engaged in a large-scale gambling business) *cert. denied sub nom.* Napoli v. United States, 429 U.S. 1039 (1977); United States v. Cappetto, 502 F.2d 1351 (7th Cir. 1974) (enterprise engaged in a gambling business), *cert. denied*, 420 U.S. 925 (1975).

Examples of such enterprises are illegal gambling businesses,[18] prostitution rings,[19] and any association in fact which serves as a "vehicle for the commission of two or more predicate crimes."[20] The last category of enterprises has been held to include organizations in which the only unifying purpose is to make money for its participants.[21] These organizations tend to be involved in more diverse types of criminal activity; for example, one enterprise may be involved in drug trafficking, murder, bribery, and theft. The position of narrow constructionists is essentially that RICO does not apply to individuals whose only enterprise activity is wholly criminal.[22]

The second level of the conflict between broad and narrow constructionists involves a refinement of the first. The question arises whether an enterprise must be a separate entity, distinct from the acts of racketeering, in order to satisfy the statute. Narrow constructionists would impose a further requirement that the enterprise be not only a separate entity but also a separate legal entity. Conceptually, broad and narrow constructionists agree that an enterprise must be separable from the pattern of racketeering through which the enterprise is conducted.[23] As a

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18. United States v. Cappetto, 502 F.2d 1351 (7th Cir. 1974), *cert. denied*, 420 U.S. 925 (1975).

19. United States v. Whitehead, 618 F.2d 523 (4th Cir. 1980); United States v. McLaurin, 557 F.2d 1064 (5th Cir. 1977), *cert. denied sub nom.* Bryant v. United States, 434 U.S. 1020 (1978).

20. United States v. Elliott, 571 F.2d 880, 898 (5th Cir.), *cert. denied sub nom.* Hawkins v. United States, 439 U.S. 953 (1978).

21. *Id.*

22. United States v. Turkette, 632 F.2d 896 (1st Cir. 1980), *cert. granted*, 101 S. Ct. 938 (1981); United States v. Anderson, 626 F.2d 1358 (8th Cir. 1980) (by implication), *cert. denied*, 101 S.Ct. 1351 (1981); United States v. Sutton, 605 F.2d 260 (6th Cir. 1979), *rev'd on rehearing en banc*, 642 F.2d 1001 (6th Cir. 1980); United States v. Aleman, 609 F.2d 298, 311 (7th Cir. 1979) (Swygert, J., dissenting), *cert. denied*, 445 U.S. 946 (1980); United States v. Rone, 598 F.2d 564, 573-74 (9th Cir. 1979) (Ely, J., dissenting), *cert. denied sub nom.* Little v. United States, 445 U.S. 946 (1980); United States v. Altese, 542 F.2d 104, 107-10 (2d Cir. 1976) (Van Graafeiland, J., dissenting), *cert. denied sub nom.* Napoli v. United States, 429 U.S. 1039 (1977).

23. An example of this proposition is United States v. Elliott, 571 F.2d 880 (5th Cir.), *cert. denied sub nom.* Hawkins v. United States, 439 U.S. 953 (1978), in which the court, although adopting a broad construction, attempted to define an enterprise as "an amoeba-like infra-structure that controls a secret

practical matter, however, a broad construction which extends RICO to encompass illegitimate enterprises tends to blur the line of separation. For the narrow constructionists, defining a legal entity is the easiest way of maintaining the distinction between the enterprise and the illegal acts through which it is conducted.

### *B. Governmental Entities as Enterprises*

While governmental entities clearly satisfy the legitimate business requirement that narrow constructionists demand, at least one court and one commentator have argued against the application of RICO to public institutions.[24] Neither the legislative history nor the statute itself specifically includes governmental entities within the scope of the statute. Additionally, the civil remedies under RICO that allow "dissolution or reorganization of any 'enterprise' "[25] in violation of the statute cannot be

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criminal network" not unlike a "duly formed corporation that elects officers and holds annual meetings." *Id.* at 898. Similarly, in United States v. Sutton, 642 F.2d 1001 (6th Cir. 1980), the court favored a broad construction of the term "enterprise" but attempted to set it apart from the pattern of racketeering by defining an enterprise as an "organization in which these nine defendants . . . joined to conduct the organization's affairs." *Id.* at 1009.

24. United States v. Mandel, 415 F. Supp. 997 (D. Md. 1976) (State of Maryland not an enterprise within RICO), *aff'd and remanded on rehearing*, 602 F.2d 653 (4th Cir. 1979); *see also* Bradley, *supra* note 9, at 858-61. Professor Bradley argues that in the presence of vague statutory language and in the absence of a clear statement of congressional intent the courts should adopt the rule of lenity and exclude governmental entities. *Id.*

25. 18 U.S.C. § 1964(a)-(d) (1976). These sections set out the civil penalties of RICO:

> (a) The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.
>
> (b) The Attorney General may institute proceedings under this section. In any action brought by the United States under this section,

applied to governmental entities. Irrespective of these arguments, however, the majority of courts considering this question have held that offices of elected state officials and state agencies are enterprises within the scope of RICO.[26] Ironically, even courts that would otherwise adopt a narrow construction of the term "enterprise" have permitted RICO prosecutions of government officers.[27] Apparently these courts are willing to defer to

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the court shall proceed as soon as practicable to the hearing and determination thereof. Pending final determination thereof, the court may at any time enter such restraining orders or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper.

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

(d) A final judgment or decree rendered in favor of the United States in any criminal proceeding brought by the United States under this chapter shall estop the defendant from denying the essential allegations of the criminal offense in any subsequent civil proceeding brought by the United States.

26. United States v. Bright, 630 F.2d 804 (5th Cir. 1980) (sheriff's office accepted as an enterprise within RICO); United States v. Altomare, 625 F.2d 5 (4th Cir. 1980) (county prosecutor's office held to be an enterprise within RICO); United States v. Grzywacz, 603 F.2d 682 (7th Cir. 1979) (city police department held to be an enterprise within RICO), *cert. denied*, 446 U.S. 935 (1980); United States v. Frumento, 563 F.2d 1093 (3d Cir. 1977) (Pennsylvania Bureau of Cigarette and Beverage Taxes held to be an enterprise within RICO), *cert. denied*, 434 U.S. 1072 (1978); United States v. Brown, 555 F.2d 407 (5th Cir. 1977) (city police department held to be an enterprise within RICO), *cert. denied*, 435 U.S. 904 (1978); United States v. Sisk, 476 F. Supp. 1061 (M.D. Tenn. 1979) (enterprise held to include government agencies). *But see*, United States v. Mandel, 415 F. Supp. 997 (D. Md. 1976).

27. In United States v. Sisk, 476 F. Supp. 1061 (M.D. Tenn. 1979), Judge Merritt, sitting by designation, held that the enterprise coverage of RICO extended to government agencies and not merely to private institutions. Judge Merritt also wrote the panel opinion in United States v. Sutton, 605 F.2d 260 (6th Cir. 1979), *rev'd on rehearing en banc*, 642 F.2d 1001 (6th Cir. 1980), which held that RICO encompassed only legitimate businesses. In United States v. Anderson, 626 F.2d 1358 (8th Cir. 1980), *cert. denied*, 101 S. Ct. 1351 (1981), the court noted that United States v. Frumento, 563 F.2d 1083 (3d Cir. 1977) (government agency was within RICO), *cert. denied*, 434 U.S. 1072 (1978), was not inconsistent with its opinion. The court otherwise adopted a

the reality that organized crime acts through public agencies. One such court has reasoned that since government agencies are not excluded specifically from RICO, and since some of the racketeering offenses such as bribery and extortion necessarily are related to governmental corruption, Congress must have intended that the statute would apply to governmental entities.[28] Looking to the overall congressional concern in enacting RICO, courts also have noted that RICO is aimed at restraining the growth of organized crime in every aspect of the American economy, not merely in the private sector.[29]

## III. Recent Judicial Developments

### A. *United States v. Sutton: The Sixth Circuit Adopts a Narrow Construction*

In September 1979 the Sixth Circuit handed down its panel decision in *United States v. Sutton*.[30] The 329-count indictment in the case named nine defendants who were involved in a significant heroin distribution business and a large-volume fencing operation.

The Government characterized this wholly illegitimate venture as a single criminal enterprise with separate departments for directing different types of criminal activity.[31] The whole enterprise was under the management of two defendants.[32] By es-

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narrow construction of RICO.

28. United States v. Sisk, 476 F. Supp. 1061, 1062 (M.D. Tenn. 1979).

29. United States v. Frumento, 563 F.2d 1083, 1090-91 (3d Cir. 1977), *cert. denied*, 434 U.S. 1072 (1978); United States v. Sisk, 476 F. Supp. 1061, 1062-63 (M.D. Tenn. 1979). To date the Third, Fourth, Fifth, and Seventh Circuits have specifically held that governmental entities are within RICO. *See* note 26 *supra*. Arguably the Sixth and Eighth Circuits should also be counted in this group. The Sixth Circuit should be included because of its decision in United States v. Sutton, 642 F.2d 1001 (6th Cir. 1980), and because of Judge Merritt's opinion in United States v. Sisk, 476 F. Supp. 1061 (M.D. Tenn. 1979). The Eighth Circuit should be included because of its decision in United States v. Anderson, 626 F.2d 1358 (8th Cir. 1980), *cert. denied*, 101 S. Ct. 1351 (1981). *See* note 27 *supra*.

30. 605 F.2d 260 (1979), *rev'd on rehearing en banc*, 642 F.2d 1001 (6th Cir. 1980).

31. *Id.* at 263.

32. *Id.*

tablishing a hierarchy in the division of labor, the Government was attempting to define the enterprise in terms of a corporate structure separate from the acts of racketeering. The court, however, refused to distinguish between the management aspects of the enterprise and the racketeering activity through which it was conducted. The court stated that such a distinction was too vague and would likely violate due process because defendants would not know at what point their activities became an enterprise in violation of RICO.[33] Consequently, the court turned to the legislative history of the statute to find a workable definition of a "criminal enterprise." The result was the adoption by the Sixth Circuit of a construction that the court felt would ensure independent significance for the enterprise element in every case. Specifically the court held that a RICO enterprise had to be an "entity larger than, and conceptually distinct from, any 'pattern of racketeering activity' ";[34] the enterprise also had to be "organized and acting for some ostensibly lawful purpose, either formally declared or informally recognized."[35]

After the panel reversed and remanded the case for separate trials, the Government petitioned for and was granted a rehearing en banc. Before the Sixth Circuit had reviewed and reversed its panel decision, however, the Eighth and First Circuits handed down opinions following the Sixth Circuit's lead in adopting a narrow construction of the term "enterprise."[36]

### *B. United States v. Anderson: The Eighth Circuit Adopts a Modified Narrow Construction*

The Eighth Circuit followed the first *Sutton* decision in *United States v. Anderson.*[37] Two defendants were convicted of

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33. *Id.* at 266.

34. *Id.*

35. *Id.* at 270.

36. The two decisions following the panel decision in *Sutton* were United States v. Anderson, 626 F.2d 1358 (8th Cir. 1980), *cert. denied,* 101 S. Ct. 1351 (1981), and United States v. Turkette, 632 F.2d 896 (1st Cir. 1980), *cert. granted,* 101 S. Ct. 938 (1981). Since these cases are chronologically sandwiched between the two decisions in *Sutton,* they will be discussed before the discussion of *Sutton* on rehearing.

37. 626 F.2d 1358 (8th Cir. 1980), *cert. denied,* 101 S. Ct. 1351 (1981).

participating by acts of racketeering in an enterprise devised to defraud their county treasuries while they were serving as county judges.[38] Specifically, these judges received kickbacks and bribes by submitting bogus invoices on merchandise they knew the county would never receive.[39] The enterprise in the case was established only by the facts which also established the predicate crimes constituting the pattern of racketeering activity.[40] Unlike the alleged enterprise in *Sutton*, the enterprise in *Anderson* had no identifiable management superstructure.

The Eighth Circuit held that a RICO enterprise could not encompass a simple association to commit a pattern of racketeering activity.[41] The court did not, however, restrict the statute to the extent that the Sixth Circuit had in its initial decision in *Sutton*.[42] Rather than require that the term "enterprise" be limited to legitimate businesses, the court defined enterprise "to encompass only an association having an ascertainable structure which exists for the purpose of maintaining operations directed toward an economic goal that has an existence that can be defined apart from the commission of the predicate acts constituting the 'pattern of racketeering activity.' "[43] Arguably, this definition allows the prosecution of racketeers conducting the affairs of an illegitimate enterprise as long as the enterprise has an existence independent of the racketeering activity.

In analyzing the scope of the term "enterprise" the *Anderson* court advanced one of the basic arguments of the narrow constructionists: by allowing the Government to prove an enterprise solely by evidence of an association to commit the pattern

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38. *Id.* at 1360.

39. *Id.* at 1362.

40. *Id.*

41. *Id.* at 1369.

42. Professor Bradley suggests that the panel in *Sutton* went too far in requiring that an enterprise operate for some ostensibly lawful purpose. He illustrates that an enterprise can satisfy the statute without being a legitimate business: "If a loan shark uses the profits of the loan-sharking activity to buy an illegal gambling enterprise, the enterprise has an independent existence from the racketeering activity, and RICO can appropriately be enforced without reading the term enterprise out of the statute." Bradley, *supra* note 9, at 854.

43. 626 F.2d at 1372.

of racketeering activity, the enterprise element would be eliminated from the statute.[44] The consequences of this interpretation troubled the court.

First, the court reasoned that Congress intended to give meaning to every element of a RICO offense, and therefore prosecutors must not be permitted to circumvent proof of an enterprise by simply proving a pattern of racketeering activity.[45] Second, the court reasoned that Congress intended that the term "enterprise" describe more than a criminal conspiracy. This notion was implied in that portion of the definition that states an enterprise can include a "group of individuals associated in fact."[46] Since RICO has a separate section proscribing conspiracies to violate its substantive sections,[47] the *Anderson* court concluded that it would be duplicative and awkward to allow a criminal conspiracy to fulfill the enterprise element. Otherwise a conspiracy to conduct an enterprise through a pattern of racketeering would be defined "as when a person, associated with a conspiracy to commit criminal acts, conspires to conduct those criminal acts."[48] Third, the court emphasized the need for a separately defined enterprise element by suggesting that this element of RICO is essential to the statute's constitutionality.[49] Because a defendant may be prosecuted separately for the predicate crimes that comprise a pattern of racketeering activity, the court reasoned that if proof of an enterprise was not required, a defendant would be placed in double jeopardy since only the facts constituting the predicate crimes would have to be proved.[50]

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44. *Id.* at 1369. *See also* United States v. Turkette, 632 F.2d 896, 903 (1st Cir. 1980), *cert. granted*, 101 S. Ct. 938 (1981); United States v. Aleman, 609 F.2d 298, 311 (Swygert, J., dissenting), *cert. denied*, 445 U.S. 946 (1980); United States v. Sutton, 605 F.2d 260, 265 (6th Cir. 1979), *rev'd on rehearing en banc*, 642 F.2d 1001 (6th Cir. 1980).

45. 626 F.2d at 1369.

46. *Id.* (quoting 18 U.S.C. § 1961(4) (1976)).

47. 18 U.S.C. § 1962(d) (1976); *see* note 2 *supra*.

48. 626 F.2d at 1369.

49. *Id.* at 1367.

50. *Id.* See United States v. Rone, 598 F.2d 564 (9th Cir. 1979), in which the court suggested that if more than one type of racketeering activity, i.e., three murders and two acts of extortion, is alleged and proved, no double jeop-

Although not an issue in this case, the *Anderson* court did question whether governmental entities would be included within its definition of an enterprise and implied that governmental entities would be within its construction of the statute.[51] The court stated that this case was not inconsistent with *United States v. Frumento*,[52] which held that a governmental agency was within RICO.[53]

Although the *Anderson* court was concerned with preserving the enterprise element of the offense, it required only that an enterprise have an ascertainable structure separate from the racketeering activity and not that the enterprise also be legitimate. This limitation makes the holding in *Anderson* much more logically and statutorily defensible. The holding is logically defensible because it demonstrates that the enterprise element may be preserved without reading into the statute the requirement that the enterprise be legitimate. Similarly, the holding is statutorily defensible because it is necessary to preserve and give content to the language that an enterprise be a group of individuals "associated in fact although not a legal entity."[54]

### *C. United States v. Turkette: The First Circuit Adopts a Narrow Construction*

The First Circuit also followed the first *Sutton* decision in *United States v. Turkette*.[55] The enterprise alleged was an association for the purpose of illegally trafficking in narcotics, committing arson and insurance fraud, influencing the outcome of state trials, and bribing police officers.[56] The defendants had engaged in this course of criminal activity for almost two years throughout eastern Massachusetts.[57] Their association during

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ardy problems exist if either the murders or extortions are not prosecuted separately, because the RICO charge can stand on either type of activity alone. *Id.* at 571. *See also* Blockburger v. United States, 284 U.S. 299 (1932).

51. 626 F.2d at 1365 n.10.

52. United States v. Frumento, 563 F.2d 1083 (3d Cir. 1977), *cert. denied*, 434 U.S. 1072 (1978).

53. 626 F.2d at 1372 & n.22.

54. 18 U.S.C. § 1961(4) (1976); *see* text accompanying note 6 *supra*.

55. 632 F.2d 896 (1st Cir. 1980), *cert. granted*, 101 S. Ct. 938 (1981).

56. *Id.* at 897.

57. Brief for the United States for Writ of Certiorari, at 2-3, United

that time was described as being "run in an organized and professional manner in which different individuals performed specific and distinct roles."[58]

In reversing the defendants' convictions, the *Turkette* court held that only legitimate businesses were within RICO's definition of an enterprise.[59] The court's analysis also incorporated several of the arguments advanced by the narrow constructionists. These arguments included the application of the principle of *ejusdem generis*,[60] the concern about interjecting the federal government into state law enforcement,[61] and, most significantly, the argument based on RICO's legislative history.[62]

Utilizing the doctrine of *ejusdem generis*, the court pointed out that each specific enterprise enumerated in the statute's definition was a legitimate one. Therefore, the phrase "any . . . group of individuals associated in fact although not a legal entity"[63] should be viewed as merely a catch-all phrase limited to legitimate enterprises.[64] Additionally, in an effort to read the statute as a whole and eliminate internal inconsistencies, the

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States v. Turkette, *cert. granted*, 101 S. Ct. 938 (1981).

58. *Id.* at 3.

59. 632 F.2d at 899.

60. This rule of statutory construction was applied in several cases favoring a narrow construction of the term enterprise. *See* United States v. Turkette, 632 F.2d 896, 899 (1st Cir. 1980), *cert. granted*, 101 S. Ct. 938 (1981); United States v. Anderson, 626 F.2d 1358, 1366 (8th Cir. 1980), *cert. denied*, 101 S. Ct. 1351 (1981); *United States v. Altese*, 542 F.2d 104, 107 (2d Cir. 1976) (Van Graafeiland, J., dissenting), *cert. denied sub nom.* Napoli v. United States, 429 U.S. 1039 (1977). The rule *ejusdem generis* dictates that when general words follow an enumeration of things which are specific, the general words are to be construed as applying only to things of the same general kind as those mentioned. This rule does not apply when the context manifests a contrary intention. BLACK'S LAW DICTIONARY 464 (5th ed. 1979). Within the context of RICO, the doctrine is used by narrow constructionists to limit the broad phrase "any association in fact although not a legal entity," 18 U.S.C. § 1961(4) (1976), to those specific legal entities named in the preceding phrase; the result is that the statute is limited to legitimate enterprises or at the least that sufficient ambiguity is created to warrant examination of the legislative history.

61. 632 F.2d at 904.

62. *Id.* at 899-903.

63. 18 U.S.C. § 1961(4) (1976).

64. 632 F.2d at 899.

court concluded that an interpretation that subsection (c) included illegitimate enterprises would be at odds with RICO's other two substantive sections.[65] Subsection (a) prohibits investing proceeds from racketeering activity in an enterprise,[66] subsection (b) prohibits acquisition of an enterprise through racketeering activity,[67] and subsection (c) prohibits conducting the affairs of an enterprise through racketeering.[68] The court reasoned that these subsections make sense only if the protected enterprise is legitimate.[69] This argument might be valid except for the statute's very broad definition of an enterprise. Similarly, the court reasoned that the phrases "employed by or associated with any enterprise" and "the conduct of such an enterprise's affairs through a pattern of racketeering activity" add nothing to the meaning of section 1962(c) unless applied to legitimate businesses and not illegitimate businesses.[70]

One possible, albeit unaddressed, consequence of the court's emphasis on reading the statute as a whole is the exclusion of governmental entities from enterprises within RICO. The implicit result of the court's approach is that since the statute's civil remedies can only be levied against privately owned businesses, governmental entities are excluded from the criminal prohibitions. In arguably excluding governmental entities and insisting on the existence of a legitimate and not merely a separately identifiable enterprise, the court in *Turkette* adopted the most narrow construction of the statute to date. Finally, the court felt the congressional mandate to liberally construe RICO should apply only to the statute's civil remedies and not to its criminal sanctions.[71]

An argument consistently advanced by narrow constructionists and also presented by the First Circuit in *Turkette* is the view that an expansive interpretation of the term "enterprise" would extend "federal jurisdiction . . . to practically every crim-

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65. *Id.*
66. 18 U.S.C. § 1962(a) (1976); *see* note 2 *supra.*
67. 18 U.S.C. § 1962(b) (1976); *see* note 2 *supra.*
68. 18 U.S.C. § 1962(c) (1976); *see* note 2 *supra.*
69. 632 F.2d at 899.
70. *Id.*
71. *Id.* at 905.

inal activity affecting interstate commerce."[72] The argument that a broad construction of RICO usurps the traditional federal-state balance tends to arouse an emotional response from the statute's opponents; this argument, however, appears flawed. The only type of offense that federal prosecutors may prosecute under a broad construction, but may not prosecute otherwise, is one in which an illegitimate enterprise is conducted through the commission of two or more state crimes that serve simultaneously to establish both a pattern of racketeering activity and the enterprise. Even under the most restrictive interpretation of RICO, individuals whose only crimes are state offenses may be prosecuted if those crimes establish a pattern of racketeering activity and are the means of infiltrating a legitimate enterprise. The statute clearly is not limited to proscribing acts of racketeering that are federal offenses. By definition, enumerated state and federal crimes constitute racketeering activity, and there is no further statutory limitation on how these sets of crimes may be combined to establish a pattern of racketeering activity. Thus, to argue against a broad construction of the term "enterprise" on the ground that it unduly interferes with state law enforcement is to argue against the statute as a whole. RICO unquestionably authorizes a substantial intrusion into state criminal jurisdiction regardless of statutory construction.[73] A narrow construction of the statute is ineffectual in containing this expansion.

With respect to the statute's legislative history, the *Turkette* court interpreted the absence of any meaningful reference to illegimate business and the repeated references to organized crime's infiltration of legitimate business as dispositive of congressional intent and the enterprise issue.[74] While the court noted the irony of exempting criminal enterprises from prosecution because they are wholly illegal, it characterized RICO not "as an offensive weapon against criminals, but as a shield to thwart their depredations against legitimate business enterprises."[75]

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72. *Id.* at 904.
73. United States v. Sutton, 642 F.2d 1001, 1009 (6th Cir. 1980).
74. 632 F.2d at 901.
75. *Id.* at 901-02.

### D. *United States v. Sutton: The Sixth Circuit Adopts a Broad Construction*

In an opinion handed down December 3, 1980, after a rehearing en banc, the Sixth Circuit reversed its panel decision in *United States v. Sutton*,[76] thereby aligning itself with the seven other circuits favoring a broad construction of the term "enterprise."[77] Approaching the issue in a simplistic manner, the majority of the court stated that this portion of the statute contained no ambiguity on its face and should therefore be interpreted literally.[78] The court emphasized Congress' use of the term "enterprise" without qualification, except as occasionally modified by the word "any," which the court described as an "all encompassing" term.[79] The court accepted the statute at face value and applied a traditional canon of statutory construction that removes the need to look to the legislative history of a statute when it is unambiguous on its face.[80] Thus, the court avoided an examination of the legislative history. As a result there was no need for the court to apply a doctrine such as *ejusdem generis*.[81] Additionally, the court noted that "the statute itself makes plain that Congress intended to bring the full force of federal law enforcement into the effort to destroy organized crime, and that it had no intention of limiting the federal effort to just those 'ostensibly legitimate' enterprises which organized crime might use."[82]

In its brief before the court en banc the Government attempted to answer the panel's objection to a broad construction by differentiating between an enterprise and a pattern.[83] The Government argued that an " 'enterprise' is a concept that denotes an entity or group of persons organized for a particular purpose. 'Pattern' is a concept which denotes the relationship,

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76. 642 F.2d 1001 (6th Cir. 1980).

77. *See* note 8 *supra*.

78. 642 F.2d at 1006-09.

79. *Id.* at 1007.

80. *Id.* at 1006.

81. *See* note 60 *supra*.

82. 642 F.2d at 1003.

83. Brief for the United States on Rehearing en Banc, at 11, United States v. Sutton, 642 F.2d 1001 (6th Cir. 1980).

not between people, but between acts which 'are interrelated by distinguishing characteristics and are not isolated events.' "[84] The Sixth Circuit, in adopting a broad construction, stated simply that an " '[e]nterprise' in the context of the case clearly referred to the organization in which these nine defendants . . . joined to conduct the organization's affairs. 'Pattern of racketeering activity' refers to the various criminal activities . . . engaged in by the 'enterprise.' "[85] Clearly the court recognized the necessity to distinguish between an enterprise and a pattern of racketeering.

As an alternative to the foregoing arguments, the court offerred the record in *Sutton* as support for "affirmance of [the] convictions if a requirement of use of or impact on ostensibly legitimate businesses were to be found as a derivative of the legislative history."[86] The bulk of the opinion was directed toward showing significant interaction between the defendants' illicit activities and an "ostensibly legitimate" jewelry store which provided a front for the sale of narcotics and stolen goods.[87] The willingness of the court to try to meet the standard enunciated by the panel indicates an uncertainty about their own holding and a recognition of the trend to narrow the scope of RICO. If the Sixth Circuit is correct in perceiving the need to meet the panel's standard, it is questionable whether the "ostensibly legitimate" test would be satisfied merely by a presentation of the facts in the record when the enterprise alleged in the indictment

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84. *Id.*

85. 642 F.2d at 1009.

86. *Id.* at 1010.

87. The court's interpretation of the statute is contained in the first eight pages. The remaining thirty-two pages are devoted to showing a significant interaction between the defendant's illegal activities and an "ostensibly legitimate" jewelry store. The court seems to suggest that even if its interpretation of an enterprise is too broad, the facts of the case would bring it within a narrower definition. *Id.* In United States v. Provenzano, 620 F.2d 985 (3d Cir.), *cert. denied*, 101 S. Ct. 267 (1980), the court manipulated the fact situation in a similar way to avoid adopting either a broad or narrow definition of enterprise. "The purpose of RICO—prevention of infiltration of legitimate business by racketeers—would in any event be vindicated by the convictions here, since the wholly illegitimate Provenzano association subverted legitimate unions and businesses, although the Government did not allege that any union local was the 'enterprise.' " 620 F.2d at 993.

is an association in fact and not a legal entity.[88]

## IV. Prospects for the Future under RICO

The United States Supreme Court has recently granted certiorari in *United States v. Turkette*.[89] *Turkette* represents the most narrow construction of the statute by any circuit and is directly opposed to decisions in eight other circuits that have considered the scope of the term "enterprise." *United States v. Anderson*[90] represents the only other decision that has adopted a narrow construction of RICO, and that court's holding is markedly different from the holding in *Turkette*.[91] *Anderson* requires only that an enterprise be a discrete economic association as opposed to an enterprise which must be a legitimate business.[92]

The United States Supreme Court previously has had several opportunities to review the scope of the RICO statute but has declined to do so.[93] Interestingly, *Turkette* is the first case in

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88. A recent decision in the Fourth Circuit, United States v. Webster, 639 F.2d 174 (4th Cir. 1981), suggests that all prosecutions where the enterprise is merely a front for the racketeering activity may be invalid. In *Webster* the facilities of a club were regularly used to promote the defendant's drug dealing business. *Id.* at 184. The evidence failed to show, however, that the affairs of the club were in any way benefited by the illegal drug dealing. *Id.* The RICO convictions were reversed because the alleged enterprise's affairs were not conducted *through* a pattern of racketeering activity; rather, the racketeering was being conducted through the enterprise, but this inversion did not constitute a RICO offense. *Id.* at 184-85. A similar situation existed in *Sutton* and *Provenzano*, in which no evidence was presented that the legitimate businesses associated with the illegal enterprises were benefited by racketeering activity. *See* note 87 *supra*.

89. 101 S. Ct. 938 (1981), *granting cert. to* United States v. Turkette, 632 F.2d 896 (1st Cir. 1980).

90. 626 F.2d 1358 (8th Cir. 1980), *cert. denied*, 101 S. Ct. 1351 (1981).

91. *See* text accompanying notes 43 & 59 *supra*.

92. *See* text accompanying notes 41-43 *supra*.

93. United States v. Diecidue, 603 F.2d 535 (5th Cir. 1979), *cert. denied*, 100 S. Ct. 1345 (1980); United States v. Rone, 598 F.2d 564 (9th Cir. 1979), *cert. denied sub nom.* Antone v. United States, 100 S. Ct. 1345 (1980); United States v. Elliot 571 F.2d 880 (5th Cir.), *cert. denied sub nom.* Hawkins v. United States, 439 U.S. 953 (1978); United States v. Altese, 542 F.2d 104 (2d Cir. 1976), *cert. denied sub nom.* Napoli v. United States, 429 U.S. 1039 (1977); United States v. Cappetto, 502 F.2d 1351 (7th Cir. 1974), *cert. denied*, 420 U.S.

which the Government has sought review. It is also the first case which establishes an irreconcilable split in the circuits. Although *Anderson* is a case of narrow construction, the decision is more moderate than *Turkette* and thus less definitive of the controversy between broad and narrow constructionists.

While *Turkette* serves to establish the lines of dispute, its usefulness in applying RICO ends there. The ultimate decision of the United States Supreme Court should favor the moderate construction expressed in *Anderson*. This construction affords the most satisfactory alternative, both in terms of complying with the statute and in terms of allowing prosecutors some flexibility. The *Anderson* court's requirement that an enterprise be separately definable has the effect of giving meaning to every element of the statute while avoiding any double jeopardy problems that may be created under a broader definition. For instance, an interstate prostitution ring promoted by a bribery scheme is an example of an enterprise that would fall within RICO under the *Anderson* definition but would be excluded under the legitimate enterprise standard.[94]

The *Anderson* approach does not overly restrict the actual language of the statute, nor does it offend the legislative history. A portion of the definition of an enterprise includes "any . . . group of individuals associated in fact although not a legal entity."[95] Although some courts construe this phrase as merely a catch-all for the enumerated legitimate enterprises preceding it,[96] the better interpretation gives content to this phrase to the fullest extent possible under the statute. This interpretation allows the prosecution of illicit enterprises as long as they are differentiated from the pattern of racketeering through which they are conducted.[97]

The legislative history, on which the court relied substantially in *Turkette*, is still important under the *Anderson* approach, but not to the extent that it is dispositive of the issue. Though congressional statements refer many times to the infil-

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925 (1975).

94. United States v. Whitehead, 618 F.2d 523, 525 (4th Cir. 1980).

95. 18 U.S.C. § 1961(4) (1976); *see* text accompanying note 6 *supra*.

96. *See* note 60 *supra* and accompanying text.

97. *See* Bradley, *supra* note 9, at 854-55.

tration of legitimate business by organized crime, these statements should be viewed as mere illustrations of the problem Congress sought to address, not binding on the courts, especially where the language of the statute indicates a much broader application.[98] To the extent that Congress perceived the self-perpetuating aspect of organized crime as the greatest threat to the American economy, its concerns can be fully vindicated under the *Anderson* approach. Ironically, if the legitimate business standard is adopted, recent prosecutions in which Mafia families themselves are alleged to be illegal enterprises would not be allowed.[99]

Use of the *Anderson* approach leaves an important aspect of the statute's scope unresolved: whether the term "enterprise" should be construed to encompass governmental entities. Under the restrictive language in *Turkette*, there is little doubt that governmental entities are not within the scope of RICO. While the *Turkette* approach offers certainty, the *Anderson* approach, which does not preclude governmental entities, is more desirable. The latter offers flexibility and permits further vindication of Congress' primary objective, namely, the removal of organized crime from every aspect of the American economy. The issue of how Congress intended to apply the civil remedies of RICO to governmental entities still remains. As practical experience has shown, however, state and county governments are often vehicles through which racketeering activity is conducted.[100] Governmental entities should be within the scope of RICO since they are included in the plain language of the statute as both legal entities and separate economic associations. As such, they meet the standard set forth in *Anderson*, and clearly their inclusion serves the underlying and pervasive purpose of RICO.

Some courts and commentators are concerned that RICO is too intrusive into state law enforcement. This intrusion should be tolerated. The language, structure, and legislative history of the statute indicate that Congress intended to engage the full resources of federal law enforcement to undermine racketeering

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98. *See* United States v. Thevis, 474 F. Supp. 117, 138 n.3 (N.D. Ga. 1979).

99. *See* NEWSWEEK, Jan. 5, 1981, at 43.

100. *See* note 26 *supra*.

activity that has a connection with interstate commerce. Additionally, the United States Supreme Court has held that

> so long as the requisite interstate nexus is present, the statute [in this case the Travel Act] reflects a clear and deliberate intent on the part of Congress to alter the federal-state balance in order to reinforce state law enforcement. . . . Until statutes . . . contravene some provision of the Constitution, the choice is for Congress, not the courts.[101]

## V. Conclusion

The United States Supreme Court should not adopt a strictly broad or narrow construction of the term "enterprise," but rather should adopt a modified narrow construction such as that established in *United States v. Anderson*.[102] In adopting this standard the Government can save many prosecutions that would otherwise be lost under a strictly narrow construction by simply redrafting its indictments.[103] Also, the fact situations in some cases in which the courts have adopted a broad construction would still provide a basis for viable prosecutions under the narrow *Anderson* definition of enterprise.[104]

The remaining problem for prosecutors, assuming the *Anderson* approach is adopted, is in cases in which only one criminal enterprise that is indistinguishable from the pattern of racketeering activity is involved. In these cases prosecutors will have either to forgo RICO prosecutions or to devise another way to define the enterprise as a separate and discrete economic association. Perhaps a corporate structure analysis[105] in which individuals have certain assigned functions to perform within the enterprise would satisfy the standard without creating double

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101. Perrin v. United States, 444 U.S. 37, 50 (1979).

102. 626 F.2d at 1372; *see* notes 41-43 *supra* and accompanying text.

103. *Id.* at 1365 n.10.

104. United States v. Whitehead, 618 F.2d 523 (4th Cir. 1980) (interstate prostitution ring promoted by bribery scheme); United States v. Diecidue, 603 F.2d 535 (5th Cir. 1979) (promotion of vending machine business through murder of competitor), *cert. denied sub nom.* Antone v. United States, 445 U.S. 946 (1980); United States v. Hawes, 529 F.2d 472 (5th Cir. 1976) (illegal gambling devices distributed through four business entities jointly owned by defendants).

105. *See* notes 31 & 58 *supra* and accompanying text.

jeopardy problems or merely establishing a conspiracy.

Regardless of the final determination, Supreme Court review will improve RICO by giving certainty to its scope. To preserve the statute's effectiveness, however, the Court must not adopt the very narrow standard set forth in *United States v. Turkette*.[106] RICO is a carefully drafted piece of legislation,[107] the result of over a decade of research and concern about the effect of organized crime on the American economy. It must not be restricted to the extent that it no longer fully reaches the harm it was designed to eradicate, especially in light of the very broad language of the statute—language that can be given full content without requiring that an enterprise be only a legitimate business.

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106. 632 F.2d at 899; *see* text accompanying note 59 *supra*.
107. Iannelli v. United States, 420 U.S. 770, 789 (1975).

# TENNESSEE CONSTITUTIONAL STANDARDS FOR CONDITIONS OF PRETRIAL DETENTION: A MANDATE FOR JAIL REFORM

## I. INTRODUCTION

American law presumes that an individual charged with a crime is innocent until proven guilty at trial. The presumption of innocence, however, is a hollow platitude for thousands of pretrial detainees who languish in jail, enduring conditions of confinement that frequently make prison look attractive.[1] Pretrial confinement is highly disruptive to one's employment, family life, and trial preparation.[2] Many jails are unsanitary,[3] over-

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1. The conditions in many of the jails . . . are admitted by all . . . to be odious, much worse than those in the prisons. Thus, the pretrial detainee—who is presumed innocent because he has not yet been convicted of anything—is forced to wait out the disposition of his case in conditions substantially more unpleasant and demeaning than those afforded to convicted criminals.

J. CASPER, AMERICAN CRIMINAL JUSTICE 51-52 (1972). The Director of the Federal Bureau of Prisons noted in 1978 that "[w]e have tended to concentrate much of our energy and many of our resources on the convicted offender in prisons and other institutions and neglected the jail problem." *Hearings on Bureau of Prisons Pre-trial Detention Program Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary*, 95th Cong., 2d Sess. 10 (1978) (testimony of Norman Carlson, director, Federal Bureau of Prisons).

Many courts have found worse conditions in jails than in penitentiaries. *E.g.*, Miller v. Carson, 401 F. Supp. 835, 889 (M.D. Fla. 1975), *aff'd in part, modified in part*, 563 F.2d 741 (5th Cir. 1977); Rhem v. Malcolm, 371 F. Supp. 594, 622 (S.D.N.Y. 1974), *aff'd in relevant part*, 507 F.2d 333, 336 (2d Cir. 1974); Inmates of Suffolk County Jail v. Eisenstadt, 360 F. Supp. 676, 688 (D. Mass. 1973), *aff'd*, 494 F.2d 1196 (1st Cir. 1974), *cert. denied sub nom.* Hall v. Inmates of Suffolk County Jail, 419 U.S. 977 (1974).

2. Barker v. Wingo, 407 U.S. 514, 532-33 (1972); *accord*, Hartage v. Hendrick, 439 Pa. 584, 601, 268 A.2d 451, 459 (1970) (Roberts, J., dissenting).

3. H. ALLEN & C. SIMONSEN, CORRECTIONS IN AMERICA 450-51 (2d ed. 1978); Symposium Comment, *Incarcerating the Innocent: Pretrial Detention in Our Nation's Jails*, 21 BUFFALO L. REV. 891, 893-94 (1972) [hereinafter cited

crowded,[4] and physically dilapidated;[5] new jails are costly for the taxpayer[6] and may be little better than the old jails.[7] Pretrial confinement can create mental stress,[8] induce guilty pleas,[9] and subject the detainee to physical abuse[10] and even death.[11] Since

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as *Incarcerating the Innocent*]; Note, *Constitutional Limitations on the Conditions of Pretrial Detention*, 79 YALE L.J. 941, 943-44 (1970); *see* text accompanying notes 21-22 *infra*.

4. *Incarcerating the Innocent*, *supra* note 3, at 893; *see, e.g.*, Campbell v. Cauthron, 623 F.2d 503, 505 (8th Cir. 1980); Anderson v. Redman, 429 F. Supp. 1105, 1112-14 (D. Del. 1977).

5. "The most striking inadequacy of jails is their abominable physical condition . . . . Jails that hold few persons tend to be neglected, and those that are overcrowded repeatedly push their equipment and fixtures beyond the breaking point." NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS, REPORT ON CORRECTIONS 275 (1973) [hereinafter cited as NATIONAL ADVISORY COMMISSION].

6. "The typical conventional jail with standard hardware costs per square foot about 16 percent more than a courthouse, 40 percent more than a new high school, and 10 percent more than a modern hospital." J. MOYNAHAN & E. STEWART, THE AMERICAN JAIL 103 (1980).

7. "[T]he modern American jail, like its predecessor of the last century is a cage and has changed only superficially. The concepts of repression and human degradation are remarkably intact." W. NAGEL, THE NEW RED BARN 20 (1973).

8. For a description of the stresses of overcrowding, see Anderson v. Redman, 429 F. Supp. 1105, 1112-14 (D. Del. 1977), and for an excellent study of the effects of separation of mothers from their children during incarceration, see A. STANTON, WHEN MOTHERS GO TO JAIL (1980).

9. Viewed from the perspective of maintaining the plea-bargaining system, pretrial detention and demoralizing conditions in jails are highly functional. They discourage the defendant from bargaining too hard; they place a high price upon filing motions or demanding a trial . . . . This is not to argue that those in authority consciously plan rotten jails . . . . But it is to suggest that such conditions are functional, to serve the needs of the production ethic that dominates our criminal justice system.

J. CASPER, *supra* note 1, at 67. *See* Thaler, *Punishing the Innocent: The Need for Due Process and the Presumption of Innocence Prior to Trial*, 1978 WIS. L. REV. 441, 457-58.

10. Unfortunately, physical abuse may come not only at the hands of a fellow inmate but from the jailer as well. In the mid-1930s a Tennessee sheriff was interviewed:

When asked how he handled unruly prisoners, he seemed to delight in describing his method very much in detail. He said he just took his rubber black jack and beat the-hell out of their head. One or more

most criminal defendants are bailable,[12] the majority of pretrial detainees who spend months in jail awaiting trial[13] are indigent and thus unable to buy their freedom. This is hardly the way to treat people before trial, unless we wish "to make a farce of the honored tradition of presumption of innocence until proven guilty."[14]

In response to deplorable jail conditions, there has been a considerable amount of jail reform litigation in the past decade. Although some commentators have noted that jails are highly

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treatments, he said, made the prisoner do what he wanted him to do. W. COLE, COUNTY JAILS IN TENNESSEE 31 (n.d.) (unpublished Tennessee Valley Authority - Civil Works Administration project in the University of Tennessee John D. Hoskins Main Library).

In 1980 Justice Blackmun wrote:

> Prison officials either are disinterested in stopping abuse of prisoners by other prisoners or are incapable of doing so, given the limited resources society allocates to the prison system . . . . Even more appalling is the fact that guards frequently participate in the brutalization of inmates. The classic example is the beating or other punishment in retaliation for prisoner complaints or court actions.

United States v. Bailey, 444 U.S. 394, 421-22 (1980) (Blackmun, J., dissenting).

11. In June of 1977 a fire in the Maury County jail left 42 prisoners dead. Tennesseean, June 27, 1977, at 1, col. 1. Today many Tennessee jails continue to have serious fire safety deficiencies. DIVISION OF JAIL INSPECTION, TENNESSEE DEPARTMENT OF CORRECTIONS, REPORT OF 1979-1980 INSPECTIONS 3-4 (1980) [hereinafter cited as INSPECTIONS REPORT]; EAST TENNESSEE DEVELOPMENT DISTRICT, SURVEY OF ETDD JAILS 556 (1980) [hereinafter cited as ETDD SURVEY]. The stresses in jail, not infrequently, lead to suicide as well. B. DANTO, JAILHOUSE BLUES (1973).

12. Only persons accused of capital offenses "when the proof is evident, or the presumption great," TENN. CONST. art. I, § 15, may be refused bail. Otherwise the defendant has a right to bail, Wallace v. State, 193 Tenn. 182, 245 S.W.2d 192 (1952), and the bail must not be excessive, thus precluding the defendant from gaining his freedom, TENN. CONST. art. I, § 16. State *ex rel.* Hemby v. O'Steen, 559 S.W.2d 340 (Tenn. Crim. App. 1977).

13. In Tennessee a detainee ordinarily spends nine months to a year in jail prior to trial. Introduction to S. CRANE & P. CRANE, TENNESSEE'S TROUBLED ROOTS (unpaginated) (1979).

14. *Id.* Of course many, if not most, pretrial detainees will be found guilty at trial. But for the innocent detainee—and one study found that 46% of a jail's population were pretrial detainees who were later found not guilty, H. ALLEN & C. SIMONSEN, *supra* note 3, at 443—the loss of liberty and the humiliation of incarceration is a real tragedy.

resistant to improvement,[15] there is evidence that court-ordered reforms are translated into tangible improvements for jail inmates.[16] One of the primary reasons jails are neglected public institutions is that it is rarely politically popular to spend public funds for inmates.[17] Likewise, prisoners have virtually no political clout.[18] A court decree can force legislators to give attention to a problem that they otherwise might ignore.

Since most jail reform litigation has concentrated on large metropolitan jails, most rural jails, including those in Tennessee, have escaped judicial scrutiny.[19] Tennessee's jails, unfortunately, have many deficiencies which may violate state and federal constitutional standards. One Tennessee county jail, for example, was described by a state jail inspector as "not fit for human habitation. . . . [I]ts mere existance [*sic*] is degrading and dehu-

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15. H. ALLEN & C. SIMONSEN, *supra* note 3, at 441-42; NATIONAL ADVISORY COMMISSION, *supra* note 5, at 273-77.

16. See M. HARRIS & D. SPILLER, AFTER DECISION: IMPLEMENTATION OF JUDICIAL DECREES IN CORRECTIONAL SETTINGS (1977), for a study of the effectiveness of court-ordered reform of jails and prisons. The authors studied the effects of four lawsuits and concluded that "court orders eliminated the worst abuses and ameliorated the harshest conditions." *Id.* at 27.

17. "[I]t is unlikely that many prisoners will ever have available the minimum precautions necessary for the safety of the inmates without judicial intervention. Legislatures traditionally have shown little readiness to provide the authority or the funds for basic institutional changes." Goldfarb & Singer, *Redressing Prisoners' Grievances*, 39 GEO. WASH. L. REV. 175, 191 (1970). The fact that prison reform is not politically popular causes many state officials to "rely upon the federal courts to impose needed reforms rather than accomplishing them themselves." McCormack, *The Expansion of Federal Question Jurisdiction and the Prisoner Complaint Caseload*, 1975 WIS. L. REV. 523, 536.

Federal courts have often noted the political inertia which results in inadequate measures by the state executive and legislative branches to improve jail and prison conditions. *E.g.*, Costello v. Wainwright, 397 F. Supp. 20, 34 (M.D. Fla. 1975); Inmates of Suffolk County Jail v. Eisenstadt, 360 F. Supp. 676, 687 (D. Mass 1973); Holt v. Sarver, 300 F. Supp. 825, 830 (E.D. Ark. 1969).

18. "[T]here is no prisoners' lobby present in legislative halls to compete with powerful pressure groups seeking a share of the tax dollar." Johnson v. Levine, 450 F. Supp. 648, 654 (D. Md. 1978); Comment, *Cruel But Not So Unusual Punishment: The Role of the Federal Judiciary in State Prison Reform*, 7 CUM. L. REV. 31, 53 (1976).

19. ETDD SURVEY, *supra* note 11, at 2.

manizing."[20] Tennessee jails in 1934 were described as "pathetically unsanitary,"[21] a conclusion which was echoed in a department of corrections report which stated, "[T]oo often cell areas are found littered with debris, and toilets, wash basins and shower stalls are covered with filth and grime."[22] The catalogue of deficiencies in Tennessee jails is long; only a few will be listed here: seventy-eight percent have no rehabilitative, work, recreational, or activity programs; sixty-four percent have physical deficiencies, and thirty percent need major renovation; seventy percent cannot adequately separate males, females, and juveniles; fifty-two percent do not provide basic essentials for maintaining personal hygiene; sixteen percent have no first-aid supplies; and thirty-one percent do not have personnel with first-aid training.[23] Only fifteen of more than one hundred Tennessee jails meet the minimum standards established by the Tennessee Department of Corrections.[24]

This Comment is concerned with constitutional standards for pretrial detention in Tennessee.[25] It begins with an overview of the standards required by the federal constitution. It then examines the possibility that state courts may impose a higher standard based on their state constitutions. Finally, it considers

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20. TENN. DEP'T OF CORRECTIONS, INSPECTION REPORT, BEDFORD COUNTY JAIL AND WORKHOUSE 6 (1978).

21. W. COLE, *supra* note 10, at 22.

22. INSPECTIONS REPORT, *supra* note 11, at 4.

23. *Id.* at 2-3.

24. *Id.* at 6. Tennessee Code Annotated § 41-1144 (Supp. 1980) requires the Department of Corrections to establish "minimum standards" for jails. For the current minimum standards, see RULES AND REGULATIONS OF THE STATE OF TENN., Ch. 0420-2-1 (1975).

25. This Comment focuses on pretrial detainees rather than convicted prisoners for several reasons. First, it is generally conceded that conditions in jails, where most detainees are held, are worse than conditions in prisons. *See* note 1 *supra* and accompanying text. Second, the pretrial detainee has been convicted of no crime. Thus, the pretrial detainee, unlike the convict, is detained not for the purpose of punishment but merely for the purpose of ensuring his presence at trial. Third, a recent United States Supreme Court decision, Bell v. Wolfish, 441 U.S. 520 (1979), *see* notes 50-59 *infra* and accompanying text, which addressed the rights of pretrial detainees under the federal constitution, provides a good backdrop for this discussion of Tennessee constitutional standards for pretrial detention. It should be noted, however, that much of this Comment is equally applicable to the convict.

and attempts to interpret two overlooked provisions in the Tennessee Constitution that set a standard higher than the federal constitutional standard for the treatment of pretrial detainees.

## II. Federal Standards for Pretrial Detention

### A. *Historical Development*

Prior to the mid-1960s federal courts followed a policy of judicial self-restraint, known as the "hands off" doctrine, and refused to hear challenges by prisoners to jail or penitentiary conditions.[26] In applying the hands off doctrine one court stated that "[c]ourts are without power to supervise prison administration or to interfere with the ordinary prison rules or regulations."[27] Gradually, federal courts abandoned this principle of judicial restraint and recognized that "a prisoner is not wholly stripped of constitutional protections when he is imprisoned for crime,"[28] and that "when a prison regulation or practice offends a fundamental constitutional guarantee" federal courts have a "duty to protect constitutional rights."[29] Many federal courts accepted this duty and ordered sweeping reforms in prison conditions.[30] At the same time, the United States Supreme Court, recognizing that the maintenance of prisons is particularly a state concern, has advised federal courts not to become overly involved in the administration of prisons.[31]

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26. *See generally* Comment, *Beyond the Ken of the Courts: A Critique of Judicial Refusal to Review the Complaints of Convicts*, 72 Yale L.J. 506 (1963).

27. Banning v. Looney, 213 F.2d 771, 771 (10th Cir.), *cert. denied*, 348 U.S. 859 (1954).

28. Wolff v. McDonnell, 418 U.S. 539, 555 (1974).

29. Procunier v. Martinez, 416 U.S. 396, 405-06 (1974).

30. *See generally* 18 Washburn L.J. 288 (1979); Comment, *Cruel But Not So Unusual Punishment: The Role of the Federal Judiciary in State Prison Reform*, 7 Cum. L. Rev. 31 (1976).

31. It is difficult to imagine an activity in which a State has a stronger interest, or one that is more intricately bound up with state laws, regulations, and procedures, than the administration of its prisons . . . . Since . . . internal problems of state prisons involve issues so peculiarly within state authority and expertise, the States have an important interest in not being bypassed in the correction of those problems . . . . The strong considerations of comity . . . require giv-

Although most of the early cases concerned conditions in state prisons and penitentiaries,[32] a number of federal courts began to recognize a distinction between pretrial detainees and post-trial convicts.[33] For example, the eighth amendment guarantee of freedom from cruel and unusual punishment, which provides the primary constitutional source for judicial enforcement of improved prison conditions,[34] protects only those already convicted of crimes[35] and thus is not directly applicable to pretrial detainees. Nevertheless, federal courts that considered constitutional challenges to pretrial confinement consistently agreed that the rights of a detainee were at least as great as those of a convict.[36] Therefore, conditions of confinement which were cruel and unusual for a convicted prisoner were necessarily unconstitutional when imposed on a presumptively innocent detainee.[37] Federal courts often used eighth amendment analysis as a starting point or as a means of analogy to determine whether a particular condition of confinement was constitutional.[38]

The majority of courts, however, went a step further and concluded that "a more stringent standard [than the eighth amendment] controls the treatment by the state of pretrial de-

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ing the States the first opportunity to correct the errors made in the internal administration of their prisons.

Preiser v. Rodriguez, 411 U.S. 475, 491-92 (1973); *accord*, Procunier v. Martinez, 416 U.S. 396, 405 (1974); Johnson v. Avery, 393 U.S. 483 (1969).

32. *See generally* Note, *Decency and Fairness: An Emerging Judicial Role in Prison Reform*, 57 VA. L. REV. 841 (1971).

33. *See, e.g.*, Anderson v. Nosser, 438 F.2d 183 (5th Cir. 1971); Inmates of Suffolk County Jail v. Eisenstadt, 360 F. Supp. 676 (D. Mass. 1973); Smith v. Sampson, 349 F. Supp. 268 (D.N.H. 1972); Brenneman v. Madigan, 343 F. Supp. 128 (N.D. Cal. 1972).

34. See Annot., 51 A.L.R.3d 111 (1973) for cases which have interpreted and applied the cruel and unusual punishment standard to prison conditions.

35. Ingraham v. Wright, 430 U.S. 651, 664 (1977).

36. *See, e.g.*, Hampton v. Holmesburg Prison Officials, 546 F.2d 1077, 1079-80 (3d Cir. 1976); Rhem v. McGrath, 326 F. Supp. 681, 690 (S.D.N.Y. 1971).

37. Rhem v. Malcolm, 507 F.2d 333, 337 (2d Cir. 1974) ("a detainee is entitled to protection from cruel and unusual punishment as a matter of due process and, where relevant, equal protection.").

38. *See, e.g.*, Norris v. Frame, 585 F.2d 1183, 1187 (3d Cir. 1978); Duran v. Elrod, 542 F.2d 998, 999 (7th Cir. 1976).

tainees."[39] The essential question was not whether the detainee was subjected to cruel punishment, but whether he was punished at all. For example, in *Conklin v. Hancock*,[40] the court declared, "Petitioner is a pretrial detainee and not a convict. Under the Constitution, he is presumed to be innocent of the pending and untried criminal charges against him. He cannot be subject to any punishment . . . ."[41] Most courts concluded that the substantive right of a detainee not to be punished prior to conviction was based on the due process clause;[42] several courts added that the common-law presumption of innocence also gave rise to this right.[43]

Virtually every federal court adopted a form of strict judicial scrutiny to protect the detainee's rights. These courts generally held that pretrial detainees could be subjected only to those "restrictions and privations . . . which inhere in their confinement itself or which are justified by *compelling necessities* of jail administration."[44] Similar forms of strict scrutiny were applied by six different circuit courts of appeals[45] and by district

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39. Duran v. Elrod, 542 F.2d 998, 1000 (7th Cir. 1976); *accord*, Norris v. Frame, 585 F.2d 1183 (3d Cir. 1978).

40. 334 F. Supp. 1119 (D.N.H. 1971).

41. *Id.* at 1121.

42. *See, e.g.*, Norris v. Frame, 585 F.2d 1183, 1187-88 (3d Cir. 1978); Rhem v. Malcolm, 507 F.2d 333, 336-37 (2d Cir. 1974); Jones v. Wittenberg, 323 F. Supp. 93, 100 (N.D. Ohio 1971), *aff'd sub nom.* Jones v. Metzger, 456 F.2d 854 (6th Cir. 1972).

43. *See, e.g.*, Campbell v. McGruder, 580 F.2d 521, 529 (D.C. Cir. 1978); Detainees of Brooklyn House of Detention for Men v. Malcolm, 520 F.2d 392, 397 (2d Cir. 1975); Rhem v. Malcolm, 507 F.2d 333, 336 (2d Cir. 1974); Conklin v. Hancock, 334 F. Supp. 1119, 1121 (D.N.H. 1971). Some courts, however, felt that the presumption of innocence did no more than allocate the burden of proof at trial. Hampton v. Holmesburg Prison Officials, 546 F.2d 1077, 1080 n.1 (3d Cir. 1976); *accord*, Campbell v. McGruder, 580 F.2d 521, 568 (D.C. Cir. 1978) (MacKinnon, J., concurring in part, dissenting in part).

44. Brenneman v. Madigan, 343 F. Supp. 128, 142 (N.D. Cal. 1972) (emphasis added).

45. Norris v. Frame, 585 F.2d 1183, 1187-88 (3d Cir. 1978); Campbell v. McGruder, 580 F.2d 521, 531 (D.C. Cir. 1978); Patterson v. Morrisette, 564 F.2d 1109, 1110 (4th Cir. 1977) (by implication); Miller v. Carson, 563 F.2d 741, 747 (5th Cir. 1977); Inmates of San Diego County Jail v. Duffy, 528 F.2d 954, 956 (9th Cir. 1975); Rhem v. Malcolm, 507 F.2d 333, 336 (2d Cir. 1974).

courts in two other circuits.[46] In some cases the standard was embellished by a further requirement that any restriction of a detainee's liberty be the "least restrictive means" required to accomplish the sole purpose of ensuring the detainee's presence at trial.[47] This compelling necessity test, however, was rejected by the Court of Appeals for the First Circuit in *Feeley v. Sampson.*[48] In *Sampson* the court concluded that the proper standard of review was that standard "normally employed in reviewing administrative actions: whether the actions of jail authorities are *arbitrary or capricious;* whether they are lacking in a *reasonable relationship* to the limited purpose of the confinement . . . ."[49] This conflict among the circuits made review by the United States Supreme Court appropriate.

### *B. The Wolfish Standard*

In *Bell v. Wolfish*[50] the United States Supreme Court for the first time considered claims by pretrail detainees of unconstitutional conditions of confinement.[51] The Court took a sharp turn away from the developing case law. In an opinion by Justice Rehnquist a majority of the Justices rejected the " 'pre-

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46. Ahrens v. Thomas, 434 F. Supp. 873, 897-98 (W.D. Mo. 1977), *aff'd in relevant part,* 570 F.2d 286 (8th Cir. 1978); Jones v. Wittenberg, 323 F. Supp. 93, 100 (N.D. Ohio 1971), *aff'd sub nom.* Jones v. Metzger, 456 F.2d 854 (6th Cir. 1972).

47. *See, e.g.,* Hamilton v. Love, 328 F. Supp. 1182, 1192 (E.D. Ark. 1971); O'Brien v. County of Saginaw, 437 F. Supp. 582, 596 (E.D. Mich. 1977); Brenneman v. Madigan, 343 F. Supp. 128, 138 (N.D. Cal. 1972).

48. 570 F.2d 364 (1st Cir. 1978).

49. *Id.* at 371 (emphasis added).

50. 441 U.S. 520 (1979), *rev'g* Wolfish v. Levi, 573 F.2d 118, 121 (2d Cir. 1978).

51. At issue before the Court were the jail practices of "double-bunking" inmates in single occupancy rooms, prohibiting receipt of books not mailed directly from publishers, prohibiting receipt of packages of food or personal items, searching inmates' rooms outside the inmates' presence, and conducting body-cavity searches of inmates after every contact visit with persons from outside the institution. *Id.* at 530. The detention facility was no dungeon-like jail of the past but a modern federal short-term custodial facility which, in the words of the court of appeals, "represented the architectural embodiment of the best and most progressive penological planning." Wolfish v. Levi, 573 F.2d 118, 121 (2d Cir. 1978), *rev'd sub nom.* Wolfish v. Bell, 441 U.S. 520 (1979).

sumption of innocence' as the source of the detainee's substantive right to be free from conditions of confinement that are not justified by compelling necessity."[52] The Court held that the presumption of innocence merely places the burden of proof on the prosecution and "has no application to a determination of the rights of a pretrial detainee during confinement . . . ."[53] The Court held that the detainee had a right based on the due process clause to be free from punishment,[54] but adopted a weak test for determining whether a particular condition constitutes punishment. If a particular condition of confinement is "reasonably related to a legitimate governmental objective, it does not, without more, amount to 'punishment.' "[55] "Absent a showing of an expressed intent to punish,"[56] a particular condition or restriction of pretrial detention does not amount to punishment unless it is "arbitrary or purposeless."[57] To further emphasize this lax standard of review the Court stressed the need for "wide-ranging deference"[58] to prison administrators and admonished judges not to substitute their judgment for the conclusion of an administrator unless he is " 'conclusively shown to be wrong . . . .' "[59]

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52. 441 U.S. at 532.

53. *Id.* at 533. This conclusion prompted Justice Stevens to comment that he could "not believe that the Court means what it seems to be saying." *Id.* at 583 n.11 (Stevens, J., dissenting). On at least two prior occasions the Court applied the presumption in a pretrial context to protect persons from governmental action. In McGinnis v. Royster, 410 U.S. 263 (1973), the Court stated that "it would hardly be appropriate for the State to undertake in the pretrial detention period programs to rehabilitate a man still clothed with a presumption of innocence." *Id.* at 273. And in Stack v. Boyle, 342 U.S. 1 (1951), the Court, with regard to the right to bail, said, "This traditional right to freedom before conviction permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction. . . . Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning." *Id.* at 4.

54. 441 U.S. at 535.

55. *Id.* at 539.

56. *Id.* at 538.

57. *Id.* at 539.

58. *Id.* at 547.

59. *Id.* at 555 (quoting Jones v. North Carolina Prisoners' Labor Union, 433 U.S. 119, 132 (1977)).

The obvious effect of the *Wolfish* decision is to create a "heavy burden" for a pretrial detainee.[60] In order to prove that the conditions of his confinement are unconstitutional the detainee must demonstrate that he is being punished. Subjectively, a detainee may be convinced that the very loss of his liberty is punishment; and indeed the disruption of employment, the restriction of family contacts, and the denial of freedom to come and go as he pleases may be indistinguishable from the punishment that a convict receives.[61] Nevertheless, the pretrial detention of a criminal defendant in order to ensure his presence at trial is clearly legitimate.[62] The detainee must demonstrate not that he thinks he is being punished but that the jail officials actually are punishing him. This requirement is stringent because an *expressed* intent to punish the detainee will be rare and because punitive intent can be *inferred* only if the action against the detainee is "arbitrary or purposeless."[63]

A pattern of post-*Wolfish* federal court decisions has begun to emerge. First, if the conditions of pretrial confinement are "barbaric" or "inhumane," or if they otherwise constitute cruel and unusual punishment,[64] federal courts have no difficulty determining that a detainee's rights have been violated. In such circumstances a court may conclude that the conditions of confinement are so severe that they amount to punishment even under the permissive *Wolfish* standard.[65] Alternatively, the court may disregard the *Wolfish* punishment test and instead emphasize the principle, recognized in *Wolfish*, that "pretrial detainees . . . retain at least those constitutional rights that . . . are enjoyed by convicted prisoners"[66] and conclude that condi-

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60. Becket v. Powers, 494 F. Supp. 364, 367 (W.D. Wis. 1980); *accord*, Epps v. Levine, 480 F. Supp. 50 (D. Md. 1979); Valentine v. Englehardt, 474 F. Supp. 294 (D.N.J. 1979).

61. *See* Carlson v. Landon, 342 U.S. 524, 557 (1952) (Black, J., dissenting); Campbell v. McGruder, 580 F.2d 521, 530 (D.C. Cir. 1978).

62. *See* Gerstein v. Pugh, 420 U.S. 103, 111-14 (1975).

63. *See* text accompanying note 57 *supra*.

64. *See, e.g.*, West v. Lamb, 497 F. Supp. 989 (D. Nev. 1980); Feliciano v. Barcelo, 497 F. Supp. 14 (D.P.R. 1979).

65. West v. Lamb, 497 F. Supp. 989, 1005 (D. Nev. 1980) (by implication); Feliciano v. Barcelo, 497 F. Supp. 14, 33 (D.P.R. 1979).

66. 441 U.S. at 545.

tions which are cruel and unusual for convicts are necessarily unconstitutional when imposed on pretrial detainees.[67] Second, when the conditions of pretrial confinement are less severe, courts apply the *Wolfish* punishment test and most frequently find that the condition or practice is not arbitrary, that it is reasonably related to a legitimate governmental purpose, and therefore that it is not punitive.[68] For example, in several cases federal courts have held that the practice of denying pretrial detainees the privilege of physical contact with family visitors was not punishment and that the practice reasonably served the security interests of the jail.[69] In the majority of these cases there was evidence that the same level of security could be maintained without eliminating contact visits; that is, a less restrictive alternative was available.[70] Finally, in a few apparently exceptional cases, federal courts have found under the *Wolfish* test that a jail condition or practice was arbitrary or not reasonably related to any legitimate governmental purpose. These cases involved the prohibition of visitation by the detainee's children,[71] the use of metal (instead of medically appropriate) restraints on a hospitalized detainee,[72] and the maintenance of

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67. Campbell v. Cauthron, 623 F.2d 503, 505 (8th Cir. 1980).

68. *See, e.g.*, Villaneuva v. George, 632 F.2d 707 (8th Cir. 1980); Jordan v. Wolke, 615 F.2d 749 (7th Cir. 1980); Inmates of Allegheny County Jail v. Pierce, 612 F.2d 754 (3d Cir. 1979); Epps v. Levine, 480 F. Supp. 50 (D. Md. 1979).

69. Jordan v. Wolke, 615 F.2d 749, 753 (7th Cir. 1980); Inmates of Allegheny County Jail v. Pierce, 612 F.2d 754 (3d Cir. 1979); Hutchings v. Corum, 501 F. Supp. 1276, 1297 (W.D. Mo. 1980); Valentine v. Englehardt, 492 F. Supp. 1039, 1041 (D.N.J. 1980).

70. Jordan v. Wolke, 615 F.2d 749, 756-57 (7th Cir. 1980) (Swygert, J., dissenting) (quoting opinion of trial court, Jordan v. Wolke, 460 F. Supp. 1080, 1084 (E.D. Wis. 1978)); Inmates of Allegheny County Jail v. Pierce, 612 F.2d 754, 758-59 (3d Cir. 1979) (report of expert appointed as adviser to the district court). In Valentine v. Englehardt, 492 F. Supp. 1039 (D.N.J. 1980), the court, relying on a master's report, concluded that "a limited contact visitation program could reasonably be instituted at the jail 'without increasing the security, financial, staffing and psychological costs feared by the Jail authorities and without interfering with the routine functioning and other activities of the Jail.'" *Id.* at 1041.

71. Valentine v. Englehardt, 474 F. Supp. 294, 301-02 (D.N.J. 1979).

72. Gawreys v. D.C. General Hospital, 480 F. Supp. 853, 955 (D.D.C. 1979).

overcrowded conditions.[73]

It is difficult to draw any generalized principle from these post-*Wolfish* federal court decisions since each was decided on its own particular facts. Clearly, however, *Wolfish* weakened but did not end the role of federal courts as protectors of the rights of detainees incarcerated in local jails. Nevertheless, *Wolfish* has made federal court involvement more difficult and less certain; the decision has also increased the likelihood of deference to jail officials.[74]

## III. State Constitutional Standards For Pretrial Detention

In light of the increased hesitancy of federal courts to consider challenges to jail conditions and in light of the fact that in the meantime jails have not become model institutions, greater attention should be given to standards for pretrial detention under state law. A state may not restrict or diminish a federally protected right, but a state may impose greater protections and higher standards than those required under federal law.[75] Thus, a state court may impose a higher standard for the treatment of detainees than that required by the federal due process clause as interpreted in *Wolfish*. The constitutions of several states, including Tennessee, provide express protection for pretrial detainees.[76] Moreover, state courts in New York and California already have interpreted their state constitutions to afford greater protection for pretrial detainees than required by *Wolfish*.[77]

The New York Court of Appeals, in *Cooper v. Morin*,[78] relying on the due process clause of the New York Constitution,[79] rejected the reasonable relationship test of *Wolfish*[80] and instead

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73. Benjamin v. Malcolm, 495 F. Supp. 1357, 1365 (S.D.N.Y. 1980).

74. *See* Becket v. Powers, 494 F. Supp. 364, 367 (W.D. Wis. 1980).

75. *See generally* Brennan, *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489 (1977); Howard, *State Courts and Constitutional Rights in the Day of the Burger Court*, 62 Va. L. Rev. 873 (1976).

76. *See* notes 92-98 & 103-13 *infra* and accompanying text.

77. *See* notes 78-92 *infra* and accompanying text.

78. 49 N.Y.2d 69, 399 N.E.2d 1188, 424 N.Y.S.2d 168 (1979).

79. N.Y. Const. art. I, § 6.

80. *See* text accompanying note 55 *supra*.

adopted an approach which balances the "harm to the individual resulting from the condition imposed against the benefit sought by the government through its enforcement."[81] The gravamen of the detainees' complaint was that they were denied physical contact with their families during visitation and that visits could be limited to ten minutes.[82] The court applied its balancing approach to the detainees' complaint and concluded that the state's interest in jail security did not outweigh the detainees' fundamental interest in maintaining family relationships, for which contact visits of a reasonable length were essential.[83] The court held as a matter of state constitutional law, but not of federal law,[84] that contact visits were required.[85] In contrast, federal courts, applying the *Wolfish* standard, have held that detainees have no constitutionally protected right to contact visits with their families.[86] Significantly, the New York due process clause, upon which the *Cooper* decision was based, is textually identical to the federal due process clause. The New York Court of Appeals, however, found the due process analysis of *Wolfish* unpersuasive and not authoritative in the interpretation of the identical New York provision.

In *De Lancie v. Superior Court*[87] a California court of appeals held that under the California Constitution, absent a compelling state interest, a pretrial detainee has a right to privacy in his jailhouse conversations that cannot be invaded by covert electronic surveillance.[88] The court noted that under fourth amendment analysis "no right of privacy is extended to ordinary jail conversations."[89] The California Constitution, however, ex-

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81. 49 N.Y.2d at 79, 399 N.E.2d at 1194, 424 N.Y.S.2d at 175.

82. *Id.* at 73-75, 399 N.E.2d at 1190-91, 424 N.Y.S.2d at 170-71. Visitors were separated from the detainee by a floor-to-ceiling barrier and could see one another through a small window. Conversations were possible only by the use of telephones. *Id.* at 74-75, 399 N.E.2d at 1191, 424 N.Y.S.2d at 171.

83. *Id.* at 81-82, 399 N.E.2d at 1195, 424 N.Y.S.2d at 176.

84. *Id.* at 78-79, 399 N.E.2d at 1193, 424 N.Y.S.2d at 173-74.

85. *Id.* at 82, 399 N.E.2d at 1195-96, 424 N.Y.S.2d at 176.

86. *See* notes 69-70 *supra* and accompanying text.

87. 97 Cal. App. 3d 519, 159 Cal. Rptr. 20 (1979).

88. *Id.* at ___, 159 Cal. Rptr. at 27.

89. *Id.* at ___, 159 Cal. Rptr. at 25. *Accord*, 3 W. LAFAVE, SEARCH AND SEIZURE § 10.9(d), at 419 (1978). *See* Lanza v. New York, 370 U.S. 139, 142-43

pressly provides for the right of privacy,[90] and the California Supreme Court has held that it may not be infringed absent a compelling state interest.[91] The court in *De Lancie*, therefore, remanded the case for a determination of whether there was a "compelling governmental necessity . . . to justify the pervasive, secret monitoring of conversations in every room of the detention facility, including visiting rooms."[92]

In contrast to the New York Court of Appeals decision in *Cooper*, the *De Lancie* opinion is based on a state constitutional provision for which there is no express counterpart in the federal constitution. The right to privacy is recognized under federal constitutional law as an implied right derived from the "penumbra" of several provisions of the Bill of Rights.[93] The right to privacy in California, however, is included expressly in the state constitution.[94] There was, therefore, a stronger textual basis for the California decision.

In several other states there are constitutional provisions that expressly benefit pretrial detainees. The Rhode Island Constitution contains a unique provision that protects pretrial detainees: "Every man being presumed innocent, until he is pronounced guilty by the law, no act of severity which is not necessary to secure an accused person shall be permitted."[95] Thus, in contrast to the decision in *Wolfish*, in Rhode Island the presumption of innocence is a source of the detainee's substan-

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(1962).

90. CAL. CONST. art. I, § 1.

91. White v. Davis, 13 Cal. 3d 752, 772, 120 Cal. Rptr. 94, 104, 553 P.2d 222, 232 (1975).

92. 97 Cal. App. 3d at ___, 159 Cal. Rptr. at 27. In contrast, the United States Supreme Court in *Wolfish* seemed amenable to the argument that a detainee could have no reasonable expectation of privacy in his room or cell, 441 U.S. at 556-57, and asserted that any right of privacy for a detainee "would be of a diminished scope." *Id.* at 557. The opinion in *De Lancie* does not necessarily represent California law on this issue. One California appellate court reached a contrary result. People v. Owens, 112 Cal. App. 3d 441, 169 Cal. Rptr. 359 (1980) (use of a hidden monitoring system in a police station interview room does not infringe detainee's right of privacy under the California Constitution).

93. Griswold v. Connecticut, 381 U.S. 479 (1965).

94. CAL. CONST. art. I, § 1.

95. R.I. CONST. art. I, § 14.

tive right to be free of unnecessary conditions of confinement.[96] No reported decision has been found, however, in which a detainee has challenged the conditions of his confinement under this provision.[97] The Georgia Constitution provides that cruel and unusual punishment shall not be inflicted "nor shall any person be abused in being arrested, *while under arrest,* or in prison."[98] This provision, however, has never been used to require jails to meet minimum standards, and on at least one occasion a Georgia court seemed not to have read its own constitution.[99] Section 11 of the Delaware Bill of Rights requires that "in the construction of jails a proper regard shall be had to the health of prisoners"[100] and section 12 provides that "when persons are confined on accusation for such offenses their friends

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96. *See* text accompanying notes 52 & 53 *supra.*

97. Most of the cases applying this provision have considered whether a jury instruction violated the presumption of innocence, State v. Costakos, 92 R.I. 415, 169 A.2d 383 (1961); State v. Papa, 32 R.I. 453, 80 A. 12 (1911), or whether a statutory presumption of an essential element of the offense violated the presumption of innocence, State v. Gaines, 32 R.I. 462, 79 A. 1107 (1911); *see, e.g.,* State v. Kurowski, 100 R.I. 25, 210 A.2d 873 (1965); State v. Tutalo, 99 R.I. 14, 205 A.2d 137 (1964). Only two cases have been found which interpret the words "act of severity." In neither case did the court consider the *conditions* of confinement in jail, but in both cases the court found that overnight confinement prior to arraignment did not violate the state constitution. State v. Kilday, 90 R.I. 91, 155 A.2d 336 (1959); State v. Wax, 83 R.I. 319, 116 A.2d 468 (1955).

98. GA. CONST. art. I, § I, para. XIV (emphasis added).

99. In Hill v. State, 119 Ga. App. 612, 168 S.E.2d 327 (1969), a convicted burglary defendant claimed on appeal that he had been mistreated in jail. The court stated that the defendant's remedy was a civil action against those responsible for the mistreatment, *id.* at 614, 168 S.E.2d at 330, and then added,

> If the alleged maltreatment occurred, it took place prior to the time of the trial and constituted no part of the sentences imposed as the result of the trial. It did not constitute cruel and unusual punishment prohibited by the constitutional provisions. These provisions [U.S. CONST. amend. VIII and GA. CONST. art. I, § I, para. XIV] have relation to punishment imposed by sentences on conviction for criminal offenses.

*Id.* Thus, the Georgia court ignored the words "while under arrest" and treated the state constitutional provision as identical to the eighth amendment of the federal constitution.

100. DEL. CONST. art. I, § 11. *See* note 102 *infra.*

and counsel may at proper seasons have access to them."[101] No reported case has been found in which these provisions have been interpreted.[102] Each of these state constitutional provisions provides the state court with the opportunity to impose a higher standard for the protection of the rights of pretrial detainees than required by *Wolfish*.

*Cooper* and *De Lancie* show that *Wolfish* will not be followed uncritically in all states. Some states may follow the New York or California precedents; others may chart a truly independent course by relying upon a unique provision in their respective state constitutions.

## IV. TENNESSEE CONSTITUTIONAL STANDARDS FOR PRETRIAL DETENTION

The Tennessee Constitution, in the Declaration of Rights, includes two provisions which expressly protect prisoners from maltreatment or abuse.[103] Section 13 of the Declaration of Rights provides that "no person arrested and confined in jail shall be treated with unnecessary rigor." This provision was adopted by the constitutional convention of 1796,[104] but no his-

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101. DEL. CONST. art. I, § 12.

102. The history of a jail suit in the United States District Court for the District of Delaware, however, illustrates the potential importance of a state's constitution to the protection of the rights of detainees. In Anderson v. Redman, 429 F. Supp. 1105 (D. Del. 1977), the court ordered, on the basis of state statutory law, the reduction of inmate population. The Delaware legislature responded by enacting a new law which undercut the basis of the court's order. Officials of the Delaware Department of Corrections then moved the district court to vacate its order. Anderson v. Redman, 480 F. Supp. 830 (D. Del. 1979). The plaintiffs challenged the constitutionality of the new statute, arguing that it violated article I, section 11 of the Delaware Constitution. *See* text accompanying note 100 *supra*. The court stayed its previous order to reduce the jail population and directed the plaintiffs to litigate their state constitutional challenge to the statute in the Delaware courts. 480 F. Supp. at 833. Therefore, the Delaware courts are faced with the challenge of interpreting a state constitutional provision which has long been overlooked.

103. TENN. CONST. art. I, §§ 13, 32.

104. The Tennessee Bill of Rights was adopted in total without any report of the discussion or debate. *See* JOURNAL OF THE PROCEEDINGS OF A CONVENTION 25 (rpt. Nashville 1852) (1st printing Knoxville 1796) (Tennessee Constitutional Convention of 1796).

torical record indicating the framers' intent has been discovered.[105] Although the Tennessee Constitution was derived largely from the North Carolina Constitution,[106] this provision was either original to Tennessee or has some unidentified source.[107]

The second provision in the Declaration of Rights is section 32, which provides that "the erection of safe and comfortable prisons, the inspection of prisons, and the humane treatment of prisoners shall be provided for." This provision was adopted by the constitutional convention of 1870,[108] and although there is no official record of legislative intent,[109] it was almost certainly the product of the Civil War experiences of the delegates. The delegate who submitted the provision to the convention had been arrested and briefly imprisoned during the Civil War;[110] the most influential delegate likely would have died in a Union

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105. *See* Laska, *A Legal and Constitutional History of Tennessee, 1772-1972*, 6 MEM. ST. U.L. REV. 563 (1976); W. MCCLURE, STATE CONSTITUTION-MAKING; WITH ESPECIAL REFERENCE TO TENNESSEE (1916); E. SANFORD, THE CONSTITUTIONAL CONVENTION OF TENNESSEE OF 1796 (1896); J. CALDWELL, STUDIES IN THE CONSTITUTIONAL HISTORY OF TENNESSEE (1895). None of these sources discusses the origin or intent of the "unnecessary rigor" provision. William Blount, president of the Constitutional Convention of 1796, wrote an exposition of the newly adopted constitution for school children. In question and answer form he discussed each of the 32 sections of the Tennessee Bill of Rights except section 13—the "unnecessary rigor" provision. W. BLOUNT, A CATECHETICAL EXPOSITION OF THE CONSTITUTION OF THE STATE OF TENNESSEE (1803), *reprinted in* TENNESSEE BEGINNINGS (1974).

106. J. CALDWELL, *supra* note 105, at 81; W. MCCLURE, *supra* note 105, at 29-51.

107. The North Carolina Constitution of 1776, which served as a model for the Tennessee Constitution of 1796, did not include an "unnecessary rigor" provision. N.C. CONST. of 1776, *reprinted in* W. MCCLURE, *supra* note 105, at 379-459.

108. JOURNAL OF THE PROCEEDINGS OF THE CONVENTION OF DELEGATES 109 (Nashville 1870) (Tennessee Constitutional Convention of 1870).

109. The journal of the convention does not record any discussion or debate of this provision. It was adopted, without amendment, in the form proposed by the committee on the bill of rights. *Id.* at 59-64.

110. *Id.* at 22. John Baxter, the delegate from Knox County, submitted this provision to the convention; he also served on the committee on the bill of rights. *Id.* at 41. After Tennessee seceded, Baxter gave his support to the Confederacy. His loyalties were suspect, however; he was arrested as an enemy of the South. O. TEMPLE, NOTABLE MEN OF TENNESSEE 72 (1912).

prison had the prison surgeon not obtained his release.[111] Another of the delegates was described as "the most indefatigable worker for [prison] reform in Tennessee" in the early 1870s.[112] Several other delegates, and many other prominent Tennesseans, recently had experienced the discomfort of imprisonment.[113] Thus, when the delegates to the constitutional convention assembled in Nashville in 1870, the memory of the war was fresh and the personal experience of imprisonment likely colored their deliberations.

These two provisions, the one prohibiting the use of "unnecessary rigor" and the other requiring "safe and comfortable prisons" and "humane treatment of prisoners," combine to create a powerful mandate for decent prison conditions. Before their combined force is evaluated, however, the provisions should be considered separately.

### *A. Unnecessary Rigor*

Although the unnecessary rigor provision was adopted in Tennessee nearly two hundred years ago, it has been discussed in only one reported decision. In *Sanders v. State*[114] two persons

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111. A.O.P. Nicholson was twice imprisoned during the war; the second imprisonment nearly resulted in his death. J. CALDWELL, SKETCHES OF THE BENCH AND BAR OF TENNESSEE 227-31 (1898); J. GREEN, LIVES OF THE JUDGES OF THE SUPREME COURT OF TENNESSEE, 1796-1947, at 168-72 (1947).

112. J. Crowe, Agitation for Penal Reform in Tennessee, 1870-1900, at 84 (1954) (unpublished Ph.D. dissertation in the Vanderbilt University Library). The author was describing Dr. William M. Wright, the delegate from Carroll County, who, while serving as superintendent of prisons from 1873 to 1874, instituted several reforms in penal administration.

113. At least three other delegates, Thomas Jones, representing Giles and Maury Counties, David Key from Chattanooga, and John Netherland of Hawkins County, were arrested or imprisoned during the war. *See* G. Stanberg, The Tennesee Constitutional Convention of 1870 (Aug. 1940) (unpublished Master of Arts thesis in The University of Tennessee John D. Hoskins Main Library). During the military occupation of Tennessee prominent Nashvillians, including the mayor, leading secessionists, clergymen, and newpaper editors with Southern sympathies, were imprisoned for refusing to take an oath of allegiance to the Union. P. MASLOWSKI, TREASON MUST BE MADE ODIOUS: MILITARY OCCUPATION AND WARTIME RECONSTRUCTION IN NASHVILLE, TENNESSEE, 1862-65, at 53-55 (1978).

114. 216 Tenn. 425, 392 S.W.2d 916 (1965).

arrested upon suspicion of burglary alleged that they were treated with unnecessary rigor because their clothing was taken from them for the purpose of obtaining soil specimens and because one of the defendants, who suffered a bone fracture, did not receive medical care for several hours after his arrest.[115] The defendants did not claim that no substitute clothing had been provided,[116] and one defendant admitted that he had not been abused, mistreated, or threatened.[117] The injured defendant was given medical care within a few hours.[118] Without attempting to define unnecessary rigor or to develop a constitutional principle, the Tennessee Supreme Court concluded that the complaint was without basis.[119] While the confiscation of clothing easily could have been justified as a reasonable search and seizure,[120] the brief delay in providing medical care merely serves as an example of what the court does not consider to be unnecessary rigor. Whether the court thought the delay was "necessary," or not "rigorous," or both, is unclear.

Four other states—Indiana,[121] Oregon,[122] Utah,[123] and Wyoming[124]—have provisions similar or identical to Tennessee's unnecessary rigor clause.[125] In only one reported decision, however,

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115. *Id.* at 431, 392 S.W.2d at 918-19.

116. *Id.*, 392 S.W.2d at 919.

117. *Id.* at 432, 392 S.W.2d at 919.

118. *Id.* at 429, 392 S.W.2d at 918.

119. *Id.* at 432, 392 S.W.2d at 919.

120. Subjecting a person held in post-arrest detention to a thorough search of his person does not violate the fourth amendment, 2 W. LAFAVE, SEARCH AND SEIZURE § 5.3(a), at 303 (1978), and his clothing may be seized for its evidentiary value, *id.*, at 305 n.16.

121. IND. CONST. art. I, § 15.

122. OR. CONST. art. I, § 13.

123. UTAH CONST. art. I, § 9.

124. WYO. CONST. art. I, § 16.

125. The differences among these provisions are insignificant. The Indiana and Oregon provisions read "arrested *or* confined." In Utah the provision reads "*persons* arrested *or imprisoned.*" Section 16 of article I of the Wyoming Constitution combines Tennessee's "unnecessary rigor" and "safe and comfortable prisons" provisions. Each of these provisions was adopted after and was perhaps derived from the Tennessee clause. The unnecessary rigor provision was adopted in Tennessee in 1796, *see* notes 104-05 *supra* and accompanying text. The Indiana provision was adopted in 1816. IND. CONST. of 1816 art. I, § 12. The Oregon Constitution was substantially derived from the Indiana Con-

has an inmate ever challenged the conditions of incarceration under any of these unnecessary rigor provisions.[126] In every other case the provision has been treated as if it were no more than a mere restatement of the prohibition of unreasonable searches and seizures,[127] of the guarantee of an impartial jury,[128] of the protection against self-incrimination,[129] of the right to a speedy trial,[130] or of the prohibition of cruel and unusual punishment.[131] The neglect of the unnecessary rigor provision led

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stitution, and the unnecessary rigor provision was adopted verbatim in 1851 as section 13 of the Oregon Bill of Rights. Palmer, *The Sources of the Oregon Constitution*, 5 OR. L. REV. 200, 201 (1926). The provision was adopted in Wyoming in 1889, WYO. CONST. of 1889 art. I, § 16, and in Utah in 1895, UTAH CONST. of 1895 art. I, § 9.

126. *See* notes 138-52 *infra* and accompanying text.

127. *See* notes 114-20 *supra* and accompanying text.

128. In Hall v. State, 199 Ind. 592, 159 N.E. 420 (1928), a criminal defendant complained that his appearance in leg irons before the jury violated his right to an impartial jury guaranteed by the Indiana Constitution, IND. CONST. art. I, § 13, and subjected him to unnecessary rigor. The Indiana Supreme Court rejected the defendant's objection to the leg irons, noting that he was dangerous and an escape risk. The court did not consider expressly the unnecessary rigor provision, and its holding could have rested soley on section 13 of the Indiana Bill of Rights. *Accord*, Hicks v. State, 213 Ind. 277, 11 N.E.2d 171 (1937).

129. The Indiana Supreme Court held that if a defendant was threatened or forced to confess, unnecessary rigor was used in violation of section 15 of the Indiana Bill of Rights, IND. CONST. art. I, § 15, and that the defendant was compelled to testify against himself in violation of section 14 of the Indiana Bill of Rights, IND. CONST. art. I, § 14. Suter v. State, 227 Ind. 648, 88 N.E.2d 386 (1949); Kokenes v. State, 213 Ind. 476, 13 N.E.2d 524 (1938). Although the unnecessary rigor provision by implication supports the exclusion of an involuntary confession, that result can be reached solely on the basis of the protection against self-incrimination.

130. In Owens v. State, 263 Ind. 487, 33 N.E.2d 745 (1975), defendant argued that a delay of six days between his arrest and arraignment constituted unnecessary rigor. The Indiana Supreme Court considered the argument inapposite, saying that the defendant could have argued more logically that the delay violated his right to a speedy trial. *Id.* at 495-96, 33 N.E.2d at 749.

131. In several decisions Oregon courts have considered habeas corpus petitions in which prisoners complained that the severe conditions of confinement constituted unnecessary rigor and cruel and unusual punishment. In each of the decisions the court treated the petition as an allegation of cruel and unusual punishment without distinguishing the unnecessary rigor provision. Benson v. Gladden, 242 Or. 132, 407 P.2d 634 (1965); Grenfell v. Gladden, 241

one commentator to conclude that "although it clearly sets out a policy against the mistreatment of prisoners, [it] apparently affords little protection beyond what is afforded by other sections of the constitution."[132] Additionally, there has been confusion about the appropriate remedy for violation of the unnecessary rigor provision. It has been claimed that a pretrial violation requires exclusion of evidence,[133] that a violation at trial requires reversal,[134] and that a violation after trial requires release.[135] The unnecessary rigor provision, however, has supported civil[136] and criminal liability[137] and logically should also support an order to correct the conditions which gave rise to liability.

A recent decision of the Oregon Supreme Court gave the unnecessary rigor provision an expansive interpretation which suggests its potential in litigation aimed at improving conditions of confinement. In *Sterling v. Cupp*[138] male inmates of the Oregon State Penitentiary sued to enjoin prison officials from assigning female guards to duties which required frisking male inmates or

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Or. 190, 405 P.2d 532 (1965), *cert. denied*, 382 U.S. 998 (1966); Williams v. Cupp, 30 Or. App. 375, 567 P.2d 565 (1977); Newton v. Cupp, 1 Or. App. 645, 465 P.2d 734 (1970).

132. Twomley, *The Indiana Bill of Rights*, 20 IND. L.J. 211, 241 (1945).

133. See Suter v. State, 227 Ind. 648, 88 N.E.2d 386 (1949), and Kokenes v. State, 213 Ind. 476, 13 N.E.2d 524 (1938), in which involuntary confessions were excluded.

134. The defendant in Hall v. State, 199 Ind. 592, 159 N.E. 420 (1928), sought a new trial on the ground that his appearance before a jury in leg irons subjected him to unnecessary rigor. *See* note 128 *supra*.

135. In several cases convicted prisoners have sought release on habeas corpus petitions on the grounds that the conditions of their confinement constituted unnecessary rigor. *See* note 131 *supra*.

136. In Matovina v. Hult, 125 Ind. App. 236, 123 N.E.2d 893 (1955), the Indiana Court of Appeals upheld the civil liability of police officers for the false imprisonment of a suspect in a hit and run driving incident. The suspect had been jailed for six days without any affidavit or warrant filed against him while the police investigated the case. The court cited, without discussing, the unnecessary rigor provision. *Id.* at 243, 123 N.E.2d at 897.

137. In Bonahoon v. State, 203 Ind. 51, 178 N.E. 570 (1931), the court relied on the unnecessary rigor provision to uphold the assault and battery convictions of police officers who brutally gave a suspect the "third degree" while interrogating him at police headquarters.

138. 290 Or. 611, 625 P.2d 123 (1981).

observing them in showers or toilets.[139] The trial court granted the injunction, and the Oregon Court of Appeal, relying on the constitutional right to privacy, affirmed.[140] The Oregon Supreme Court upheld the injunction, but relied on Oregon's unnecessary rigor provision instead of the right to privacy.[141] The court noted that the unnecessary rigor provision was "expressly directed toward guaranteeing humane treatment of those prosecuted for crime"[142] and had no parallel in the federal constitution.[143] The court held that the constitutional prohibition was not "confined only to such historically 'rigorous' practices as shackles, the ball and chain, or to physically brutal treatment or conditions . . ."[144] nor was unnecessary rigor "to be equated only with beatings or other forms of brutality."[145] Rather, the provision was intended to minimize "needlessly harsh, degrading, or dehumanizing treatment of prisoners."[146] The issue, as framed by the court, was whether the searches by guards of the opposite sex constituted "a cognizable indignity and if so, whether it was justified by necessity."[147] The court noted that the searches were offensive to many of the inmates[148] and that prevailing social and penal standards do not permit body searches of female inmates by male guards.[149] The court concluded that there was no reason to deny to "men in the prison setting . . . the proprieties that [are] unquestioningly grant[ed to] women in the same setting."[150] Finally, the court found no necessity which would justify searches by the opposite sex.[151] Thus, significantly, the *Ster-*

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139. *Id.* at ___, 625 P.2d at 125.

140. Sterling v. Cupp, 44 Or. App. 755, 607 P.2d 206 (1980), *aff'd*, 290 Or. 611, 625 P.2d 123 (1981).

141. 290 Or. at ___, 625 P.2d at 129.

142. *Id.* at ___, 625 P.2d at 127-28.

143. *Id.* at ___, 625 P.2d at 128.

144. *Id.* at ___, 625 P.2d at 129.

145. *Id.* at ___, 625 P.2d at 130.

146. *Id.* at ___, 625 P.2d at 131.

147. *Id.* at ___, 625 P.2d at 131-32.

148. *Id.* at ___, 625 P.2d at 132.

149. *Id.* at ___, 625 P.2d at 132.

150. *Id.* at ___, 625 P.2d at 133.

151. The court held that the state's policy of providing equal employment opportunities for women did not constitute necessity and thus did not justify these searches. Both the rights of the prisoners and the rights of the

*ling* court defined the word "rigor" expansively to include conditions which violate the dignity of inmates. The opinion is a creative and scholarly attempt to give independent significance to an obscure state constitutional provision;[152] the court succeeds in interpreting the provision so that it is not merely duplicative of other constitutional rights.

In interpreting a constitutional provision a court should presume that the framers of the constitution did not adopt any provision needlessly.[153] A state's constitution, therefore, should be construed to give effect to all of its provisions, if possible,[154] and unless the provision is ambiguous it should be given its plain meaning.[155] The plain language of section 13 of the Tennessee Declaration of Rights[156] suggests its proper interpretation. First, it offers protection to persons "arrested and confined in jail" and, therefore, clearly includes the pretrial detainee.[157]

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guards run against the state and not against each other. The female guards were not asserting a right to search male prisoners for its own sake, but were alleging an interest in employment opportunities. As such the guards' rights constituted a separate issue which the court did not decide. *Id.* at ___, 625 P.2d at 133.

152. The opinion in *Sterling* is not that of a majority of the court, however. It represents the opinion of only two justices. One justice concurred in the result only, and two other justices dissented.

153. This presumption is not merely a canon of construction, it is virtually a constitutional principle in Tennessee. *See* TENN. CONST. art. II, § 16. *See generally* State v. Staten, 46 Tenn. (6 Cold.) 233, 264 (1869); Laska, *A Legal and Constitutional History of Tennessee, 1772-1972*, 6 MEM. ST. U.L. REV. 563, 592-93 (1976).

154. State *ex rel.* Ind. State Bar Ass'n v. Moritz, 244 Ind. 156, 160-66, 191 N.E.2d 21, 23 (1963).

155. *See* Chattanooga-Hamilton County Hosp. Auth. v. City of Chattanooga, 580 S.W.2d 322, 327 (Tenn. 1979).

156. TENN. CONST. art. I, § 13.

157. The protection of section 13, however, should not be limited to the pretrial detainee in jail, but should extend to the convicted prison inmate as well. In 1796, when Tennessee adopted the unnecessary rigor provision, there was no state-wide prison system. The only institutions in which criminals could be held were local jails. It was not until 1813 that the legislature authorized the collection of subscriptions for the purpose of erecting a penitentiary. 2 E. SCOTT, LAWS OF THE STATE OF TENNESSEE ch. 77, at 145 (1st ed. Knoxville 1821), and it was not until 1829 that the legislature acted to establish the penitentiary "within two miles of the town of Nashville," 1829 Tenn. Pub. Acts, ch. 5, § 2, *reprinted in* 1 J. HAYWOOD & R. COBBS, THE STATUTE LAWS OF THE

Second, it curtails the use of "rigor" in the treatment of detainees. The word "rigor" suggests synonyms such as harshness, severity, or strictness and implies a discipline that is sternly imposed.[158] It is not merely a synonym for cruel and unusual punishment. Although cruelty may be rigorous, rigor embraces more than cruelty. In other words, this provision places a wider range of conditions under judicial scrutiny and requires a higher standard than that imposed by the eighth amendment of the federal constitution.[159] Furthermore, the word should be interpreted to create an evolving, dynamic standard measured by twentieth-century conditions, not by the standards of the eighteenth century.[160]

Third, and perhaps more importantly, section 13 requires that any use of rigor must be justified by a standard of necessity. The United States Supreme Court in *Wolfish* rejected the compelling necessity test as the standard for review of conditions of pretrial confinement.[161] The Tennessee Constitution puts the element of necessity back into the formula. If there is a feasible, less restrictive alternative to the allegedly rigorous condition or treatment, it must be substituted for the rigorous condition unless the detention officials can prove necessity; such a showing

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STATE OF TENNESSEE 255 (1831). Therefore, at the time of its adoption, section 13 was intended to prohibit the use of unnecessary rigor against persons lawfully confined in jail. Because state prisons as an institution did not exist in Tennessee in 1796, the word "jail" should be interpreted generically to mean an institution of imprisonment and thus should include "prisons."

158. Rigor is defined as "often harsh inflexibility in opinion, temper, or judgment . . . an act or instance of strictness, severity, harshness, oppression or cruelty . . . a condition that makes life difficult, challenging, or uncomfortable." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1957 (1971). The Oxford English Dictionary defines "rigour" as "severity in dealing with a person or persons; extreme strictness; harshness." 8 OXFORD ENGLISH DICTIONARY 682 (1933).

159. *See* notes 148-50 *supra* and accompanying text.

160. Analogously, the words "cruel and unusual punishment" are not limited to their historic meaning. The words "are not precise, and . . . their scope is not static. The [eighth amendment] must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." Trop v. Dulles, 356 U.S. 86, 100-01 (1958). *See* Estelle v. Gambel, 429 U.S. 97, 102-03 (1976).

161. *See* text accompanying note 52 *supra*.

would require much more than a mere demonstration that the condition was not arbitrary or purposeless.[162] Essentially, section 13 expresses in constitutional language a principle stated by Blackstone:

> [Pretrial detention] is only for safe custody, and not for punishment: therefore, in this dubious interval between the commitment and trial, a prisoner ought to be used with the utmost humanity, and neither be loaded with needless fetters, or subject to other hardships than such as are absolutely requisite for the purpose of confinement only . . . .[163]

The restrictions placed upon a detainee's liberty, therefore, should be minimal and limited to those necessary to ensure the detainee's presence at trial. In short, there cannot be blind deference to jail officials. The judgments of these officials must be subjected to the probing inquiry of the court, and the officials must be required to meet the burden of showing necessity.

### *B. Safe and Comfortable Prisons*

Tennessee and Wyoming[164] are the only states that have incorporated the safe and comfortable prisons provision in their state constitutions. The provision has never been interpreted in any reported case in either Tennessee or in Wyoming; however, it has been discussed briefly in one unreported Tennessee case. In *Trigg v. Blanton*[165] inmates of the Tennessee prison system brought a suit, claiming that the conditions of their confinement violated the state and federal constitutions. Chancellor Cantrell correctly recognized that "[t]he legality of prison conditions in

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162. *See* text accompanying note 57 *supra*. Fifty-two percent of the jails in Tennessee have no written rules for prisoners. INSPECTIONS REPORT, *supra* note 11, at 2. Presumably, the discipline in these jails is ad hoc and potentially arbitrary.

163. 4 W. BLACKSTONE, COMMENTARIES *300.

164. The Wyoming Constitution incorporates the unnecessary rigor provision, *see* note 124 *supra* and accompanying text, and the safe and comfortable prisons provision into one section. WYO. CONST. art. I, § 16.

165. No. A-6047 (Tenn. Ch. Davidson County Aug. 23, 1978), *modified*, Appeal from Davidson Equity (Tenn. Ct. App. Feb. 21, 1980), *appeal granted sub nom.* Trigg v. Alexander, No. 81-2-I (Tenn. Jan. 12, 1981). For a discussion of the *Trigg* decision, see 1 L. & SOC. PROB. 99 (1980). *See also* note 172 *supra*.

Tennessee [is] to be measured by an even higher standard than the standard established by the Eighth Amendment to the U.S. Constitution."[166] The substance of his remedial order, however, followed precedents based on the lower federal standard.[167] Thus, the chancery court recognized a high state constitutional standard, but failed to define or apply it. In the Tennessee Court of Appeals, Judge Todd discussed section 32 and concluded that the words "safe and comfortable" were not static, but were evolving in meaning:

> It was intended by the framers and adoptors of the Constitution that its words would be interpreted from time to time in accordance with the current concepts of the people of the State.
>
> That is, what was considered safe, comfortable, humane, cruel or unusual in 1870 is not necessarily the same as what would be considered such in 1978 or 1980.
>
> Thus, in the present case, consideration must be given to what would be considered safe, comfortable, humane, cruel or unusual by the present generation of Tennesseans as contrasted to that of a century ago.[168]

The test stated by the court to apply this provision is "what a reasonable and conscientious citizen would deem to constitute a safe and comfortable prison, humane treatment, or cruel and unusual punishment."[169] The court of appeals, however, found error in the admission of evidence by the chancery court[170] and limited the remedial order entered by Chancellor Cantrell.[171] Both courts properly recognized that section 32 sets a very high standard for the conditions of incarceration. Neither court, however, actually translated that standard into a mandate that exceeded the requirements of the federal eighth amendment.[172]

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166. Trigg v. Blanton, No. A-6047, mem. op. at 56 (Tenn. Ch. Davidson County Aug. 23, 1978).

167. *Id.* at 56-63.

168. Trigg v. Blanton, Appeal from Davidson Equity, interim op. at 20 (Tenn. Ct. App. Feb. 21, 1980).

169. *Id.*

170. *Id.* at 15.

171. *Id.* at 26-27.

172. The Tennessee Supreme Court recently decided to "abstain" in the *Trigg* case. The court noted that a similar class action involving the same is-

The meaning of section 32 is clear and becomes even clearer when compared with the weaker guarantees of other state constitutions. First, the provision is broad, applicable not merely to state-run correctional institutions but to local county jails as well. The word "prison" is a generic term which includes "every place of confinement of a person in the custody of the law,"[173] and it includes "jail," which is a prison under the authority of a county or municipality.[174] If the delegates to the 1870 constitutional convention had wished to restrict the scope of the provision by eliminating jails from its coverage, they could have used the more precise words "state prison"[175] or "penitentiary."[176] Or instead of the word "prisoners," which includes jail inmates,[177] the delegates could have substituted the word "convicts."[178] The

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sues presently was pending in federal district court and considered it "unwise and contrary to the public interest to have this litigation proceed in both the federal courts and the state courts at the same time." The court thus placed the case on "retired status" subject to reactivation in the event the federal court decides to abstain or dismiss without an adjudication on the merits. Trigg v. Alexander, Appeal No. 81-2-1 (Tenn. Sup. Ct. July 2, 1981).

173. Copeland v. Commonwealth, 214 Ky. 209, 211, 282 S.W. 1077, 1077 (1926). "[T]he word 'prison' [is] sufficiently broad to include all institutions for the detention of persons sentenced to imprisonment or *detained to await their trial* . . . ." Brewer v. Casey, 196 Mass. 384, 387, 82 N.E. 45 (1907) (emphasis added). *Accord*, Scarborough v. Thornton, 9 Pa. 451, 454 (1848) (county jail considered a prison). *See generally* 60 AM. JUR. 2d *Penal and Correctional Institutions* § 1 (1972); BALLENTINE'S LAW DICTIONARY 991 (1969). The tendency to use the word "prison" as a synonym for "state penitentiary" and to distinguish it from the word "jail" is relatively recent. *Compare* the definition of "prison" in BLACK'S LAW DICTIONARY 1075 (5th ed. 1979) *with* the definition of "prison" in BLACK'S LAW DICTIONARY 940 (2d ed. 1910).

174. "The county jail is used as a prison for the safe keeping and confinement of all persons committed thereto, under the authority of law." 8 STATUTES OF TENNESSEE § 5395 (S. Thompson & T. Steger 1872). *See generally* 60 AM. JUR. 2d *Penal and Correctional Institutions* § 1 (1972).

175. *See* State v. Delmonto, 110 Conn. 298, 147 A. 825 (1929); Martin v. Martin, 47 N.H. 52 (1866).

176. "The penitentiary . . . is the State prison. . . ." 3 STATUTES OF TENNESSEE § 5436 (S. Thompson & T. Steger 1872).

177. BALLENTINE'S LAW DICTIONARY 991 (1969).

178. For example, the Kentucky Constitution requires the state to "provide for all supplies, and for the sanitary condition of the *convicts* . . . ." KY. CONST. § 254 (emphasis added). This provision has been held to apply only to those convicted of felonies and sentenced to the state penitentiary. Briskman

plain meaning of section 32 indicates that the delegates wanted the protections of the provision extended to all persons who were confined under the authority of law, whether in a local jail or a state penitentiary.

Second, section 32 sets a qualitative standard for prison conditions: prisons must be safe and comfortable, and prisoners must receive humane treatment. The only other state to incorporate a qualitative constitutional standard for prison conditions is Kentucky, which requires the state to provide for the "sanitary conditions of the convicts."[179] The Kentucky courts, however, never have defined the standards implied by the words "sanitary conditions," although implicitly they suggest better living conditions than required by the cruel and unusual punishment clause. In most states the only standard is a prohibition against cruel and unusual punishment,[180] a standard which is also found in the Tennessee Constitution.[181] Cruel and unusual punishment, however, is a condition which is prohibited; it is a negative standard. The words "safe and comfortable prisons" and "humane treatment" describe conditions which must be

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v. Central State Hosp., 264 S.W.2d 270 (Ky. 1954) (citing Lang v. Commonwealth, 190 Ky. 29, 226 S.W.2d 379 (1920)).

179. *See* note 178 *supra*. More common are state constitutional provisions that merely authorize the establishment of penal institutions or jails without making specific requirements concerning conditions of confinement. *See, e.g.*, ARIZ. CONST. art. XXII, § 15; COLO. CONST. art. VIII, § 1; IDAHO CONST. art. 10, § 1; S.C. CONST. art. XII, § 2.

180. Several states have constitutional provisions which establish the principle of reformation or rehabilitation as the basis of the penal code. ALASKA CONST. art. I, § 12; ILL. CONST. art. I, § 11; IND. CONST. art. I, § 18; MONT. CONST. art. II, § 28; N.H. CONST. pt. 1, art. 18; OR. CONST. art I, § 15; WYO. CONST. art. I, § 15. Because these provisions provide only for rehabilitation or reformation of the individual who has been convicted, an examination of these provisions is beyond the scope of this study. No cases have been found in which any of these provisions have been used to attack conditions of confinement. The Alaska provision, however, is quite broad, and the Alaska Supreme Court has developed a considerable body of law upon it. *See, e.g.*, State v. Chaney, 477 P.2d 441 (Alaska 1970) (seminal case establishing sentencing criteria); McGinnis v. Stevens, 543 P.2d 1221 (Alaska 1975) (Alaska Constitution affords Alaska prisoners greater due process rights than does the federal constitution); Abraham v. State, 585 P.2d 526 (Alaska 1978) (prisoner has a constitutional right to receive rehabilitative treatment).

181. TENN. CONST. art. I, § 16.

achieved; they create an affirmative obligation. Thus, in no sense are these provisions equivalent or redundant.

Finally, the drafters of the Tennessee Constitution clearly intended that section 32 be taken seriously. By its very terms the provision is mandatory—"safe and comfortable prisons, . . . inspection of prisons, and the humane treatment of prisoners *shall* be provided for."[182] Moreover, if the drafters had been indifferent to its enforcement they easily could have omitted the requirement of inspection of the prisons. The obvious purpose of an inspection requirement is to ensure that deficiencies are discovered and inadequate facilities brought into compliance.

Obviously, it is beyond the power of any jailer to ensure the absolute safety or comfort of all inmates, and neither the drafters of the constitution nor any modern court could expect otherwise. To the extent that this standard seems unrealistic—no jail can be perfectly safe or comfortable—it can be tempered by judicial interpretation. Justification for violation of the standard, however, should be subjected to strict judicial scrutiny. By contrast, the United States Supreme Court in *Wolfish* declared that "the detainee's desire to be free from discomfort" is not constitutionally protected;[183] that even "discomforting" restraints are permissible if "reasonably related to the institution's interest in maintaining jail security . . . ."[184] In Tennessee a detainee does have a constitutionally protected right to be free from discomfort, and thus the Tennessee standard is considerably higher than the federal standard.

### *C. Sections 13 and 32 in Pari Materia*

The unnecessary rigor and clean and comfortable prisons provisions can be better understood by comparing and combining them. Section 13, by prohibiting unnecessary rigor, reasonably requires that jailhouse discipline be tested by a standard of necessity;[185] it does not deny the need for order and security in a jail. The guarantee in section 32 is different. It assures each inmate the right to safety, comfort, and humane treatment, a right

182. TENN. CONST. art. I, § 32 (emphasis added).
183. 441 U.S. 520, 534 (1979).
184. *Id.* at 540.
185. *See* text accompanying notes 162 & 163 *supra*.

that cannot be sacrificed even by a claim of necessity.[186] The operation of these provisions can be illustrated by example. Some jails prohibit physical contact between detainees and their visitors. For the detainee physical contact with his family and friends may be vital in order to maintain those relationships. Such a rule is justified, however, as a means of preventing contraband from entering the jail. Under *Wolfish* the jail merely needs to show that the prohibition of contact visits is reasonably related to the security interests of the jail. Since this can easily be demonstrated, the denial is consistently upheld.[187] Section 13 imposes a different standard. The jail must show that the denial of contact visits is necessary. Therefore, if jailhouse security can be maintained by use of a less restrictive alternative—which is almost always available[188]—then the denial of contact visits is prohibited. A second example further illustrates the Tennessee constitutional standards. In some circumstances it may be necessary to segregate a violent inmate from the general jail population.[189] Assuming that necessity can be shown, section 13 does not prohibit such discipline, but section 32 requires that the segregated inmate be made comfortable and be treated humanely.

Thus, the Tennessee Constitution recognizes that the maintenance of order and security in jail is necessary, but prohibits jailers from being overly zealous disciplinarians. The Tennessee Constitution does not, however, recognize any corresponding necessity to hold a person under uncomfortable conditions or to place him in danger.

## V. Conclusion

Tennessee's constitution has two separate provisions which impose a higher standard for the conditions of confinement than required by the United States Supreme Court decision in *Bell v. Wolfish*. A pretrial detainee under *Wolfish* has a due process right to be free from punishment, the absence of which can be shown by establishing a reasonable relation to a legitimate governmental interest, such as the security needs of the detention

186. *See* text accompanying note 182 *supra*.
187. *See* note 69 *supra* and accompanying text.
188. *See* note 70 *supra* and accompanying text.
189. *See* Villanueva v. George, 632 F.2d 707 (8th Cir. 1980).

center. By contrast, the Tennessee Constitution requires that detainees be free from unnecessary rigor, that they be safe and comfortable, and that they be treated humanely. Yet the conditions in Tennessee jails are often deplorable. Tennessee courts are likely to face a number of jail suits and will be forced to interpret these long overlooked provisions. They should be enforced strictly.

First, Tennessee courts should require strong remedial action, when necessary, not only because the problem is grave[190] but, moreover, because judicial intervention is effective.[191] The fact that the Tennessee Constitution establishes high standards does not justify judicial disregard for them. Standards as high as Tennessee's may be necessary to combat a problem so impervious to solution.[192] Second, detainees are politically impotent, and the only viable avenue for redress of their grievances is the judiciary.[193] These are times of fiscal restraint and political conservatism, certainly not the best of times for politicans to advocate compassion or increased expenditures for accused criminals. Pretrial detainees, however, have been convicted of no crime and should be treated as presumptively innocent. Third, the condition of Tennessee jails is a Tennessee problem. The United States Supreme Court has admonished federal courts to avoid excessive entanglement in the administration of state prisons, noting that the "[s]tates have an important interest in not being bypassed in the correction of those problems."[194] If the state and local governments fail to act and if the state courts fail to protect adequately the rights of pretrial detainees, then federal court intervention is proper[195] and virtually certain. The only sure way for the Tennessee courts to avoid federal court intervention is to apply the higher standards outlined in the Tennessee Constitution. Finally, the courts of Tennessee should insist on strict enforcement of these provisions simply because the plain language of the provisions requires it. It is not for the

190. *See* notes 1-11 *supra* and accompanying text.
191. *See* note 16 *supra* and accompanying text.
192. *See* text accompanying note 15 *supra*.
193. *See* notes 16-18 *supra* and accompanying text.
194. Preiser v. Rodriguez, 411 U.S. 475, 492 (1973); *see* note 31 *supra*.
195. *See* notes 64-73 *supra* and accompanying text.

court to decide what should or should not be in the constitution but to interpret and apply the constitution as written. Inherent in our federal system is the opportunity for states to experiment with local solutions to local problems. If these constitutional provisions are sound, then other states may choose to follow the Tennessee example. If these provisions are unwise, the citizens of Tennessee can remove them through the process of amendment.

For more than a century these provisions have lain dormant. During these years indigent defendants, unable to make bail, unable to afford an attorney, and with no right to a court-appointed attorney, have awaited trial in jails under conditions that accurately could be described as intolerable were it not for the fact that they have been tolerated for so long. It is unlikely that litigants and their attorneys will ignore these provisions today. One can hope that the courts will interpret them faithfully. These provisions provide the courts with an opportunity to deal creatively with a problem of grave proportion, to protect adequately the rights of powerless individuals, and to decrease the necessity of resorting to federal courts to correct state problems. If, on the other hand, the Tennessee courts disregard these provisions, they will have abdicated their stewardship of the state constitution.

ROBERT W. LOUGH

# RECENT DEVELOPMENTS

## Criminal Law and Procedure—Evidence—Impeachment of Cross-Examination Response With Suppressed Evidence

*United States v. Havens*, 446 U.S. 620 (1980).

Defendant was being tried on illegal drug charges arising out of a fourth trip that he and an accomplice made to Peru.[1] The accomplice testified that on the first trip to Peru defendant draped tape and ace bandages around him as a means of transporting cocaine.[2] He further testified that on subsequent trips the drugs were transported by means of a T-shirt with makeshift pockets, which defendant had altered and given to him.[3] A T-shirt from which swatches of cloth matching the makeshift pockets on the accomplice's T-shirt were cut was seized from defendant's suitcase.[4] This evidence was suppressed at trial because it had been seized in a warrantless search in violation of the fourth

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1. United States v. Havens, 592 F.2d 848, 849 (5th Cir. 1979). Defendant was charged with "conspiring to import cocaine into the United States, . . . importing approximately 1490 grams of cocaine into the United States, and of knowingly and intentionally possessing with intent to distribute approximately 1490 grams of cocaine." The accomplice was charged in the same three-count indictment but, prior to trial, pleaded guilty to one count in exchange for dismissal of the other two charges. Havens was tried in this separate proceeding. *Id.* at 850.

2. *Id.* at 852.

3. United States v. Havens, 446 U.S. 620, 621-22. The accomplice was wearing the altered T-shirt upon his arrest following the fourth trip to Peru. Cocaine was found sewn into the makeshift pockets of the T-shirt. The accomplice implicated defendant, and Havens was arrested.

4. *Id.* at 622.

amendment.[5] On direct examination defendant was asked whether he was involved in the taping and draping and "so on"[6] on the fourth trip. Defendant denied involvement in "that kind of activity."[7] On cross-examination defendant was questioned about the T-shirt that was found in his luggage, but he denied possession of or involvement with the T-shirt.[8] Following a government agent's rebuttal testimony,[9] the T-shirt was admitted into evidence.[10] The district court judge determined that the suppressed T-shirt was admissible for impeachment purposes even though no reference had been made to it on direct examination.[11] Defendant was convicted and appealed.[12] The United

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5. Since defendant had cleared customs some four hours earlier a warrant for the search of his luggage was necessary. Because no warrant was obtained, the search and seizure violated the fourth amendment. The fourth amendment provides:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

The traditional mechanism employed to prevent the use of illegally seized evidence against a defendant is suppression, upon defendant's timely objection or motion, of the evidence from use at trial. *See* Amos v. United States, 255 U.S. 313 (1921); Gouled v. United States, 255 U.S. 298 (1921); Silverthorne Lumber Co. v. United States, 255 U.S. 358 (1920). Upon Havens' motion the illegally seized evidence was suppressed from use in the prosecution's case-in-chief at trial.

6. 446 U.S. at 622.

7. *Id.*

8. *Id.* at 622-23.

9. *Id.* at 623. In contrast to defendant's testimony, the government agent testified that the T-shirt was in defendant's luggage at the time of arrest and that defendant claimed that all of the T-shirts therein belonged to the accomplice.

10. *Id.*

11. *Id.* at 628. The jury was given an instruction limiting the use of the rebuttal evidence to consideration of defendant's credibility. *Id.* at 623. This is in accordance with the Federal Rules of Evidence: "When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly." FED. R. EVID. 105.

States Court of Appeals for the Fifth Circuit reversed, holding that impeachment by the use of suppressed evidence must go to a specific statement made on direct examination.[13] On certiorari to the United States Supreme Court, *held*, reversed.[14] Although illegally seized evidence is inadmissible as substantive evidence in the prosecutor's case-in-chief, it may be used to impeach defendant's response to proper cross-examination that relates to matters "reasonably suggested"[15] on direct examination. *United States v. Havens*, 446 U.S. 620 (1980).

The exclusionary rule provides that evidence acquired in violation of the fourth amendment may not be used by the government to obtain conviction in a criminal proceeding.[16] The primary purpose of this judicial mandate is to deter police from unconstitutional searches and seizures.[17] When application of the rule will not effectuate this remedial end, certain use of the evidence is permitted despite the fact that it was obtained unconstitutionally.[18] In determining whether the government should be permitted to use illegally seized evidence for impeachment purposes when a defendant gives perjured testimony on cross-examination, the Supreme Court in *Havens* balanced the

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12. 446 U.S. at 621.

13. The court's standard required that "[f]irst, the predicate for its use in impeachment must be found in the direct examination of defendant. . . . Second, the evidence in question must contradict a particular statement made by the defendant." 592 F.2d at 851.

14. 446 U.S. at 629.

15. *Id.* at 627.

16. United States v. Calandra, 414 U.S. 338 (1974); Mapp v. Ohio, 367 U.S. 643 (1961); Weeks v. United States, 232 U.S. 383 (1914).

17. *See, e.g.*, United States v. Calandra, 414 U.S. 338 (1974); Elkins v. United States, 364 U.S. 206 (1960). *But see* Mapp v. Ohio, 367 U.S. 643 (1961) (purpose of the exclusionary rule is deterrence and protection of judicial integrity); Weeks v. United States, 232 U.S. 383 (1914) (judicial participation in illegal governmental conduct by countenancing police misconduct is proscribed by the fourth amendment).

18. *See* Stone v. Powell, 428 U.S. 465 (1976) (cannot raise anew a fourth amendment claim in habeas corpus proceedings); United States v. Paepke, 550 F.2d 385 (7th Cir. 1977) (evidence "purged of illegal taint" by defendant's actions); United States v. Peterson, 524 F.2d 167 (4th Cir. 1975) (use of illegally seized evidence to prove case against co-defendant permissible); Crews v. United States, 389 A.2d 277 (D.C. App. 1978) (evidence would have inevitably been discovered by legal means).

deterrent objective of the exclusionary rule against its danger to accurate judicial fact-finding.

At early common law the means used to acquire evidence was not subject to inquiry.[19] In 1886 the Supreme Court held that compelling a defendant to produce evidence against himself was a violation of both the fourth and fifth amendments.[20] Then in 1914 the Court adopted a rule of exclusion that made evidence obtained by federal agents in an unconstitutional search or seizure inadmissible in federal courts.[21] The Court thus provided a remedy for a fourth amendment violation that was not explicit in the language of the amendment itself. The original rationale for the exclusionary rule was that the Court should not sanction government conduct that was forbidden by the fourth amendment.[22]

In 1925 the Supreme Court in *Agnello v. United States*[23] first addressed the issue whether the testimony of a defendant could be impeached with the use of illegally seized evidence. Defendant Agnello was arrested and charged with conspiracy to sell cocaine.[24] At the time of his arrest, packets of cocaine were

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19. *See* C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE 165 (2d ed. 1972). *See also* Agnello v. United States, 290 F. 671 (2d Cir. 1923).

20. Boyd v. United States, 116 U.S. 616 (1886).

> [A] compulsory production of the private books and papers of the owner of goods sought to be forfeited in such a suit is compelling him to be a witness against himself, within the meaning of the Fifth Amendment to the Constitution, and is the equivalent of a search and seizure—and an unreasonable search and seizure—within the meaning of the Fourth Amendment.

*Id.* at 634-35.

The Court seemed to retreat from the *Boyd* rule in favor of the common law approach in Adams v. New York, 192 U.S. 585 (1904).

21. Weeks v. United States, 232 U.S. 383 (1914). Although the defendant appealed his conviction on fourth and fifth amendment grounds, the case was decided on the basis of the fourth amendment.

22. "To sanction such proceedings would be to affirm by judicial decision a manifest neglect if not an open defiance of the prohibitions of the Constitution, intended for the protection of the people against such unauthorized action." *Id.* at 394.

23. 269 U.S. 20 (1925).

24. Defendant was charged with conspiracy to sell cocaine without prior registration with the Internal Revenue collector and without having paid the applicable special tax. *Id.* at 28.

found on his person, and a subsequent warrantless search of his house produced a can of cocaine.[25] On direct examination defendant admitted possession of the packets, but denied knowing that they contained cocaine.[26] On cross-examination defendant claimed that he had never even seen narcotics.[27] Over objection, the prosecution was allowed to question defendant concerning the illegally seized can and to introduce the can into evidence.[28] The defendant was convicted,[29] but the Supreme Court reversed the conviction and held that illegally seized evidence could not be used to impeach defendant's testimony on a subject first elicited on cross-examination.[30] The Court went further and said that illegally seized evidence should not be admitted for any purpose.[31]

In the 1954 landmark impeachment decision of *Walder v. United States*[32] the Supreme Court retreated from the "no use" position espoused in *Agnello*. The *Walder* Court approved the introduction of previously suppressed evidence[33] to impeach a defendant's testimony when that evidence blatantly contradicted defendant's direct examination testimony and concerned a matter collateral to the crime charged.[34] When *Walder* was decided, the Supreme Court had retreated from its earlier rationale for the exclusionary rule[35] which was based on a reluctance

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25. *Id.* at 29.

26. *Id.*

27. *Id.*

28. *Id.* at 29-30.

29. The court of appeals affirmed defendant's conviction. 290 F. 671, 684 (2d Cir. 1923). The court held that since the search and seizure was not made in violation of the fourth and fifth amendments, use of the evidence was proper.

30. 269 U.S. at 35. Since introduction of the fact that defendant had the can of cocaine in his house tended to establish the requisite "guilty knowledge and criminal intent" in the crime charged, its introduction was prejudicial. *Id.*

31. *Id.*

32. 347 U.S. 62 (1954).

33. The evidence was suppressed from use in connection with charges arising out of the prior incident. The case never went to trial and the charges were eventually dropped. *Id.* at 64. *See* note 38 *infra* and accompanying text.

34. 347 U.S. at 65. Collateral matters are those other than the elements of the crime charged, but which are relevant to the proceedings.

35. *See* note 22 *supra* and accompanying text.

to sanction fourth amendment violations by the government. Instead, the Court emphasized the policy of deterring police conduct that violates the fourth amendment as the primary basis of the exclusionary rule.[36]

Defendant Walder, charged with selling narcotics, testified on direct examination that he had never sold, possessed, given away, or handled narcotics.[37] On cross-examination he acknowledged and reaffirmed these claims.[38] In an attempt to impeach defendant's testimony, the prosecution questioned him about a prior incident in which an illegal narcotic was seized from him.[39] Following defendant's denial of this incident, the Government was permitted to introduce rebuttal testimony, despite the fact that such evidence was suppressed in connection with the charges arising out of the prior incident.[40] Defendant was convicted,[41] and the court of appeals[42] and the Supreme Court affirmed.[43] The Supreme Court held that defendant's constitutional right to testify and deny any involvement in the crime charged precluded substantive rebuttal of his testimony with illegally seized evidence.[44] This rule of exclusion, however, did not prohibit the impeachment of defendant's claim that he had never possessed narcotics, since this claim went beyond a denial

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

37. 347 U.S. at 63.

38. *Id.* at 64.

39. *Id.*

40. *Id. See* note 31 *supra.*

41. 347 U.S. at 64.

42. 201 F.2d 715 (D.C. Cir. 1953). The court of appeals affirmed the district court's holding that since defendant's attorney had elicited from him the response that he had never had anything to do with illegal narcotics, and because a limiting instruction was given so that the evidence only went to defendant's credibility, the impeachment was proper. *Id.* at 716. The court also determined that reference to a prior conviction and time served in a penitentiary was not improper in the prosecution's closing argument since defendant had testified concerning such matters on cross-examination. Likewise, the reference to defendant as "Mr. Big" in argument to the jury was not error since defendant was a narcotics wholesaler and wholesalers commonly called themselves "big dealers." *Id.* at 718.

43. 347 U.S. at 66. Justices Black and Douglas dissented but filed no opinion.

44. *Id.* at 65.

of involvement in the crime charged.[45] In distinguishing *Agnello,* the Court noted that in that case the prosecution sought to impeach a response elicited from defendant on cross-examination for the sole purpose of using the suppressed evidence.[46] In *Walder,* on the other hand, the statements sought to be impeached were posited by defendant on direct examination.[47] The *Walder* Court balanced the defendant's fourth amendment remedy of suppression against the Government's interest in exposing perjurious testimony to the jury and concluded that the Constitution did not prohibit contradiction of false testimony.[48]

A parallel exclusionary problem exists when evidence is obtained in violation of the fifth amendment privilege against self-incrimination. Although *Miranda v. Arizona*[49] involved the substantive use of confessions obtained by police interrogation in violation of the fifth amendment,[50] the case suggested the issue

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45. *Id.*

46. *Id.* at 66.

47. *Id.* at 65.

48. *Id.* The Court's conclusion was that allowing a defendant to so shield himself would be "an extension of the Weeks doctrine [which] would be a perversion of the fourth amendment." *Id.* Clearly, the interpretation of the exclusionary rule as requiring total nonuse of the illegally seized evidence was rejected.

49. 384 U.S. 436 (1966). *Miranda* held that when an individual is taken into custody he must be advised of his constitutional rights to remain silent and to have an attorney present prior to any questioning. The Court's guidelines for proper procurement of a statement provide:

> Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently. If, however, he indicates in any manner and at any stage of the process that he wishes to consult an attorney before speaking, there can be no questioning. Likewise, if the individual is alone and indicates in any manner that he does not wish to be interrogated, the police may not question him.

*Id.* at 444-45.

50. The fifth amendment provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of War or public danger; nor shall any

whether such confessions could be used for impeachment purposes.[51] The Supreme Court addressed this issue in *Harris v. New York*.[52]

Defendant Harris was convicted of selling narcotics.[53] At trial the prosecutor was permitted to read portions of defendant's prior statement, obtained by police in violation of *Miranda*,[54] to impeach his direct testimony.[55] The appellate courts[56] and the United States Supreme Court affirmed[57] defen-

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person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. CONST. amend. V.

51. Lower state and federal courts divided on this issue. *See* United States v. Fox, 403 F.2d 97 (2d Cir. 1968); State v. Brewton, 247 Or. 241, 422 P.2d 581 (1967). *See also* People v. Disbrow, 16 Cal. 3d 101, 545 P.2d 272, 127 Cal. Rptr. 360 (1976); Commonwealth v. Triplett, 462 Pa. 244, 341 A.2d 62 (1975); State v. Santiago, 53 Hawaii 254, 492 P.2d 657 (1971). *But see* People v. Wise, 46 N.Y.2d 321, 385 N.E.2d 1262, 413 N.Y.S.2d 334 (1978) & State v. Miller, 67 N.J. 229, 337 A.2d 36 (1975) (applying *Harris* to permit impeachment of direct examination testimony with statement); Serrano v. State, 84 Nev. 676, 447 P.2d 497 (1968) (collateral testimony of defendant to grand jury admissible since it was primarily used for recollection refreshment and did not necessarily impeach defendant); Fernandez v. Delgado, 257 F. Supp. 673 (D. P. R. 1966) (may use prior voluntary confession to impeach cross-examination responses).

52. 401 U.S. 222 (1971). Chief Justice Burger delivered the opinion of the Court, in which Justices Harlan, Stewart, White, and Blackmun joined. Justice Black dissented. Justice Brennan filed a dissenting opinion in which Justices Marshall and Douglas joined.

53. *Id.* at 223.

54. *See* note 49 *supra*. The warnings given Harris were inadequate to meet the prescribed standards since he was not advised of his right to appointed counsel. 401 U.S. at 224.

55. 401 U.S. at 224.

56. People v. Harris, 31 A.D.2d 828, 298 N.Y.S.2d 245 (1969); People v. Harris, 25 N.Y.2d 175, 250 N.E.2d 349, 303 N.Y.S.2d 71 (1969). The Court of Appeals of New York affirmed the propriety of using the prior statement for impeachment of defendant on the basis of a prior New York case. The court also had to determine that the statutory requirement that notice be given a defendant of intent to use a prior statement did not apply since the evidence was not offered against defendant.

57. 401 U.S. at 226. Thus, lower court holdings on the basis of the *Mi-*

dant's conviction. The Court held that the defendant's prior voluntary statement taken in violation of *Miranda* could be used to impeach his direct testimony concerning the crime charged.[58] It found no "difference in principle"[59] between the direct and collateral use of suppressed evidence, since, in both instances, the evidence blatantly contradicted defendant's trial testimony and, therefore, facilitated the jury's evaluation of defendant's credibility.[60] The Court found that neither defendant's constitutional right to testify in his own defense nor the holding in *Miranda* negated his duty to speak the truth, and neither implied a privilege to commit perjury.[61] The Court interpreted *Miranda* to bar

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*randa* decision prohibiting impeachment with confessions obtained in violation of *Miranda* were overruled. *See* note 51 *supra* and accompanying text. Likewise cases such as United States *ex rel.* Dixon v. Cavell, 284 F. Supp. 535 (E. D. Pa. 1968) and Brown v. United States, 338 P.2d 543 (D.C. Cir. 1964), which restricted impeachment to matters collateral to the crime charged on the basis of *Walder*, were overruled.

58. 401 U.S. at 224-25. The Court noted that the statement was not coerced or involuntary, implying that a contrary result would be reached in such a case.

Justice Brennan contended that *Walder* retained the right of a defendant to deny "complicity in the crimes . . . charged." *Id.* at 228 (Brennan, J., dissenting) (quoting Walder v. United States, 347 U.S. 62, 65 (1954)). "*Miranda v. Arizona* . . . identified the Fifth Amendment's privilege against self-incrimination as one of those specifics [of the constitution that guarantees] a defendant the fullest opportunity to meet the accusation against him." *Id.* at 229 (Brennan, J., dissenting). The defendant has the right to speak in an "unfettered" manner, and the prosecution's use of the tainted statement for impeachment "cuts down . . . the privilege by making its assertion costly." *Id.* at 230. (Brennan, J., dissenting) (quoting Griffin v. California, 380 U.S. 609, 614 (1965)). *Miranda* made it clear that these statements "may not be used without the full warnings and effective waiver." *Id.* at 230 (Brennan, J., dissenting) (quoting 384 U.S. at 476-77). Justice Brennan also maintained that the deterrence of "improper police conduct is only part of the larger objective of safeguarding the integrity of our adversary system," and that the " 'essential mainstay' of that system . . . is the privilege against self-incrimination." *Id.* at 231 (Brennan, J., dissenting). Finally, Justice Brennan declared it "monstrous" for the courts to aid law-breaking police. *Id.* at 232 (Brennan, J., dissenting).

59. 401 U.S. at 225.

60. *Id.*

61. *Id.* at 225-26. Consequently, the *Walder* proposition that a defendant must be free to deny the elements of the crime charged without rebuttal was implicitly rejected.

only the substantive use of statements taken in violation of the *Miranda* standard.[62] The value of the impeaching evidence to the jury in its assessment of defendant's credibility was balanced against the probable deterrent effect that prohibiting such impeachment would have on unconstitutional searches and seizures. Since the Court concluded that the deterrent effect was at best "speculative,"[63] prohibiting substantive use of the evidence against a defendant was deemed adequate to satisfy the deterrent goal of the rule.[64]

The Court further clarified the impact of *Miranda* on impeachment in *Oregon v. Hass*.[65] The *Hass* Court held that statements of the defendant, which were suppressed because they were procured after his request for an attorney was ignored,[66] could be used to impeach his direct examination testimony. The Court cited *Harris* and the reasoning therein as definitively

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62. *Id.* at 224.

63. *Id.* at 225.

64. *Id.*

65. 420 U.S. 714 (1975). Justice Blackmun delivered the opinion of the Court in which Chief Justice Burger and Justices Stewart, White, Powell, and Rehnquist joined. Justice Brennan filed a dissenting opinion in which Justice Marshall joined, and Justice Marshall filed a dissent in which Justice Brennan joined. Justice Douglas took no part in deciding the case. Initially the Court emphasized that it had power to compel state conformance with federal constitutional law. The Court concluded that a state may not impose greater restraint on police activity as a matter of federal constitutional law than is required by federal standards. Since the case was decided on the basis of the fifth and fourteenth amendments, and not state law, the Court's power was manifest. The Court established its authority to review by characterizing the state as an aggrieved party when "for constitutional reasons, the prosecution may not utilize otherwise relevant evidence." *Id.* at 720. Justice Brennan, in dissent, found that *Hass* went even "beyond *Harris* in undermining *Miranda*" and reiterated the points of his dissent in *Harris*. *Id.* at 724-25 (Brennan, J., dissenting). *See* note 52 *supra*. Justice Marshall maintained that since the Oregon Constitution contained a self-incrimination prohibition, the question was, at least in part, one of state law and the state supreme court should be free "to strike its own balance between individual rights and police practices." *Id.* at 728 (Marshall, J., dissenting). The Court should not reverse a conviction by a state court unless "all applicable state-law questions [have been resolved] adversely to the defendant and it feels compelled by its view of the federal constitutional issue to reverse the conviction at hand." *Id.* at 729 (Marshall, J., dissenting).

66. *See* note 67 *infra*.

making the *Hass* impeachment proper.[67]

The Court's willingness in *Walder, Harris,* and *Hass* to modify application of the exclusionary rule when its deterrent purpose was not clearly served, or when its remedial value was outweighed by competing interests, exemplified its general refusal to treat the exclusionary rule as an absolute prohibition. As the boundaries of the rule were defined,[68] the Court used a similar balancing process in other contexts to allow the use of illegally seized evidence for various collateral purposes.[69] By allowing such collateral use, the Court made it clear that the exclusionary rule will foreclose use of the evidence only when the rule's remedial end is served.

Prior to *United States v. Havens*[70] the use of suppressed evidence to impeach testimony first elicited on cross-examination consistently was held impermissible by the lower courts.[71] Since it was accepted that illegally seized evidence could be used to impeach defendant's direct examination testimony, the anomalous result was that the exclusionary rule allowed "a defendant to lie safely on cross-examination but not on direct."[72] *Agnello,* hailed as having survived *Harris,* was interpreted as an absolute prohibition against impeachment of statements first made on

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67. 420 U.S. at 722. Hass was arrested on a burglary charge. Although he was initially given proper *Miranda* warnings, questioning continued after he had requested an attorney. The statements made after this request were excluded from the state's case-in-chief. When defendant gave an account of the events on direct examination that conflicted with his suppressed statements, however, the contradictory portions of these statements were admitted for impeachment purposes. *Id.* at 717. The Court again stressed the inviolate function of truth-finding by courts in criminal cases. *Id.* at 722.

68. *See, e.g.,* Wong Sun v. United States, 371 U.S. 471 (1963) (derivative evidence of illegal search and seizure excluded by the rule); Mapp v. Ohio, 367 U.S. 643 (1961) (exclusionary rule applies to the states through the fourteenth amendment); Elkins v. United States, 364 U.S. 206 (1960) (use of evidence illegally seized by state officers prohibited in federal courts); Olmstead v. United States, 277 U.S. 438 (1928) (conduct violative of a statute not covered by exclusionary rule).

69. *See* note 18 *supra* and accompanying text.

70. 446 U.S. 620 (1980).

71. *See* United States v. Hickey, 596 F.2d 1082 (1st Cir. 1979); United States v. Whitson, 587 F.2d 948 (9th Cir. 1978); United States v. Mariani, 539 F.2d 915 (2d Cir. 1976); United States v. Trejo, 501 F.2d 138 (9th Cir. 1974).

72. United States v. Hickey, 596 F.2d 1082, 1088 (1st Cir. 1979).

cross-examination.[73] The Supreme Court consistently denied certiorari[74] to cases raising this question until *United States v. Havens*.[75]

In *Havens*, the Court upheld the use of suppressed physical evidence to impeach defendant's cross-examination responses concerning the crime charged. The major significance of the *Havens* decision is its expansion of the impeachment exception to the exclusionary rule to include impeachment of cross-examination responses that may only be suggested tenuously by the direct examination. The Court purported to limit permissible cross-examination impeachment to instances in which questioning "grow[s] out of [defendant's] direct testimony."[76] Subject to this limitation, the collective result of *Walder*, *Harris*, and *Havens* is to permit impeachment of a defendant's direct or cross-examination testimony regarding either the crime charged or matters collateral to it by use of either suppressed physical or testimonial evidence. Thus, virtually all limitations on the use of suppressed evidence for impeachment of a criminal defendant have been removed.

The *Havens* Court determined that it was confronted with the same considerations it faced in *Harris* and *Hass* and, therefore, the reasoning of those cases controlled.[77] Although impeachment in *Harris* and *Hass* went to direct examination testimony, the Court found no constitutionally significant difference between defendant's direct examination testimony and his responses to cross-examination which is "plainly within the

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73. *Id.*; 539 F.2d at 924; 501 F.2d at 143-44.

74. *See, e.g.*, United States v. Moss, 562 F.2d 155 (2d Cir. 1977), *cert. denied*, 435 U.S. 914 (1978); People v. Taylor, 8 Cal. 3d 174, 501 P.2d 918, 104 Cal. Rptr. 350 (1972), *cert. denied*, 414 U.S. 863 (1973); State v. Kidd, 281 Md. 32, 375 A.2d 1105 (1976), *cert. denied*, 432 U.S. 1002 (1977).

75. 592 F.2d 848 (5th Cir. 1979), *cert. granted*, 444 U.S. 962 (1979), *rev'd*, United States v. Havens, 446 U.S. 620 (1980). A minor importance of *Havens* is its extension of the *Harris* and *Hass* holdings from testimonial to physical evidence. Some lower courts had previously made this extension. *See, e.g.*, United States v. Trejo, 501 F.2d 138 (9th Cir. 1974); State v. Davis, 127 N.J. Super. 55, 316 A.2d 61 (1974).

76. 446 U.S. at 628. Justice White delivered the opinion of the Court. Justice Brennan, joined by Justice Marshall and joined in part by Justices Stewart and Stevens, filed a dissenting opinion.

77. *Id.* at 624-26.

scope"[78] of the direct examination. The Court concluded that the defendant's duty to testify truthfully and the "fundamental goal"[79] of truth ascertainment were undiminished on cross-examination.[80] It found "proper and effective cross-examination"[81] to be essential to judicial truth finding. The Court cited *Harris* and *Hass* as previously establishing that the suppression mechanism does not give a defendant the right to deliver perjurious testimony "free from the risk of confrontation with prior inconsistent utterances."[82] Finally, the Court determined that the "incremental furthering"[83] of the deterrent purpose of the exclusionary rule did not justify the detrimental effect that restricted cross-examination would have on judicial fact-finding. Continuing the prohibition against substantive use of illegally seized evidence was deemed adequate to satisfy the deterrent ends of the exclusionary rule.

The Court posited its holding in *Havens* as a logical corol-

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78. *Id.* at 627.

79. *Id.* at 626.

80. *Id.* at 627.

81. *Id.* Justice Brennan, in dissent, maintained that the defendant's right to testify in his own defense and deny the elements of the crime charged required that the prosecution forego "certain areas of questioning." *Id.* at 631 (Brennan, J., dissenting). The majority flatly rejected any notion of curtailing cross-examination. The fifth amendment does not prohibit "proper questioning" of a defendant, and the mere fact that responses may be contradicted by the evidence does not render cross-examination improper. *Id.* at 627.

In justifying its holding the Court pointed out that a contrary decision would impede "the *normal* function of cross-examination." *Id.* (emphasis added). This phraseology reflects the Court's disposition to treat illegally seized evidence in the same manner as legally obtained evidence to the extent possible. This attitude is precisely the point of tension between the majority and dissent. The import of the dissent is that illegally seized evidence should be afforded a more limited purpose in light of the policies of the exclusionary rule and the defendant's constitutional right to take the stand in his own defense.

82. 446 U.S. at 626 (quoting Harris v. New York, 401 U.S. 222, 226 (1971)). The Court thus applied the same reasoning to illegally seized physical evidence that it applied in *Harris* and *Hass* to improperly obtained prior statements of the defendants. *See* note 75 *supra* and accompanying text. The Court did not consider whether there is any intrinsic difference between voluntary statements made by a defendant and physical evidence that is seized from a defendant. 446 U.S. at 627-28.

83. 446 U.S. at 627.

lary to *Agnello, Walder, Harris,* and *Hass.* It distinguished *Agnello,* in which the defendant did nothing to "justify cross-examination"[84] regarding the suppressed evidence, as a case in which the course of cross-examination was simply too tenuously connected with matters raised on direct examination.[85] Since the "no use" rule in *Agnello* was rejected in subsequent case law,[86] and since *Agnello* did not prohibit all cross-examination impeachment, the Court determined that the *Havens* extension could be made consistently. With this reasoning, the Court implicitly overruled the broad interpretation of *Agnello* as banning all cross-examination impeachment.[87] By failing to overrule *Agnello* outright, however, the Court implied that cross-examination pertaining to the suppressed evidence was reasonably suggested by direct examination in *Havens* but was not reasonably suggested in *Agnello.* Presumably, after *Havens, Agnello* still will preclude cross-examination on matters that are only tenuously related to direct examination.

As Justice Brennan pointed out in dissent, however, the circumstances in *Havens* were strongly analogous to those in *Agnello.*[88] Agnello's possession of cocaine in his home was "closely connected to" and "within the scope of" his direct testimony in which he stated that he did not know the substance in his possession was cocaine.[89] Possession of cocaine in his home strongly suggested that Agnello knew what cocaine was. In an attempt to preserve the reasoning of *Agnello,* the *Havens* majority intimated that Havens did something more than Agnello did to warrant the introduction of the suppressed evidence for impeachment.[90] The Court failed, however, to identify specifically the critical link between direct and cross-examination. Nor did the Court offer any practical guidance for making future gray area determinations of the point at which the subject of cross-examination ceases to be reasonably suggested by direct exami-

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84. *Id.* at 625 (quoting Agnello v. United States, 269 U.S. 20, 35 (1925)).

85. *Id.*

86. *Id.* at 624. *See* Oregon v. Hass, 420 U.S. 714 (1975); Walder v. United States, 347 U.S. 62 (1954). *See* note 57 *supra.*

87. *See* note 72 *supra* and accompanying text.

88. 446 U.S. at 629 (Brennan, J., dissenting).

89. *Id.* at 630-31 (Brennan, J., dissenting).

90. *Id.* at 625.

nation and becomes impermissibly "smuggled in."[91] In light of the similarity between *Agnello* and *Havens*, the Court should have overruled *Agnello* as wrongly decided instead of suggesting invisible distinctions in conclusory terms.

The Court's choice of *Havens* as the case in which to make the extension permitting cross-examination impeachment is perplexing. The trial dialogue used by the Court to illustrate that the predicate for the cross-examination in *Havens* was laid in direct examination manifests the Court's willingness to find that cross-examination pertaining to the suppressed evidence is within the scope of direct examination. Havens' accomplice had testified that tape and ace bandages were used on the *first* trip to transport cocaine and that the T-shirt was utilized on subsequent trips as an improved mode of transport.[92] He also testified that Havens had altered and given him the T-shirt.[93] On direct examination of Havens the defense attorney's question specifically referred to taping and draping. Defendant denied that he had engaged in activity of that kind on the *fourth* trip to Peru, from which the charges arose.[94] The Court found that "[t]his testimony could easily *be understood* as a denial of any connection with [accomplice's] *T-shirt* and as a contradiction of [accomplice's] testimony."[95] The Court's interpretation that defendant's denial of a specific type of activity on the trip at issue was a general denial of the type of activity alleged strongly suggests that the scope of direct examination is indeterminate.

As the court of appeals pointed out, no reference was made on direct examination to either the incriminating "T-shirt [or]

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91. The subjective standard announced by the Court for determining whether cross-examination "grows out of" direct examination is as follows: "If these questions would have been suggested to a reasonably competent cross-examiner by . . . direct testimony, they were not 'smuggled in.'" *Id.* at 626. Justice Brennan said that the Court's holding would allow "even the moderately talented prosecutor to 'work in . . . evidence on cross-examination [as it would] in its case-in-chief . . . .'" *Id.* at 632 (Brennan, J., dissenting) (quoting Walder v. United States, 347 U.S. 62, 66 (1954)).

92. United States v. Havens, 592 F.2d 848, 852 (5th Cir. 1979).

93. 446 U.S. at 622.

94. *Id.*

95. *Id.* at 628 (emphasis added).

. . . the contents of [defendant's] luggage."[96] It is unclear whether the Supreme Court found that defendant's testimony fairly implied a denial of involvement with the T-shirt because of the sequence of the accomplice's prior testimony, or merely because of the imprecise wording of defense counsel's questions.[97] Since the direct examination dialogue is set out and repeatedly referenced in the Court's opinion, it was apparently the imprecise wording of the question. Interpretation of involvement with the T-shirt as "like kind" with the taping and draping appears improper in light of the accomplice's testimony that the taping and draping activity and the T-shirt involvement were unrelated and had occurred on separate trips to Peru.[98] Evidently the critical link between Havens' cross-examination and his direct examination was defense counsel's general reference to the accomplice's testimony, by the use of the words "and so on."[99] If an attorney's loose usage of words can link direct and cross-examination, then the likelihood that a defendant can hereafter testify without opening the door for admission of suppressed evidence is slight. Avoiding direct examination questions or responses that can "be understood"[100] to connote more than the everyday meaning of the literal words presents an insurmountable barrier to the defendant who takes the stand in his own defense.

The *Havens* majority pointed out that *Walder*, *Harris*, and

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96. 592 F.2d at 852. *See* 446 U.S. at 625. Justice Brennan did not consider this point. He concluded that *Agnello* precluded cross-examination and therefore rejected the majority's interpretation of *Agnello* "as turning upon the tenuity of the link between the cross-examination involved there and the subject matter of the direct examination." *Id.* at 630 (Brennan, J., dissenting).

97. If the defense attorney's imprecise wording in ending the questions to defendant "and so on" and "that kind of activity" made cross-examination within the scope of direct, the implications are many. Virtual scientific precision in the phrasing of both questions and answers would be necessary to avoid questioning in any undesirable subject area. In seeking to employ this tactic to avert reference to the suppressed evidence, extensive witness-coaching would be required. Consequently, spontaneity at trial would be reduced. If the conviction turned on the semantics of defense counsel, a malpractice question may even be raised.

98. *See* note 100 *infra* and accompanying text.

99. 446 U.S. at 622.

100. *Id.* at 628.

*Hass* did not preclude impeachment of cross-examination responses. It noted that the Court in *Walder* distinguished *Agnello* as an instance in which suppressed evidence was "smuggled in on cross-examination, and defendant "had done nothing 'to justify cross-examination in respect of the evidence . . . .' "[101] By negative implication, the Court found that *Walder* reserved the possibility that cross-examination impeachment would be permissible when the evidence is not "smuggled in" and the defendant has warranted cross-examination by referring to the suppressed evidence on direct examination.

However, as Justice Brennan pointed out, *Walder* specifically ensured that a defendant "must be free to deny all the elements of the case against him without thereby giving leave to the Government to introduce by way of rebuttal evidence illegally secured . . . ."[102] Since cross-examination concerning complicity in the crime charged is proper and direct testimony denying the elements of the crime charged is permissible, *Walder* limited impeachment with suppressed evidence to "particular direct testimony by the accused that relies upon 'the Government's disability to challenge his credibility.' "[103] The "sweeping claim" made by the defendant in *Walder* on direct examination went beyond a denial of criminal complicity and thus was properly impeachable.

Although *Harris* subsequently permitted impeachment of a defendant's testimony concerning the crime charged,[104] the fact that impeachment in *Harris* also went to particular *direct* testimony is of paramount importance. To the extent that a defendant could deny criminal complicity without making a statement on direct examination that was subject to contradiction with the suppressed evidence, he remained free to testify without penalty of such impeachment. If the prosecution elicited comment on other aspects of the crime charged, defendant then could deny those aspects and be free from impeachment with suppressed evidence which directly contradicted the denial. This state of

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101. *Id.* at 625 (quoting Agnello v. United States, 269 U.S. 20 (1925)).

102. *Id.* at 631 (Brennan, J., dissenting).

103. *Id.* (Brennan, J., dissenting) (quoting Walder v. United States, 347 U.S. 62, 75 (1954)).

104. *See* notes 54, 55 & 57 *supra* and accompanying text.

the law appears to have represented a proper balance of the goals of truth ascertainment, deterrence of illegal police conduct by exclusion, protection of the defendant's right to take the stand, and preclusion of perjurious testimony. Even before *Havens*, the defendant could not freely offer perjurious testimony. The prosecution had to be instrumental in eliciting it by examining defendant on matters not covered on direct examination. This rule preserved the balance intended by the *Agnello* ban on the prosecutor's "smuggling in" of evidence. The *Havens* requirement of only a tenuous linkage between direct and cross-examination effectively denies the defendant his right to testify if illegally seized evidence exists.[105] Upon testifying on direct examination about any aspect of the crime charged, any testimony that can be contradicted by the suppressed evidence and that was untouched on direct examination will then be elicited on cross-examination and impeached.[106]

Justice Brennan characterized the majority's holding as a conscious abandonment of the principle that "convictions cannot be procured by governmental lawbreaking"[107] in favor of avoiding the "possible exclusion of otherwise probative evidence."[108] This assessment is sound, since the effect of the majority's rule is to align more closely illegally seized evidence with its legal counterpart. By allowing cross-examination of a defendant "within the scope" of direct examination[109] and impeachment of cross-examination responses with the illegally seized ev-

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105. 446 U.S. at 632 (Brennan, J., dissenting). Justice Brennan maintained that surrender of the right to testify "is the price the Court imposes for the defendant to claim his right not to be convicted on the basis of evidence obtained in violation of the Constitution." *Id.*

106. Justice Brennan opined that the majority holding "passes control of the exception to the Government, since the prosecutor can lay the predicate for admitting otherwise suppressible evidence with his own questioning." *Id.* at 631 (Brennan, J., dissenting).

107. *Id.* at 631 (Brennan, J., dissenting).

108. *Id.* at 632 (Brennan, J., dissenting).

109. The scope of cross-examination is discussed in rule 611(b) of the Federal Rules of Evidence which provides as follows: "Scope of cross-examination. Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The Court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination." FED. R. EVID. 611(b).

idence,[110] the treatment parallels the existing standard in federal courts for legally obtained evidence. The single remaining distinction is the initial suppression of illegally seized evidence from the prosecution's case-in-chief. Since submission of incriminating evidence to the jury for the limited purpose of credibility evaluation is unrealistic,[111] the defendant's suppression remedy for a fourth amendment violation has become a remedy in name only. Incriminating evidence no doubt will play a substantial part in assessing the defendant's culpability, despite the fact that suppression technically forbids such use. Under *Havens* the prosecution can use illegally seized evidence for the purported limited purpose of impeaching defendant's credibility in virtually any case in which the defendant testifies.

By promulgating a standard which virtually assures the introduction of suppressed evidence when a defendant testifies, the Court effectively has provided a secondary route for admission of illegally seized evidence. This result clearly disregards the deterrent goal of the exclusionary rule and amounts to a veritable sanction of the illegal means employed to procure the evidence.[112] In aligning tainted evidence with legally seized evidence, the Court failed to consider that the very reason for the former disparate treatment was the fact that the effectuation of the remedial goal is incongruous with the notion of treating illegally seized evidence identically to legally seized evidence. The urgent need to present all possible evidence to the jury was, and is, tempered by the fact that the evidence is the product of a

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110. "The credibility of a witness may be attacked by any party, including the party calling him." FED. R. EVID. 607.

111. "[I]t is unrealistic to assume that limiting instructions will afford the defendant significant protection." 446 U.S. at 632 n.2. In effect, the limiting instruction tells the jury to evaluate contradictory evidence which strongly suggests that defendant's testimony on a particular matter is not worthy of belief. On the other hand, even if the jury determines that the evidence more closely approximates the truth than defendant's testimony, they are not supposed to accept it as true in determining defendant's guilt. If the evidence strongly suggests the truth for one purpose, however, in the final assessment of defendant's guilt the jury cannot effectively disregard it.

112. Justice Brennan characterized *Havens* as the culmination of the approach taken in *Harris* and *Hass*. "[T]his sequence of decisions undercuts the constitutional canon that convictions cannot be procured by governmental lawbreaking." 446 U.S. at 633 (Brennan, J., dissenting).

breach of the fourth amendment.[113] Although the exclusionary rule has been criticized relentlessly by Chief Justice Burger,[114] it and the doctrine of suppression have endured as the only remedies of a defendant whose fourth amendment rights have been violated. In order to preserve the de minimis effectiveness of suppression after *Havens*, trial judges should be strict in determining whether cross-examination is "reasonably suggested" by the direct examination. A standard which might be employed in this determination is whether the line of cross-examination was in fact independently suggested to the prosecutor by the direct examination or whether but for the suppressed evidence the inquiry on cross-examination would have been unproductive and would not have been raised by a reasonably competent cross-examiner. Thus, the crucial issue should be whether the inquiry on cross-examination was solely a product of the prosecutor's knowledge of the suppressed evidence and the desire to get the suppressed evidence before the jury.[115]

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113. The Court has consistently ignored this factor in its recent decisions. The Court denied exclusion in five of six cases it heard last term. Rawlings v. Kentucky, 447 U.S. 98 (1980) (exclusion of inculpatory statements made during possible unlawful detention denied); United States v. Salvucci, 447 U.S. 83 (1980) (respondents charged with unlawful possession of stolen mail lacked standing to challenge the legality of the search of an apartment producing evidence of stolen checks); United States v. Payner, 447 U.S. 727 (1980) (respondent charged with falsifying tax return lacked standing to suppress documents illegally seized from bank officer); United States v. Havens, 446 U.S. 620 (1980) (exclusion denied); United States v. Mendenhall, 446 U.S. 544 (1980) (suppression of introduction of heroin into evidence denied on basis of sufficient evidence of voluntary consent to search of defendant's person).

Only in Walter v. United States, 447 U.S. 649 (1980), was exclusion of evidence in violation of the fourth amendment upheld. Obscene films were mistakenly delivered to the wrong party. The films were turned over to the F.B.I. The Court held that lawful possession of the boxes did not authorize the agents to search the contents, even though they had previously been opened by the mistaken addressee.

114. *See, e.g.*, Stone v. Powell, 428 U.S. 465 (1976) (Burger, C.J., dissenting); Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971) (Burger, C.J., dissenting); *see* generally 48 TENN. L. REV. 742, 762 (1981).

115. Only with the exercise of careful scrutiny in finding an *actual* relationship between the content of the direct and cross-examinations can effective suppression be preserved. Likewise, employment of an exacting standard will

prevent the "smuggling in" of suppressed evidence by a prosecutor and retain the distinction the Court attempts to make involving the *Agnello* situation in which cross-examination is too tenuously related to the direct examination case where it is not.

# Criminal Law and Procedure—Exclusionary Rule—Standing to Challenge the Admissibility of Evidence in Possession Cases

*United States v. Salvucci*, 448 U.S. 83 (1980)

Defendants were indicted by a federal grand jury and were charged with twelve counts of unlawful possession of stolen mail in violation of federal law.[1] The twelve checks whose theft formed the basis of the indictment were seized from the apartment of one defendant's mother in a search authorized by warrant. At trial, defendants filed a motion to suppress the checks on the ground that the affidavit supporting the application for the search warrant failed to establish the requisite probable cause.[2] The United States District Court for the District of Massachusetts granted defendants' motion to suppress.[3] The Government, contending that defendants lacked standing[4] to challenge the constitutionality of the search, filed a motion for reconsideration of the district court's ruling. The district court

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1. 18 U.S.C. § 1708 (1976).

2. The affiant relied on double hearsay. He failed to specify the dates on which the informant had engaged in the critical conversations with the defendant and the date on which the informant had conveyed the information so obtained to the officer. United States v. Salvucci, 448 U.S. 83, 85 n.1 (1980).

3. *Id.* at 85. The district court proceedings are not reported.

4. The concept of standing under the fourth amendment focuses on a defendant's capacity to challenge the legality of a search or seizure. It requires a showing by the defendant that he was "[a] person aggrieved by an unlawful search and seizure." FED. R. CRIM. P. 41(e). "A person aggrieved" has been defined as a "victim of a search or seizure, one against whom the search was directed, as distinguished from one who claims prejudice only through the use of evidence gathered as a consequence of a search or seizure directed at someone else." Jones v. United States, 362 U.S. 257, 261 (1960). *See* Stone v. Powell, 428 U.S. 465 (1976); Brown v. United States, 411 U.S. 223 (1973); Alderman v. United States, 394 U.S. 165 (1969); Wong Sun v. United States, 371 U.S. 471 (1963). Defendant carries the burden of establishing his standing to challenge the legality of a search or seizure. United States v. Masterson, 383 F.2d 610 (2d Cir. 1967), *cert. denied*, 390 U.S. 954 (1968).

reaffirmed its suppression order and the Government appealed. The United States Court of Appeals for the First Circuit affirmed[5] and held that because defendants were charged with a possessory offense they were entitled to assert automatic standing to challenge the search and seizure.[6] On certiorari to the United States Supreme Court, *held,* reversed. A defendant charged with a crime of possession will not be granted standing to challenge the introduction of evidence derived from an illegal search unless he can demonstrate that he had a legitimate expectation of privacy that was violated by that search. *United States v. Salvucci,* 448 U.S. 83 (1980).

The fourth amendment protects the right of persons to be secure against unreasonable searches and seizures.[7] To enforce the fourth amendment guarantee against unreasonable searches and seizures, the Supreme Court has developed a rule of exclusion that operates to prevent the introduction of evidence obtained in violation of a defendant's fourth amendment rights.[8]

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5. United States v. Salvucci, 599 F.2d 1094 (1st Cir. 1979).

6. Jones v. United States, 362 U.S. 257 (1960), held that a defendant charged with a crime of possession will not be required to establish his status as a person aggrieved in order to challenge the search but will be granted automatic standing to make that challenge.

7. 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.

8. The Supreme Court first suggested that evidence obtained in violation of the fourth amendment should be inadmissible in Boyd v. United States, 116 U.S. 616, 634-35 (1886). Weeks v. United States, 232 U.S. 383 (1914), made exclusion of such illegally obtained evidence a requirement in federal cases. "To sanction [admission of such evidence] would be to affirm by judicial decision a manifest neglect if not an open defiance of the prohibitions of the Constitution, intended for the protection of the people against such unauthorized action." *Id.* at 394. The Court recognized that the right to protection from unreasonable searches and seizures was applicable to state as well as to federal action in Wolf v. Colorado, 338 U.S. 25, 28 (1949), but the Court declined to require the exclusionary rule as the method of enforcing that right. In 1961 the exclusionary rule was finally applied to the states in Mapp v. Ohio, 367 U.S. 643 (1961). The Court held that to admit evidence obtained by an unreasonable search and seizure violated a defendant's rights under the due process

This exclusionary rule may be invoked only by those belonging to the class for whom the fourth amendment's protection is intended[9] and only when the disputed search or seizure infringes an interest of the defendant that the fourth amendment was designed to protect.[10] Thus, a criminal defendant is granted

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clause of the fourteenth amendment. *Id.* at 655.

One justification for the exclusionary rule is the protection of judicial integrity. "If the federal court permits such [illegally obtained] evidence . . . to be used to obtain a conviction, it places its imprimatur upon such lawlessness and thereby taints its own integrity." United States v. Payner, 447 U.S. 727, 746 (1980) (Marshall, J., dissenting). "Courts which sit under our Constitution cannot and will not be made party to lawless invasions of the constitutional rights of citizens by permitting unhindered governmental use of fruits of such invasions." Terry v. Ohio, 392 U.S. 1, 13 (1968). Thus, admission of evidence obtained in violation of the fourth amendment "is denied in order to maintain respect for law; in order to promote confidence in the administration of justice; in order to preserve the judicial process from contamination." Olmstead v. United States, 277 U.S. 438, 484 (1928) (Brandeis, J., dissenting).

The primary goal of the exclusionary rule, however, is to deter unlawful police conduct. Terry v. Ohio, 392 U.S. 1, 29 (1968); Tehan v. United States *ex rel.* Shott, 382 U.S. 406, 413 (1966) (quoting Linkletter v. Walker, 381 U.S. 618, 637 (1965)); Mapp v. Ohio, 367 U.S. 643 (1961); Elkins v. United States, 364 U.S. 206, 217 (1960). The deterrence rationale is based on the belief that if police have advance notice that illegally obtained evidence will be held inadmissible in court, they will avoid future fourth amendment violations.

The most apparent disadvantage of the exclusionary rule is that to protect a potentially guilty criminal defendant, relevant and probative evidence may be kept from the trier of fact, thus thwarting the search for truth. *See generally* Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665 (1970) [hereinafter cited as Oaks]. To minimize the social cost exacted each time relevant evidence is excluded, the Court requires a defendant to establish his standing to challenge a disputed search or seizure; he must show that his fourth amendment interests were violated by the search.

9. The fourth amendment's protection extends to those whose rights have been violated by the search or seizure. Alderman v. United States, 394 U.S. 165, 171-72 (1969). *Cf.* New York *ex rel.* Hatch v. Reardon, 204 U.S. 152 (1907) (to invoke protection of the Constitution, a party must belong to a class for whose sake the protection is intended). *See generally* Trager & Lobenfeld, *The Law of Standing Under the Fourth Amendment*, 41 BROOKLYN L. REV. 421 (1975) [hereinafter cited as Trager & Lobenfeld].

10. The Supreme Court has held that the fourth amendment protects individuals from unreasonable invasions of their legitimate expectations of privacy. Rakas v. Illinois, 439 U.S. 128, 143 (1978); United States v. Chadwick, 433 U.S. 1, 7 (1977); United States v. Miller, 425 U.S. 435, 442 (1976); Alder-

standing to challenge the disputed search only when he is able to establish that he is within the class to be protected and that a fourth amendment interest was violated by the search or seizure itself. Under the doctrine of automatic standing, a defendant charged with a possessory offense may challenge the legality of a search or seizure without being required to establish that his own fourth amendment rights have been violated. The *Salvucci* Court rejected this doctrine on the ground that a person in legal possession of a good seized during an illegal search has not necessarily been deprived of his fourth amendment rights.[11] The issue in *Salvucci* was whether a defendant in possession of a seized good should automatically be granted standing to challenge the search and seizure.

The primary goal of the exclusionary rule is to deter law enforcement officials from unlawful invasions of a person's fourth amendment rights.[12] One consequence of the rule is that reliable evidence is often excluded from court, thus frustrating the court's truth-finding mission.[13] To assure that a defendant whose constitutional rights were not infringed does not take unfair advantage of the protections of the exclusionary rule, the Court applied the concept of standing.[14] To establish standing to invoke the exclusionary rule, a defendant was required to show that his fourth amendment rights were in fact violated by the disputed search or seizure. The standing requirement, then, functioned to limit the application of the exclusionary rule.[15]

A determination of the question of standing necessarily required an inquiry into what interests the fourth amendment was designed to protect. In the early cases involving fourth amendment questions, the Supreme Court tended to find a violation only when a defendant was able to show a property interest in

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man v. United States, 394 U.S. 165, 179 n.11 (1969); Katz v. United States, 389 U.S. 347, 353 (1967); Warden v. Hayden, 387 U.S. 294, 304 (1967).

11. 448 U.S. at 91.

12. *See* note 8 *supra*.

13. *Id.*

14. *See* notes 9-10 *supra*.

15. For an excellent discussion of the limiting effect of the standing doctrine on the exclusionary rule, see White & Greenspan, *Standing to Object to Search and Seizure*, 118 U. PA. L. REV. 333 (1970).

either the place searched or the property seized.[16] The relationship between protected fourth amendment interests and standing was not addressed until 1960 in *Jones v. United States*.[17]

Defendant in *Jones* was arrested for violation of federal

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16. Olmstead v. United States, 277 U.S. 438, 466 (1928); Boyd v. United States, 116 U.S. 616, 627 (1886).

17. 362 U.S. 257 (1960).

Cases prior to *Jones* had dealt with the question of standing, but not extensively. United States v. Jeffers, 342 U.S. 48 (1951); McDonald v. United States, 335 U.S. 451 (1948); Agnello v. United States, 269 U.S. 20 (1925). Until *Jones*, *Jeffers* was the leading case on the question of standing. In *Jeffers* police learned that defendant possessed certain narcotics in violation of federal law. These narcotics were stored in a hotel room rented by defendant's two aunts. Defendant did not reside in the room but had access to the room by permission of his aunts. Without obtaining a search warrant, and in the absence of either defendant or his aunts, officers entered and searched the room extensively. In the course of the search the narcotics were found. The contraband was seized and taken to the police station. Defendant was arrested the following day on possession charges. At trial defendant sought to exclude the evidence yielded by the unlawful search. In an unreported decision, the district court denied the motion to exclude, and defendant was convicted. Upon appeal, the Court of Appeals for the District of Columbia Circuit, 187 F.2d 498 (D.C. Cir. 1950), reversed the judgment. The Supreme Court affirmed. The Government's main contention in *Jeffers* was that defendant lacked standing to suppress the evidence seized, since the search did not invade his own expectation of privacy. United States v. Jeffers, 342 U.S. 48, 52-53 (1951). The Supreme Court rejected this privacy interest argument, holding instead that defendant had standing to object to the unlawful seizure of his property "for purposes of the exclusionary rule." *Id.* at 52. The *Jeffers* Court recognized a property interest in an article seized as sufficient to establish fourth amendment standing.

*Jeffers* appears to stand for the interesting proposition that one can have a fourth amendment interest in contraband. Although the Supreme Court has never directly addressed the question, two appellate courts do seem to recognize a fourth amendment interest in contraband. *See* United States v. Dye, 508 F.2d 1226 (6th Cir. 1974); United States v. Palazzo, 488 F.2d 942 (5th Cir. 1974). Brown v. United States, 411 U.S. 223, 229 (1973), implied that a defendant must legitimately possess property in order to base standing on property interests. It has been suggested that there are no fourth amendment restrictions on contraband, stolen goods, or other property that defendant has no right to possess. *See generally* Knox, *Some Thoughts on the Scope of the Fourth Amendment and Standing to Challenge Searches and Seizures*, 40 Mo. L. Rev. 1 (1975) [hereinafter cited as Knox].

narcotics laws.[18] Prior to trial, defendant moved to suppress evidence obtained through the execution of a search warrant on the ground that the warrant had been issued without a showing of probable cause.[19] The Government challenged defendant's standing to make this motion since defendant alleged neither an interest in the premises searched nor ownership of the articles seized. The Government contended that defendant was not the victim of the search or the seizure. During pretrial proceedings, evidence was taken on the issue of defendant's standing.[20] Defendant testified that the premises searched belonged to a friend who had given defendant permission to use them. The district judge accepted the Government's argument that defendant lacked standing to challenge the search and denied the motion to suppress. Defendant was convicted, and the United States Court of Appeals for the District of Columbia affirmed that conviction.[21]

In reversing the court of appeals, the Supreme Court recognized that a defendant charged with a possessory offense faced a dilemma if he chose to challenge the legality of a search.[22] Ordinarily, an accused seeking to establish standing was required to allege an interest either in the property seized or in the prem-

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18. Int. Rev. Code of 1954, ch. 39, § 4704, 68A Stat. 550 (repealed 1970); The Narcotic Drugs Import and Export Act, ch. 100, § 2, 35 Stat. 614 (1909) (repealed 1970).

19. Jones v. United States, 362 U.S. 257, 268-69 (1960). Defendant claimed that the affidavit was insufficient to establish probable cause because it rested wholly on hearsay. Affiant, a member of the narcotics squad in the District of Columbia, admitted no direct knowledge of the presence of narcotics in the apartment. Instead, he swore to have acquired the information of this illicit narcotics traffic through an informant who had proven reliable in the past. This same information had also been given to the narcotics squad by other sources. The court of appeals found that a substantial basis for crediting the hearsay was presented and held the affidavit sufficient to establish probable cause. Jones v. United States, 262 F.2d 234 (D.C. Cir. 1958).

20. Only defendant presented evidence. 362 U.S. at 259.

21. 262 F.2d 234 (D.C. Cir. 1958).

22. Several courts of appeals have placed defendants in this dilemma. *See, e.g.*, Accardo v. United States, 247 F.2d 568 (D.C. Cir. 1957); United States v. Eversole, 209 F.2d 766 (7th Cir. 1954); Scoggins v. United States, 202 F.2d 211 (D.C. Cir. 1953); Grainger v. United States, 158 F.2d 236 (4th Cir. 1946). *But see* United States v. Dean, 50 F.2d 905 (D. Mass. 1931).

ises searched to establish that he himself was the victim of a fourth amendment violation.[23] Since guilt of a possessory offense may be established solely through proof of possession of the contraband, compliance with the conventional standing requirement forced a defendant to allege facts that if proven would tend to convict him.[24] Justice Frankfurter quoted Learned Hand's pointed exposition of the problem:

> Men may wince at admitting that they were the owners, or in possession, of contraband property; may wish at once to secure the remedies of a possessor, and avoid the perils of the part; but equivocation will not serve. If they come as victims, they must take on that role, with enough detail to cast them without question. The petitioners at bar shrank from that predicament; but they were obliged to choose one horn of the dilemma.[25]

A defendant in this difficult situation was forced to choose between his fourth amendment right to be protected from unreasonable searches and seizures and his fifth amendment privilege against self-incrimination.

The *Jones* Court felt that it was wrong to place a defendant in such a quandary because to do so would be "to permit the Government to have the advantage of contradictory positions as a basis for conviction."[26] Defendant in *Jones* was convicted of possession, yet was denied the remedy designed specifically for one in his situation;[27] standing to challenge the disputed search was denied on the ground that the defendant did *not* have possession.[28] The Court felt that to allow such "squarely contradictory assertions of power by the Government" would subvert the administration of criminal justice.[29]

In response to this dilemma, the *Jones* Court recognized two separate grounds upon which defendant's standing could be sustained. First, for a possessory offense, it was held that posses-

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23. *See* note 4 *supra*.
24. 362 U.S. at 261-62.
25. Connolly v. Medalie, 58 F.2d 629, 630 (2d Cir. 1932).
26. 362 U.S. at 263.
27. *Id.*
28. *Id.*
29. *Id.* at 263-64.

sion sufficient to convict would also suffice to give a defendant standing to challenge the search and seizure.[30] The requirement of a preliminary showing of an interest in either the premises searched or the property seized, which previously was essential to establish standing, was eliminated.[31] This automatic standing rule functioned as an exception to the standing limitation on the use of the exclusionary rule. After *Jones*, a defendant charged with a possessory offense was not required to establish that he was the victim of a fourth amendment violation in order to invoke the exclusionary rule.

As an alternative basis for granting standing, the Court held that even if the *Jones* action had not been a prosecution turning on illicit possession, "the legally requisite interest in the premises [essential to a finding of standing] was . . . satisfied [by defendant's legitimate presence on the searched premises] . . . ."[32] Lower courts had required an extensive property interest in the premises to establish standing.[33] Refusing to import common-law property concepts into fourth amendment inquiries,[34] the *Jones* Court introduced a new basis for determining fourth amendment standing: the "legitimately on the premises" standard. The new standard recognized that "anyone legitimately on

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30. *Id.* at 263.

31. *Id.*

32. *Id.*

33. *Id.* The prevailing trend in lower courts had been to deny standing to guests and invitees. *See* Jones v. United States, 262 F.2d 234 (D.C. Cir. 1958); Gaskins v. United States, 218 F.2d 47 (D.C. Cir. 1955); Gibson v. United States, 149 F.2d 381 (D.C. Cir. 1945); *In re* Nassetta, 125 F.2d 924 (2d Cir. 1942). "Ownership in or right to possession of the premises searched" had been distinguished as meeting that standard of interest to establish standing, Jeffers v. United States, 187 F.2d 498, 501 (D.C. Cir. 1950) (quoting Gibson v. United States, 149 F.2d 381, 384 (D.C. Cir. 1945)), *aff'd*, 342 U.S. 48 (1951), as had the interest of a "lessee or licensee," United States v. De Bousi, 32 F.2d 902, 903 (D. Mass. 1929); or of one with "dominion," Steeber v. United States, 198 F.2d 615, 617 (10th Cir. 1952); McMillan v. United States, 26 F.2d 58, 60 (8th Cir. 1928).

34. "[I]t 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 . . . ." Jones v. United States, 362 U.S. 257, 266 (1960).

premises where a search occurs may challenge its legality by way of a motion to suppress, when its fruits are proposed to be used against him."[35] Such a standard considerably broadened the interpretation of fourth amendment standing by encompassing privacy as well as property interests within the protection of the fourth amendment.[36] *Jones* is noted, then, primarily for its contribution of the automatic standing rule and for the "legitimately on the premises" test that defines the scope of fourth amendment standing.

The "legitimately on the premises" gauge was modified by the Court's decision in *Katz v. United States*.[37] In *Katz*, the Government electronically tapped the telephone receiver of a public telephone booth that defendant was using to transmit wagers. Defendant was arrested and convicted in the United States District Court for the Southern District of California for violation of a federal statute proscribing the interstate transmission by wire communication of bets or wagers.[38] The tapped conversations were introduced into evidence over defendant's objection. He appealed his conviction on grounds that his right to privacy under the fourth amendment had been invaded. The United States Court of Appeals for the Ninth Circuit rejected

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35. *Id.* at 267. Lower federal and state courts followed the *Jones* "legitimately on the premises" rule and conferred standing on guests in apartments, Murray v. United States, 351 F.2d 330 (10th Cir. 1965), *cert. denied*, 383 U.S. 949 (1966); State v. Manetti, 56 Del. 32, 189 A.2d 426 (1963); State v. Sims, 10 Wash. App. 75, 516 P.2d 1088 (1973); on guests of lodgers in motel rooms, United States v. Anderson, 453 F.2d 174, 177 n.6 (9th Cir. 1971); Garza-Fuentes v. United States, 400 F.2d 219 (5th Cir. 1968); and on passengers in automobiles, United States v. Medina-Flores, 477 F.2d 225 (10th Cir. 1973); United States v. Peisner, 311 F.2d 94 (4th Cir. 1962); Plazola v. United States, 291 F.2d 56 (9th Cir. 1961); Paxton v. State, 255 Ind. 264, 263 N.E.2d 636 (1970); State v. Osborne, 200 N.W.2d 798 (Iowa 1972); Kleinhart v. State, 2 Md. App. 183, 234 A.2d 288 (1967); People v. Smith, 35 Misc. 2d 533, 230 N.Y.S.2d 894 (Kings County Ct. 1962); State v. Bresolin, 13 Wash. App. 386, 534 P.2d 1394 (1975). *Contra*, State v. Edwards, 197 Kan. 146, 415 P.2d 231 (1966); Carter v. State, 236 Md. 450, 204 A.2d 322 (1964); State v. Hornbeck, 492 S.W.2d 802 (Mo. 1973); McDoulett v. State, 368 P.2d 522 (Okla. Crim. App. 1961).

36. *See* Knox, *supra* note 17, at 36.

37. 389 U.S. 347 (1967).

38. 18 U.S.C. § 1084 (1961) (current version at 18 U.S.C. § 1084 (1976)).

defendant's argument because there had been "no physical entrance into the area occupied by [the defendant]."[39]

In reversing the court of appeals the Supreme Court overruled *Olmstead v. United States*,[40] which had limited fourth amendment protections to actual physical invasions.[41] Earlier in the term, in *Warden v. Hayden*,[42] the Court expressly had established that "the principal object of the Fourth Amendment [was] the protection of privacy rather than property . . . ."[43] The *Katz* majority supported this proposition by maintaining that "people—and not simply 'areas' "—were protected by the fourth amendment.[44] Justice Harlan's concurring opinion in *Katz* formulated a two-pronged rule for determining whether an expectation of privacy was protected under the fourth amendment. Under that rule, a person must have exhibited a subjective expectation of privacy, and that expectation must have been one that was recognized by society as "reasonable."[45]

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39. Katz v. United States, 369 F.2d 130, 134 (9th Cir. 1966).

40. 277 U.S. 438 (1928).

41. *Id.* In *Olmstead* federal officials had tapped defendant's telephone wires, thereby intercepting conversations that revealed a criminal conspiracy to import, possess, and sell liquor. The Supreme Court, using a property rights rationale, found no fourth amendment violation because the wiretapping did not amount to a search and seizure within the literal meaning of the fourth amendment. The Court emphasized that no tangible material effect was seized, nor was there an actual physical invasion of the house.

42. 387 U.S. 294 (1967).

43. *Id.* at 304.

44. 389 U.S. at 353. The Court attempted to define "privacy" for the purpose of applying fourth amendment protection to this case:

> What a person knowingly exposes to the public . . . 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. . . . [W]hat [defendant] sought to exclude when he entered the [telephone] booth was not the intruding eye—it was the uninvited ear. . . . [A] person in a telephone booth may rely upon the protection of the Fourth Amendment. One who occupies it, shuts the door behind him, and pays the toll that permits him to place a call is surely entitled to assume that the words he utters into the mouthpiece will not be broadcast to the world.

*Id.* at 351-52 (citations omitted).

45. *Id.* at 361 (Harlan, J., concurring). Justice Harlan's concurrence has been cited with approval in Smith v. Maryland, 442 U.S. 735, 740 (1979); Man-

Although *Katz* did not deal directly with the question of standing, the case is vital to that issue, for *Katz* followed the *Jones* standard in purporting to break away from the property rights basis for determining fourth amendment scope. Both *Jones* and *Katz* broadened the scope of protection given by the fourth amendment—*Jones*, by increasing the number of defendants who could invoke the protection and *Katz*, by increasing the scope of expectations which would be protected.[46]

In 1968 one of the underlying justifications for the automatic standing rule was undermined by the Supreme Court's holding in *Simmons v. United States*.[47] *Simmons* eliminated the self-incrimination dilemma cited in *Jones* as the primary reason for the establishment of the automatic standing rule. Defendant in *Simmons* had been arrested for robbery of a federal bank. Prior to trial, defendant moved to suppress the Government's exhibit of a suitcase containing items which tended to incriminate him. The suitcase had been seized during a search of a co-defendant's mother's home. To establish his standing to make the motion, defendant testified that, although he could not identify the suitcase with certainty, it was similar to one he had owned and that he was the owner of the clothing found inside the suitcase. The motion to suppress was denied. Defendant's testimony at the suppression hearing was admitted against him at trial and he was convicted. The United States Court of Appeals for the Seventh Circuit affirmed.[48]

The United States Supreme Court, holding that testimony on a motion to suppress evidence on fourth amendment grounds was inadmissible at trial on the issue of guilt, reversed.[49] The

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cusi v. DeForte, 392 U.S. 364, 368 (1968); and Terry v. Ohio, 392 U.S. 1, 9 (1968).

46. Katz v. United States, 389 U.S. 347, 353 (1967); Jones v. United States, 362 U.S. 257, 267 (1960). The legitimate expectation of privacy measure of the fourth amendment's scope received additional support from Mancusi v. DeForte, 392 U.S. 364 (1968). *Mancusi* restated the test in terms of "reasonable expectation of freedom from governmental intrusion." *Id.* at 368.

47. 390 U.S. 377 (1968).

48. United States v. Garrett, 371 F.2d 296 (7th Cir. 1966).

49. 390 U.S. at 394. *See also* Safarik v. United States, 62 F.2d 892 (8th Cir. 1933), a Prohibition Act violation case where defendant's motion to suppress illegally seized evidence succeeded, but the motion and affidavits sup-

Court fashioned this evidentiary remedy by reasoning that a defendant who knows that his testimony might be used against him at trial may be precluded from presenting the testimonial proof needed to establish his standing to challenge a fourth amendment violation.[50] Justice Harlan, writing for the majority, found it "intolerable" that a fourth amendment right might have to be surrendered in order to preserve the fifth amendment privilege.[51] *Simmons* thus provided a solution for the self-incrimination dilemma that had greatly concerned the Court in *Jones*. After *Simmons*, a basis for the automatic standing rule no longer existed, at least insofar as the protection of a defendant from self-incrimination was concerned. During the twelve years following *Simmons*, however, the Court neglected to address the question of the validity of *Jones*.

Despite a tendency to analyze the scope of the fourth amendment in terms of privacy interests, the Court had not yet abandoned the property rights analysis in the context of standing questions. Two years after *Katz* was decided, the Court in *Alderman v. United States*[52] used the property rights analysis to grant standing to a defendant who owned premises on which police "seized" intangible conversations between third-party defendants through illegal electronic surveillance of defendant's home. Standing was granted despite the fact that defendant was not present during the invasions. Simultaneously, standing was

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porting that motion were used by the Government as evidence to prove the guilt of defendant. The court said that allowing such evidence to be used was a violation of defendant's constitutional guarantees: "The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all." *Id.* at 898. "[W]hen the motion to suppress succeeds the testimony given in support of it is excludable as a 'fruit' of the unlawful search." 390 U.S. at 392. Conversely, the court in Fowler v. United States, 239 F.2d 93, 95 (10th Cir. 1956), expressed the precept that a motion to suppress, together with a defendant's testimony supporting the motion, *which has been properly overruled* on the ground that the search was legal, is admissible in evidence as an admission against interest. Such statements may then be used by the prosecution to impeach the credibility of a defendant who chooses to testify. Harris v. New York, 401 U.S. 222 (1971).

50. 390 U.S. at 392.

51. *Id.* at 394.

52. 394 U.S. 165 (1969).

denied to the third-party participants on the theory that only those whose rights were violated by the search itself, and not those aggrieved solely by the introduction of damaging evidence, successfully may urge suppression of evidence seized in violation of the fourth amendment.[53]

The *Alderman* decision obviously was inconsistent with *Katz*. Justice Harlan, in his dissenting opinion, pointed out the inconsistencies.[54] Harlan reasoned that, in light of *Katz*, traditional property concepts should be rejected entirely as a basis for analyzing standing. If the legitimate expectation of privacy standard had been used in *Alderman*, defendant owner would have had no standing to challenge the introduction of the conversations seized on his premises. He was not a party to the conversations and could have had no subjective expectation of privacy concerning those conversations merely because they occurred on his property.[55] Conversely, third-party defendants, because they may have had a subjective expectation of privacy in the conversations, should have been granted standing to challenge the fourth amendment violation.[56]

*Brown v. United States*[57] relied upon privacy interests as well as property interests in defining the scope of fourth amendment standing for a nonpossessory offense. Defendants in *Brown* were convicted of transporting and conspiring to transport stolen goods in interstate commerce.[58] The stolen goods had been transported to a co-conspirator's retail store. Police searched the store under a defective warrant while defendants were in custody in another state.[59] At a pretrial hearing on defendants' motion to suppress the seized evidence, defendants alleged no proprietary or possessory interest in either the store or the goods. The United States District Court for the Eastern District of Kentucky denied the motion for lack of standing. The United

53. *Id.* at 171.

54. *Id.* at 191-93 (Harlan, J., dissenting).

55. *Id.* (Harlan, J., dissenting).

56. *Id.* (Harlan, J., dissenting).

57. 411 U.S. 223 (1973).

58. 18 U.S.C. §§ 2314 & 371 (1976).

59. Conspirators were arrested in Cincinnati, Ohio. Co-conspirator's store was located in Manchester, Kentucky. 411 U.S. at 225.

States Court of Appeals for the Sixth Circuit affirmed.[60]

The Supreme Court affirmed the decision of the court of appeals. The Court supported its decision to deny standing on three bases. Automatic standing was denied because possession was not an essential element of the crime charged.[61] Because defendants were not on the premises at the time of the search, and because no proprietary or possessory interest in either the store or the stolen goods was ever alleged, there existed no possible interest to be protected.[62] The *Brown* Court made only a brief reference to the *Simmons* case and to the possible effect *Simmons* might have on the automatic standing doctrine of *Jones*.[63] The Court reserved the question "for a case where possession at the time of the contested search and seizure is 'an essential element of the offense . . . charged.' "[64]

Before such a case came before the Court, the Justices had

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60. 452 F.2d 868 (6th Cir. 1971).

61. 411 U.S. at 227.

62. *Id.* at 229.

63. *Id.* at 228. After *Simmons*, a marked disagreement on the continued validity of the automatic standing rule became apparent among the federal courts of appeals. The Second Circuit, despite "misgivings about the continued survival of the concept of automatic standing," United States v. Oates, 560 F.2d 45, 52 (2d Cir. 1977), stated that "overruling *Jones* is properly a matter for the Supreme Court." United States v. Galante, 547 F.2d 733, 737 (2d Cir. 1976). *See also* United States v. Ochs, 595 F.2d 1247, 1253 n.4 (2d Cir. 1979); United States v. Riquelmy, 572 F.2d 947, 950-51 (2d Cir. 1978). The Fifth Circuit had expressed "serious doubts" about the viability of the rule in light of *Simmons* in United States v. Edwards, 577 F.2d 883, 892 (5th Cir. 1978). The Sixth Circuit completely abandoned the rule. *See* United States v. Grunsfeld, 558 F.2d 1231, 1241-42 (6th Cir. 1977), *cert. denied sub nom.* Flowers v. United States, 434 U.S. 872 (1977) (No. 77-5363), *cert. denied, id.* at 1016 (1978) (No. 77-5271); United States v. Delguyd, 542 F.2d 346, 350 (6th Cir. 1976); United States v. Dye, 508 F.2d 1226, 1232-34 (6th Cir. 1974), *cert. denied*, 420 U.S. 974 (1975). The Seventh and Ninth Circuits continued to recognize the automatic standing doctrine. *See* United States v. Powell, 587 F.2d 443, 446 (9th Cir. 1978); United States v. Alewelt, 532 F.2d 1165, 1167 (7th Cir. 1976). The Eighth Circuit also declared that it would adhere to the automatic standing rule in the absence of a clear mandate from the Supreme Court. *See* United States v. Anderson, 552 F.2d 1296, 1299 (8th Cir. 1977). The Tenth Circuit interpreted *Simmons* and *Brown* together to repudiate the rule. *See* United States v. Smith, 495 F.2d 668, 670 (10th Cir. 1974).

64. 411 U.S. at 228 (quoting Simmons v. United States, 390 U.S. at 390).

an opportunity to look once again at the alternative legimately on the premises holding of *Jones*.[65] In *Rakas v. Illinois*[66] the Court again addressed the question of what interests should determine the scope of fourth amendment standing. Defendants in *Rakas*, before their trial for robbery, moved to suppress evidence consisting of a sawed-off rifle and rifle shells that had been seized by police during a search of an automobile in which defendants had been passengers. Neither defendant was the owner of the automobile, and neither claimed to own the rifle or shells. The motion to suppress was denied on the ground that defendants lacked standing to object to the allegedly unlawful search and seizure. Defendants were thereafter convicted. On appeal, the Appellate Court of Illinois, Third Judicial District, affirmed the convictions.[67] When the Illinois Supreme Court denied defendants leave to appeal, the United States Supreme Court granted certiorari.

The *Rakas* Court addressed the question of standing by inquiring whether a particular defendant's personal fourth amendment rights were violated by the search in question.[68] Using the *Katz* measure of fourth amendment scope, the Court acknowledged that an illegal search invades only the rights of those who have a "legitimate expectation of privacy in the invaded place."[69] The legitimately on the premises test of *Jones* was rejected by the *Rakas* Court as "too broad a gauge for measurement of Fourth Amendment rights."[70]

Legitimate presence on the premises was not rejected as a totally irrelevant measure of a person's expectation of privacy. In his concurring opinion, Justice Powell pointed out that property rights should perhaps be considered to determine whether an individual's expectation of privacy is reasonable.[71] Property rights are, after all, merely society's recognition of privacy expectations. The Justices in *Rakas*, however, unanimously agreed

65. *See* text accompanying notes 32-36 *supra*.
66. 439 U.S. 128 (1978). *See generally* 46 TENN. L. REV. 827 (1979).
67. 46 Ill. App. 3d 569, 360 N.E.2d 1252 (1977).
68. 439 U.S. at 133.
69. *Id.* at 143.
70. *Id.* at 142 (footnote omitted).
71. *Id.* at 153 (Powell, J., concurring).

that property interests should not be the sole indicator of fourth amendment rights.[72]

The *Rakas* decision is significant for two reasons. First, by applying the legitimate expectation of privacy standard to the standing question, the need for a separate inquiry on the issue of standing was eliminated. Once there is a determination that a legitimate expectation of privacy has been violated, the court may simply move on to a determination of whether the invasion of privacy expectations also violated the fourth amendment. *Rakas* is also significant for the limitation it places upon the *Jones* case. Whereas *Jones* expanded the availability of the exclusionary rule by allowing persons legitimately on the premises to invoke it, *Rakas* limited the availability of the rule by requiring a much narrower privacy interest.[73]

Despite its close analysis of standing requirements, *Rakas* neglected to address the question of automatic standing, and what effect, if any, the *Simmons* case had on the rule. Presumably, the question was not addressed because *Rakas* was not a case in which the charge was a possessory offense. If *Simmons* did indeed eliminate the automatic standing rule of *Jones*, *Rakas*, in rejecting the alternative legitimately on the premises holding of *Jones*, would serve to eliminate *Jones* as a relevant inquiry in defining the scope of the fourth amendment in future cases. The Court addressed this issue in *United States v. Salvucci*.[74]

*Salvucci* expressly overruled the automatic standing rule of *Jones*.[75] By overruling *Jones*, the Court completed a trend that shifted the focus of standing from whether a fourth amendment violation occurred to whether an individual's personal fourth amendment rights, defined in terms of privacy interests, were violated by a search or seizure.[76] The availability of the exclusionary rule has been restricted by this shift.[77]

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72. *Id.* at 143. *See also* Mancusi v. DeForte, 392 U.S. 364, 368 (1968); Jones v. United States, 362 U.S. 257, 263 (1960).

73. 439 U.S. at 135 n.4. *But see* note 63 *supra*.

74. 448 U.S. 83 (1980).

75. "The automatic standing rule of Jones v. United States . . . is therefore overruled." *Id.* at 85.

76. *Id.* at 86-87.

77. The *Salvucci* Court viewed the *Jones* measure of fourth amendment

*Salvucci* attacked the automatic standing rule on the two bases upon which the rule had been conceived: the protection against self-incrimination rationale and the prosecutorial self-contradiction rationale.[78] *Simmons* was cited by the Court as eliminating the self-incrimination dilemma that the automatic standing rule was designed to protect.[79] *Simmons*, by holding that testimony in support of a motion to suppress cannot be admitted as evidence of guilt at trial, eliminated the need for automatic standing.[80]

The automatic standing rule was also invoked by the *Jones* Court because of the unfairness of allowing a prosecutor to convict a defendant of possession while simultaneously denying that the defendant had possession sufficient to allow him to invoke the exclusionary rule.[81] This prosecutorial self-contradiction rationale was based on the assumption of the *Jones* Court that possession of a seized good sufficient to establish criminal culpability would also suffice to establish fourth amendment standing.[82] The assumption was rejected expressly by the *Salvucci* Court, who stated that a prosecutor may, without legal contradiction, simultaneously maintain that a defendant has possession for purposes of conviction, but that the same defendant could not challenge the disputed search or seizure because he was not subject to a fourth amendment violation.[83]

*Salvucci* recognized that a "person in legal possession of a good seized during an illegal search has not necessarily been subject to a Fourth Amendment deprivation."[84] Therefore, the Court declined to substitute the possession of a seized good for a factual finding that a defendant actually was deprived of his

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rights in terms of possession as "too broad a gauge for measurement," *id.* at 92 (quoting Rakas v. Illinois, 439 U.S. 128, 142 (1978)), and therefore narrowed the measure by requiring a defendant to show that his own legitimate expectations of privacy were invaded.

78. *See* text accompanying notes 22-29 *supra*.

79. 448 U.S. at 88.

80. *Id.* at 89.

81. 362 U.S. at 263.

82. *Id. See* text accompanying notes 22-29 *supra*.

83. 448 U.S. at 88-89.

84. *Id.* (footnote omitted).

fourth amendment rights.[85] Limiting the availability of the exclusionary rule to protect only those whose fourth amendment rights have been violated by an illegal search or seizure, the Court held that fourth amendment interests now are defined in terms of "legitimate expectation[s] of privacy."[86]

Dissenting Justices in *Salvucci* argued for the retention of the automatic standing rule.[87] The dissent argued that although *Simmons* did not allow the use of a defendant's testimony at a suppression hearing as evidence of guilt at trial, "*Simmons* did not eliminate other risks to the defendant which attach to giving testimony at a motion to suppress."[88] The principal remaining risk was that such testimony might be used to impeach a defendant at trial.[89] The *Salvucci* majority failed to resolve the question whether suppression hearing testimony might be used for impeachment purposes. This question, said the Court, was "an issue which more aptly relates to the proper breadth of the *Simmons* privilege, and not to the need for retaining automatic standing."[90] The automatic standing doctrine of *Jones*, however, was based in part on the need to protect a defendant from the dilemma of having to choose between asserting his fourth amendment claim or surrendering his fifth amendment privilege

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85. *Id.* at 91.

86. "[W]e must instead engage in a 'conscientious effort to apply the Fourth Amendment' by asking not merely whether the defendant had a possessory interest in the items seized, but whether he had an expectation of privacy in the area searched." *Id.* at 93.

87. *Id.* at 95 (Marshall & Brennan, JJ., dissenting).

88. *Id.* at 93 (Marshall & Brennan, JJ., dissenting). Incriminating information beyond that required to establish the requisite fourth amendment interest, elicited by a prosecutor through his cross-examination at the suppression hearing, might prove helpful to a prosecutor in preparing his case, or deciding his trial strategy. "The furnishing of such a tactical advantage to the prosecution should not be the price of asserting a Fourth Amendment claim." *Id.* at 96-97 (Marshall & Brennan, JJ., dissenting).

89. *Id.* at 96 (Marshall & Brennan, JJ., dissenting). A number of courts have already indicated that a defendant's testimony at a suppression hearing is admissible at trial for impeachment purposes. United States v. Havens, 446 U.S. 620 (1980); People v. Douglas, 66 Cal. App. 3d 998, 136 Cal. Rptr. 358 (1977); People v. Sturgis, 58 Ill. 2d 211, 317 N.E.2d 545 (1974); Gray v. State, 43 Md. App. 238, 403 A.2d 853 (1979).

90. 448 U.S. at 94.

against self-incrimination.[91] By upholding the admissibility of testimony given at a suppression hearing for impeachment purposes, a defendant would be subjected to precisely the same dilemma as that identified in *Jones*.[92] In evaluating the need for an automatic standing rule, it would seem that any danger of self-incrimination that remained after *Simmons* would be relevant to the inquiry, since that danger was itself a principal reason for the creation of the rule.[93]

The *Salvucci* majority rejected an argument by respondents that the automatic standing rule would maximize deterrence of illegal law enforcement action by enlarging the number of defendants who could invoke the exclusionary rule.[94] Logically, this argument appears to be a valid one, for if deterrence of illegal police conduct is the goal of the exclusionary rule, all illegally obtained evidence should be excluded.[95] The requirement of a showing by defendant that his own fourth amendment rights were violated by the search and seizure tends to hinder rather than further this goal of deterrence.[96] The *Salvucci* Court, however, sought to restrict the availability of the exclusionary rule

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91. 362 U.S. at 262.

92. 448 U.S. at 96 (Marshall & Brennan, JJ., dissenting).

93. The dissenting Justices argued for retention of the automatic standing rule, asserting that possession itself is sufficient to establish the fourth amendment interest necessary to invoke the exclusionary rule. *Id.* at 97 (Marshall & Brennan, JJ., dissenting). *See also* Rawlings v. Kentucky, 448 U.S. 98 (1980). In *Rawlings* the Court narrowed the measure of fourth amendment rights a step further than they had in *Salvucci* by defining the requisite interest in terms of legitimate expectations of privacy *in the area searched*. Justices Marshall and Brennan dissented, asserting that an interest in the property seized should suffice to allow a defendant to contest the validity of a search:

> The Fourth Amendment . . . provides in plain language that if one's security in one's "effects" is disturbed by an unreasonable search and seizure, one has been the victim of a constitutional violation; and so it has always been understood. Therefore the Court's insistence that in order to challenge the legality of the search one must also assert a protected interest in the premises is misplaced.

*Id.* at 117-18 (Marshall & Brennan, JJ., dissenting).

94. 448 U.S. at 94.

95. Trager & Lobenfeld, *supra* note 9, at 453.

96. Grove, *Suppression of Illegally Obtained Evidence: The Standing Requirement on its Last Leg*, 18 CATH. U.L. REV. 150, 178 n.185 (1968) (quoting People v. Martin, 45 Cal. 2d 755, 290 P.2d 855 (1955)).

to those whose fourth amendment rights had been violated. It was the general opinion of the Court that the automatic standing doctrine served "only to afford a windfall to defendants whose Fourth Amendment rights have *not* been violated."[97]

The exclusionary rule has been limited by the Court primarily for reasons of public policy. A substantial social cost is exacted each time the rule is applied.[98] Probative evidence is kept from the trier of fact, and the search for truth at trial is frustrated.[99] Physical evidence is no less reliable because it was obtained illegally. The deterrent values of the exclusionary rule have been considered sufficient to risk excluding evidence that would allow a criminal defendant whose rights have been violated to go free. The Court, however, has not been persuaded that extending the rule to other defendants would justify further infringement of the public interest in prosecuting persons accused of crime and the interest in having a determination of guilt or innocence made on the basis of all the facts that expose the truth.[100] Another arguable drawback to the exclusionary rule is that exclusion of illegally obtained evidence does nothing to punish the wrongdoing official[101] and is likely to release a wrongdoing defendant. The cost, then, of deterring law enforcement officials from illegal searches or seizures is a high one—both guilty law-breakers are set free.

Opponents of the rule of exclusion argue that the rule does not accomplish its primary goal of deterrence.[102] No empirical evidence supports the claim that the exclusionary rule deters police from illegal searches and seizures.[103] If it can be determined that the exclusionary rule does not deter police, it is hard to justify retention of the rule in light of the social costs exacted each

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97. 448 U.S. at 95.

98. Rakas v. Illinois, 439 U.S. 128, 137 (1978); United States v. Ceccolini, 435 U.S. 268, 275-76 (1978); United States v. Calandra, 414 U.S. 338, 350-51 (1974); Alderman v. United States, 394 U.S. 165, 174-75 (1969).

99. *See* note 98 *supra*.

100. *Id.*

101. Irvine v. California, 347 U.S. 128, 136 (1954), *quoted in* Bivens v. Six Unknown Named Agents, 403 U.S. 388, 413 (1971) (Burger, C.J., dissenting).

102. "As a device for directly deterring illegal searches and seizures by the police, the exclusionary rule is a failure." Oaks, *supra* note 8, at 755.

103. *See generally* Oaks, *supra* note 8.

time the rule is invoked. Without an alternative to the exclusionary rule, however, the rule should not be discarded. A great advantage of the rule, apart from any deterrent effect, is that the rule provides an opportunity for judicial review, and through regular, predictable review the guarantees of the fourth amendment are likely to retain their vitality.[104]

Alternatives to the exclusionary rule have been suggested.[105] In a dissenting opinion,[106] Chief Justice Burger suggested "an administrative or quasi-judicial remedy against the government itself to afford compensation and restitution for persons whose Fourth Amendment rights have been violated."[107] Chief Justice Burger favors either a modification or the absolute abolition of the exclusionary rule.[108]

The American Law Institute, in its Model Code of Pre-Ar-

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104. *Id.* at 756.

105. *See* Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971) (Burger, C.J., dissenting); ALI MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE §§ SS 8.02(2), (3) (Tent. Draft No. 4, 1971) [hereinafter cited as ALI MODEL CODE].

106. 403 U.S. 388 (1971) (Burger, C.J., dissenting).

107. *Id.* at 422 (Burger, C.J., dissenting) (footnotes omitted).

> The venerable doctrine of *respondeat superior* in our tort law provides an entirely appropriate conceptual basis for this remedy.
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> . . . .
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> A simple structure would suffice. For example, Congress could enact a statute along the following lines:
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> (a) a waiver of sovereign immunity as to the illegal acts of law enforcement officials committed in the performance of assigned duties;
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> (b) the creation of a cause of action for damages sustained by any person aggrieved by conduct of governmental agents in violation of the Fourth Amendment or statutes regulating official conduct;
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> (c) the creation of a tribunal, quasi-judicial in nature or perhaps patterned after the United States Court of Claims, to adjudicate all claims under the statute;
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> (d) a provision that this statutory remedy is in lieu of the exclusion of evidence secured for use in criminal cases in violation of the Fourth Amendment; and
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> (e) a provision directing that no evidence, otherwise admissible, shall be excluded from any criminal proceeding because of violation of the Fourth Amendment.

*Id.* at 422-23 (Burger, C.J., dissenting) (footnote omitted).

108. 403 U.S. 388 (1971) (Burger, C.J., dissenting).

raignment Procedure, has formulated an alternative that does not discard the exclusionary rule entirely. Instead, the Institute's proposal restricts application of the exclusionary rule to those instances in which the violation in question was "substantial."[109] Exclusion will not be invoked if a finding is made by the court that the illegally seized evidence probably would have been discovered by law enforcement officials despite the search and seizure, and if exclusion is not necessary to deter constitutional violations.[110] Neither of these suggested alternatives impairs the vitality of fourth amendment protections, and both avoid the high social costs incurred under the exclusionary rule.

The policies underlying the exclusionary rule are noble ones. The courts in good conscience cannot sanction violation of a citizen's fourth amendment rights.[111] The exclusionary rule, however, has failed to accomplish its goal of deterring official misconduct. Since the rule succeeds only in thwarting the search for truth in the judicial process, a viable alternative should be found. In determining the most efficient manner to enforce the fourth amendment protections of the Constitution, the policy considerations discussed above must be weighed carefully in or-

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109. ALI MODEL CODE, *supra* note 105, § 2, at 23.

> *Determination.* Unless otherwise required by the Constitution of the United States or of this State, a motion to suppress evidence based upon a violation of any of the provisions of this code shall be granted only if the court finds that such violation was substantial. In determining whether a violation is substantial the court shall consider all the circumstances, including:
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> (a) the importance of the particular interest violated;
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> (b) the extent of deviation from lawful conduct;
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> (c) the extent to which the violation was willful;
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> (d) the extent to which privacy was invaded;
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> (e) the extent to which exclusion will tend to prevent violations of this Code;
>
> (f) whether, but for the violation, the things seized would have been discovered; and
>
> (g) the extent to which the violation prejudiced the moving party's ability to support his motion, or to defend himself in the proceeding in which the things seized are sought to be offered in evidence against him.

*Id.*

110. *Id.* § SS 8.03, at 24.

111. *See* United States v. Payner, 447 U.S. 727 (1980).

der to find and maintain a balance between the search for truth in judicial proceedings and the protection of a defendant's fourth amendment rights.

KAREN HURT HORNSBY

# Criminal Law and Procedure— Search and Seizure— Viewing a Movie Constitutes a "Search"

*Walter v. United States*, 447 U.S. 649 (1980).

Using fictitious names for both sender and addressee, defendants shipped twelve sealed cartons containing over eight hundred eight-millimeter movies by private carrier from Florida to Georgia on a "will call" basis.[1] The cartons were delivered mistakenly to a local business firm whose name closely resembled that of the addressee. The firm's employees opened the cartons and found individual boxes of film labeled with explicit descriptions and suggestive drawings indicating the movies' pornographic content.[2] The firm's manager notified the FBI, who took custody of the films.[3] Subsequently,[4] the FBI agents viewed the film without obtaining a warrant or communicating with the cosignor of the shipment.[5] Defendants were charged and con-

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1. The packages indicated that the intended recipient would pick them up and pay for them at the carrier's terminal in Atlanta. The mistaken delivery occurred because the packages were addressed to "Leggs, Inc."—"Leggs" being the nickname of a woman employed by one of the defendants' companies—and it happened that L'Eggs Products, Inc., the hosiery manufacturer, regularly received deliveries at the same terminal. Walter v. United States, 447 U.S. 649, 651 n.1 (1980).

2. A variety of male homosexual activities were depicted. The label descriptions are given in United States v. Sanders, 592 F.2d 788, 793 n.5 (5th Cir. 1979).

3. For purposes of the decision, the Court accepted the Government's argument that the delivery of the films to the FBI by a third party was not a "seizure" subject to the warrant requirement of the fourth amendment. The Court determined that certiorari had been "improvidently granted" and dismissed as to the issues not covered in the opinion. 447 U.S. at 652 n.4.

4. As stated in the opinion, "[t]he record does not indicate exactly when they viewed the films, but at least one of them was not screened until more than two months after the FBI had taken possession of the shipment." *Id.* at 652.

5. Defendants were ultimately traced when they made inquiries of the carrier concerning the missing shipment. *Id.* at 652 n.3.

victed of multiple counts of interstate transportation of obscene matter.[6] The Court of Appeals for the Fifth Circuit affirmed.[7] On writ of certiorari to the United States Supreme Court, *held*, reversed. The warrantless screening by government agents of explicitly labeled obscene movies lawfully in their possession constitutes an unreasonable search violating the provisions of the fourth amendment. *Walter v. United States*, 447 U.S. 649 (1980).

Courts frequently have experienced difficulty in deciding whether a given activity carried out by law enforcement authorities constitutes a search. According to commonly accepted definitions, a search consists of a prying or probing into hidden areas—an uncovering of objects or acts previously screened from view.[8] Such activities generally are held to be unreasonable and violative of the fourth amendment to the United States Constitution[9] unless they are undertaken pursuant to a valid warrant.

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6. Defendants were charged with violation of the following statutes: 18 U.S.C. § 371 (1976) (conspiracy to commit offense or to defraud United States); *id.* § 1462 (1976) (importation or transportation of obscene matters); and *id.* § 1465 (1976) (transportation of obscene matters for sale or distribution).

7. United States v. Sanders, 592 F.2d 788 (5th Cir. 1979). The actions against Sanders and Walter were consolidated; Walter's name was listed first on appeal.

8. *See* 38A WORDS AND PHRASES *Search* at 23 (1967 & Supp. 1981) for numerous definitions.

9. 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.

By the time of Katz v. United States, 389 U.S. 347 (1967), it was generally held that searches conducted without a warrant were *per se* unreasonable. It was also understood that in certain well-recognized and carefully limited circumstances, warrantless searches were permissible. The exceptions included cases where "the societal costs of obtaining a warrant, such as danger to law officers or the risk of loss or destruction of evidence, outweigh the reasons for prior recourse to a neutral magistrate." Arkansas v. Sanders, 442 U.S. 753, 759 (1979). Thus, a warrant is not required when the suspect consents; when the search is incident to a valid arrest; when police officers are in "hot pursuit"; when there really has been no search, since the incriminating evidence was in

Under the exclusionary rule, incriminating evidence procured in violation of the fourth amendment cannot be introduced at trial.[10] Because it usually is impossible to obtain a conviction without such evidence, the determination of whether a search is unreasonable is critical.[11]

The case law reveals two different approaches taken by the courts in examining illegal searches. One group of cases focuses on whether the police activity uncovered anything that should have remained private and secure from intrusion regardless of the suspect circumstances. The second concerns incriminating evidence that allegedly was uncovered by a private party search before the police became involved, leading to the conclusion that no government search has occurred. Federal and state courts have reached conflicting results when dealing with essentially similar fact situations of the latter type.[12] The issue presented in *Walter*—whether the actions of FBI agents following their acquisition of obscene movies should be termed an unconstitu-

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"plain view" and the officers simply came upon it inadvertently; and when the focus of the search is an automobile or other easily movable object (or an item that can quickly be disposed of or destroyed). *See* 2 W. LaFave, Search and Seizure § 4.1 (1978).

10. A discussion of the exclusionary rule, already the subject of wide-ranging debate and a flood of legal literature, is beyond the scope of this Note. A majority of the current Supreme Court appears to be uneasy about the suppression of otherwise valuable evidence. The rule is not likely to be abandoned outright, but it may be applied more narrowly in future cases. *See* Stone v. Powell, 428 U.S. 465 (1976) (Burger, C.J., concurring); Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 411 (1971) (Burger, C.J., dissenting).

11. United States v. Haes, 551 F.2d 767 (8th Cir. 1977); United States v. Sherwin, 539 F.2d 1 (9th Cir. 1976); United States v. Kelly, 529 F.2d 1365 (8th Cir. 1976); United States v. Ford, 525 F.2d 1308 (10th Cir. 1975); United States v. Pryba, 502 F.2d 391 (D.C. Cir. 1974).

12. *See* United States v. Kelly, 529 F.2d 1365 (8th Cir. 1976) (shipping company employee discovered obscene literature in a damaged carton and turned it over to the FBI; held, illegal search and seizure); United States v. Pryba, 502 F.2d 391 (D.C. Cir. 1974) (airline employee whose suspicions were aroused found pornographic movies and notified FBI; held, no government search). *Contra*, United States v. Haes, 551 F.2d 767 (8th Cir. 1977) (facts similar to *Pryba*, but court found more FBI participation; held, government search); United States v. Sherwin, 539 F.2d 1 (9th Cir. 1976) (facts similar to *Kelly*, but no fourth amendment violation found).

tional search—requires consideration of both approaches.

In the 1967 decision of *Katz v. United States*[13] the Court formulated an enduring test for prohibited government behavior. In that case defendant was convicted of transmitting wagering information across state lines. The evidence against the defendant consisted of recordings of telephone calls he had made from a public booth to which agents had attached a tapping device. The appeals court found no fourth amendment violation because there had been no physical intrusion into the area occupied by the defendant.[14] The Supreme Court reversed the conviction and held that physical intrusion was not necessary.[15] The Court reasoned that "[o]ne who occupies [a telephone booth], shuts the door behind him, and pays the toll that permits him to place a call is surely entitled to assume that the words he utters into the mouthpiece will not be broadcast to the world."[16] Traditionally, a person's home or private office was secure against warrantless searches,[17] but *Katz* extended the zone of protection to include any location where the defendant had a right to expect privacy. Justice Harlan, concurring, stated: "My understanding of the rule . . . 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.' "[18]

The *Katz* rationale was relied upon a decade later in *United States v. Chadwick*,[19] in which federal narcotics officers obtained custody of a double-locked footlocker pursuant to an arrest and opened it. Since there was reliable evidence that the locker contained marijuana,[20] the officers maintained that the search was fully justified under either of two exceptions to the warrant re-

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13. 389 U.S. 347 (1967).

14. Since the fourth amendment protects people, not places, defendant's right to privacy was violated. United States v. Katz, 369 F.2d 130, 133 (1966).

15. 389 U.S. at 353.

16. *Id.* at 352.

17. *Id.* at 351 n.8.

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

19. 433 U.S. 1 (1977).

20. The footlocker was observed to be leaking talcum powder, a substance frequently used to mask the odor of marijuana, and a trained dog had signaled the presence of the drug to the arresting officers. *Id.* at 3-4.

quirement: the automobile exception or the incident-to-a-lawful-arrest exception.[21] The district court disagreed and cited *Chimel v. California*[22] for the proposition that absent the accused's consent, only the area within the immediate control of an arrested person may be searched.[23] The court pointed out that the footlocker was well beyond defendants' reach at the time it was searched, and thus the incident-to-a-lawful-arrest exception did not apply.[24] The automobile exception did not apply either, since the footlocker had rested only briefly in the car's trunk and the trunk lid had not been closed at the time of the arrest.[25] The footlocker was not part of the car but rather was an item of personal luggage.[26]

The court of appeals affirmed, stating that probable cause alone was not enough to sustain the warrantless search,[27] and on appeal the Supreme Court concurred. The seized marijuana could not be introduced as evidence, because "[b]y placing personal effects inside a double-locked footlocker, [defendants] manifested an expectation that the contents would remain free from public examination."[28] Justice Harlan's twofold requirement stated in *Katz*[29] was fulfilled because the defendants expected the locker to be safe from intrusion, and their expectation was a reasonable one. Although there is a diminished expectation of privacy surrounding one's automobile because of its function, its physical characteristics, and its capacity to be regulated and registered, the Court concluded that "the factors which diminish the privacy aspects of an automobile do not apply to respondents' footlocker."[30]

Justice Blackmun, dissenting in *Chadwick*, felt that one

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21. Exceptions to the warrant requirement are discussed in note 9 *supra*.
22. 395 U.S. 752 (1969).
23. United States v. Chadwick, 393 F. Supp. 763, 775 (D. Mass. 1975).
24. 433 U.S. at 15.
25. *Id.* at 4.
26. *See id.* at 5.
27. *Id.* United States v. Chadwick, 532 F.2d 773, 778 (1st Cir. 1976). The court relied on the Supreme Court's language in Katz v. United States, 389 U.S. 347 (1967).
28. 433 U.S. at 11.
29. *See* note 18 *supra* and accompanying text.
30. 433 U.S. at 13.

who had just been arrested should have *reduced* expectations of privacy.[31] The dissent predicted that the Court's decision would serve only to create further confusion among law enforcement officers concerning the rules of search and seizure.[32] A better course would have been "to adopt a clear-cut rule permitting property seized in conjunction with a valid arrest in a public place to be searched without a warrant."[33]

Two years later, in *Arkansas v. Sanders*,[34] the Court attempted to clear up the confusion generated by *Chadwick*. The container at issue in *Sanders* was an ordinary green suitcase. Without a warrant and without defendant's consent, police officers stopped the taxi in which defendant was riding, asked the driver to open the trunk, and removed the suitcase, which previously had been described to them by an informer. They opened the suitcase on the spot and found it full of marijuana. Like the federal government in *Chadwick*, the state authorities maintained that opening the suitcase was a valid and necessary step in the process of arresting the suspect and confiscating the illegal substance.[35] The Supreme Court of Arkansas, however, reversed the defendant's conviction because of the illegal search of his suitcase.[36] The court held that a warrantless search generally must be supported by "probable cause coupled with exigent cir-

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31. *Id.* at 21 (Blackmun & Rehnquist, JJ., dissenting).

32. "It is decisions of the kind made by the Court today that make criminal law a trap for the unwary policeman . . . ." *Id.* at 24 (Blackmun, J., joined by Rehnquist, J., dissenting).

33. *Id.* (Blackmun & Rehnquist, JJ., dissenting).

34. 442 U.S. 753 (1979).

35. *Id.* at 762.

> In effect, the State would have us extend [the automobile exception] to allow warrantless searches of everything found within an automobile, as well as of the vehicle itself. . . . The State contends . . . that *Chadwick* does not control because in that case the vehicle had remained parked at the curb where the footlocker had been placed in its trunk. . . . This Court has not had occasion previously to rule on the constitutionality of a warrantless search of luggage taken from an automobile lawfully stopped. Rather, the decisions to date have involved searches of some integral part of the automobile.

*Id.* at 762-63.

36. Arkansas v. Sanders, 262 Ark. 595, 559 S.W.2d 704 (1977), *aff'd* 442 U.S. 753 (1979).

cumstances."[37] In *Sanders*, as in *Chadwick*, there was ample cause to suspect the existence of the marijuana, but there were none of the exceptional circumstances held by the court to "outweigh the reasons for prior recourse to a neutral magistrate."[38] The United States Supreme Court approved the Arkansas decision because "[a] lawful search of luggage generally may be performed only pursuant to a warrant. . . . Luggage is a common repository for one's personal effects, and therefore is inevitably associated with the expectation of privacy."[39] The Court found no justification for extending the automobile exception to the "warrantless search of one's personal luggage merely because it was located in an automobile lawfully stopped by the police."[40] Sensing that the container theory could give rise to problems if taken to extremes, however, the Court added a cautionary footnote:

> Not all containers and packages found by police during the course [of an automobile search] will deserve the full protection of the Fourth Amendment. Thus, some containers (for example a kit of burglar tools or a gun case) by their very nature cannot support any reasonable expectation of privacy because their contents can be inferred from their outward appearance. Similarly, in some cases the contents of a package will be open to "plain view," thereby obviating the need for a warrant.[41]

Unpersuaded by this dictum, the dissent warned that police of-

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37. 442 U.S. at 756.

38. *Id.* at 759.

39. *Id.* at 762.

40. *Id.* at 765.

41. *Id.* at 764 n.13. The plain view doctrine has frequently been invoked by police in search and seizure cases. *See generally* 1 W. LAFAVE, SEARCH AND SEIZURE § 2.2 (1978). According to Coolidge v. New Hampshire, 403 U.S. 443 (1971), *see* text accompanying notes 43-48 *infra*, the fact that objects are in plain view can justify a warrantless search or seizure only if a lawful search is in progress and the police inadvertently come upon incriminating evidence. 403 U.S. at 466-68. Therefore, no privacy interest is at stake since the individual's privacy has already been disturbed. The difficulty is in deciding whether "plain view" means with the naked eye only, or with the aid of a telescope or binoculars; search by daylight or with the assistance of a flashlight; or inspection from the officer's normal position or from a position adopted in order to have a better view. For discussions of the plain view doctrine, see 38 LA. L. REV. 635 (1978); 76 MICH. L. REV. 154 (1977).

ficers would encounter great difficulties in delineating which containers could be opened without a search warrant and which could not.[42]

The second line of cases relevant to the issue before the Supreme Court in *Walter* focused on a different theory. In these cases the prosecution sought to introduce incriminating evidence at trial, not on the basis that the search was legitimate, but on the ground that there was no search at all. *Coolidge v. New Hampshire*[43] exemplified this approach. After a jury trial in a New Hampshire state court, defendant was convicted of murder and sentenced to life imprisonment. On appeal, he claimed that the evidence used against him—some clothing and a rifle said to be the murder weapon—should have been suppressed because it was obtained without a search warrant. Police officers had visited his home during his absence to question his wife, who voluntarily produced four guns belonging to her husband and several items of his clothing.[44] The Supreme Court held:

> There is not the slightest implication of an attempt on [the officers'] part to coerce or dominate her. . . . To hold that the conduct of the police here was a search and seizure would be to hold, in effect, that a criminal suspect has constitutional protection against the adverse consequences of a spontaneous, good-faith effort by his wife to clear him of suspicion.[45]

Thus, Mrs. Coolidge was in no way acting as the instrument of the police.[46] According to the long-familiar rationale of *Burdeau v. McDowell*,[47] the fourth amendment proscribes only governmental searches and seizures. Evidence turned up by a private party and handed to the police "on a silver platter" is not subject to the exclusionary rule.[48]

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42. "Still hanging in limbo, and probably soon to be litigated, are the briefcase, the wallet, the package, the paper bag, and every other kind of container." 442 U.S. at 768 (1979) (Blackmun, J., dissenting).

43. 403 U.S. 443 (1971).

44. *Id.* at 446.

45. *Id.* at 489-90. Defendant's conviction was reversed and the case was remanded on other grounds.

46. *Id.* at 487.

47. 256 U.S. 465 (1921).

48. Although strongly criticized by some commentators and carefully lim-

As in *Coolidge*, the goverment in *United States v. Pryba*[49] contended that no official search had occurred. In *Pryba* the Court of Appeals for the District of Columbia Circuit considered whether the fruits of a private search, conducted in this case by an airline freight service employee, could be used at trial to secure a conviction for shipping pornographic movies. Alerted by the behavior of a customer, the airline employee opened a box brought in for shipment and found several eight-millimeter color movies with titles "unsubtly suggesting sex."[50] He and his supervisor held portions of two films up to the light and discerned nude males and females performing sexual acts. They notified the FBI, and an agent arrived with a projector that was used by the three to view more of the films. The materials were repackaged and forwarded to their original destination, where the owner ultimately was arrested.[51]

Judge Spottswood Robinson, writing for the *Pryba* court, reviewed relevant case law and concluded that the search was a private one because it was made on the carrier's own initiative for its own purposes.[52] The subsequent FBI activity did not amount to a new or different search. "Once the box was opened, the unpackaged reels of film bearing sex-suggested titles justified closer examination, ultimately by use of the projector, to see whether they were in fact contraband. In sum, each event in this succession prompted naturally the next. . . . Neither the law nor common sense dictated a different course."[53] Therefore, the films were admissible as evidence, and Pryba's conviction was upheld.

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ited by Justice White, concurring in *Walter v. United States*, the *Burdeau* rule has remained in force for almost sixty years. *See* 90 HARV. L. REV. 463 (1976).

49. 502 F.2d 391 (D.C. Cir. 1974), *cert. denied*, 419 U.S. 1127 (1975).

50. *Id.* at 395.

51. As well as protesting that there *was* a government search when the FBI screened the films, the defendant maintained that the initial seizure was illegal because it had not been preceded by an adversary hearing to determine whether the films were obscene. A hearing was in fact held five days after the seizure, and the films were swiftly adjudged to be hard-core pornography. The search and seizure conducted in the defendant's office took place pursuant to a properly detailed search warrant. *Id.* at 395-96.

52. *Id.* at 401.

53. *Id.* at 400.

Shortly after *Pryba* the Tenth Circuit dealt with a similar situation. In *United States v. Ford*[54] the court upheld a conviction for shipping heroin by air freight. As in *Pryba*, airline officials opened and inspected a package delivered for shipment by a nervous and suspicious-looking individual. They found a number of condoms filled with a powdered substance. Local police officers were notified; an officer who had experience in narcotics investigation performed an on-the-spot field test which showed that the substance was heroin.[55] Relying on *Pryba*, the court held that these actions did not constitute a government search. The officers were in fact duty bound to "further investigate the open box . . . to determine whether the suspicious substance in plain view was . . . contraband. . . . Indeed, they could not turn their backs or walk away from what appeared to their trained eyes to be, and which was, a violation of the law."[56]

The Eighth Circuit took the opposite view. In *United States v. Haes*[57] an air freight supervisor opened an unclaimed package in an attempt to trace the owner. It contained movies that he believed to be pornographic. FBI agents were summoned; they brought a projector and viewed several of the films in a private office, verifying the fact that they contained hardcore pornography. The *Haes* court maintained that the search and the seizure of the films had to analyzed separately,[58] and if

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54. 525 F.2d 1308 (10th Cir. 1975).

55. *Id.* at 1310.

56. *Id.* at 1312. It may be assumed that the timing of the test for heroin was not critical. Had it been performed several days later, it would still have been legitimate as a necessary step in the investigation.

Older cases that involved the "testing" or verification of suspected contraband did not view such testing as a search. In Prohibition-era moonshine cases, for example, the results of chemical analysis of bootleg liquor observed by revenue officers in plain sight were held admissible although the analysis was done without a warrant. *See, e.g.*, United States v. Lee, 274 U.S. 559 (1927); Carroll v. United States, 267 U.S. 132 (1924); Hester v. United States, 265 U.S. 57 (1924).

57. 551 F.2d 767 (8th Cir. 1977).

58. *Id.* at 770. Unlike the *Pryba* court, which had been able to overcome its qualms about the warrantless seizure of obscene films for a judicial showing to support the issuance of a warrant for their seizure, the *Haes* court was unwilling to countenance a procedure "fraught with constitutional difficulties." 502 F.2d at 400 n.59.

*either* were tainted with government participation, the fourth amendment was violated. The court distinguished *Pryba* in that there the government had merely been an "observer"—the airline employees evidently had operated the projector.[59] Moreover, in *Pryba* the employees had already "viewed" the films with the naked eye before calling the FBI, whereas in *Haes* there had been no prior "looking" and no determination with regard to the films' obscenity.[60] The court rejected the "plain view" theory advanced by the government, holding that the *real* search here was made by the FBI. Their actions in screening the movies changed the nature of the search process that previously was begun, but was not completed, by the private party.[61] In a strong dissent Judge Webster advocated the "common-sense" approach espoused by the *Pryba* majority. In his opinion the agents had not pried or probed into something concealed but had merely viewed the motion pictures "in the manner in which they were intended to be viewed."[62]

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59. 551 F.2d at 770.

60. *Id.* at 771. It is unclear why in *Walter* the Court agreed with the defendant that eight-millimeter films cannot be examined successfully with the naked eye, 447 U.S. at 652 n.2, whereas in *Pryba* the airline employees were able to hold portions of a film up to the light and discern nude males and females performing sexual acts, 502 F.2d 391, 395 (D.C. Cir. 1974).

61. 551 F.2d at 771. A test that frequently has been used in disputes about whether a search was in fact private or government-connected is that formulated in Lustig v. United States, 338 U.S. 74, 79 (1949): "It is immaterial whether the federal agent originated the idea or joined in it while the search was in progress. So long as he was in it before the object of the search was completely accomplished, he must be deemed to have participated in it." The Court's test in Coolidge v. New Hampshire, 403 U.S. 443, 487 (1971), was whether in light of all the circumstances of the case, the private searcher must be regarded as having acted as an "instrument" or "agent" of the state when turning over evidence. *See* notes 41-42 *supra*.

62. 551 F.2d at 772 (Webster, J., dissenting). Judge Webster then asked:

> Can it be seriously argued that an agent receiving a suspected book or magazine from a freight carrier could not reasonably open the publication and peruse its pages to determine whether its contents offended the law? . . . Would a government agent who used a magnifying glass or other mechanical aid to identify an object be vulnerable to a claim of an unreasonable search independent of the lawful private search which produced the object? I think clearly not.

*Id.* at 772 (Webster, J., dissenting) (footnote omitted). Judge Webster touched

When the Supreme Court turned its attention to *Walter v. United States*,[63] it had two tests for determining whether the FBI's screening of the movies in its custody constituted an illegal search. First, the Court might ask whether any legitimate privacy interests of the owners had been violated. Second, it might consider whether the movies were the fruits of a prior private search that had conclusively established their contents, leaving them in plain view with nothing to be discovered by the government.

In a 5-4 decision that produced no clear majority opinion, the Court overturned Walter's conviction.[64] Justice Stevens announced the judgment and wrote an opinion which Justice Stewart joined. Justice Stevens felt that the "bizarre" facts of the case[65] left no doubt that "the unauthorized exhibition of the films constituted an unreasonable invasion of their owner's constitutionally protected interest in privacy. It was a search; there was no warrant; the owner had not consented; and there were no

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upon one of the major difficulties with the plain view doctrine, namely, that what can be seen with the naked eye and what can be seen with artificial aids are vastly different things. *See* note 33 *supra*. It is generally held that the use of a flashlight by a lawfully positioned officer is not a search. Walker v. Beto, 437 F.2d 1018 (5th Cir. 1971). In some cases the use of a telescope has been upheld, Lee v. United States, 343 U.S. 747 (1952), but there is support for the opposite view, as in United States v. Kim, 415 F. Supp. 1252 (D. Hawaii 1976). The use of ultraviolet light to detect the presence of fluorescent grease on a suspect's hands was upheld in Commonwealth v. DeWitt, 314 A.2d 27 (Pa. Super. Ct. 1973) but was deemed impermissible in United States v. Kenaan, 496 F.2d 181, 182 n.1 (1st Cir. 1974).

63. 447 U.S. 649 (1980).

64. The search and seizure clause of the fourth amendment was considered in seven different cases during the Supreme Court's 1979-80 term. In each decision the Court was split. Rawlings v. Kentucky, 448 U.S. 98 (1980); United States v. Salvucci, 448 U.S. 83 (1980); United States v. Payner, 447 U.S. 727 (1980); Walter v. United States, 447 U.S. 649 (1980); United States v. Havens, 446 U.S. 620 (1980); United States v. Mendenhall, 446 U.S. 544 (1980); Ybarra v. Illinois, 444 U.S. 85 (1979).

65. 447 U.S. at 651. The case is reminiscent of Professor Prosser's characterization of Palsgraf v. Long Island R.R. Co., 248 N.Y. 339, 162 N.E. 99 (1928) (passenger on railroad platform struck by falling scales after freak explosion caused when guard pushed someone aboard moving train, dislodging his package of fireworks): "a law professor's dream of an examination question." W. PROSSER, LAW OF TORTS § 43, at 254 (4th ed. 1971).

exigent circumstances."[66] Justice Stevens conceded that the explicit labels on the boxes indicated the nature of the films' contents. The labels only gave the FBI probable cause to believe the films were obscene, however, and if probable cause "dispensed with the necessity of a warrant, one would never be needed."[67] The labels "were not sufficient to support a conviction and were not mentioned in the indictment. Further investigation—that is to say, a search of the contents of the films—was necessary in order to obtain the evidence which was to be used at trial."[68]

Citing *Burdeau* and *Coolidge*,[69] Justice Stevens agreed that the process had begun with a private search. He further believed that if the carrier's employees had screened the films before turning them over to the FBI, there would have been no significant expansion of the search, and the government, therefore would have been justified in reexamining the materials.[70] In this

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66. 447 U.S. at 654. Curiously, Justice Stevens placed great reliance on Justice Stewart's concurring opinion in Stanley v. Georgia, 394 U.S. 557 (1969), a first amendment obscenity case in which the Court held that mere private possession of obscene materials in one's home was not illegal. In that case, FBI agents were lawfully in the defendant's home pursuant to a warrant to search for wagering paraphernalia when they came upon several reels of unmarked film in a desk drawer. The agents viewed the films with the defendant's projector, found them to be obscene, and arrested him. Justice Stewart maintained that the warrantless projection of motion picture films was an unconstitutional invasion of the owner's privacy. 394 U.S. at 569. But in *Stanley* the agents were indeed prying or probing, since they had no idea what the films might contain, and having secreted the films in a drawer, the defendant clearly manifested an expectation that they would remain secure from intrusion by the authorities. The facts of *Stanley* thus appear closer to those of *Chadwick* than to those of *Walter*.

67. 447 U.S. at 657 n.10.

68. *Id.* at 654.

69. *Id.* at 656.

70. *Id.* at 656-57. Justice White, in his separate opinion, disagreed with this contention. *Id.* at 662 (White, J., concurring in part). There is good authority for the Stevens position. For example, in United States v. Blanton, 479 F.2d 327 (5th Cir. 1973), an airline attendant found a pistol and a silencer inside an unclaimed bag and summoned a federal officer after closing the bag. The court held that no new or separate search took place when the officer reopened the bag. *Accord*, United States v. McDaniel, 574 F.2d 1224 (5th Cir. 1978) (government agent reopened an unclaimed attaché case already searched by an airline employee; held, no illegal search); State v. Pohle, 160 N.J. Super. 576, 390 A.2d 692 (1978) (reexamination by law enforcement officers of evi-

case, however, the FBI agents saw much more than the private party did—that is, they enlarged the scope of the private party search and carried out a separate activity of their own. Justices Stevens and Stewart were also troubled by the fact that "an officer's authority to possess a package is distinct from his authority to examine its contents,"[71] and that "[w]hen the contents of the package are books or other materials arguably protected by the First Amendment, . . . it is especially important that [the warrant] be scrupulously observed."[72]

Discussing the reasonable expectation of privacy test, Justice Stevens saw "no reason why the consignor of [this] shipment would have any lesser expectation of privacy than the consignor of an ordinary locked suitcase."[73] Refuting the government's claim that because the packages had been opened by a private party, Walter no longer had any reasonable expectation of privacy in the films, Stevens asserted that such expectation must be measured "by the condition of the package at the time it was shipped unless there is reason to assume that it

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dence in their control held not a search).

71. 447 U.S. at 654 (citing Arkansas v. Sanders, 442 U.S. 753 (1979) and United States v. Chadwick, 433 U.S. 1 (1977)).

72. *Id.* at 655. *See* note 50 *supra*. There had been no judicial determination of the films' obscenity at the time the FBI accepted them. Justice White, in his separate opinion, did not address the question whether the government's acquisition of the films was thus strictly legal, a question on which the court of appeals had been divided, but he was clearly troubled by it. *Id.* at 660 n.1 (White, J., concurring in part).

Justice Stevens' reference to the first amendment was expanded in an accompanying footnote. *Id.* at 655 n.6. Although the first amendment issue was not crucial to the Court's decision, the plurality opinion seems to have included it in order to strengthen the argument. The footnote quotes Justice Douglas: "The commands of our First Amendment (as well as the prohibitions of the Fourth and the Fifth) reflect the teachings of *Entick v. Carrington* . . . . These three amendments are indeed closely related, safeguarding not only privacy and protection against self-incrimination but 'conscience and human dignity and freedom of expression as well.' " *Id.* (Douglas, J., dissenting) (quoting Frank v. Maryland, 359 U.S. 360, 376 (1959)). The plurality believed that since the contraband in *Walter* consisted of expressive material and not drugs or weapons, the warrant requirement must be given heightened attention.

73. *Id.* at 658.

would be opened before it arrives at its destination."[74] Referring to the dictum in *Arkansas v. Sanders*,[75] Stevens explained that there could be no expectation of privacy with regard to the contents of a gun case delivered to a carrier, but if the gun case were enclosed in a locked suitcase, the shipper would surely expect that the privacy of its contents would be respected.[76]

Justice Stevens did not believe that the defendants' expectations were frustrated by the fact of the unexpected private search of the cartons. The private action "merely frustrated [the expectation] in part. It did not simply strip the remaining unfrustrated portion of that expectation of all Fourth Amendment protection."[77] In sum, because they constituted a separate additional search, the FBI's actions in screening the movies were illegal.[78]

Justice Marshall concurred but wrote no opinion. Justices White and Brennan concurred in part and in the result. Justice White disagreed with the contention that private searches "insulate from Fourth Amendment scrutiny subsequent governmental searches of the same or lesser scope."[79] He read the prior cases as holding that when a container has been opened by a private individual, searched, and reclosed,[80] the contents still may not be reexamined by police, absent exigent circumstances, unless they have a warrant. "Unlike the opening of the packages that destroyed their privacy by exposing their contents to the plain view of subsequent observers, a private screening of the films would not have destroyed petitioners' privacy interest in them."[81] According to the plurality, the obscene movies were not in plain view when the FBI took over the cartons; what *was* in plain view was a collection of little boxes bearing descriptive la-

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74. *Id.* at 658 n.12.

75. 442 U.S. 753, 764 n.13 (1979).

76. 447 U.S. at 658 n.12.

77. *Id.* at 659. "A partial invasion of privacy cannot automatically justify a total invasion." *Id.* at 659 n.13.

78. *Id.* at 659. Justice Stevens concluded by applying the rationale of Stanley v. Georgia, 394 U.S. 557 (1967). *See* note 56 *supra*.

79. 447 U.S. at 660 (White, J., dissenting in part).

80. This would have been the case if the carrier's employees had taken the films out of their boxes, screened them, and replaced them.

81. 447 U.S. at 662 (White, J., dissenting in part).

bels. The case, therefore, was squarely within the ambit of *Chadwick*[82] and *Sanders*,[83] which held that no amount of probable cause such as the explicit description in *Walter*, could justify opening the boxes without a warrant.

The dissenting justices clearly felt that Walter and his colleagues had been caught red-handed shipping obscene material and should not be allowed "to go free because the constable ha[d] blundered."[84] According to the dissenters, the principal distinction to be made between *Walter* and the previous "container" cases was that in *Walter* the defendants no longer had any *reasonable* expectation of privacy[85] with regard to either the large outer cartons, which had been fully opened by private parties, or the inner boxes, which had descriptive labels advertising the nature of their contents. Their illicit activities no longer remained a secret. "The ultimate question . . . is whether one's claim to privacy from government intrusion is reasonable in light of all the surrounding circumstances. . . . [N]o single factor invariably will be determinative."[86] The Court's dictum in *Arkansas v. Sanders*[87] foreshadowed this very situation, for here the contents of the films could be "inferred from their outward appearance," like a kit of burglar tools or a gun case.

A troublesome feature of cases like *Walter* is the need for some artificial sensory device—here, a movie projector—to ascertain the exact character of the suspected contraband. The Court's decision suggests that when police lawfully have ac-

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82. *See* notes 19-33 *supra* and accompanying text.

83. *See* notes 34-42 *supra* and accompanying text.

84. This was the time-honored phrase used by Justice Cardozo in People v. Defore, 242 N.Y. 13, 21, 150 N.E. 585, 587 (1926), when he was a member of New York's Court of Appeals. *Defore* affirmed a conviction for possessing an illegal weapon although defendant's room had been searched without a proper warrant. The New York court unanimously agreed that "until the Legislature has spoken with a clearer voice," the court could not subject society to the adverse consequences of suppressing incriminating evidence that had been acquired under questionable circumstances. *Id.* at 24, 150 N.E. at 588.

85. That is, one that "society [would] recognize as 'reasonable.'" Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

86. Rakas v. Illinois, 439 U.S. 128, 152 (1978) (Powell, J., concurring). *See* 46 TENN. L. REV. 827 (1979).

87. 442 U.S. 753, 764 n.13 (1979). *See* note 41 *supra* and accompanying text.

quired incriminating evidence consisting of films, microfilms, video cassettes, tape recordings, computer data, and the like—that is, items that require mechanical playback, projection, or processing—a warrant must be obtained before such examination is carried out. The use of mechanical devices to aid the human eye or ear represents more of an intrusion than ordinary looking or listening.[88]

The dissenting justices appeared reluctant to ban the warrantless use of all artificial aids to vision.[89] Perhaps they feared that the Court might soon find itself called upon to specify which artificial aids may be employed by police without a warrant, since even eyeglasses and flashlights serve the same basic function as the movie projector in *Walter*—namely, magnification and illumination permitting the agents to see things that previously were imperceivable. The results of many prior cases involving telescopes, searchlights, and similar devices may be called into question.[90]

There is no indication, however, that the holding of this case is likely to be extended into other areas, such as laboratory analysis or testing of evidence with a microscope. In light of the narrow margin for reversal and the "strange and particular" circumstances of this "bizarre" series of events,[91] it is difficult to draw firm conclusions. The fragmented nature of the Court's holding, typical of all the recent search and seizure cases,[92] underscores the deep divisions within its ranks concerning the provisions of the fourth amendment.[93] Much of the difficulty ap-

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88. *Cf.* Katz v. United States, 389 U.S. 347 (1967), in which an eavesdropping device was used because the defendant's conversations could not have been overheard by persons passing the telephone booth.

89. The dissenting opinion made use of Judge Webster's dissent in United States v. Haes, 551 F.2d 767 (8th Cir. 1977), suggesting that "a magnifying glass or other mechanical aid" could be used without a warrant. *Id.* at 772 (Webster, J., dissenting). 447 U.S. at 664 n.1 (Blackmun, J., dissenting).

90. *See* note 62 *supra*.

91. 447 U.S. at 666 (Blackmun, J., dissenting).

92. *See* 66 A.B.A. J. 1114 (1980).

93. One writer calls the current state of the law concerning unreasonable searches and seizures a "shambles" and maintains that it will remain so until the Court is willing "to provide a more concrete analysis of unreasonable searches and seizures and to face head-on its qualms concerning the exclusionary rule." 15 LAND & WATER L. REV. 298 (1980). Justice Rehnquist, dissenting

pears to stem from dissatisfaction over the effects of the exclusionary rule.[94]

The Supreme Court's dilemma in the search and seizure cases originates in the inevitable conflict between two antithetical goals—on the one hand, society's desire to apprehend and punish lawbreakers and, on the other, the inviolable right of every citizen to be free from government intrusion and oppression. In the last few decades the Supreme Court has delineated and secured the rights of the accused in criminal cases, bringing about substantial gains toward the realization of justice in that field. Perhaps the decision in *Walter* heralds the start of a new trend, however, for there are now four dissenting justices who would have affirmed the convictions. Should the composition of the Court change in the near future, which is not unlikely in view of the conservative, law-and-order-seeking movement that clearly influenced the 1980 elections, the scales may well begin to tip in favor of law enforcement authorities. Justice Blackmun in his *Sanders* dissent reflected the concerns of many judges whose sympathies lie with the prototypical "cop on the beat."[95]

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in Delaware v. Prouse, 440 U.S. 648 (1979), referred to the Court's rulings on the subject as "curiouser and curiouser." *Id.* at 664 (Rehnquist, J., dissenting).

94. *See* note 10 *supra*.

95. "The Court today . . . while purporting to clarify the confusion occasioned by *Chadwick*, creates in my view only greater difficulties for law enforcement officers, for prosecutors, for those suspected of criminal activity, and, of course, for the courts themselves." Arkansas v. Sanders, 442 U.S. 753, 768 (1979) (Blackmun, J., dissenting). Almost twenty years ago, in Chapman v. United States, 365 U.S. 610 (1961), Justice Clark said:

> Every moment of every day, somewhere in the United States, a law enforcement officer is faced with the problem of search and seizure. He is anxious to obey the rules that circumscribe his conduct in this field. It is the duty of the Court to lay down those rules with such clarity and understanding that he may be able to follow them.

*Id.* at 622 (Clark, J., dissenting). The goal seems little closer to being realized. However, there is some indication that not all police officers or lower court judges are "anxious to obey" each ruling of the Supreme Court. In Landynski, *Search and Seizure*, in THE RIGHTS OF THE ACCUSED 52-53 (S. Nagel ed. 1972), the author mentions a survey conducted in the lower criminal courts in Boston wherein one judge is quoted as saying, "We don't follow those Supreme Court decisions here." Another judge remarked, "The day I throw out a warrant that uncovers 100 decks of heroin is the day they'll throw a net over my head." *Id.* at 57 n.87.

It will not be surprising if a majority of future appointees at all levels of the judiciary share the views expressed in this case by Chief Justice Burger and Justices Blackmun, Rehnquist, and Powell.

The decision in *Walter* is disappointing primarily because it applies the *Katz* expectation of privacy test in a manner that destroys much of its effectiveness. There seems little doubt that one who labels his merchandise as the *Walter* defendants did is not attempting to conceal it or keep it private. Movie producers do not use reels of film to "hide" actors, props, or scenery, any more than phonograph record manufacturers or cassette tape makers use their products to "hide" words and music. Had the defendants enclosed the films in the proverbial plain brown wrapping instead of boxes adorned with explicit labels and drawings, their expectations of privacy would have been legitimate. The actions of these defendants, however, were more like those of a gambling-den operator whose premises sport a clearly visible sign advertising the kind of illegal activity being carried on and the hours of business. If for some reason the building were completely inaccessible, but police could observe the goings-on through a telescope, they would be obliged to secure a proper warrant before doing so. No amount of probable cause, such as explicit advertising, can justly excuse a warrantless intrusion made with the help of a mechanical device: this is the teaching of *Walter*.[96] The present Supreme Court, it seems, would not be swayed by the argument that the gambling-den operator is virtually inviting arrest and should bear the consequences of his foolhardiness. Police officers are strictly charged with observing all the formalities of the search procedure, and a technical blunder, such as failure to secure a warrant when there was ample time to do so, apparently is unforgivable.

One way to avoid the unjust results that often follow application of the exclusionary rule would be to engage in a process of balancing the competing interests, a process which the Supreme Court is not reluctant to use in other areas where difficult con-

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96. Only activities that can be observed in plain sight by officers lawfully positioned in the normal course of their duties will be admissible as evidence. Coolidge v. New Hampshire, 403 U.S. 443 (1971). One wonders whether in the future a policeman fitted with a bionic eye might be able to thwart the rule.

stitutional questions are posed. When police intrusion is as minimal as it appears to have been in *Walter*, the state's compelling interest in law enforcement should take precedence. "[T]he reasonableness of the search will depend on the nature of the intrusion into the privacy interest affected as balanced against the public interest to be served by that intrusion."[97]

The authors of the fourth amendment surely did not contemplate activities of the sort censured in *Walter* when they formulated the amendment's guarantees. An unconstitutional search, whether today or in colonial times, implies an unreasonable intrusion by government authorities into the privacy of one's home or one's personal effects. Five members of the current Supreme Court, however, may have lost sight of the plain meaning of the phrase "to search." The term is ambiguous in some respects, and the justices—like Justice Stewart in the case of obscenity—may not have been able to define it, but they ought to "know it when [they] see it."[98] Patently, the FBI's activity in *Walter* did not infringe upon any rights of the accused. Nevertheless, although they clearly had violated federal obscenity laws and were caught *flagrante delicto*, two fortunate individuals succeeded in escaping punishment thanks to a minor blunder on the part of a hapless constable.

MARGARET GORDON KLEIN

97. United States v. Burgos, 484 F. Supp. 605, 607 (S.D. Fla. 1980).
98. Jacobellis v. Ohio, 378 U.S. 184, 187 (1964) (Stewart, J., concurring).

# Criminal Law and Procedure—Self-Incrimination—Defining Interrogation for *Miranda* Purposes

*Rhode Island v. Innis*, 446 U.S. 291 (1980).

Defendant, wanted for the murder of a cab driver, was arrested near a school for handicapped children.[1] After being advised of his rights,[2] defendant was placed in a patrol car. En route to the police station one of the officers expressed anxiety to another officer about the possibility of a handicapped child finding the shotgun used in the crimes for which defendant was arrested.[3] Defendant's request to be returned to the scene of his arrest to reveal the location of the shotgun was honored.[4] Defendant's motion to suppress the shotgun and his statements to the police concerning it was denied by the trial court on the ground that he had waived his rights.[5] He was convicted of murder, kidnaping, and robbery.[6] On appeal, the Supreme Court of Rhode Island vacated the judgment of the lower court and held that defendant had been interrogated in violation of the require-

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1. Rhode Island v. Innis, 446 U.S. 291, 294 (1980). Defendant had been identified by another cab driver who was robbed earlier in the evening by a man wielding a shotgun. Defendant was arrested near the scene of this robbery. *Id.* at 293-94. The most complete account of the facts can be found in State v. Innis, 391 A.2d 1158, 1168-69 (R.I. 1978) (Kelleher, J., dissenting).

2. 446 U.S. at 294. Defendant was advised of his rights three times as additional officers arrived to assist the arresting officer. He invoked his right to counsel after the third recitation. *Id.* *See* text accompanying notes 47-51 *infra*.

3. The three officers assigned to take defendant to the police station were under orders not to interrogate him. One of the officers recalled at trial that his colleague "said it would be too bad if the little—I believe he said girl—would pick up the gun, maybe kill herself." 446 U.S. at 295.

4. After being returned to the scene of his arrest, defendant was advised of his rights for the fourth time and he indicated that he understood them. He then led the police to the shotgun hidden nearby. *Id.*

5. The trial court found that waiver was established and assumed, without finding, that defendant had been interrogated. *Id.* at 296.

6. State v. Innis, 391 A.2d 1158, 1160 (1978).

ments of *Miranda v. Arizona*[7] and *Brewer v. Williams*[8] and that he had not waived[9] his fifth amendment right against compulsory self-incrimination.[10] On writ of certiorari to the United States Supreme Court, *held*, judgment vacated and case remanded. Interrogation within the meaning of *Miranda* occurs "whenever a person in custody is subjected to either express questioning" or to conduct "reasonably likely to elicit an incriminating response."[11] *Rhode Island v. Innis*, 446 U.S. 291 (1980).

The controversial decision of the United States Supreme Court in *Miranda v. Arizona*[12] required that certain "procedural safeguards" be taken to counteract the "inherently compelling pressures" felt by persons subjected to "custodial interrogation."[13] In this manner the Court sought to protect the fifth amendment right against compulsory self-incrimination.[14] Al-

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7. 384 U.S. 436 (1966). The *Miranda* decision held that certain procedural safeguards were necessary to secure the fifth amendment right against compulsory self-incrimination in the context of custodial interrogation. *See* text accompanying notes 14 & 46-53 *infra*.

8. 430 U.S. 387 (1977). The *Brewer* decision held that the deliberate attempts to elicit information from a suspect, which were "tantamount to interrogation," were in violation of the sixth amendment right to counsel if they occurred after the initiation of formal judicial proceedings. 430 U.S. at 400-01. *See* text accompanying notes 73-79 *infra*.

9. The traditional test for waiver of constitutional rights is whether, in light of all the circumstances, the defendant relinquished his rights intentionally and with knowledge. *See* Brookhart v. Janis, 384 U.S. 1 (1966); Glasser v. United Sates, 315 U.S. 60 (1942); Johnson v. Zerbst, 304 U.S. 458 (1938). *Cf.* North Carolina v. Butler, 441 U.S. 369 (1979) (express waiver of fifth amendment rights not required); Schneckloth v. Bustamonte, 412 U.S. 218 (1973) (waiver of fourth amendment right against unreasonable search need not be knowledgeable, only voluntary).

10. State v. Innis, 391 A.2d 1158 (1978). The Rhode Island Supreme Court did not distinguish the fifth and sixth amendment rights, but assumed that the test for interrogation was the same for both. Although the court's emphasis was on the fifth amendment right against compulsory self-incrimination, the court's reliance on Brewer v. Williams, 430 U.S. 387 (1977), demonstrated that it also considered the right to counsel to be relevant. 391 A.2d at 1160-64.

11. 446 U.S. at 301.

12. 384 U.S. 436 (1966).

13. *Id.* at 444, 467.

14. After Kirby v. Illinois, 406 U.S. 682 (1972), in which the Court held that the sixth amendment right to counsel attached only upon the commencement of formal judicial proceedings by way of indictment, arraignment, infor-

though the Court clarified many of the ambiguous elements of *Miranda* in subsequent decisions,[15] the issue of what conduct by police constituted impermissible interrogation was not addressed.[16] The Court defined interrogation in the context of the sixth amendment right to counsel in *Brewer v. Williams*,[17] but it was unclear whether this definition applied in fifth amendment cases as well. The result was confusion and inconsistency among the state and lower federal courts.[18] The Supreme Court granted certiorari in *Rhode Island v. Innis* "to address for the first time the meaning of 'interrogation' under *Miranda v. Arizona*."[19]

The right against compulsory self-incrimination can be traced to the English common law.[20] This traditional right was incorporated into the fifth amendment to the United States Constitution: "No person . . . shall be compelled in any criminal case to be a witness against himself. . . ."[21] Although the right against compulsory self-incrimination was established early in

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mation, preliminary hearing, formal charge, or the like, it seemed settled that *Miranda* was strictly a fifth amendment decision, despite heavy sixth amendment overtones. However, Justice Douglas, a member of the *Miranda* majority, later wrote that "[t]he *Miranda* rule . . . was adopted . . . because of the right to counsel guaranteed by the Sixth Amendment and the right of an accused to remain silent guaranteed by the Fifth Amendment." W. DOUGLAS, THE COURT YEARS 387 (1980).

15. *See* notes 54-55 *infra*.

16. Under *Miranda* interrogation prior to warnings or after the invocation of the fifth amendment is impermissible. *See* text accompanying notes 46-53 *infra*.

17. 430 U.S. 387 (1977). *See* notes 8 & 14 *supra* and text accompanying notes 73-79 *infra*.

18. *See* notes 62-72 *infra* and accompanying text.

19. 446 U.S. at 297.

20. The right grew out of the jurisdictional squabbles in thirteenth-century England between the ecclesiastical courts, which initially had the power to administer the oath *ex officio*, binding the witness to answer all questions on pain of contempt, and the civil courts, which had no such power. The opposition of the Puritans to such inquisitorial practices, such as the eloquent protests of John Lilburn in the mid-seventeenth century, helped to establish the right at common law. M. BERGER, TAKING THE FIFTH 5-9, 14-20 (1980); Sunderland, *Self-Incrimination and Constitutional Principle: Miranda v. Arizona and Beyond*, 15 WAKE FOREST L. REV. 171, 173-76 (1979) [hereinafter cited as Sunderland].

21. U.S. CONST. amend. V.

the history of American law, it is the most recent of three distinct constitutional guarantees[22] which have been used to determine the admissibility of confessions into evidence at criminal trials.

The first test employed by the United States Supreme Court to determine the constitutionality[23] of admitting a confession into evidence was that of voluntariness, a fair trial requirement imposed on the states by the due process clause of the fourteenth amendment.[24] This voluntariness requirement was first applied in the 1936 case of *Brown v. Mississippi*,[25] in which the Court held that the admission at trial of confessions obtained by torture violated the due process clause. The test under the due process clause, as developed in subsequent decisions, determined the crucial issue of voluntariness from a consideration of the "totality of circumstances."[26] In declaring a confession to have been involuntary the Court emphasized physical mistreatment,[27] an atmosphere of mob violence,[28] prolonged questioning,[29] the suspect's ignorance or incapacity,[30] and trickery by the

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22. The other two guarantees are the fourteenth amendment guarantee of due process and the sixth amendment right to counsel. *See* text accompanying notes 23-43 *infra*.

23. The Court first addressed the issue in Hopt v. Utah, 110 U.S. 574 (1884), in which it stated that the common-law requirement of voluntariness was satisfied under the facts of that case. In Bram v. United States, 168 U.S. 532 (1897), the Court grounded the requirement of voluntariness not in the common law as a matter of evidence but in the fifth amendment as a constitutional guarantee. *Id.* at 542. However, *Bram* remained an anomaly until it was rehabilitated by *Miranda* almost 70 years later. *See* M. BERGER, *supra* note 20, at 102.

24. Brown v. Mississippi, 297 U.S. 278 (1936).

25. *Id.* The three codefendants in *Brown*, all of whom were black, were whipped, beaten, and hung by a deputy sheriff and a mob of whites before confessing to a murder. *Id.* at 281-83.

26. *See, e.g.*, Haynes v. Washington, 373 U.S. 503 (1963); Lynumn v. Illinois, 372 U.S. 528 (1963); Rogers v. Richmond, 365 U.S. 534 (1961); Blackburn v. Alabama, 361 U.S. 199 (1960); Spano v. New York, 360 U.S. 315 (1959); Watts v. Indiana, 338 U.S. 49 (1949); Ashcraft v. Tennessee, 322 U.S. 143 (1944); Chambers v. Florida, 309 U.S. 227 (1940).

27. Brown v. Mississippi, 297 U.S. 278 (1936).

28. Chambers v. Florida, 309 U.S. 227 (1940).

29. Watts v. Indiana, 338 U.S. 49 (1949); Ashcraft v. Tennessee, 322 U.S. 143 (1944). *Cf.* Lisenba v. California, 314 U.S. 219 (1941) (prolonged interroga-

police.[31] These factors, however, were not necessarily decisive.[32] The vagueness of this voluntariness standard resulted in inconsistency and confusion among the state and lower federal courts.[33] Nevertheless, by the early 1960s the trend was toward finding less egregious police conduct—conduct that tended to "overbear" the suspect's "will to resist"—to have rendered a confession involuntary.[34]

A second trend in the early 1960s was the willingness of the Court to expand the scope of the sixth amendment right to counsel.[35] Beginning in 1932 with *Powell v. Alabama*[36] the Court expanded the right to counsel and to appointed counsel for indigent defendants to apply not only to the trial but also to certain "critical stages" prior to trial.[37] In 1964 in *Massiah v. United*

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tion of sophisticated suspect does not render subsequent confession involuntary).

30. Lynumn v. Illinois, 372 U.S. 528 (1963); Blackburn v. Alabama, 361 U.S. 199 (1960). *Cf.* Gallegos v. Nebraska, 342 U.S. 55 (1951) (confession of migrant farm worker who did not speak English held to have been voluntary).

31. Rogers v. Richmond, 365 U.S. 534 (1961); Spano v. New York, 360 U.S. 315 (1959).

32. *See* Gallegos v. Nebraska, 342 U.S. 55 (1951); Lisenba v. California, 314 U.S. 219 (1941).

33. M. BERGER, *supra* note 20, at 109-12; Stone, *The Miranda Doctrine in The Burger Court*, 1977 S. CT. REV. 99, 101-03 (1978) [hereinafter cited as Stone].

34. Lynumn v. Illinois, 372 U.S. 528, 534 (1963); Rogers v. Richmond, 365 U.S. 534, 544 (1961).

35. "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. CONST. amend. VI.

36. 287 U.S. 45 (1932). The *Powell* decision held that the codefendants, three of the "Scottsboro Boys," had been denied their sixth amendment right to counsel—a "fundamental" right imposed upon the states by the due process clause of the fourteenth amendment—by the trial court's failure to appoint counsel in time to prepare an effective defense. *Id.* at 53.

37. Coleman v. Alabama, 399 U.S. 1 (1970) (preliminary hearing); Gilbert v. California, 388 U.S. 263 (1967) (postindictment lineup); United States v. Wade, 388 U.S. 218 (1967) (postindictment lineup); Escobedo v. Illinois, 378 U.S. 478 (1964) (point at which an investigation "has begun to focus on a particular suspect"); Massiah v. United States, 377 U.S. 201 (1964) (indictment); White v. Maryland, 373 U.S. 59 (1963) (preliminary hearing); Hamilton v. Alabama, 363 U.S. 52 (1961) (arraignment at which defenses must be raised or waived). *See also* Argersinger v. Hamlin, 407 U.S. 25 (1972) (counsel must be provided for indigent defendant charged with crime punishable by imprison-

*States*[38] the Court used a critical stage analysis[39] and concluded that statements made by a defendant during a postindictment surreptitious interrogation had been obtained in violation of the sixth amendment. The Court reasoned that if the right to counsel was to be effective at trial, it had to apply to attempts by police to obtain information from an indicted suspect.[40] Later that same year, the Court again moved forward the point at which the right to counsel attached. In *Escobedo v. Illinois*[41] the Court held that incriminating statements made by a suspect who had been denied access to his attorney during a preindictment interrogation at a police station should have been suppressed as the product of a denial of the suspect's sixth amendment right to counsel. While this was an unprecedented extension of that right, the limiting language of the *Escobedo* decision[42] raised questions about the scope of its holding.[43] Yet another decision

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ment); Gideon v. Wainwright, 372 U.S. 335 (1963) (counsel must be provided for indigent defendant charged with a felony).

38. 377 U.S. 201 (1964).

39. A critical stage is a point prior to trial, but after the initiation of formal judicial proceedings, at which the right to counsel must attach if it is to be effective at trial. *See* Kirby v. Illinois, 406 U.S. 682 (1972); Coleman v. Alabama, 399 U.S. 1 (1970); Gilbert v. California, 388 U.S. 263 (1967); United States v. Wade, 388 U.S. 218 (1967); Escobedo v. Illinois, 378 U.S. 478 (1964); Massiah v. United States, 377 U.S. 201 (1964); White v. Maryland, 373 U.S. 59 (1963); Hamilton v. Alabama, 368 U.S. 52 (1961); Powell v. Alabama, 287 U.S. 45 (1932).

40. 377 U.S. at 204-06.

41. 378 U.S. 478 (1964).

42. We hold . . . that where . . . the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect, the suspect has been taken into police custody, the police carry out a process of interrogations that lends itself to elicting incriminating statements, the suspect has requested and been denied an opportunity to consult with his lawyer, and the police have not effectively warned him of his absolute constitutional right to remain silent, the accused has been denied "the Assistance of Counsel" in violation of the Sixth Amendment . . . and that no statement elicited by the police during the interrogation may be used against him at a criminal trial.

*Id.* at 490-91.

43. Stone, *supra* note 33, at 101-03.

announced in 1964, *Malloy v. Hogan*,[44] which applied the fifth amendment to the states by way of the fourteenth amendment due process clause, laid the foundation for a decision that rendered all debate over the scope and merits of *Escobedo* academic—the controversial case of *Miranda v. Arizona*.[45]

The *Miranda* Court considered four consolidated cases[46] that raised the issue of the admissibility of confessions obtained from suspects in police custody who had been interrogated without first being advised of their constitutional rights to remain silent or to have the assistance of counsel. The Court concluded that the process of "custodial interrogation," defined as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of their freedom of action in any significant way,"[47] involved "inherently compelling pressures which work to undermine the individual's will to resist and compel him to speak when he would not otherwise do so freely."[48] To counterbalance these pressures, which were thought to undermine the fifth amendment right against compulsory self-incrimination (rather than the fourteenth amendment's guarantee of due process), the Court required that certain procedural safeguards be taken. Thus, the Court found that a suspect must "be warned prior to any questioning that he has the right to remain silent, that anything he says may be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so

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44. 378 U.S. 1 (1964). *Malloy* held that a state could not imprison a grand jury witness who asserted his right against compulsory self-incrimination without violating the due process clause of the fourteenth amendment. *Id.* at 11.

45. 384 U.S. 436 (1966).

46. Westover v. United States, 342 F.2d 684 (9th Cir. 1965); Miranda v. Arizona, 98 Ariz. 18, 401 P.2d 721 (1965); California v. Stewart, 62 Cal. 2d 571, 400 P.2d 97, 43 Cal. Rptr. 201 (1965); Vignera v. New York, 15 N.Y.2d 970, 207 N.E.2d 527, 259 N.Y.S.2d 857 (1965).

47. 384 U.S. at 444. The issue of when a suspect is in custody, as distinct from that of when a suspect admittedly in custody has been interrogated, is beyond the scope of this Note. For a discussion of cases in which the custody issue has arisen, see Annot., 31 A.L.R.3d 565 (1970).

48. 384 U.S. at 467.

desires."[49] The Court also required that all questioning cease when a suspect invokes his rights[50] and placed a heavy burden of proof on the state to establish a waiver of these rights.[51] As was noted by Justice Harlan in his dissent, the *Miranda* majority took a purist position regarding the fifth amendment which condemned virtually any coercion of a suspect leading to a confession.[52] Although *Miranda* was criticized as unsupported by legal history in its indiscriminate mixture of the historically distinct voluntary confessions requirement, the right to counsel, and the right against compulsory self-incrimination,[53] the decision created a new, and stringent, standard for determining the constitutionality of admitting confessions based upon the fifth amendment right against compulsory self-incrimination.

After an initial expansion,[54] the Supreme Court began to limit the scope of *Miranda*.[55] Surprisingly, the Court never di-

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49. *Id.* at 479.

50. Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease. At this point he has shown that he intends to exercise his Fifth Amendment privilege; any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise.

*Id.* at 473-74 (footnote omitted).

51. *Id.* at 475. The standard applied to waiver was the "knowing and intelligent" standard of Johnson v. Zerbst, 304 U.S. 458 (1938). *Cf.* North Carolina v. Butler, 441 U.S. 369 (1979) (express waiver of *Miranda* rights not required).

52. 384 U.S. at 505 (Harlan, J., dissenting).

53. *Id.* at 499 (Clark, J., dissenting); *id.* at 504 (Harlan, J., dissenting); *id.* at 526 (White, J., dissenting); M. BERGER, *supra* note 20, at 100-02; Sunderland, *supra* note 20, at 188-97. The right against compulsory self-incrimination had never before been applied to pretrial interrogations. 384 U.S. at 510-12 (Harlan, J., dissenting); *id.* at 526-31 (White, J., dissenting).

54. Mathis v. United States, 391 U.S. 1 (1968). In *Mathis* the Court held that *Miranda* warnings were required before questioning by Internal Revenue Service agents when the investigation might lead to criminal charges and when the subject of that investigation was in custody, even for unrelated reasons.

55. *See* North Carolina v. Butler, 441 U.S. 369, 374-76 (1979) (express waiver of *Miranda* rights not required); Oregon v. Mathiason, 429 U.S. 492, 495-96 (1977) (*Miranda* does not apply to inherently coercive noncustodial situations); United States v. Mandujano, 425 U.S. 564, 578-80 (1976) (*Miranda* warnings not required prior to grand jury testimony) (plurality opinion); Beck-

rectly addressed the issue of what police conduct constituted interrogation under *Miranda*. Although the Court did confront the issue of interrogation in the context of the sixth amendment in *Brewer v. Williams*,[56] it was not clear whether the Court's dictates in *Brewer* applied to cases arising under *Miranda* and the fifth amendment.[57] The lower courts, however, were faced with the issue many times.[58]

If the *Miranda* opinion was vague about what constituted interrogation,[59] it was somewhat more explicit about what did not. First of all, "[a]ny statement given freely and voluntarily without any compelling influence is . . . admissible in evidence."[60] In addition, "[g]eneral on-the-scene questioning as to facts surrounding a crime or other general questioning of citizens in the fact-finding process" was excluded from the restrictions imposed on "custodial interrogation."[61] Of these two exceptions, the exception for voluntary statements was applied more often by the lower courts.[62] Most courts applied a test for

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with v. United States, 425 U.S. 341, 346-47 (1976) (*Miranda* does not apply to inherently coercive noncustodial interrogations); Michigan v. Mosley, 423 U.S. 96, 104 (1975) (second interrogation of suspect after invocation of right to silence permissible so long as his "right to cut off questioning" was "scrupulously honored") (quoting Miranda v. Arizona, 384 U.S. at 474, 479); Oregon v. Hass, 420 U.S. 714, 722-23 (1975) (statements obtained in violation of *Miranda* admissible for impeachment purposes); Michigan v. Tucker, 417 U.S. 433, 441-46 (1974) (*Miranda* "procedural safeguards" not required by the fifth amendment but merely "prophylactic standards" intended to secure the right against compulsory self-incrimination); Harris v. New York, 401 U.S. 222, 226 (1971) (statements obtained in violation of *Miranda* admissible for impeachment purposes).

56. Brewer v. Williams, 430 U.S. 387 (1977).

57. *See* note 14 *supra* & notes 73-79 *infra* and accompanying text.

58. *See* notes 62-72 *infra*.

59. *See* text accompanying note 47 *supra*.

60. 384 U.S. 436, 478 (1966).

61. *Id.* at 477.

62. *See, e.g.*, United States v. Cruz, 265 F. Supp. 15, 20 (W.D. Tex. 1967) (suspect's assertion that marked money from sale of heroin belonged to him was voluntary); People v. Mercer, 257 Cal. App. 2d 244, 246, 64 Cal. Rptr. 861, 863 (1967) (escaping prisoner's statement "I did it. No one else was involved" when stopped by officer was voluntary); People v. Leffew, 58 Mich. App. 533, 536, 228 N.W.2d 449, 451 (1975) (suspect's statement about rings he was wearing when stopped by officer was voluntary); People v. Kaye, 25 N.Y.2d 139,

interrogation based on the officer's subjective[63] or objective[64] intent when confronting the suspect, although many merely stated their conclusions. Some courts held that subterfuge on the part of officers,[65] prolonged questioning,[66] or accusatory statements by officers[67] rendered subsequent incriminating statements involuntary. The courts in these latter cases emphasized the effect of the police conduct on the suspect rather than the officer's intent—an emphasis which seems more in harmony with the desire of the Supreme Court in *Miranda* to avoid coercion of suspects. The exception for general on-the-scene questioning was applied when incriminating statements were made in response to "threshold inquiries" into the nature of the situation confronting the officer or to questions about prior statements.[68] The most widely used test for interrogation was again that of the officer's intent judged either by an objective or a subjective stan-

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144, 250 N.E.2d 329, 332, 303 N.Y.S.2d 41, 46 (1969) (officer's request that suspect start from the beginning when suspect made voluntary confession was not interrogation); Commonwealth v. Whitman, 252 Pa. Super. 66, 71-72, 380 A.2d 1284, 1287 (1977) (suspect's statement that he committed the roberry but did not shoot anyone held to be voluntary); McClellan v. State, 53 Wis. 2d 724, 733, 193 N.W.2d 711, 716 (1972) (suspect's incriminating statement after being called "an amateur" by officer was voluntary). *See generally* Annot., 31 A.L.R.3d 565, 676-96 (1970).

63. *See* Johnson v. State, 380 N.E.2d 1236 (Ind. 1978); State v. Simoneau, 402 A.2d 870 (Me. 1979); People v. Leffew, 58 Mich. App. 533, 228 N.W.2d 449 (1975).

64. *See* Commonwealth v. Mercier, 451 Pa. 211, 302 A.2d 337 (1973); Commonwealth v. Simala, 434 Pa. 219, 252 A.2d 575 (1969); Commonwealth v. Whitman, 252 Pa. Super. 66, 380 A.2d 1284 (1977).

65. United States v. Massey, 550 F.2d 300 (5th Cir. 1977) (suspect assured that questions were not relevant to investigation).

66. Moore v. Ballone, 488 F. Supp. 798 (E.D. Va. 1980) (suspect questioned for five hours).

67. State v. Godfrey, 131 N.J. Super. 168, 329 A.2d 75 (1974) (mentally deficient suspect called a liar and accused of guilt by officer).

68. *See, e.g.*, Neal v. State, 263 S.E.2d 185, 187 (Ga. App. 1979) ("What happened?"); Johnson v. State, 380 N.E.2d 1236, 1240-41 (Ind. 1978) ("What happened?"); State v. Simoneau, 402 A.2d 870, 872 (Me. 1979) ("What's going on?", "What do you mean?"); State v. Weinacht, 203 Neb. 124, 127, 277 N.W.2d 567, 569 (1979) ("Does that mean that you do not want to say anything without an attorney present?"). *Cf.* People v. Hoffman, 81 Ill. App. 3d 304, 307, 401 N.E.2d 323, 325-26 (1980) ("Where's the gun?").

dard. Some courts, however, did consider the suspect's perceptions,[69] and for at least one court this was the decisive factor.[70] Cases involving planned or inadvertent confrontations between a suspect and an accomplice or between a suspect and incriminating evidence[71] and cases involving "indirect questioning"[72] presented particularly difficult questions—and the courts were anything but consistent in their answers. Thus, the result of the Supreme Court's failure to address the issue of interrogation

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69. *See* State v. Weinacht, 203 Neb. 124, 277 N.W.2d 567 (1979). The court stated in *Weinacht* that " '[i]nterrogation' occurs when the subject is placed under a compulsion to speak." *Id.* at 130, 277 N.W.2d at 571.

70. Proctor v. United States, 404 F.2d 819 (D.C. Cir. 1968). In *Proctor* the court held that a suspect's incriminating statement in response to a routine lineup question was the product of impermissible interrogation. The court reasoned as follows:

> Even innocent questions asked of a suspect in the inherently coercive atmosphere of the police station may create in him the impression that he must answer them. His answers then cannot be considered voluntary in the sense required by *Miranda*. Where such answers turn out to be damaging, they cannot be used against him at trial . . . .

*Id.* at 821.

71. *See, e.g.*, State v. Sauve, 112 Ariz. 576, 544 P.2d 1091 (1976) (confrontation with incriminating evidence was interrogation); People v. Sanders, 55 Ill. App. 3d 178, 370 N.E.2d 1213 (1977) (confrontation with confession of accomplice was interrogation); Commonwealth v. Mercier, 451 Pa. 211, 302 A.2d 337 (1973) (confrontation with confession of accomplice was interrogation); Commonwealth v. Hamilton, 445 Pa. 292, 285 A.2d 172 (1971) (confrontation with accomplice was interrogation). *Cf.* Rosher v. State, 319 So. 2d 150 (Fla. App. 1975) (confrontation with accomplice was not interrogation); People v. Doss, 44 Ill. 2d 541, 256 N.E.2d 753 (1970) (confrontation with accomplice was not interrogation); Vines v. State, 285 Md. 369, 402 A.2d 900 (1979) (confrontation with incriminating evidence was not interrogation); Howell v. State, 5 Md. App. 337, 247 A.2d 291 (1968) (confrontation with confession of accomplice was not interrogation), *cert. denied*, 396 U.S. 907 (1969); Commonwealth v. Sheperd, 409 A.2d 894 (Pa. Super. 1979) (confrontation with accomplice was not interrogation).

72. *See, e.g.*, State v. Amorin, 604 P.2d 45 (Hawaii 1979) (officer's questioning of third person in suspect's presence was interrogation of suspect); Commonwealth v. Simala, 434 Pa. 219, 252 A.2d 575 (1969) (official's remark "if you want to talk, talk" was interrogation); State v. Boggs, 16 Wash. App. 682, 559 P.2d 11 (1977) (casual conversation between suspect and officer was interrogation). *Cf.* Santos v. Bayley, 400 F. Supp. 784 (M.D. Pa. 1975) (conversation between officers about marijuana in hearing of suspect in custody for possession of marijuana was not interrogation).

under *Miranda* was confusion and inconsistency among the state and lower federal courts.

In 1977 the Supreme Court was given an opportunity to dispel the confusion surrounding the issue of interrogation under *Miranda* in the case of *Brewer v. Williams*.[73] In that case the defendant was taken by detectives from one city to another after his arraignment on charges of abducting a child. Despite warnings not to answer, he revealed the location of the child's body after a detective expressed anxiety over finding the body before an impending snowfall.[74] Since the defendant had been arraigned before the trip, the Court declined to consider the case under *Miranda* and chose instead to consider it as arising under *Massiah v. United States*[75] and the sixth amendment.[76] Finding that the detective in *Brewer*, like the agents in *Massiah*, had "deliberately elicited" information from the defendant after the initiation of judicial proceedings by means "tantamount to interrogation" in the absence of counsel, the Court held that defendant's sixth amendment right to counsel had been violated.[77] Since the Court did not rely on *Miranda*, and particularly in light of its prior decision in *Kirby v. Illinois*,[78] which held that the sixth amendment right to counsel attached only upon the initiation of formal judicial proceedings, it was unclear whether the *Brewer* "deliberately elicited" test for interrogation was relevant in the context of custodial interrogation. Two years after the *Brewer* decision, the Supreme Court of Rhode Island, believ-

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73. 430 U.S. 387 (1977).

74. *Id.* at 392-93. The detective's ploy has become known as the "Christian burial speech." *Id.*

75. 377 U.S. 201 (1964).

76. *See* notes 38-40 *supra* and accompanying text.

77. 430 U.S. at 397-406.

78. 406 U.S. 682 (1972). The *Kirby* case held that *Escobedo v. Illinois*, which was contra on the issue of when the right to counsel attached, *see* text accompanying note 41 *supra*, was limited to its facts. The Court stated that *Escobedo* was in reality a fifth amendment decision. This resulted in the recognition of a *fifth* amendment right to counsel in the preindictment custodial interrogation situation created by *Miranda*. 406 U.S. at 687-90. *See generally* Grano, *Rhode Island v. Innis: A Need to Reconsider the Constitutional Premises Underlying the Law of Confessions*, 17 AM. CRIM. L. REV. 1, 5-31 (1979); White, *Rhode Island v. Innis: The Significance of a Suspect's Assertion of His Right to Counsel*, 17 AM. CRIM. L. REV. 53, 57-61 & 70 (1979).

ing *Brewer* to be relevant to fifth amendment issues, relied upon it in reversing the conviction of the defendant in *State v. Innis*.[79]

In *Rhode Island v. Innis*[80] the United States Supreme Court confronted the issue of what police conduct constituted interrogation under *Miranda*. Dismissing *Brewer* as inapposite because of its reliance on the sixth amendment,[81] the Court, per Justice Stewart, stated that "[t]he concern of the Court in *Miranda* was that the 'interrogation environment' created by the interplay of interrogation and custody would 'subjugate the individual to the will of his examiner' and thereby undermine the privilege against compulsory self-incrimination."[82] Reasoning that the protection of fifth amendment rights required a definition of interrogation that encompassed more subtle forms of examination than direct questioning, the Court adopted the following formulation:

> We conclude that the *Miranda* safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent. That is to say, the term "interrogation" . . . refers not only to express questioning, but also to *any words or actions on the part of the police* (other than those normally attendant to arrest and custody) *that the police should know are reasonably likely to elicit an incriminating response from the suspect.* The latter portion of the definition focuses primarily upon the perceptions of the suspect, rather than the intent of the police.[83]

The Court pointed out that its emphasis on the "perceptions of the suspect" was in harmony with the goals of *Miranda*.[84] The Court also noted, however, that the intent of the police was not irrelevant since it was useful in determining the foreseeability of an incriminating response[85] and "the police surely cannot be held accountable for the *unforeseeable* results of their words or

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79. *See* text accompanying notes 93-100 *infra*.
80. 446 U.S. 291 (1980).
81. *See* text accompanying notes 93-100 *infra*.
82. 446 U.S. at 299.
83. *Id.* at 300-01 (emphasis added) (footnotes omitted).
84. *Id.* at 301-02.
85. *Id.* at 301 n.7.

actions."[86] Applying this definition to the facts before it, the Court held that defendant was not interrogated because the conversation between the officers in the car did not amount to "words or actions . . . reasonably likely to elicit an incriminating response" from the suspect.[87] Defendant's statements were an "unforeseeable result" of the officers' discussion of the dangers a concealed and loaded shotgun posed to nearby handicapped children because "nothing in the record suggested that the officers were aware that [defendant] was *peculiarly susceptible* to an appeal to his conscience concerning the safety of handicapped children."[88]

The application of the Court's definition of interrogation to the facts of *Innis* strains that definition to the breaking point. To suggest that one must be "peculiarly susceptible" to act for the protection of handicapped children represents a cynical view of the reasonable man, who acts as the standard for determining the foreseeability of a response. As Justice Marshall put it in his dissent, "[o]ne can scarcely imagine a stronger appeal to the conscience of a suspect—*any* suspect—than the assertion that if the weapon is not found an innocent person will be hurt or killed."[89] In addition, as Justice Stevens pointed out in his dissent, the Court's determination of the issue by its new definition was curious since the trial court had merely assumed, without finding, that defendant had been interrogated.[90] Justice Stevens argued that the case should have been remanded for determination of the factual issues of interrogation and waiver in light of the new definition.[91]

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86. *Id.* at 302 (emphasis added).

87. *Id.* at 301-02.

88. *Id.* at 302 (emphasis added). The Court had suggested earlier that "[a]ny knowledge the police may have had concerning the unusual susceptibility of a defendant to a particular form of persuasion might be an important factor in determining whether the police should have known that their words or actions were reasonably likely to elicit an incriminating response from the suspect." *Id.* at 302 n.8.

89. *Id.* at 306 (Marshall, J., dissenting). At least two commentators agree that the officer's statement was either likely to or intended to elicit a response. Grano, *supra* note 78, at 35-36; White, *supra* note 78, at 68-69.

90. 446 U.S. at 314 (Stevens, J., dissenting). *See* note 5 *supra*.

91. 446 U.S. at 317 (Stevens, J., dissenting).

The Court distinguished the seemingly on point precedent of *Brewer v. Williams*,[92] in a footnote, on the grounds that *Brewer* rested solely on the sixth amendment right to counsel, which arises only after the initiation of formal judicial proceedings.[93] *Innis*, on the other hand, involved the fifth amendment as interpreted in *Miranda*, which applies to custodial interrogation prior to the initiation of formal judicial proceedings.[94] The Court stated that "[t]he definitions of 'interrogation' under the Fifth and Sixth Amendments . . . are not necessarily interchangeable, since the policies underlying the two constitutional protections are quite distinct."[95] Although, given the decision in *Kirby v. Illinois*,[96] this is certainly true, it fails to explain why those two policies dictate such distinct definitions and results, particularly in light of the refusal of at least five members of the Court to make that distinction in *Brewer*.[97] Concerned with this ambiguity, Chief Justice Burger stated in his *Innis* concurrence that he feared "that the rationale . . . of the Court's opinion will not clarify the tension between this holding and *Brewer v. Williams* and our other cases."[98] This fear was apparently justified,

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92. *See* notes 73-79 *supra* and accompanying text.

93. 446 U.S. at 300 n.4.

94. *Id.*

95. *Id.* The Court cited Kamisar, *Brewer v. Williams, Massiah, and Miranda: What is Interrogation? When Does it Matter?* 67 GEO. L.J. 1, 41-55 (1978) as authority for this view. In the section of his Article cited by the Court, Professor Kamisar argued that *Massiah* created an absolute right to counsel after indictment which protects a defendant from *all* deliberate attempts to elicit information, not only from those that attempt to elicit it through interrogation. *Id.*

96. *See* note 78 *supra* and accompanying text.

97. Justice Marshall stated that both the defendant's fifth and sixth amendment rights had been violated. 430 U.S. at 407 (Marshall, J., concurring). Chief Justice Burger stated that *Brewer* arose "under *Miranda v. Arizona* and the Sixth Amendment right to counsel." *Id.* at 422 (Burger, C.J., dissenting) (citation omitted). Justice White, who was joined in his dissent by Justices Blackmun and Rehnquist, stated that "[t]here is absolutely no reason to require an additional question to the already cumbersome *Miranda* litany just because the majority finds another case—*Massiah v. United States*—providing exactly the same right to counsel as that involved in *Miranda*." *Id.* at 436 n.5 (White, J., joined by Blackmun & Rehnquist, JJ., dissenting).

98. 446 U.S. at 304-05 (Burger, C.J., concurring) (citation omitted).

as Justice Stevens was of the opinion that defendant's assertion of his right to counsel made the two cases "indistinguishable."[99]

If the application of the Court's new definition of interrogation and its distinguishing of *Brewer* raise doubts, there is also room for doubt whether the *Innis* definition adheres to the dictates of *Miranda*. *Miranda* represented the triumph of a purist's view of the fifth amendment and was designed to protect a suspect's willingness to assert his rights.[100] To determine whether the exacting standards of *Miranda* have been met, it is necessary to ascertain whether the words or actions of the police constituted custodial interrogation, with all its concomitant compelling pressures, from the suspect's point of view. The intent of the police, whether judged by a subjective or an objective standard, is simply irrelevant to such an inquiry.[101] Although the *Innis* definition gives more weight to the suspect's perceptions than to the officer's intent, virtually any mention of intent as a relevant factor seems to be in derogation of the goals and rationale of *Miranda*. Thus, it seems incongruous for the Court to state in *Innis* that "[t]he Rhode Island Supreme Court erred . . . in equating 'subtle compulsion' with interrogation"[102] when the concern of the Court in *Miranda* was to prevent "compulsion, subtle or otherwise."[103] Although the high standards of *Miranda* can be criticized for a number of reasons, the fact remains that such a standard was established in that case. Justice Stevens summarized this criticism in his dissent and offered an alternative definition:

> From the suspect's point of view, the effectiveness of the warning depends on whether it appears that the police are scrupulously honoring his rights. Apparent attempts to elicit information from a suspect after he has invoked his right to cut off questioning necessarily demean that right and tend to reinstate the imbalance between police and suspect that the *Miranda* warnings are designed to correct. Thus, if the rationale for requiring those warnings in the first place is to be respected, any

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99. *Id.* at 310 n.7 (Stevens, J., dissenting).
100. *See* text accompanying notes 46-53 *supra*.
101. *See* note 70 *supra*; Kamisar, *supra* note 95, at 9.
102. 446 U.S. at 303.
103. 384 U.S. 436, 473-74 (1966).

> police conduct or statements that would appear to a reasonable person in the suspect's position to call for a response must be considered "interrogation."[104]

Thus, by placing any emphasis upon the officer's intent, the *Innis* definition risks diverting a *Miranda* inquiry from its proper path.

If the *Innis* definition does dilute the *Miranda* requirements, it seems ironic that Justice Marshall, who as Solicitor General argued one of the companion cases to *Miranda* before the Supreme Court,[105] and Justice Brennan, the only member of the *Miranda* majority left on the Court, were "substantially in agreement" with the *Innis* definition of interrogation.[106] Justice Marshall's belief that his definition of interrogation—"police conduct . . . intended or likely to produce a response from a suspect in custody"—was "equivalent, for practical purposes," with the majority's definition[107] may reflect skepticism about the impact of fine verbal distinctions on the results obtained in lower courts or in the back seats of police cars. Whatever their motivations may have been, it is important to note that two of the Justices who should be most familiar with the views of the *Miranda* majority found nothing objectionable in the *Innis* definition of interrogation, although they did see its application to the facts of the case as "an aberration."[108]

In *Rhode Island v. Innis*, as in *Brewer v. Williams*,[109] the United States Supreme Court missed an opportunity to clarify some of the more troubling issues concerning the fifth amend-

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104. 446 U.S. at 311 (Stevens, J., dissenting) (footnotes omitted). Justice Stevens stated in a footnote to the passage in the text that he "would use an objective standard both to avoid the difficulties of proof inherent in a subjective standard and to give police adequate guidance in their dealings with suspects who have requested counsel." *Id.* at 311 n.10 (Stevens, J., dissenting).

105. Westover v. United States, 384 U.S. 436 (1966).

106. 446 U.S. at 305 (Marshall & Brennan, JJ., dissenting).

107. *Id.* (Marshall & Brennan, JJ., dissenting).

108. *Id.* (Marshall & Brennan, JJ., dissenting). Of course, the decision of Justices Marshall and Brennan, widely seen as the members of the current Court most concerned with the rights of suspects, to lend their support to the *Innis* definition while dissenting from its application may result in a broader interpretation of that definition by the lower courts.

109. *See* notes 73-79 *supra* and accompanying text.

ment right against compulsory self-incrimination and the sixth amendment right to counsel.[110] Of course, the decision will be welcomed if it leads to more careful analysis in the lower courts.[111] The Court's failure, however, to explain adequately its application of the *Innis* definition of interrogation to the facts before it, and its rejection of *Brewer* as relevant precedent, are not likely to lead to a consistent application of the principles of *Miranda* by lower courts, and indeed may exacerbate an already muddled situation.[112] As Chief Justice Burger, a member of the *Innis* majority, wrote, "Trial judges have enough difficutly discerning the boundaries and nuances flowing from post-*Miranda* opinions, and we do not clarify that situation today."[113] Finally, any inconsistency[114] between *Innis* and *Miranda* presents an even more serious problem. Although such discrepancies may fall short of the dire predictions of some critics that the present Court will "gradually dismantle *Miranda* piecemeal,"[115] it is wise to recall the warning echoed by Justice Stewart in an earlier decision:[116]

> "It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that

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110. *See* White, *supra* note 78, at 56 & 69-70.

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

112. *See, e.g.*, Commonwealth v. Brant, 406 N.E.2d 1021 (Mass. 1980) (confrontation of suspect with confession of accomplice held to be interrogation); *In re* Durand, 292 N.W.2d 383 (Neb. 1980) (confrontation of suspect with confession of accomplice held to be interrogation); People v. Benitez, 76 A.D.2d 196, 430 N.Y.S.2d 287 (1980) (casual conversation between officers and suspect while returning suspect to jail by car was interrogation). *Cf.* State v. Mullaley, 614 P.2d 820 (Ariz. 1980) (casual conversation between officer and suspect held not to be interrogation).

113. 446 U.S. at 305.

114. *See* notes 101-07 *supra* and accompanying text.

115. Stone, *supra* note 33, at 169. *See also* Michigan v. Mosley, 423 U.S. 96, 111 (1975) (Brennan, J., dissenting); Vines v. State, 40 Md. App. 658, 664, 394 A.2d 809, 812 (1978) (Moylan, J., concurring), *aff'd*, 285 Md. 369, 402 A.2d 900 (1979). *See also* W. DOUGLAS, *supra* note 14, at 231; Sunderland, *supra* note 20, at 204.

116. Schneckloth v. Bustamonte, 412 U.S. 218 (1974). *See* note 9 *supra*.

> 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."[117]

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117. 412 U.S. at 228-29 (quoting Boyd v. United States, 116 U.S. 616, 635 (1886)).

# BOOK REVIEW

CRIMINAL PROCEDURE. By Joseph G. Cook and Paul Marcus. New York: Matthew Bender. 1981. Pp. 930. $24.50.

Few areas of law allow the casebook author to produce a work that is both comprehensive and manageable. Touching upon every issue that merits attention typically results in a massive casebook, one that is far too long for use in the standard law school course. Criminal procedure has become such a subject, and authors of a casebook like *Criminal Procedure*[1] by Joseph G. Cook and Paul Marcus face a choice between comprehensiveness and manageability.

This was not always the case. The law of criminal procedure first appeared in the casebooks as an appendage to the study of substantive criminal law. In 1940 Jerome Michael and Herbert Wechsler devoted only ninety pages of their 1410-page *Criminal Law and Its Administration* to what they labeled "Administrative Problems": "Search and Seizure," "Entrapment," "Third Degree," "Fair Trial," and "Double Jeopardy."[2] By 1952 casebook authors like Rollin M. Perkins were aware that these and similar topics deserved more space. Three of the twelve chapters in Perkins' *Cases on Criminal Law and Procedure*[3] focused exclusively on procedural law. Growing recognition of the significance of criminal justice administration caused Monrad G. Paulsen and Sanford H. Kadish to include a 462-page procedure section in their 1962 edition of *Criminal Law and Its Processes.*[4]

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1. J. COOK & P. MARCUS, CRIMINAL PROCEDURE (1981).

2. J. MICHAEL & H. WECHSLER, CRIMINAL LAW AND ITS ADMINISTRATION xi (1940). The casebook accorded almost as much space to the impact of "Freedom of Speech, Press, Assembly and Religion" on criminal justice. *Id.* (87 pages).

3. R. PERKINS, CASES ON CRIMINAL LAW AND PROCEDURE (1952) (only 184 of 851 pages focused on criminal procedure).

4. M. PAULSEN & S. KADISH, CRIMINAL LAW AND ITS PROCESSES (1962). In the second edition, published in 1969, the procedural section contained 745

This same recognition led to the appearance of casebooks devoted exclusively to criminal procedure. *Cases and Materials on the Administration of Criminal Justice*[5] by Sullivan, Hardin, Huston, Lacy, Murray, and Pugh and *Modern Criminal Procedure*[6] by Hall and Kamisar were published in 1965. A second edition of *Modern Criminal Procedure* appeared in 1966[7] and a third in 1969.[8] By 1974, when the fourth edition of *Modern Criminal Procedure* was published,[9] no fewer than eight casebooks devoted exclusively to criminal procedure were on the market.[10]

Casebook authors were not the only ones who noted the increased significance of criminal procedure. While the law professors were generating casebooks, defense attorneys, prosecutors, and judges were engaged in a sometimes feverish production of new procedural law. In the late 1970s this expansion in the body of criminal procedure law gave prospective authors of casebooks

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pages compared to the substantive section which contained 669 pages. *Id.* (2d ed. 1969). This same proportion was maintained in the third edition. *Id.* (3d ed. 1975) (821 pages procedural to 753 pages substantive). The publishers of the casebook have indicated that the combined law and procedure format will be revised substantially in the forthcoming fourth edition, in part because of the rapid expansion in criminal procedure law.

5. F. SULLIVAN, P. HARDIN, J. HUSTON, F. LACY, D. MURRAY & G. PUGH, CASES AND MATERIALS ON THE ADMINISTRATION OF JUSTICE (1965).

6. L. HALL & Y. KAMISAR, MODERN CRIMINAL PROCEDURE (1965) (562 pages).

7. *Id.* (2d ed. 1966) (881 pages).

8. L. HALL, Y. KAMISAR, W. LAFAVE & J. ISRAEL, MODERN CRIMINAL PROCEDURE (3d ed. 1969) (1456 pages).

9. Y. KAMISAR, W. LAFAVE & J. ISRAEL, MODERN CRIMINAL PROCEDURE (4th ed. 1974) (1644 pages).

10. In addition to the fourth edition of *Modern Criminal Procedure* and the second edition of *Cases and Materials on the Administration of Criminal Justice* (which was published in 1969), the following casebooks were extant in 1974: A. GOLDSTEIN & L. ORLAND, CRIMINAL PROCEDURE (1974); F. INBAU, J. THOMPSON, J. HADDAD, J. ZAGEL & G. STARKMAN, CASES AND COMMENTS ON CRIMINAL PROCEDURE (1974); F. MILLER, R. DAWSON, G. DIX & R. PARNAS, CASES AND MATERIALS ON CRIMINAL JUSTICE ADMINISTRATION AND RELATED PROCESSES (1971); F. REMINGTON, D. NEWMAN, E. KIMBALL, M. MELLI & H. GOLDSTEIN, CRIMINAL JUSTICE ADMINISTRATION (1969); H. UVILLER, THE PROCESSES OF CRIMINAL JUSTICE: INVESTIGATION (1974); L. WEINREB, CRIMINAL PROCESS (2d ed. 1974).

or of successor editions a choice. They could produce either works that were comprehensive but were overlong, or ones that were short enough to be "teachable" but consequently were restricted in scope.[11]

Foremost among the authors opting for comprehensiveness were Kamisar, LaFave, and Israel; the fifth edition of *Modern Criminal Procedure,* published in early 1980, is 1724 pages long.[12] There is already a Fall 1980 supplement, which contains 101 additional pages. The majority of recently published casebook editions follow this trend toward comprehensiveness.[13]

A growing minority of casebook authors, however, are choosing manageability over completeness, apparently preferring to produce books that allow the instructor to begin on the first page with some hope of being able to cover all the material by the end of the course. Such manageability seems particularly desirable in a casebook assigned to a first-year class,[14] since anxiety about material omitted and about "skipping around in the

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11. This choice took a specialized form when the format of the casebook combined criminal law and procedure. Either the work had to be truly gargantuan, or one half of the format had to be given short shrift. The latter choice has proved the more popular. *E.g.*, P. JOHNSON, CRIMINAL LAW IN ITS PROCEDURAL CONTEXT (2d ed. 1980); J. VORENBERG, CRIMINAL LAW AND PROCEDURE (1975); *see* note 4 *supra*.

12. *See* Y. KAMISAR, W. LAFAVE & J. ISRAEL, MODERN CRIMINAL PROCEDURE (5th ed. 1980); *cf.* notes 6-9 *supra* (indicating lengths of previous editions). The publishers of *Modern Criminal Procedure* also produce a paperbound version of Kamisar, LaFave, and Israel's first twelve chapters under the title *Basic Criminal Procedure*. This abbreviated version contains over 500,000 words.

13. F. INBAU, J. THOMPSON, J. HADDAD, J. ZAGEL & G. STARKMAN, CASES AND COMMENTS ON CRIMINAL PROCEDURE (2d ed. 1980) (1564 pages); F. MILLER, R. DAWSON, G. DIX & R. PARNAS, CASES AND MATERIALS ON CRIMINAL JUSTICE ADMINISTRATION (1976) (1357 pages); S. SALTZBURG, AMERICAN CRIMINAL PROCEDURE (1980) (1253 pages); H. UVILLER, THE PROCESSES OF CRIMINAL JUSTICE: INVESTIGATION AND ADJUDICATION (2d ed. 1979) (1384 pages); L. WEINREB, CRIMINAL PROCESS (3d ed. 1978) (1274 pages).

14. A number of law schools require classes in criminal procedure in the first year. At Stetson, for example, criminal procedure was added to the first-year curriculum in 1977; forty percent of the classes in my four-hour course in Criminal Law and Procedure are devoted to an introduction to criminal procedure.

book" abounds.[15] The casebook prepared by Professors Cook and Marcus, the latest entry in this category,[16] is a most welcome addition.

Cook and Marcus' casebook contains 930 pages,[17] divided into seven chapters, a glossary, a table of cases, and an index.[18] The first chapter is a brief "Overview of the Criminal Justice System,"[19] followed by an equally brief description of how the criminal procedure aspects of the Bill of Rights became applicable to the states. The chapters that follow deal with the most significant of these constitutional guarantees.

Chapters two, three, and four consider the fourth amendment's protection against unreasonable searches and seizures. Chapter two deals with deprivations of liberty—stops and arrests—[20] while chapter three examines seizures of evidence,[21]

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15. Each of the seven groups of first-year students to whom I have taught criminal procedure (either from Kadish and Paulsen or from Kamisar, LaFave, and Israel) has displayed these anxieties. My two upperclass groups of criminal procedure students were affected less noticeably.

16. Professor Cook teaches criminal procedure as an upperclass elective at the University of Tennessee. Professor Marcus teaches the subject to first-year students at the University of Illinois.

Other works of this type are A. MOENSSENS, S. SINGER & R. BACIGAL, CASES AND COMMENTS ON CRIMINAL PROCEDURE (1979) (930 pages); J. SCARBORO & J. WHITE, CONSTITUTIONAL CRIMINAL PROCEDURE (1977) (875 pages).

17. The pages, organized in single columns, average 400 words each and are thus eminently readable. The only drawback in the physical presentation of the casebook is its looseleaf binder format. J. COOK & P. MARCUS, *supra* note 1.

18. The table of cases and the index refer the reader to sections of chapters, not to specific pages, and thus are virtually worthless. It should be noted that these portions of the casebook were not prepared by the authors.

19. The apparently obligatory flow-chart depicting "A general view of the Criminal Justice System" follows chapter one. J. COOK & P. MARCUS, *supra* note 1, at 1-23; *See* Y. KAMISAR, W. LAFAVE & J. ISRAEL, *supra* note 12, at 26-27; F. MILLER, R. DAWSON, G. DIX & R. PARNAS, *supra* note 13, at 28-29; S. SALTZBURG, *supra* note 13, at 30-31.

20. Frisks are also discussed in chapter two, but body searches incident to arrest are not. Chapter three considers these latter intrusions as a subset of all searches incident to arrest.

21. Probable cause is discussed in both the second and third chapters, but consideration of Aguilar v. Texas, 378 U.S. 108 (1964), and Spinelli v. United States, 393 U.S. 410 (1969), is deferred until chapter three.

both with[22] and without warrants.[23] The exclusionary rule and related issues—retroactivity, standing, fruit of the poisonous tree,[24] and harmless error—are the subject matter of Cook and Marcus' fourth chapter.

The sixth amendment's guarantee of the right to counsel is studied in chapter five. Although the chapter begins with a general analysis of the right,[25] the chapter's main emphasis is on the right's applicability at various stages of the criminal process: lineups and other identifications,[26] preliminary examinations, grand jury proceedings, sentencing hearings, parole and probation revocations, and appeals.[27] The concluding section of the chapter treats the issue of ineffective assistance of counsel.

Chapter six surveys confession law. After introductory explication of the due process objection to an incriminating statement, Cook and Marcus discuss the impact on interrogations of the sixth amendment's right to counsel and of the fifth amendment's privilege against self-incrimination.[28] The chapter concludes with a treatment of the use of an otherwise inadmissible statement to impeach the defendant's testimony.[29]

The final chapter considers four aspects of the Constitution's general guarantee of a fair trial: the use of presumptions, the defendant's presence at trial, the prosecution's presentation

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22. A lengthy subdivision of the search warrant section surveys "Special Considerations": bodily intrusions, electronic eavesdropping, the use of undercover operatives, and regulatory inspections, among other topics. J. COOK & P. MARCUS, *supra* note 1, at 3-63 to -143.

23. Consent searches are included in the warrantless search category.

24. The section on the fruit of the poisonous tree doctrine also examines due process based objections to prosecutions initiated by flagrantly abusive arrests.

25. This analysis includes study of the problems of joint representation and of the *pro se* defense.

26. Due process objections to identifications are also discussed at length.

27. Consideration of the right to counsel during interrogation is postponed until chapter six.

28. Escobedo v. Illinois, 378 U.S. 478 (1964), is included in the fifth amendment section of chapter six, as opposed to the sixth amendment section, primarily to facilitate understanding of Miranda v. Arizona, 384 U.S. 436 (1966), which immediately follows *Escobedo* in the Cook and Marcus casebook.

29. This concluding subsection also mentions the impeachment use of evidence illegally seized.

of a codefendant's confession, and prosecutorial or judicial comment on the defendant's failure to testify. Cook and Marcus label these "four different, but ultimately related, trial issues."[30] The implied relation appears to be that resolution of each of these issues vitally affects the defendant's ability to challenge the case against him.

The foregoing synopsis of the Cook and Marcus casebook indicates that the authors have omitted a number of highly significant issues in the law of criminal procedure. No systematic attention is given to matters largely controlled by subconstitutional law; for example, the only reference to discovery appears in a footnote.[31] More significantly, some important topics of constitutional criminal procedure—bail, the impact and validity of guilty pleas, the right to trial by jury, and the ban on double jeopardy—are also missing.

But of course these omissions are intentional. As Cook and Marcus explain in their preface, "To achieve the result we sought, the major sacrifice has been scope of coverage. Our emphasis has been upon three major subject areas: Arrest, Search and Seizure; Right to Counsel; and Confessions. . . . [W]e believe a basic course in criminal procedure is best taught by exploring these areas in depth."[32] The assumption behind such an explanation is well accepted in law teaching: A student who has mastered some of the major aspects of a given subject can educate himself on other aspects of the subject.[33]

While this is certainly a sufficient explanation for the casebook's omissions, Cook and Marcus also attempt in their last chapter to satisfy those who want to go further. They join four seemingly disparate topics under the general heading of fair trial rights and give relatively superficial treatment to each. The

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30. J. COOK & P. MARCUS, *supra* note 1, at 7-1.

31. *Id.* at 1-6 n.*.

32. *Id.* at v.

33. Kadish and Paulsen's approach to substantive criminal law perhaps best exemplifies this assumption at work. Their *Criminal Law and Its Processes*, *see* text at note 4 *supra*, gives systematic consideration to only two classes of crimes—homicides and thefts. A student who understands these crimes, as well as the general principles of substantive criminal law, does not require further directed instruction in order to understand, for example, rape or arson.

clear implication to the student is that there is more, much more, to be said about these issues and about the myriad of other issues affecting the fairness of a criminal trial. In this sense, the final chapter of the casebook is less an end than it is a beginning of further, self-directed study.[34]

A casebook that seeks to prepare students for such self-education must force them to develop the necessary analytic skills. While the materials that Cook and Marcus have provided will accomplish this purpose, the materials could be made more effective in some minor ways.

The division of the analysis of fourth amendment law into chapters raises questions about the proper sequence of topics. For example, should consideration of the exclusionary rule appear at the beginning of the section (the place chosen by Kamisar, LaFave, and Israel) or near the end of the section (the option selected by Cook and Marcus)? Logically, the question of a remedy for violation of a right should follow the definition of the content of that right. But experience shows that students chafe when discussion of the exclusionary rule is delayed until the end of the search and seizure unit. Furthermore, there is much support for the notion that judges define the scope of the fourth amendment with the exclusionary rule in mind;[35] if judges think of fourth amendment law in this way, students probably should too.

Another question of sequence concerns the proper treatment of *Katz v. United States*,[36] a landmark case in fourth amendment law. Cook and Marcus categorize *Katz* as an electronic eavesdropping case and treat it under the heading "Obtaining Search Warrants: Special Considerations."[37] This overlooks the fact that *Katz'* definition of the scope of the fourth amendment as a protection against intrusions on actual and reasonable expectations of privacy[38] has impact far beyond elec-

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34. Viewed in this way, the final chapter can be criticized as too narrow. By focusing only on trial rights, chapter seven forgoes an opportunity to interest the student in pretrial issues such as the exercise of prosecutorial discretion and in post-trial matters such as habeas corpus and other collateral attacks.

35. *See* Rakas v. Illinois, 439 U.S. 128, 157 (1978) (White, J., dissenting).

36. 389 U.S. 347 (1967).

37. *See* note 22 *supra*.

38. 389 U.S. at 361 (Harlan, J., concurring). Subsequent decisions have

tronic eavesdropping.

The Cook and Marcus casebook compounds this organizational problem by misplacing three other *Katz*-related issues. The open fields doctrine of *Hester v. United States*,[39] a 1924 decision that anticipated the *Katz* analysis by finding no fourth amendment violation in an entry into an unfenced field, is discussed under the plain view exception to the warrant requirement. *United States v. White*,[40] a 1971 case suggesting an assumption of risk corollary to the *Katz* requirement of an actual and reasonable expectation of privacy, follows the materials on entrapment in the Cook and Marcus casebook. Also related to *Katz* are the recent decisions in *Rakas v. Illinois*[41] and *Rawlings v. Kentucky*,[42] in which no intrusions upon legitimate expectations of privacy were found when the police searched the property belonging to a nondefendant and shared by the defendant. In the Cook and Marcus casebook, these cases appear in the standing section of the exclusionary rule chapter. A better placement would be to join *Rakas* and *Rawlings* with *Katz*, *White*, and the open field cases in an introductory section of the chapter on the seizure of evidence.[43]

These quibbles notwithstanding, Cook and Marcus' chapters on fourth amendment law work exceptionally well. The division of the subject matter between deprivations of personal liberty and seizures of property should seem sensible to the student, as should commencing the study of intrusions on liberty with the least intrusion: the street stop.[44] The materials move

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accepted Harlan's formulation as a statement of the *Katz* test. For an example, see Smith v. Maryland, 442 U.S. 735, 740 (1979).

39. 265 U.S. 57 (1924).

40. 401 U.S. 745 (1971).

41. 439 U.S. 128 (1978).

42. 448 U.S. 98 (1980).

43. To my knowledge, no criminal procedure casebook treats these cases in the manner recommended. Kamisar, LaFave, and Israel do deal with *Katz* and *Hester* near the beginning of their chapter on arrest, search, and seizure. Y. KAMISAR, W. LAFAVE & J. ISRAEL, *supra* note 12, at 241-47 & 252. But they place *White* 250 pages away, in a chapter on electronic eavesdropping, *id.* at 498-503, and *Rakas* and *Rawlings* over 500 pages away, in the standing section of a chapter entitled "The Scope of the Exclusionary Rules." *Id.* at 796-806; *id.* at 55 (5th ed. Supp. Fall 1980).

44. One not inconsiderable contribution to the appeal of this beginning is

from the relative simplicity of stop law through the increasing complexities of the laws of arrest,[45] search warrants, and exceptions to the search warrant requirement, and conclude with the frequently mind-boggling ramifications of the fruit of the poisonous tree doctrine.[46] Gathering speed in this way, the casebook prepares the student for rapid examination of the right to counsel and interrogations chapters.

The right to counsel materials that Cook and Marcus have amassed are wide ranging and examine topics as diverse as self-representation and the filing of an *Anders* brief.[47] This diversity, by forcing the student to generalize beyond the narrow holdings of specific cases, is one of the casebook's greatest assets. Yet the breadth of the inquiry becomes a liability at some points in the chapter. One such passage is the lengthy subsection dealing with lineups. Although the checkered history of the right to counsel recognized in *United States v. Wade*[48] should be a part of any consideration of the sixth amendment's guarantee of effective assistance,[49] it is doubtful that due process based objections to

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that it allows Cook and Marcus to start their consideration of deprivations of liberty with a six-page excerpt from Charles Reich's *Police Questioning of Law Abiding Citizens*, 75 YALE L.J. 1161 (1966), *reprinted in* J. COOK & P. MARCUS, *supra* note 1, at 2-1.

45. The arrest section does appear to give inadequate attention to the arrest warrant requirement. For example, United States v. Watson, 423 U.S. 411 (1976), which holds a warrant unnecessary for a public felony arrest, is not a principal case, while Payton v. New York, 445 U.S. 573 (1980), which requires a warrant for a felony arrest in the home in the absence of exigent circumstances, appears as the last case in the chapter on deprivations of liberty, without any following questions or comments. This is perhaps attributable to the fact that *Payton*, which breathed new life into the arrest warrant requirement, was decided only last year.

46. Cook and Marcus give the student Wong Sun v. United States, 371 U.S. 471 (1963), as a principal case. Though this riot of Chinese-surnamed informers, defendants, and federal agents is maddeningly difficult to follow, reproducing a substantial part of the opinion is preferable for teaching purposes to vain attempts at summarization like the one offered by Kamisar, LaFave, and Israel. *See* Y. KAMISAR, W. LAFAVE & J. ISRAEL, *supra* note 12, at 819.

47. *See* Anders v. California, 386 U.S. 738 (1967).

48. 388 U.S. 218 (1967).

49. One of the weaknesses of Kamisar, LaFave, and Israel's casebook is that chapter three, which deals with the right to counsel cases, does not include the lineup right to counsel cases. These appear in a separate chapter on

inherently unreliable identifications also should be included in such a consideration. Yet Cook and Marcus do just that, presenting *Stovall v. Denno*[50] and *Manson v. Brathwaite*[51] as principal cases.[52]

This excursion into due process arguably takes space away from a topic that the Cook and Marcus casebook should consider more thoroughly: the denial of the effective assistance of counsel. The section dealing with ineffective assistance is only eighteen pages long; half of this length is devoted to ineffective assistance on appeal.[53] Considering the importance of the overall topic, such treatment seems scant, especially in a casebook committed to the development of legal skills in addition to legal analysis.[54]

But for these flaws, the right to counsel chapter would be outstanding. Even with them, the chapter should be exhiliarating to the student, taking him from *Powell v. Alabama*,[55] through *Gideon v. Wainwright*,[56] to the recent decision in *Cuyler v. Sullivan*,[57] which holds that retained counsel also must be effective.

This same historical sweep is evident in the chapter on interrogations. This chapter begins with a discussion of *Brown v. Mississippi*,[58] highlights *Massiah v. United States*[59] and *Miranda v. Arizona*,[60] and includes recent cases like *United States v. Henry*[61] and *Rhode Island v. Innis*.[62] Not quite so diffuse as

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identification procedures. Y. KAMISAR, W. LAFAVE & J. ISRAEL, *supra* note 12, at 51 & 666. The same criticism applies to Cook and Marcus in another context. They place the confession right to counsel cases in a separate chapter dealing with interrogations.

50. 388 U.S. 293 (1967).

51. 432 U.S. 98 (1977).

52. For a recommendation of where these cases should properly be considered, see text accompanying note 63 *infra*.

53. *See* J. COOK & P. MARCUS, *supra* note 1, at 5-172 to -188.

54. The casebook is part of Matthew Bender's Analysis and Skills Series.

55. 287 U.S. 45 (1932).

56. 372 U.S. 335 (1963).

57. 446 U.S. 335 (1980).

58. 297 U.S. 278 (1936).

59. 377 U.S. 201 (1964).

60. 384 U.S. 436 (1966).

61. 447 U.S. 264 (1980).

the chapter that precedes it, the interrogation chapter focuses on due process, the right to counsel, and the privilege against self-incrimination, in that order.

An obvious problem with the first two of these sections is the repetition of analysis that appears in the casebook's preceding chapter. Pedagogically, it would be more sensible to consider together, in a chapter devoted strictly to due process, the objections to both interrogations and identifications that derive from that constitutional guarantee.[63] This chapter could be followed by chapters dealing with the right to counsel and the privilege against self-incrimination. Both chapters could contain sections dealing with interrogations and identifications. Such a format—using the Bill of Rights as the basis for the casebook's organization—would be preferable to the more customary format which uses the stages of the criminal process as the organizational basis,[64] or the uneasy mix of formats that Cook and Marcus actually employ.[65]

The organizational oversights exposed in the first two sections of the interrogation chapter[66] are perhaps explained by the authors' haste to reach the essence of the chapter—the self-incrimination section. This *tour de force* presents *Miranda* and the major Supreme Court cases interpreting it, addressing the issues of custody, interrogation, waiver, and the impeachment use of evidence that is inadmissible because of *Miranda*. The only flaw detected in this section is a somewhat confused presen-

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62. 446 U.S. 291 (1980).

63. This arrangement would have removed the due process lineup cases from right to counsel chapter, a defect noted elsewhere. *See* text accompanying notes 48-52 *supra*.

64. Kamisar, LaFave, and Israel, for example, devote more than twenty of their twenty-seven chapters to specific stages of the criminal process, from "Arrest, Search and Seizure" to "Appeals" and "Habeas Corpus and Related Collateral Remedies." *See* Y. KAMISAR, W. LAFAVE & J. ISRAEL, *supra* note 12, at xxi-xxii.

65. The casebook has one overview chapter, five chapters mainly organized according to constitutional right, and one chapter dealing with the interrogation stage in the criminal process.

66. Another trivial oversight in the right to counsel section is the apparent repetition in the notes following Brewer v. Williams, 430 U.S. 387 (1977), of the issues raised in the notes following *Massiah*. *Compare* J. COOK & P. MARCUS, *supra* note 1, at 6-26 to -27 *with id.* at 6-43 to -46.

tation of the decision in *Michigan v. Tucker*,[67] which is understandable in light of the confusing nature of Justice Rehnquist's majority opinion in that case.

*Tucker* is discussed under the heading "Questions and Comments," and its treatment is one of the rare lapses in these notes. In more than ninety sets of such notes strewn throughout their casebook, Cook and Marcus have presented provocative questions and enlightening comments. These notes are supplemented by commentaries that give more detailed background information, by a few excerpts of articles, and by the usual mix of statutes and rules.

Cook and Marcus also use problems to supplement the selected cases, most of which are excellent teaching devices. The four *Aguilar-Spinelli* problems,[68] for example, force the student not just to conceptualize the rules in this complex area of law, but also to comprehend those rules and to apply them to highly specific sets of facts. Unfortunately, there are not enough problems in the casebook (only thirty-three, twenty-six of which appear in chapters two and three), and a few of them are not "problems" at all.[69]

As additional supportive materials, Cook and Marcus also present the student with numerous copies of documents. The Chicago Police Department's search warrant form, with instructions, appears in the search chapter.[70] Pennsylvania's form application for appointed counsel is reproduced in the right to counsel chapter,[71] as are two form motions to suppress identifications.[72] The confessions chapter contains the District of Co-

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67. 417 U.S. 433 (1974). *Compare* J. COOK & P. MARCUS, *supra* note 1, at 6-85 to -86 *with id.* at 6-87.

68. J. COOK & P. MARCUS, *supra* note 1, at 3-47 to -51.

69. *E.g., id.* at 5-144 (discussion of ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO THE DEFENSE FUNCTION § 8.1 (Official draft 1971)); *id.* at -172 (discussion of United States v. Woods, 440 F.2d 835 (7th Cir. 1971)); *id.* at -183 to -185 (reprint of correspondence prior to Anders v. California, 386 U.S. 738 (1967)). The three problems in chapter six are similarly questionable. *See id.* at 6-27 to -28, -114 to -115, -171 to -173.

70. *Id.* at 3-13 to -22.

71. *Id.* at 5-15 to -19.

72. *Id.* at -86 to -89.

lumbia standard jury instruction on voluntariness;[73] the Chicago and Houston directives on custodial interrogations, including, in the latter set, a Spanish translation of the *Miranda* warnings;[74] and the Chicago directive on field interrogations.[75]

Each of these documents, and the many others like them in the Cook and Marcus casebook, makes fascinating reading. Since the practical effect of abstract rules of law has a great impact on the student, Cook and Marcus have chosen well in deciding to include documents that reflect this impact.[76]

This use of documents exemplifies the method that Cook and Marcus have pursued so admirably in crafting their casebook. They were willing to "waste" space on such documents in order to maximize the student's understanding of the relevant cases. In this, as in their selection of subjects and in their treatment of those subjects, they have shown a deep commitment not merely to scholarship, but to learning. As the authors write in the preface, "[T]he book is designed to promote a high quality classroom experience. . . . It is our hope, above all else, that it is a highly teachable book."[77] This hope has been realized.

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73. *Id.* at 6-20 to -21.

74. *Id.* at -89 to -93.

75. *Id.* at -99 to -100.

76. There could easily be more. While the right to counsel and interrogations chapters are replete with copies of documents, the rest of the casebook has relatively few. Surprisingly, there is no arrest warrant form and no motion to suppress evidence obtained through an illegal search or seizure form.

77. J. COOK & P. MARCUS, *supra* note 1, at v.

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# CREATION, PERFECTION, AND ENFORCEMENT OF SECURITY INTERESTS UNDER THE "TENNESSEE" COMMERCIAL CODE

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## I. INTRODUCTION

The Uniform Commercial Code (the Code) became the law in Tennessee on July 1, 1964.[1] Although one of the stated purposes of the Code was "to make uniform the law among the various jurisdictions,"[2] each of the forty-nine states that have adopted it has subsequently put its own judicial gloss on the statute. Tennessee is no exception. In the last fifteen years, there have been a number of cases construing and applying the Code which are unique and deserve special attention. Several other statutes and areas of case law have an impact on the actual operation of the Code in Tennessee. This Article focuses on the creation, perfection, and enforcement of security interests under the "Tennessee" Commercial Code.

## II. CREATION OF SECURITY INTERESTS

For a security interest to be effective between the parties,

1. Act of Mar. 8, 1963, ch. 81, 1963 Tenn. Pub. Acts 243 (codified at TENN. CODE ANN. §§ 47-1-101 to -9-507 (1979)).
2. TENN. CODE ANN. § 47-1-102(2)(c) (1979).

the Code requires a written security agreement signed by the debtor, unless the secured party has physical possession of the collateral,[3] such as an oral pledge of stock to secure a note accompanied by delivery of the shares to the lender. In addition, the creditor must have given value, and the debtor must have rights in the collateral.[4] Neither a financing statement,[5] even if perfectly executed, nor a title certificate[6] is an adequate substitute for a security agreement.

In order for the security interest to be valid, it must properly describe the collateral before it is signed by the debtor.[7] The addition of a new item of collateral to a security agreement is not per se a material and fraudulent alteration of the instrument which would discharge the maker of the secured note since the secured party does not automatically obtain a security interest in the added collateral.[8]

## III. Perfection of Security Interests

### *A. The Proper Parties*

Although the creation of security interests is simple, the perfection of security interests is byzantinely complex. When a security interest is created, the secured party can enforce it against the debtor upon default if there are no third-party inter-

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3. *Id.* § 47-9-203(1)(a).

4. *Id.* § 47-9-204(1).

5. *In re* Medical Arts Luncheonette, Main, Inc., No. BK-3-78-279 (E.D. Tenn. Oct. 2, 1978) (per Bare, B.J.).

6. *In re* Dykes, 20 U.C.C. Rep. 524 (E.D. Tenn. 1976) (per Bare, B.J.).

7. *Id.* at 528-29. In *Dykes* the bank held a security agreement covering a Ford and a Cadillac. The debtor, Dykes, came into the bank and said he wanted to sell the Ford and substitute a Chevrolet for it. The bank officer marked out the Ford on the security agreement and wrote in the Chevrolet, including its serial number. The bank's lien was duly noted on the Chevrolet title certificate. Dykes later took bankruptcy and his trustee claimed the Chevrolet on the basis that the bankrupt/debtor had signed no security agreement covering the Chevrolet. Bankruptcy Judge Clive W. Bare agreed, holding that the security agreement should have been re-signed by the debtor after the Chevrolet was substituted. *Id.*

8. City & County Bank v. Vandagriff, Inc., Appeal from Knox Law, slip op. at 3 (Tenn. Ct. App. Jan. 19, 1979).

ests which might be superior to the secured party's interest.[9] To protect against such third-party interests—the levying creditor, the subsequent lienor, and the trustee in bankruptcy in the role of hypothetical lien creditor[10]—the security interest must be "perfected."[11] As a general rule, a creditor who perfects a security interest in collateral has a right in that collateral which is superior to the rights of secured creditors who perfect later.[12] The most important and the most common method of perfecting a security interest is the filing of a financing statement.[13]

In Tennessee, financing statements are filed with the secretary of state in all cases[14] except those involving consumer goods, fixtures, and farm-related collateral.[15] The Code requires that only a minimum amount of information be set out in the

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9. J. WHITE & R. SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE § 23-1, at 785-86 (1st ed. 1972). White and Summers' book is rapidly becoming the bible of attorneys who work with the Uniform Commercial Code. It is especially valuable to the lawyer whose forays into the thickets of the Code are infrequent. A second edition was published in 1980; citations in this Article are to the first edition unless otherwise noted.

10. 11 U.S.C. § 544 (Supp. III 1979).

11. J. WHITE & R. SUMMERS, *supra* note 9, § 23-1, at 786.

12. An important exception is the subsequently perfected purchase money security interest. *See, e.g.*, TENN. CODE ANN. § 47-9-312(3)-(4) (1979).

13. A financing statement is frequently referred to as a UCC-1 because of the document's form number. 5 U.L.A. Form 9:3000, at 562 (1968).

Perfection may also be accomplished by the secured party's taking physical possession of the collateral. TENN. CODE ANN. § 47-9-305 (1979). Comment One to that section states that a security interest in accounts, contract rights, and general intangibles cannot be perfected by possession. *Id.*, Comment 1. Except for stock certificates and negotiable instruments, perfection by possession is an unwieldy alternative to filing.

14. TENN. CODE ANN. § 47-9-401(1)(c) (1979).

15. *Id.* § 47-9-401(1)(a)-(b). In the case of consumer goods and farm-related collateral, filing is with the register of deeds in the county of the debtor's residence, if any, or in the county where the goods are kept. With regard to crops and fixtures, filing is required in the register's office in the county where the collateral is located. *Id.* The test of classification of the collateral is not the debtor's statements about how the property will be used or the possible uses of the collateral; it is rather the actual use the debtor makes of the collateral that controls whether filing should be central, local, or omitted altogether. *In re* Cahoon, 9 U.C.C. Rep. 535 (E.D. Tenn. 1971); Still v. Murfreesboro Prod. Credit Ass'n (*In re* Butler), 3 B.R. 182, 28 U.C.C. Rep. 596 (B.C.E.D. Tenn. 1980).

financing statement[16] and provides that substantial compliance with these minimal requirements is sufficient so long as any "minor errors . . . are not seriously misleading."[17] In determining whether the minimal requirements have been satisfied, the Tennessee courts have several times been confronted with financing statements in which names or addresses were wrong or omitted.

The federal courts in Tennessee are divided on the issue whether the omission of a party's address renders a financing statement ineffective in Tennessee. In *In re French*[18] Judge Robert L. Taylor, sitting in the Northern Division of the Eastern District of Tennessee, held that even though a financing statement omitted the addresses of both parties, the omissions were "minor errors which are not seriously misleading."[19] Especially since no creditor had ever checked the central filing at the secretary of state's office,[20] the court refused to "create a windfall for the general creditors [of the bankrupt's estate] solely because of this slight dereliction. . . . The failure to include the addresses would, at most, have inconvenienced a creditor."[21] Judge Taylor seemed to think that actual prejudice to a creditor was necessary to invalidate the perfection, even though section 70c of the Bankruptcy Act[22] gave the trustee the rights of a hypothetical lien creditor.[23]

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16. TENN. CODE ANN. § 47-9-402(1) (1979).

17. *Id.* § 47-9-402(5).

18. 317 F. Supp. 1226 (E.D. Tenn. 1970).

19. *Id.* at 1229 (quoting U.C.C. § 9-402(5), *quoted in In re* Excel Stores, Inc., 341 F.2d 961 (2d Cir. 1965)).

20. *Id.* at 1228.

21. *Id.* The Tennessee Court of Appeals apparently agrees with Judge Taylor's analysis that a mistake in an address is not seriously misleading absent a showing that someone was misled by the error. In First National Bank v. Allison, Appeal from Bedford Equity (Tenn. Ct. App. June 27, 1980), the debtor's Memphis address should have been "Raines" Road, but was listed on the security agreement as "Range" Road. The court held that the listing substantially complied with the Code. *Id.*, slip op. at 5.

22. Bankruptcy Act of 1898, ch. 541, § 70c, 30 Stat. 544 (current version at 11 U.S.C. §§ 502(b)(1), 541(d)-(e) & 544(a) (Supp. III 1979)).

23. There is some support for this conclusion. In Rooney v. Mason, 394 F.2d 250 (10th Cir. 1968), both addresses were omitted. *Id.* at 253. The court held that the omission was a minor error. "[T]he fact that the addresses of

In the Northeastern Division of the Eastern District of Tennessee, however, the omission of the debtor's address renders a financing statement totally invalid and ineffective against a trustee in bankruptcy. Bankruptcy Judge Clive W. Bare, whose decision in *In re French* had been reversed by Judge Taylor,[24] held in *In re HGS Technical Associates, Inc.*[25] that when the space on the financing statement intended for the debtor's name and address read merely "HGS Technical Associates, Inc.," there was no compliance with Tennessee Code Annotated section 47-9-402(1).[26] United States District Judge Neese agreed on appeal.[27] The principle of *HGS Technical Associates, Inc.* was followed in *In re Gibson's Discount Pharmacy,*[28] decided in April 1974 by Judge Bare. In *Gibson's* the financing statement did not show an address for the First National Bank of Sullivan County, the secured party.[29] Citing *HGS Technical Associates, Inc.*, the court found a failure to comply with the statute and accordingly held the security interest of the bank ineffective against the trustee.[30] *In re French* was neither discussed nor cited. Thus, it appears that at least in bankruptcy court the *French* rule will be read and applied narrowly. A prudent creditor would be well advised to include in the financing statement adequate addresses for both parties.

In addition to the parties' addresses, a financing statement should contain the name of the debtor. While Tennessee Code Annotated section 47-9-402(1) requires a debtor and a creditor to "sign" a financing statement, it does not specifically require that the "name" of the debtor (or of the secured party) appear

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both parties were readily available and known by virtually all creditors could reasonably be found sufficient to make unnecessary the listing of the addresses of the parties." *Id.*

24. 317 F. Supp. 1226 (E.D. Tenn. 1970); *see* notes 18-23 *supra* and accompanying text.

25. 14 U.C.C. Rep. 237 (E.D. Tenn. 1972), *aff'd*, 14 U.C.C. Rep. 247 (E.D. Tenn. 1973).

26. *Id.* at 243.

27. *In re* HGS Technical Assocs., Inc., 14 U.C.C. Rep. 247 (E.D. Tenn. 1973).

28. 15 U.C.C. Rep. 233 (E.D. Tenn. 1974).

29. *Id.* at 234.

30. *Id.* at 235.

on the financing statement.[31] Nevertheless, the name is part of the address and will usually coincide with the required signature. A problem arises, however, when a trade name is involved.

In *In re Humphrey*[32] the court indicated that under Tennessee Code Annotated section 47-9-402(1) a financing statement may be filed under the trade style of a partnership but not in the trade name of a sole proprietor.[33] In *Humphrey* three men formed a partnership under the name "Electronic Enterprises." The partnership borrowed money from a bank, and the financing statement, reflecting a security interest in equipment, showed "Electronic Enterprises" as the debtor. Two partners withdrew from the business and left Humphrey to operate Electronic Enterprises as a sole proprietorship.[34] The court held that the security interest was properly perfected at the time it was taken and that it continued effective against the bankrupt even after he became the sole proprietor.[35] If, however, Humphrey had granted a security interest after he became a sole proprietor, a financing statement that identified the debtor as "Electronic Enterprises" would have been ineffective against the trustee.[36] The creditor, therefore, should always ascertain the correct business nature of the debtor and, in the case of a sole proprietorship, should identify the debtor by his actual name.

### *B. When to File*

If a filing is required to perfect a security interest, the Code generally follows the "race" principle: If special priority rules do not apply, priority between conflicting security interests in the

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31. TENN. CODE ANN. § 47-9-402(1) (1979).

32. 12 U.C.C. Rep. 986 (E.D. Tenn. 1973) (per Bare, B.J.).

33. *Id.* at 988. This dictum became the holding in a later case also decided by Judge Bare. Carter v. Greene County Bank (*In re* Wilhoit), 6 B.R. 574 (B.C.E.D. Tenn. 1980).

34. 12 U.C.C. Rep. at 987.

35. *Id.* at 990.

36. *Id.* at 988. See *In re* Platt, 257 F. Supp. 478 (E.D. Pa. 1966), in which the court held, however, that if the proprietorship trade style (Platt Fur Co.) is sufficiently related to the name of the debtor (Henry Platt) to require those who search the records to make further investigation, the discrepancy is not "seriously misleading" within the meaning of § 9-402(5) of the Uniform Commercial Code. *Id.* at 482.

same collateral is determined by the chronological order of filing, regardless of which security interest attached first.[37] There is, however, a special rule for purchase money security interests. Prior to April 1978, the Code provided that a purchase money security interest in collateral (except inventory) could be perfected up to ten days after the debtor obtained the collateral and still retain priority over a previously perfected security interest.[38] For example, suppose that the National Union Bank holds a lien on all the equipment owned by Ajax Manufacturing Co. and that the bank's financing statement is properly filed. One year later Ajax buys a cookie-crushing machine from Tipton Machinery Co. on a conditional sales contract. Before 1978 Tipton would have had ten days from the time Ajax took delivery of the cookie crusher to file its financing statement with the secretary of state. If the financing statement were filed within that ten-day period, Tipton's purchase money lien on the cookie crusher would have priority over National Union's blanket lien. In addition, Code section 9-301(2) gave a similar ten-day grace period for perfection of purchase money security interests in all collateral, including inventory, insofar as the rights of levying creditors and transferees were concerned.[39]

In 1978 the Tennessee legislature doubled both of these grace periods to twenty days,[40] but the grace period remains ten days for purposes of determining whether a perfection is preferential under the Bankruptcy Code. Section 547(e)(2)(A) of the Bankruptcy Code deems a transfer to have been made at the time it takes effect between transferor and transferee if it is perfected within ten days thereafter.[41] A creditor would be well advised always to perfect a security interest within ten days of the transfer regardless of state law.

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37. TENN. CODE ANN. § 47-9-312(5)(a) (1979).

38. *Id.* § 47-9-312(4) (1964).

39. *Id.* § 47-9-301(2).

40. Act of Apr. 2, 1978, ch. 773, §§ 1-2, 1978 Tenn. Pub. Acts 840 (reenacted as Act of May 9, 1979, ch. 283, §§ 1-2, 1979 Tenn. Pub. Acts 583).

41. 11 U.S.C. § 547(e)(2)(A) (Supp. III 1979). However, Bankruptcy Judge Ralph H. Kelley has recently held that a security interest which was perfected more than 10 days but less than 20 days after it attached, but within 90 days of the fiing of the petition, is not a preference. Jahn v. First Tennessee Bank (*In re* Burnette), No. 1-81-00300 (B.C.E.D. Tenn. Oct. 26, 1981).

### C. Fixtures

The method of perfecting a security interest in fixtures deserves special note, for in no other area of filing are the rules less known and more violated. The Code provides that "when the collateral is goods which at the time the security interest attaches are or are to become fixtures," the financing statement is to be recorded in the office of the register of deeds of the county where the fixture is located; that is, "in the office where a mortgage on the real estate concerned would be . . . recorded."[42] This local filing is in lieu of the central filing with the secretary of state that is required for many other types of security interests. Thus, proper filing requires a determination of whether an item is a fixture. Because the drafters of the Uniform Commercial Code made no attempt to define "fixture," pre- and post-Code case law must be examined in order to determine whether an item is a fixture.

For planning purposes, the careful lawyer does not try to decide which classification applies in a close case, but instead follows Peskind's Law[43] and files in both places. If only one filing is made, the collateral must be classified. Defining a "fixture" has not been easy. Tennessee courts generally stated the test to be one of intention, a subjective test under which the parties' intentions had to be examined.[44]

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42. TENN. CODE ANN. § 47-9-401(1)(b) (1979).

43. Professors White and Summers advocate filing both locally (as if the collateral were a fixture) and also with the secretary of state (as if it were equipment). "This application of Peskind's law (file everywhere it could possibly benefit you to do so) will save countless hours of frustrating research with dusty and inconclusive fixture cases when the debtor goes bankrupt." J. WHITE & R. SUMMERS, *supra* note 9, § 23-12, at 821.

44. Before 1979 the law in Tennessee was that there was no firm, objective rule on what constituted a fixture. The manner in which the chattel was annexed to the realty did not control. Intention was the key; that is, was it the intention of the parties that the chattel be removable? *See, e.g.*, Julian Eng'r Co. v. R.J. & C.W. Fletcher, Inc., 194 Tenn. 542, 253 S.W.2d 743 (1952); Dudzick v. Lewis, 175 Tenn. 246, 133 S.W.2d 496 (1939).

If the parties intended that the chattel be removable, the item generally was not considered a fixture, and central rather than local filing was required. The intention did not control, however, where removal of the object would cause serious injury to the freehold; in that situation an item was considered a fixture regardless of the parties' intention. *Compare* Lenoir Land Co. v.

In *Still v. City Bank & Trust Co. (In re Belmont Industries)*[45] Bankruptcy Judge Ralph H. Kelley carefully reviewed Tennessee law and found an *objective* standard for defining a fixture: removability.[46] He concluded that while the courts paid lip service to the intention test, they were in fact applying a far more objective standard. "Intention" was a misleading term; the intention that mattered was not that of the parties, but that of an innocent realty mortgagee. If the mortgagee could have relied on the inclusion of the collateral in the real estate mortgage, the requisite intention would be found.[47] The criterion of intent thus involved an *objective* determination of a real estate mortgagee's expectation that an article was intended to be a permanent annexation to the realty. The test, then, is threefold: (1) Is the article annexed to the real estate—anchored, for example, by bolts, nails, cement, or the like? (2) Would a mortgagee be likely to expect the article to be covered by the mortgage? (3) Can the annexed article be removed without material physical injury to the freehold?

Once a particular item of collateral is determined to be a fixture, a set of special filing rules in addition to the local filing requirement becomes applicable. A financing statement covering fixtures must contain, in addition to the standard information, (1) a statement that the financing statement relates to fixtures,[48] (2) the name of the record (presumably fee) owner of the realty on which the fixture is located, and (3) a description of the real estate concerned.[49] The Tennessee legislature has added a nonuniform amendment imposing a special duty on the register of

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Haynes Heating Co., 166 Tenn. 494, 63 S.W.2d 659 (1933) (a furnace installed in a house is not a fixture) *with* Johnson v. Patterson, 81 Tenn. 495, 13 Lea 626 (1884) (pieces of machinery in a cotton factory, even though removable without serious injury to the realty, are fixtures because removing them would seriously impair the efficiency of the plant). *See also* 24 TENN. L. REV. 372 (1956).

45. 1 B.R. 608 (B.C.E.D. Tenn. 1979).

46. *Id.* at 612.

47. *Id.* at 610-12.

48. TENN. CODE ANN. § 47-9-408(c) (1979).

49. *Id.* § 47-9-402(1). In Still v. City Bank & Trust Co. (*In re* Belmont Indus.), 1 B.R. 608 (B.C.E.D. Tenn. 1979), Judge Kelley held that a street address from which the house number had been omitted was a sufficient description. *Id.* at 613.

deeds when presented with a financing statement covering fixtures.[50] Instead of filing the financing statement as though it were an ordinary UCC-1,[51] the register must file, record, and index it "in the same manner as deeds of trust covering real property; provided, however, that no . . . acknowledgment . . . shall be a prerequisite to such filing . . . ."[52] The financing statement is then indexed under the name of the debtor and also under the name of the record owner of the real estate[53] so that a person searching real estate titles can readily find a recorded fixture filing.

### *D. Consumer Goods*

The most important exception to the rule that a security interest must be perfected by either filing or taking possession is a purchase money security interest in consumer goods other than motor vehicles and fixtures,[54] which is perfected automatically upon the attachment of the security interest.[55] Yet some creditors persist in filing in such cases, apparently because they believe that if the consumer sells or otherwise disposes of the encumbered property, the security interest might not be good against a subsequent purchaser. This was indeed the result under the Code as enacted in 1963,[56] but the legislature in 1965[57] repealed this exception. Therefore, not even a bona fide purchaser for value can acquire rights in consumer goods superior to those of the unfiled purchase money secured creditor. A better reason for filing is to protect the secured party if the debt is refinanced. When a lender refinances, or "flips," a debt secured by a purchase money security interest, the security interest se-

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50. TENN. CODE ANN. § 47-9-408 (1979).

51. *See* note 12 *supra*.

52. TENN. CODE ANN. § 47-9-408(a) (1979).

53. *Id.* Even though this statute was enacted in 1965, a number of registers seem to be unaware of the statute. Fortunately, the register's failure to perform his statutory duties does not affect the validity of the filing if the proper documents and fee are tendered. *Id.* § 47-9-403(1).

54. *Id.* § 47-9-302(1)(d).

55. *Id.*

56. *Id.* § 47-9-307(2) (1964).

57. Act of Mar. 27, 1965, ch. 362, § 1, 1965 Tenn. Pub. Acts 1087.

curing the refinanced debt loses its purchase money status.[58] Thus, a prudent consumer lender who expects to refinance would be well advised to file a financing statement with the register of deeds in every case.

### *E. "Probate": The Transfer Tax*

In addition to the Code's specific requirements of the formalities necessary to draft a financing statement suitable for filing,[59] the Tennessee legislature has imposed a special transfer tax that must be paid before the financing statement can be filed.[60] The tax is on the indebtedness secured, but the vehicle for payment is the recording of the financing statement. The

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58. Slay v. Pioneer Credit Co. (*In re* Slay), 8 B.R. 355 (B.C.E.D. Tenn. 1980); *accord*, Coomer v. Barclays Amer. Financial, Inc. (*In re* Coomer), 8 B.R. 351 (B.C.E.D. Tenn. 1980).

The Tennessee General Assembly in 1981 attempted to overrule *Slay* and *Coomer* by adopting chapter 502 of the 1981 Tennessee Public Acts. This most inartfully drawn statute purports to preserve the purchase money status of a security interest in a transaction which is refinanced. The Act amends Tennessee Code Annotated § 47-9-107 (Supp. 1981) to read in part as follows:

> A security interest is a "purchase money security interest" to the extent that it is:
>
> . . . .
>
> (c) Under subsections (a) and (b), a purchase money security interest upon any unpaid balance in preexisting collateral arising pursuant to a series of purchases or extension of payment time and terms.

Act of June 12, 1981, ch. 502, § 1, 1981 Tenn. Pub. Acts ___. Also, under the Act payments are credited on a first-in, first-out basis, so that older collateral gradually loses its purchase money status, presumably to legislatively overrule *Slay* and *Coomer*. *Id.* § 1.

Obviously, the Tennessee legislature cannot amend the Bankruptcy Code; thus *Slay* and *Coomer* should continue to be good law in interpreting 11 U.S.C. § 522(f). But see *In re* Dills, No. BK-3-80-00366 (B.C.E.D. Tenn. Sept. 9, 1980), in which the court relied on Uniform Commercial Code definitions in reaching a result similar to that reached in *Slay* and *Coomer*. *Id.*, slip op. at 4.

59. TENN. CODE ANN. § 47-9-402, -408(c) (1979).

60. *Id.* § 67-4102, Item S(b) (1976). The tax is $0.10 per $100 of indebtedness in excess of $2,000. *Id.*

Although there is an exemption from probate or transfer tax on security interests in motor vehicles if the lien is noted on the title, the exemption does not apply to motor vehicles being floor-plan financed as inventory. In that case, the probate tax must be paid when the financing statement is filed. Carr v. Chrysler Credit Corp., 541 S.W.2d 152 (Tenn. 1976).

Code requires that the amount of the then-outstanding indebtedness be stated on the face of the financing statement or in a separate sworn statement.[61] Until March 28, 1974, the tax could be neatly avoided (at least for five years)[62] by first recording the financing statement with the notation "no present indebtedness." This loophole was closed by a 1974 act that amended the transfer tax statute to define "indebtedness" as the "principal debt or obligation which is, or under any contingency may be" secured at the time of filing or at any time in the future.[63] The effect of the amendment was to require the parties to state the full amount of anticipated indebtedness at the front end of a transaction and pay tax on that (possibly speculative) figure. Frequently, in large commercial loans the amount of credit that may be extended in the future is not known, yet under the amendment the debtor must pay tax on the highest amount he will ever borrow. Thus, the usefulness of the Code as a flexible tool for long-term financing arrangements has been at least partially sacrificed on the altar of the state treasury.

The 1974 amendment is especially pernicious in its effect on accounts receivable factoring. Factoring, a form of financing most commonly used in the textile industry, is essentially nonrecourse, notification accounts receivable financing, in which the factor takes the credit risk. In the typical case, the factor actually purchases the seller's accounts receivable, rather than merely taking a security interest in the accounts.[64] While conventional wisdom would suggest that Article Nine of the Uniform Commercial Code applies only to transactions for security and not to absolute sales, in fact section 9-102(1)(b) unequivocally states that Article Nine is applicable "to any sale of ac-

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61. TENN. CODE ANN. § 67-4102, Item S(b) (1976).

62. This is because security filings are effective only for five years unless a continuation statement is filed. *Id.* at § 47-9-403 (1979). Filing a continuation statement disclosing the then-existing obligation requires payment of the transfer tax. International Harvester Co. v. Carr, 225 Tenn. 244, 466 S.W.2d 207 (1971).

63. Act of Mar. 28, 1974, ch. 632, § 2, 1974 Tenn. Pub. Acts 640 (codified at TENN. CODE ANN. § 67-4102, Item S(b) (1976)).

64. *See* Moore, *Factoring—A Unique and Important Form of Financing and Service*, 14 BUS. LAW. 703, 706-08 (1959).

counts."[65] The factor assumes the risk that the account debtor may default in payment because of insolvency or other purely credit circumstances, but usually the seller nevertheless is liable to repurchase any account if the account debtor asserts a defense based on a breach of warranty with respect to the goods whose sale gave rise to the account.[66]

As long as such warranty defenses are relatively infrequent, the seller owes the factor nothing; quite often, the factor actually owes the seller for accounts purchased. There is thus no "indebtedness" of seller to factor upon which the transfer tax can be calculated. If significant warranty claims are asserted, however, the seller may suddenly become indebted to the factor for millions of dollars by virtue of the seller's obligation to repurchase. Such a circumstance is certainly a "contingency" within the meaning of the statute.[67] Read literally, the statute requires the factor to pay the transfer tax on these highly contingent millions at the time the financing statement is recorded.[68]

When a secured creditor in good faith states an anticipated indebtedness, but the indebtedness subsequently exceeds that figure, is the excess subject to the creditor's perfected security agreement? As an original proposition, the excess indebtedness would seem to be subject to the creditor's security interest since the filing laws and the tax laws serve entirely separate purposes. It has been definitively held, however, that a creditor's security interest is limited to the amount of indebtedness stated on the face of the financing statement insofar as third parties such as holders of second security interests or trustees in bankruptcy are concerned. In the leading case, *In re HGS Technical Associates, Inc.*,[69] Bankruptcy Judge Clive W. Bare held that third parties examining the public record were entitled to rely on that record. If the financing statement recited a present indebtedness of $10,000, the secured party who was in fact owed $30,000 was

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65. TENN. CODE ANN. § 47-9-102(1)(b) (1979).

66. It is the custom of the trade, in the author's experience, for factoring contracts to contain such repurchase clauses.

67. TENN. CODE ANN. § 67-4102, Item S(b) (1976).

68. *Id.*; *see* note 63 *supra* and accompanying text.

69. 14 U.C.C. Rep. 237 (E.D. Tenn. 1972), *aff'd*, 14 U.C.C. Rep. 247 (E.D. Tenn. 1973).

secured as against the trustee in bankruptcy only up to $10,000.[70] One could avoid the danger of the *HGS* rule, however, by filing a separate affidavit that the indebtedness might go higher than the amount on which tax was paid and that no one should rely on the tax figure to ascertain the actual indebtedness outstanding.

In January 1980 United States District Judge L. Clure Morton reached the same result as in *HGS*, but on a different basis.[71] He limited a secured party to the amount on which it had paid tax on the theory that the transfer tax is a "privilege" tax. By virtue of the privilege tax law, contracts made in violation of the privilege tax requirements are unenforceable.[72] Reliance on the financing statement is therefore irrelevant. The secured party is prohibited from asserting, at least against competing lien holders, a security interest in excess of the dollar amount on which the "privilege" tax was paid.[73]

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70. *Id.* at 246. *HGS* was followed in Bell v. Cherokee Aviation Corp. (*In re* Executive Airways, Inc.), No. BK-3-76-423 (E.D. Tenn. Dec. 23, 1977), and *In re* Core, No. BK-1-76-1086 (E.D. Tenn. Apr. 5, 1978) (per Kelley, B.J.).

71. Jackson County Bank v. Ford Motor Credit Co., 488 F. Supp. 1001 (M.D. Tenn. 1980), *appeals docketed*, No. 80-53-78 (6th Cir. Oct. 28, 1980). The district court's analysis has been cast into great doubt, however, by the Tennessee Supreme Court in Commerce Union Bank v. Possum Holler, Inc., 620 S.W.2d 487 (Tenn. 1981). In an opinion filed August 24, 1981, Justice Drowota, speaking for a unanimous court, wrote: "Our holding is an implicit rejection of the rationale employed in *Jackson County Bank* to the effect that a security agreement is an illegal contract to the extent it secures advances in excess of the amount upon which the tax was paid." *Id.* at 492 n.5. He went on to indicate that the Tennessee Supreme Court might have reached the same result as did the district court on the facts of *Jackson County Bank*. *Id.* The Tennessee Court of Appeals for the Middle Section also seems to agree with the result in *Jackson County Bank*. American City Bank v. Western Auto Supply Co., No. 80-311-II, slip op. at 23-24 (Tenn. Ct. App. Sept. 18, 1981).

72. TENN. CODE ANN. § 67-4015 (1976).

73. There is an escape hatch in the statute, however. Before the court rules on the validity of the security interest, the secured party pays double the tax due at the time the contract was made plus a criminal penalty of $5.00 per day for each day the privilege was exercised without a license. *Id.* § 67-4012. Thus, at the time the court rules on the validity of the security interest, tax on the excess will have been paid.

In a bankruptcy case, however, rights are fixed at the time the petition is filed, and the escape hatch cannot be used post-petition. *In re* Ken Gardner

### *F. The Open-End Clause*

It is axiomatic that the prudent creditor frequently takes more security for a loan than is absolutely necessary, in order to provide a cushion in the event of collateral devaluation, depreciation, or other unexpected developments. A frequently seen form of such collateral "insurance" is the "open-end clause" in a security agreement, a provision that makes the collateral described in the security agreement stand as security not only for the specifically described debt but also for other debts of the debtor to the secured party.

Future advance clauses in mortgages have been valid in Tennessee for many years,[74] even when the mortgagee is under no obligation to make such advances. Because such clauses are construed against the creditor, careful drafting is essential.[75] In the commercial context, future advance clauses will be enforced in security agreements covering personal property[76] by virtue of Tennessee Code Annotated section 47-9-204(5), which provides that the "[o]bligations covered by a security agreement may include future advances or other value whether or not the advances or value are given pursuant to commitment."[77]

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Ford Sales, Inc., 10 B.R. 632 (B.C.E.D. Tenn. 1981).

74. McGavock v. Deery, 41 Tenn. 154, 1 Cold. 265 (1860).

75. See United States v. Automatic Heating & Equip. Co., 181 F. Supp. 924 (E.D. Tenn. 1960), *aff'd on opinion below*, 287 F.2d 885 (6th Cir. 1961), for an object lesson in the proper drafting of such a clause.

76. *In re* White Plumbing & Heating Co., 6 U.C.C. Rep. 467 (E.D. Tenn. 1969). The specific language approved by the court was that the security interest was granted to secure a particularly described indebtedness and "any and all extensions or renewals [thereof] in whole or in part, and also any other indebtedness or liabilities now existing or hereafter arising, due or to become due, absolute or contingent, and whether several, joint, or joint and several, of the debtor . . . to bank." *Id.* at 469.

The utility of such a clause is limited. Professor Gilmore, in his landmark treatise, states that "[n]o matter how all-embracing the [dragnet] clause may be, the mortgagee who seeks to assert a claim under it will find himself restricted by a rule of reason and good faith." 2 G. GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY § 35.2, at 920 (1965). *See In re* Eshleman, 10 U.C.C. Rep. 750 (E.D. Pa. 1972).

77. TENN. CODE ANN. § 47-9-204(5) (1979).

### G. The Waiver-of-Defenses Clause

For a security interest to be valid, the underlying security agreement must be valid. Financing agencies have for many years purchased installment sales contracts without fear that the buyer/debtor might have some defense against the immediate seller (the financing agency's assignor), because the contracts invariably contained language waiving such defenses as against the assignee. Since May 1973, however, such waivers, at least in consumer contracts, have been void in Tennessee by virtue of *Discount Purchasing Co. v. Porch.*[78] Porch purchased a photograph album and 100 enlargement certificates for $232.71 from Southern Portrait Plan, a sole proprietorship owned by Lamey. He was promised that if he sent letters to his friends, he would receive five dollars for every friend contacted and ten dollars for every friend to whom a photograph album was sold. Porch signed a retail installment sales contract that called for fifteen payments of $14.85 each. Porch wrote seventy-three letters and received ten dollars before Lamey disappeared. Meanwhile, Lamey had assigned the contract to Discount Purchasing Company. After Lamey disappeared, Porch refused to pay Discount Purchasing, who sued Porch, pointing out that the contract contained a waiver of defenses: " 'If permitted by law, buyers hereby waive as against . . . successors and assigns all defenses and all right of recoupment, set-off and counterclaim which he has or ever might have against the Seller.' "[79] The trial judge thought it immoral to allow recovery under these facts and directed a verdict for Porch.[80]

The finance company appealed. The court of appeals, in an opinion by Judge Nearn, held that a retail installment sales contract is not a "note"[81]—not a negotiable instrument within the Code definition[82]—and hence one cannot be a holder in due course[83] of such a contract. Judge Nearn was then confronted

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78. 12 U.C.C. Rep. 600 (Tenn. Ct. App. 1973).

79. *Id.* at 605 (quoting the retail installment contract signed by Porch).

80. *Id.* at 604.

81. *Id.* at 608; *accord,* General Motors Acceptance Corp. v. Presley, Appeal from Shelby Law, slip op. at 3-4 (Tenn. Ct. App. Oct. 3, 1973).

82. TENN. CODE ANN. § 47-3-104(1) (1979).

83. *See* BLACK'S LAW DICTIONARY 658 (5th ed. 1979).

with the Code provision that validates waiver-of-defenses clauses in retail installment sales contracts unless "[a] statute or decision . . . establishes a different rule."[84] Looking first at other jurisdictions, Judge Nearn found that courts have almost universally invalidated such provisions when the buyer's defense is based on fraud arising from misrepresentation.[85] He then examined the Tennessee Retail Installment Sales Act,[86] which sets out "the requirements of the paper and duties of the seller and the assignee."[87] Even though the Retail Installment Sales Act deals only with rates and definitions and is totally silent on questions of fraud or questions of the inducement of the parties or their fair dealing, Judge Nearn concluded that the waiver-of-defenses clause was an attempted waiver of all rights granted to the buyer by the Retail Installment Sales Act.[88] Since under the Act a waiver of the provisions of the Act is void,[89] the waiver-of-defenses clause was void.[90] Judge Nearn went on to hold the waiver-of-defenses clause void as against the public policy of Tennessee: "It is nothing more than an attempt to make negotiable an otherwise nonnegotiable instrument. . . . If the [clause] inhibits justice and promotes fraud it should be, and is, against the public policy of the State."[91]

Shortly after the *Porch* decision, the Federal Trade Commission codified the result by regulation.[92] In essence the regulation requires that consumer credit contracts contain language to

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84. TENN. CODE ANN. § 47-9-206(1) (1964) (current version at TENN. CODE ANN. § 47-9-206(1) (1979)).

85. 12 U.C.C. Rep. at 609-10.

86. TENN. CODE ANN. §§ 47-11-101 to -110 (1979).

87. 12 U.C.C. Rep. at 610.

88. *Id.*

89. TENN. CODE ANN. § 47-11-108 (1979).

90. 12 U.C.C. Rep. at 610.

91. *Id.* If the case had come up a year later, the court could have accomplished the same result by applying a statute passed by the legislature in 1974 that made such "referral" contracts void. *See* Act of Apr. 5, 1974, ch. 782, § 1, 1974 Tenn. Pub. Acts 1237.

92. 16 C.F.R. §§ 433.1-.3 (1980). The Tennessee General Assembly also codified the result in *Porch* by going one step further and prohibiting such "chain referral sales plans." Tennessee Consumer Protection Act, ch. 438, § 4(B)(18), 1977 Tenn. Pub. Acts 1107 (codified at TENN. CODE ANN. § 47-18-104(b)(18) (1979)).

the effect that any holder of the contract is subject to all claims and defenses that the debtor could assert against the seller of the goods or services.[93] Both *Porch* and the federal regulations apply only in consumer cases. In 1980 the Tennessee Court of Appeals for the Eastern Section, in an opinion by Presiding Judge Parrott, specifically upheld a waiver-of-defenses clause in the lease of a machine to a tailpipe shop under Tennessee Code Annotated section 47-9-206.[94] Therefore, at least in a commercial, nonconsumer context, an assignee of a contract that contains a waiver-of-defenses clause can enforce the contract free of any personal defenses, such as failure of consideration, which the obligor might assert against the immediate obligee.[95] If the contract is not a negotiable instrument and does not contain such a waiver clause, one who takes the assignment of the contract for security purposes takes it subject to all defenses, setoffs, and counterclaims the obligor has against the obligee/assignor, whether they arise before or after the assignment.[96]

### *H. Errors by Filing Officer*

Generally, the secured party does not bear the risk that the filing officer will not properly file the financing statement. When the proper documents and fee are tendered, "filing" is complete.[97] For example, assume that Creditor 1 properly filed financing statements covering inventory. Creditor 2 then made a purchase-money extension of credit on inventory. Before extending the credit, however, Creditor 2 sent a UCC-11[98] to the secretary of state. Because the secretary of state failed to list Creditor 1 on the UCC-11, Creditor 2 did not give proper notice to Creditor 1 before extending credit on the inventory. If proper

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93. The required language is set out in the regulation, as is the size of type required (10 point). *Id.* § 433.2.

94. The Chase Manhattan Bank v. Sherwood Chevrolet, Inc., Appeal from Washington Law, slip op. at 4-5 (Tenn. Ct. App. June 18, 1980).

95. *Id.* at 5.

96. Greene County Bank v. F.B. Lawless Carpet Co., Appeal from Greene Equity, slip op. at 5-6 (Tenn. Ct. App. July 31, 1979).

97. TENN. CODE ANN. § 47-9-403(1) (1979).

98. Request for Information or Copies—Form UCC 11. This is an unofficial form available from commercial suppliers.

notice had been given, Creditor 2 would have had a purchase money priority in the inventory sold.[99] Because the prior secured party (Creditor 1) does not bear the risk that the filing officer will not properly perform his duties, Creditor 2 does not obtain a purchase money priority in the inventory.[100]

The Code rule should be compared with the rule on motor vehicles, as reflected in *Gourley v. Chrysler Credit Corp.*[101] In *Gourley*, Richard bought a Dodge van and financed it through Chrysler Credit. Chrysler Credit sent the proper papers to the state motor vehicle division to have its lien noted on the title. The motor vehicle division erred and sent Richard a title certificate with no notation of the Chrysler Credit lien.[102] Richard then sold the van to Gourley. Chrysler Credit sought possession of the van on the theory that it had done all it could do to get its lien noted.[103] Gourley argued that she was an innocent purchaser, and the court agreed: Chrysler Credit must bear the risk that the filing officer will not perform his duties.[104] The court relied on Tennessee Code Annotated section 59-327,[105] which requires filing *and notation* to give constructive notice of the lien.[106]

A lien on an automobile is perfected when the proper papers are received in the office of the state motor vehicle division in Nashville, not when they are filed with the county court clerk. Therefore, if there is more than a twenty-day period between the sale of the automobile and the receipt of the title papers by the motor vehicle division, there is a hiatus during which a superior lien could attach. Constructive notice under Tennessee Code Annotated section 59-327 dates from the first notation of the lien made by the motor vehicle division at its office in

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99. *See* notes 37-41 *supra* and accompanying text.

100. First Nat'l Bank v. Mann (*In re* Tri-Cities Music Centers, Inc.), 22 U.C.C. Rep. 254 (E.D. Tenn. 1977) (per Bare, B.J.).

101. Appeal from Davidson Equity (Tenn. Ct. App. July 28, 1978).

102. *Id.*, slip op. at 2.

103. *Id.* at 7-8.

104. *Id.* at 9.

105. TENN. CODE ANN. § 59-327 (1955) (current version at TENN. CODE ANN. § 55-3-126(a) (1980)).

106. Appeal from Davidson Equity, slip op. at 6-7.

Nashville.[107]

### *I. Non-Code Filing*

We have seen that perfection of security interests in motor vehicles is governed not by the Code but by other law. In addition, non-Code law must be examined when perfection of a security interest in certain other types of property is sought.

In *Morrison v. Helms*[108] the Tennessee Court of Appeals settled the question of priority as between an assignee of royalties and a levying creditor. MCA owed Helms royalties. In 1974 Helms assigned those royalties to Ratts. Morrison later obtained a judgment against Helms and then served a garnishment on MCA. MCA interpleaded the royalties. Morrison argued that the royalties owed were accounts, that the transaction was governed by the Code, and that since Ratts had not perfected his interest by filing, Morrison was entitled to priority on the royalties. The court held that the Code did not apply.[109] The Code requires filing for an assignment of "accounts,"[110] but "accounts" means the right to payment for goods or services.[111] Because the royalties were not rights to payment for goods or services, they could only be "general intangibles," the Code catch-all phrase for property rights that do not fit into any other category;[112] and the Code says its filing requirements do not apply to the outright

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107. *In re* Orr, No. BK-3-77-620, slip op. at 18-24 (E.D. Tenn. 1978) (per Bare, B.J.). For a good discussion of the cases involving perfection of liens on motor vehicles, see Weill v. United Bank (*In re* Poteet), No. 1-80-0104 (B.C.E.D. Tenn. Aug. 13, 1980), in which the court held that filing is accomplished only when the *correct* papers are received by the motor vehicle division. *Id.*, slip op. at 7, 12.

108. Appeal from Davidson Equity (Tenn. Ct. App. Apr. 27, 1979). The Tennessee Supreme Court has cast doubt on this analysis by stating in dictum that although the Code expressly excludes from its filing requirements the assignment of a right represented by a judgment, TENN. CODE ANN. § 47-9-104(h) (1979), the assignment of a right represented by a judgment on appeal is the assignment of a chose in action or an account. Third Nat'l Bank in Nashville v. Highlands Ins. Co., 603 S.W.2d 730, 732 (Tenn. 1980).

109. Appeal from Davidson Equity, slip op. at 2-4.

110. TENN. CODE ANN. § 47-9-302(e) (1979).

111. *Id.* § 47-9-106.

112. Appeal from Davidson Equity, slip op. at 3.

assignment or sale of general intangibles.[113] The court then turned to non-Code law and adopted the minority rule: The assignee who first gives notice of the assignment to the debtor has priority, even if the assignment is subsequent to that of another.[114] Under this rule, an attachment by a creditor in the period between the assignment and the assignee's giving notice to the debtor has priority. In *Morrison,* because Ratts had given notice to MCA of the royalty assignment long before Morrison served MCA with the garnishment, Ratts gained priority.

The Code does not apply to an assignment of rents and royalties. In *Union Livestock Yards, Inc. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.,*[115] Walker owed royalties to Lambert for the use of a rock quarry. In November 1974 Lambert assigned the royalties to Union Livestock Yards, but never told Walker of the assignment.[116] In January 1975 Merrill Lynch obtained a judgment against Lambert and in May served a garnishment on Walker. Whom should Walker pay, assignee (Livestock Yards) or garnisheeing creditor (Merrill Lynch)?

The court held for Merrill Lynch. Since Merrill Lynch served the garnishment before the assignment was perfected, it gained priority over Livestock Yards.[117] If Livestock Yards had perfected its interest by giving notice of the assignment to Walker, it would have prevailed over Merrill Lynch.[118] The stockyards argued that under the Code a lien creditor cannot take priority over a creditor with an unperfected security interest if the lien creditor has knowledge of the security interest.[119] The Code, however, simply does not apply, said Judge Dyer, " 'to the . . . transfer of an interest in . . . real estate, including a lease or rents thereunder.' "[120]

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113. TENN. CODE ANN. § 47-9-102(1)(b) (1979).

114. Appeal from Davidson Equity, slip op. at 4-5 (quoting opinion of the Chancellor).

115. 552 S.W.2d 392 (Tenn. Ct. App. 1976), *cert. denied, id.* (Tenn. 1977).

116. *Id.* at 393.

117. *Id.*

118. *Id.* at 394-95, 397.

119. *Id.* at 397.

120. *Id.* (quoting TENN. CODE ANN. § 47-9-104(j) (1979)).

## IV. Enforcement of Security Interests

The remainder of this Article is devoted to a discussion of the enforcement of consensual liens under the Uniform Commercial Code as enacted in title 47 of the Tennessee Code Annotated.[121] It does not include the panoply of other, nonconsensual remedies such as prejudgment attachment and postjudgment levy. In particular, this Article examines the doctrine of election of remedies, the mechanics of repossession, and the rules applicable to the disposition of collateral, as these concepts have been interpreted and applied by the courts of Tennessee.

### *A. Preservation of In Personam Rights Against the Debtor*

#### 1. Election of Remedies

In the typical secured transaction, the debtor makes a personal obligation to the creditor and also grants the creditor a security interest in certain collateral. The question may arise whether the creditor may proceed against both the collateral and the debtor personally, or whether the creditor must choose one of the two remedies. In Tennessee remedies are not mutually exclusive, and the creditor clearly need not make an election of remedies. The creditor can foreclose on the collateral and also can sue the debtor, although he is entitled to only one satisfaction of the claim.[122]

At common law respectable authority supported the proposition that a conditional vendor of a chattel forfeits the right to sue on the debt if the vendor repossesses the collateral; retaking possession was an election among inconsistent remedies.[123]

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121. Some attention is given to the arguably nonconsensual lien or right to reclaim under Tennessee Code Annotated § 47-2-702 (1979). *See* notes 212-27 *infra* and accompanying text.

122. Tenn. Code Ann. § 47-9-504(2) (1979).

123. *See, e.g.*, Russell v. Martin, 232 Mass. 379, 122 N.E. 447 (1919); *cf.* Washington Coop. Chick Ass'n v. Jacobs, 42 Wash. 2d 460, 256 P.2d 294 (1953) (vendor may either sue on the debt or repossess, but not both). For a discussion of election of remedies, see 2 G. Gilmore, *supra* note 76, § 43.6. *See also* Glenn, *The Conditional Sale at Common Law and as a Statutory Security*, 25 Va. L. Rev. 559, 569-74 (1939). The theory was that repossession resulted in recission of the sale, whereas suit on the indebtedness confirmed title in the buyer.

Some courts avoided the election issue by reluctantly allowing sellers to enforce explicit contract provisions that permitted both repossession and deficiency suits.[124] The common-law rule of election of remedies, however, has never prevailed in Tennessee,[125] and the doctrine of election of remedies in secured transactions is rejected definitively by Tennessee Code Annotated section 47-9-504(2), which permits both foreclosure and a deficiency judgment, even if the security agreement does not explicitly provide for a deficiency judgment:

> If a security interest secures an indebtedness, the secured party must account to the debtor for any surplus, and, unless otherwise agreed, the debtor is liable for any deficiency. But if the underlying transaction was a sale of accounts, contract rights, or chattel paper, the debtor is entitled to any surplus or is liable for any deficiency only if the security agreement so provides.[126]

Under a recent Tennessee statute, however, the creditor's initial choice of remedies does have some impact on the subsequent availability of additional relief. Tennessee law now provides that the creditor who brings an "action to recover personal prop-

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124. *See, e.g.*, White Motor Co. v. Briles, 137 Fla. 268, 188 So. 222 (1939).

125. *See* Turner v. Brock, 53 Tenn. 41, 1 Heisk. 50 (1871). A number of states, not including Tennessee, recently have restricted by statute the right of a creditor with a security interest in consumer goods to repossess, resell, and then collect a deficiency judgment. *See, e.g.*, N.M. STAT. ANN. § 50A-9-504(2) (Supp. 1971).

126. TENN. CODE ANN. § 47-9-504(2) (1979). This conclusion is reinforced by Tennessee Code Annotated § 47-9-501(1) (1979), which specifically makes rights and remedies cumulative. *Accord*, Williams v. Westinghouse Corp., 250 Ark. 1065, 468 S.W.2d 761 (1971). The plaintiff who elects to proceed against the collateral by action is encouraged by the statute to sue for possession and damages:

> In an action to recover personal property, in addition to the recovery of the property, the plaintiff may proceed to recover the balance due on the debt or the plaintiff may, in addition to recovering the personal property, obtain a judgment against the defendant for any debt or other claim arising out of the same transaction or set of circumstances, or the plaintiff may proceed solely for recovery of the personal property with the right to seek a judgment for additional relief in a subsequent action.

TENN. CODE ANN. § 29-30-108(a) (1980).

erty"[127] (the statutory successor to the unconstitutional replevin statute[128]) may sue both for possession and on the instrument or contract, but "[n]o deficiency judgment shall be obtained by the plaintiff(s) until plaintiff(s) shall have complied with all requirements of the Uniform Commercial Code applicable thereto."[129] Apparently, these requirements are the disposition-of-collateral provisions of Article Nine of the Code,[130] which require the plaintiff who forecloses by process to liquidate the collateral before seeking a personal judgment against the debtor. Presumably the "deficiency" or in personam portion of the action lies dormant in the bosom of the court between the filing of the suit and liquidation of the collateral. No such stricture against personal judgments applies when the collateral is taken by self-help.

2. Discharge by Impairment of Collateral or Recourse

An important defense available to debtors and their sureties in actions brought against them personally by creditors is commonly referred to as "discharge by impairment of collateral." This term is used to refer to two different actions that cause discharge of the debtor's personal liability: impairment of the collateral itself by the creditor without the consent of the debtor or surety, and impairment of recourse against the collateral. An example of impairment of the collateral itself is the creditor's allowing the collateral to deteriorate in value. Impairment of recourse against the collateral would result if the creditor allowed the debtor to use the collateral in a manner rendering recourse against it meaningless. Such conduct discharges a surety who presumably relied on the value of the collateral in guaranteeing

127. TENN. CODE ANN. §§ 29-30-101 to -111 (1980).

128. *See* notes 180-99 *infra* and accompanying text.

129. TENN. CODE ANN. § 29-30-108(b) (1980). The statute was drafted by a committee of lawyers representing members of the Tennessee Bankers Association in response to the decision in Mitchell v. Tennessee, 351 F. Supp. 846 (W.D. Tenn. 1972). The author served on that committee but made only a minimal contribution. The provision quoted in the text was not a part of the draft bill, but was added on the floor of the General Assembly.

130. TENN. CODE ANN. §§ 47-9-501 to -507 (1979). *See* notes 49-59 *supra* and accompanying text.

the debt, since the collateral would cushion any loss the surety might suffer by paying the debt. This second type of impairment also occurs when the creditor fails to perfect the security interest in the collateral, thereby exposing it to the competing claim of another creditor's security interest. When the third-party claim against the collateral prevails over the secured party's claim, the guarantor's exposure obviously is increased, and accordingly, the guarantor is discharged to the extent of the value of the security.[131]

The prudent creditor can avoid such discharges by obtaining consent to the impairment from the debtor or surety who otherwise would be discharged. This consent may be obtained before, at the time of, or after the conduct in question.[132] The consent commonly is buried in the fine print of a written security agreement.[133] An additional boon to creditors is the principle enunciated in a number of cases that failure to perfect a security interest does not ipso facto constitute an impairment of collateral giving rise to a discharge.[134]

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131. *See, e.g.*, Magnolia Homes Mfg. Corp. v. Montgomery, 451 F.2d 934 (8th Cir. 1971) (release of collateral for an inadequate price discharges accommodation parties); Shaffer v. Davidson, 445 P.2d 13 (Wyo. 1968) (failure to note a lien on the title certificate of a car discharges accommodation parties).

132. TENN. CODE ANN. § 47-3-606(1) (1979) provides:

> The holder discharges any party to the instrument to the extent that without such party's consent the holder:
>
> (a) without express reservation of rights releases or agrees not to sue any person against whom the party has to the knowledge of the holder a right of recourse or agrees to suspend the right to enforce against such person the instrument or collateral or otherwise discharges such person . . . or
>
> (b) unjustifiably impairs any collateral for the instrument given by or on behalf of the party or any person against whom he has a right of recourse.

133. Etelson v. Suburban Trust Co., 263 Md. 376, 378, 283 A.2d 408, 410 (1971) (note recited indorsers' "consent to . . . the release or exchange of any collateral without notice.").

134. Robertson State Bank v. Adams, Appeal from Robertson Equity (Tenn. Ct. App. Oct. 31, 1980); note 160 *infra* and accompanying text. *See, e.g.*, Nation Wide, Inc. v. Scullin, 256 F. Supp. 929 (D.N.J. 1966); Rushton v. U.M. & M. Credit Corp., 245 Ark. 703, 434 S.W.2d 81 (1968); Lafayette Bank & Trust Co. v. Silver, 58 Misc. 2d 891, 296 N.Y.S.2d 926 (App. Term 1969); *cf.* Wohlhuter v. St. Charles Lumber & Fuel Co., 25 Ill. App. 3d 812, 323 N.E.2d

The Tennessee courts generally have been neither strict nor liberal in applying the rule of discharge by impairment of collateral. In the leading case of *Commerce Union Bank v. May*[135] a surety argued that his obligation on a promissory note was discharged by the creditor bank's failure to renew an insurance policy on a parcel of land that served as collateral for a loan. Although the case involved liability on a promissory note, the Tennessee Supreme Court noted that because the collateral was real property, the Code did not apply.[136] The court adopted section 132 of the Restatement of Security as the law governing real estate collateral in Tennessee:

> Where the creditor has security from the principal and knows of the surety's obligation, the surety's obligation is reduced pro tanto if the creditor
>
> (a) surrenders or releases the security, or
>
> (b) wilfully or negligently harms it, or
>
> (c) fails to take reasonable action to preserve its value at a time when the surety does not have an opportunity to take such action.[137]

The court concluded that the bank had not impaired the collateral because both parties were equally able to take the steps necessary to protect it.[138]

The rationale of *May* has been adopted in two subsequent Tennessee cases. In *Tampa Bay Bank v. Loveday*[139] the president of a corporate debtor personally indorsed the corporation's note to the bank. The business subsequently failed, and the inventory, which the corporation had pledged as security for the loan, disappeared. The court of appeals affirmed the trial court's judgment against Loveday, the corporation's president,[140] noting

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134 (knowing acceptance of personal liability nullifies defense of unjustifiable impairment), *aff'd*, 62 Ill. 2d 16, 338 N.E.2d 179 (1975).

135. 503 S.W.2d 112 (Tenn. 1973).

136. *Id.* at 117.

137. RESTATEMENT OF SECURITY § 132 (1941).

138. "The nature of the security may impose upon the creditor duties to preserve its value so long as the creditor is the only person who can conveniently take the appropriate action." *Id.*, Comment c.

139. 526 S.W.2d 480 (Tenn. Ct. App. 1974), *cert. denied, id.* (Tenn. 1975).

140. The jury at trial had found Loveday to be a maker of the note, ren-

that as president she could have taken steps to protect the collateral and that she was in a better position than the bank to do so.[141] Similarly, in an unreported case, *American National Bank v. Henderson*,[142] the court of appeals for the western section held that a bank's failure to see that an automobile was insured did not discharge the accommodation indorsers when the car was wrecked.[143]

In *Commerce Union Bank v. Davis*[144] the court of appeals held that an extension of time for payment without a reservation of rights discharges an accommodation party on the theory of impairment of recourse. The court also discussed how to determine whether a party is an "accommodation party." The test applied by the court was whether the purported accommodation party received proceeds or other direct benefit from the instrument. The court indicated that "the receipt of benefits raises a presumption that a party's purpose is other than mere accommodation, and any person claiming such status must carry the burden of proof."[145] In *Davis*, Davis signed a note for $30,000 and a security agreement covering an airplane. He later sold the plane to Trulson. In order to get the bank to agree to the sale, Davis signed a "transfer of equity" agreement in which he agreed to remain liable on the $30,000 note. Trulson defaulted, and two years later the bank gave notice of the default to Davis

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dering the discharge issue moot since impairment does not discharge a maker but only an accommodation party. *Id.* at 481. Because the court of appeals found her to be an indorser, it had to face the discharge issue. *Id.*

141. *Id.* at 482.

142. Appeal from the Circuit Court of Hamilton County (Tenn. Ct. App. June 24, 1975) (per curiam). Unreported cases were for a time in a limbo created by Tennessee Supreme Court Rule 31. Revised and entered on April 30, 1976, the rule provided that "all unpublished opinions of any appellate court released prior to [April 30, 1976] shall not be cited as precedent in any brief or other materials presented to any court." On March 2, 1977, the supreme court amended the rule to provide that no unpublished opinion "shall be cited in any court unless a copy thereof shall be furnished to the court and to adversary counsel." Tenn. Sup. Ct. R. 31 (current version at TENN. SUP. CT. R. 4).

143. Appeal from the Circuit Court of Hamilton County, slip op. at 4.

144. 581 S.W.2d 142 (Tenn. Ct. App. 1978), *cert. denied, id.* (Tenn. 1979).

145. *Id.* at 144.

by suing him.[146] Davis pleaded discharge, arguing that the transfer-of-equity contract recast him in the role of an accommodation party on the note. The court found distinct benefits to Davis as a result of the transaction, including a favorable restructuring of his debt to the bank and the elimination of the cost of maintaining the plane.[147] Davis was therefore not an accommodation party and was not discharged.

The Tennessee rule is stricter, however, with respect to perfection of security interests. In *Southern Credit Union v. Rucker*[148] Patten borrowed money from his credit union to buy a sports car. The credit union obtained a security interest in the car and the personal guarantee of three of Patten's co-workers. The credit union then instructed Patten to re-title the car with a notation of the credit union's lien. Instead, Patten obtained a clear title and used the title certificate to borrow from another lender, who properly noted its lien on the title. Upon Patten's default, the credit union sued the indorsers. The court of appeals, citing Tennessee Code Annotated section 47-3-606,[149] observed that the credit union "sen[t] a goat to tend the cabbage patch" when it gave Patten the title papers.[150] The credit union's action amounted to an unjustifiable impairment of the collateral and, therefore, released the co-signers from liability on the note.[151] Thus, under the Tennessee rule a surety is discharged if the creditor fails to perfect its lien, but is not discharged if the surety could have performed the omitted act just as easily as could the creditor.[152]

Creditors can prevent the discharge of accommodation par-

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146. *Id.*

147. *Id.*

148. Appeal from the Circuit Court for Hamilton County (Tenn. Ct. App. Oct. 25, 1974).

149. TENN. CODE ANN. § 47-3-606 (1979).

150. Appeal from the Circuit Court for Hamilton County, slip op. at 5.

151. *Id.* at 6.

152. *See also* Tennessee Farmers Mut. Ins. Co. v. Scott, 8 U.C.C. Rep. 399 (Tenn. Ct. App. 1970) (bank had not taken reasonable steps to preserve collateral); United American Bank v. Buxbaum, Appeal from the Circuit Court of Shelby County at Memphis (Tenn. Ct. App. Aug. 18, 1980) (bank did not verify ownership of collateral and did not perfect security interest in collateral).

ties by including in the security agreement language by which the signatories waive their right to rely on the discharge defense. United States District Judge Bailey Brown recently summarized the law in this area and specifically upheld such a waiver. In *Union Planters National Bank v. Markowitz*[153] a guarantor was sued by the bank on his guaranty of a corporate note. The note was originally for $600,000; the bank took a security interest in $866,000 worth of accounts receivable. The bank failed to perfect its security interest and realized only $4,700 from the $866,000 worth of receivables. It then sued Markowitz for a $100,000 deficiency.

Markowitz argued negligent impairment of collateral, but the court noted that he had expressly waived that defense in the guaranty, which provided that the bank need not take steps to preserve its rights in the collateral.[154] The court held that the waiver was valid.[155] Markowitz also pleaded Tennessee Code Annotated section 47-9-207(3), under which a secured party is liable for any loss caused by his failure to protect the collateral adequately.[156] The court ruled that section 47-9-207(3) applies only to the debtor who pledged the collateral and not to a guarantor.[157] Finally, Markowitz relied upon Tennessee Code Annotated section 47-3-606, which states that the holder of an instrument discharges any party to the instrument to the extent that the holder unjustifiably impairs any collateral without the party's consent.[158] This defense, said Judge Brown, is available only to parties on the note, not to guarantors who sign a sepa-

153. 468 F. Supp. 529 (W.D. Tenn. 1979).

154. *Id.* at 533.

155. *Id.*

156. TENN. CODE ANN. § 47-9-207(3) (1979).

157. 468 F. Supp. at 534. In the case of a party primarily liable, facts like those in *Markowitz* may give rise to a claim for set-off. Tennessee Code Annotated § 47-9-207(1) (1979) imposes a statutory duty on the pledgee of collateral to exercise "reasonable care in the . . . preservation of collateral." *See* text accompanying note 161 *infra*. If the pledgee does not exercise reasonable care, the maker of the note has a claim of set-off because of the breach of the implied contract. Federal Deposit Ins. Corp. v. Webb, 464 F. Supp. 520 (E.D. Tenn. 1978) (per Wilson, J.).

158. TENN. CODE ANN. § 47-3-606 (1979).

rate agreement.[159] Thus, judgment was entered for the bank.

A waiver clause like that in *Markowitz* will be strictly construed, however, against the secured party. Therefore, language allowing a bank to release any and all collateral has been held not to excuse the bank's failure to perfect a lien in the collateral in the first instance.[160] When stock is pledged to secure a loan, the pledgee/secured party has no duty to sell the stock if it declines in value unless the debtor demands that it be sold; furthermore, the pledgee is not liable for any decline in its value. To impose a duty on the pledgee to sell declining collateral " 'would cast the pledgee in the role of investment advisor.' "[161]

### *B. Repossession*

When a debtor defaults, the secured creditor must decide whether to attempt to take possession of the collateral. Sometimes the nature of the collateral would render repossession counterproductive. For example, if the collateral is highly specialized equipment, the creditor may be wise to allow the debtor to retain the equipment and to use it to generate the cash necessary to pay the debt. Usually, however, the secured party decides to repossess, either for the purpose of coercing the debtor into finding the money for the next installment or for the purpose of selling the collateral and applying the proceeds against the debt. The following portion of this Article discusses some of the methods of repossession and their implications.

#### 1. Self-Help

The Code allows a secured party to take possession of the collateral from a defaulting debtor if it can be done without violence:

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159. 468 F. Supp. at 535.

160. First Tennessee Bank, N.A. v. Nance, Appeal from the Chancery Court for Hamilton County (Tenn. Ct. App. May 16, 1980). *But see* Robertson State Bank v. Adams, Appeal from Robertson Equity, slip op. at 5 (Tenn. Ct. App. Oct. 31, 1980) (*Nance* distinguished), *cert. denied, concurring in result only*, No. 79-154-II (Tenn. Feb. 23, 1981).

161. Bowling v. Bowling, Appeal from the Circuit Court for Knox County, slip op. at 4 (Tenn. Ct. App. June 18, 1980) (quoting Federal Deposit Ins. Corp. v. Webb, 464 F. Supp. 520, 527 (E.D. Tenn. 1978) (per Wilson, J.)).

> Unless otherwise agreed a secured party has on default the right to take possession of the collateral. In taking possession a secured party may proceed without judicial process if this can be done without breach of the peace or may proceed by action. If the security agreement so provides the secured party may require the debtor to assemble the collateral and make it available to the secured party at a place to be designated by the secured party which is reasonably convenient to both parties. Without removal a secured party may render equipment unusable, and may dispose of collateral on the debtor's premises under § 47-9-504.[162]

Under prior Tennessee law, the conditional vendor could retake possession of the merchandise only by judicial process unless the conditional sales contract contained a specific provision allowing repossession.[163] Tennessee Code Annotated section 47-9-503 overrules prior law by giving the secured party the right to repossess by self-help unless the security agreement specifically prohibits it.[164]

Doubt about the constitutionality of the Code provisions allowing self-help arose in 1969 when the United States Supreme Court held that prejudgment garnishment of wages violated the due process clause of the fourteenth amendment because the deprivation was accomplished without prior notice to the debtor or an opportunity for the debtor to be heard.[165] Three years later the Court held on similar grounds that the Pennsylvania and Florida replevin statutes violated the due process clause of

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162. TENN. CODE ANN. § 47-9-503 (1979). The right to repossess arises only upon "default." *Id.* Article Nine of the Code does not define "default." The definition of default is left to the terms of the security agreement. Whisenhunt v. Allen Parker Co., 119 Ga. App. 813, 168 S.E.2d 827 (1969). An acceleration clause is usually coupled with a default clause. For an excellent discussion of the efficacy of such clauses, see P. COOGAN, W. HOGAN & D. VAGTS, SECURED TRANSACTIONS UNDER THE UNIFORM COMMERCIAL CODE (1A BENDER'S UNIFORM COMMERCIAL CODE SERVICE) § 8.02[1] (1981).

163. *See, e.g.*, Rice v. Lusky Furniture Co., 167 Tenn. 202, 68 S.W.2d 107 (1934); Mitchell v. Automobile Sales Co., 161 Tenn. 1, 28 S.W.2d 51 (1930); Morrison v. Galyon Motor Co., 16 Tenn. App. 394, 64 S.W.2d 851 (1932). *But see* Third Nat'l Bank v. Olive, 198 Tenn. 687, 281 S.W.2d 675 (1955).

164. TENN. CODE ANN. § 47-9-503 (1979).

165. Sniadach v. Family Fin. Corp., 395 U.S. 337 (1972).

the fourteenth amendment.[166] On the basis of these cases, lawyers have argued that Code section 9-503, by legislatively authorizing direct action by secured creditors to deprive debtors of property without notice to the debtor or an opportunity for the debtor to be heard, is the functional equivalent of a state replevin statute and thus violates the fourteenth amendment. Some federal district judges have agreed with this analysis,[167] but the argument that self-help repossession under the Code is state action has been rejected by at least six different courts of appeals, including the Sixth Circuit.[168] Since the constitutionality of self-help repossession under Code section 9-503 seems settled,[169] the only qualification on the secured party's right to

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166. Fuentes v. Shevin, 407 U.S. 67 (1972).

167. *See, e.g.*, Gibbs v. Titelman, 369 F. Supp. 38 (E.D. Pa. 1973), *rev'd*, 502 F.2d 1107 (3d Cir.), *cert. denied*, 419 U.S. 1039 (1974); Boland v. Essex County Bank & Trust Co., 361 F. Supp. 917 (D. Mass. 1973). For more details on the background of these cases, see 5 MEM. ST. U.L. REV. 74 (1974).

168. Turner v. Impala Motors, 503 F.2d 607 (6th Cir. 1974), *cited with approval in* Jackson v. Metropolitan Edison Co., 419 U.S. 345, 349 n.6 (1974). The United States Supreme Court refused to grant certiorari in the following cases: Gibbs v. Titelman, 502 F.2d 1107 (3d Cir.), *cert. denied*, 419 U.S. 1039 (1974); Brantley v. Union Bank & Trust Co., 498 F.2d 365 (5th Cir.), *cert. denied*, 419 U.S. 1034 (1974); Nowlin v. Professional Auto Sales, Inc., 496 F.2d 16 (8th Cir.), *cert. denied*, 419 U.S. 1006 (1974); Shirley v. State Nat'l Bank, 493 F.2d 739 (2d Cir.), *cert. denied*, 419 U.S. 1009 (1974); Adams v. Southern California First Nat'l Bank, 492 F.2d 324 (9th Cir. 1973), *cert. denied*, 419 U.S. 1006 (1974).

169. As Professor Gilmore points out, however, the constitutionality of self-help does not make it safe:

> In the financing of business debtors repossession causes little trouble or dispute. In the underworld of consumer finance, however, repossession is a knockdown, drag-out battle waged on both sides with cunning guile and a complete disregard for the rules of fair play. A certain amount of trickery seems to be accepted: it is all right for the finance company to invite the defaulting buyer to drive over to its office for a friendly conference on refinancing the loan and to repossess the car as soon as he arrives. It is fairly safe for the finance company to pick up the car on the street wherever it may be parked, although there is always a danger that the buyer will later claim that he had been keeping a valuable stock of diamonds in the glove compartment. But the finance company will do well to think twice before allowing its man to break into an empty house, even though a well-drafted clause in the security agreement gives it the right to do ex-

repossess is the requirement that the repossession be conducted without a breach of the peace.[170]

A peaceful repossession does not give rise to criminal liability even if the repossessing party impersonates a peace officer. In *White v. State*[171] the defendant operated a repossession business. On instructions from a bank in Missouri, he went to the debtor's house to pick up her truck. He flashed some official-looking documents, including an ersatz badge, and she gave him the keys. Her testimony was that she thought he was a policeman.[172] The truck contained some of the debtor's personal property, which was ultimately discarded by the buyer of the truck. At trial the defendant was convicted of obtaining property under false pretenses and was sentenced to three to six years' imprisonment. The Tennessee Court of Criminal Appeals reversed the conviction. Although the defendant's conduct was "offensive"[173] and he could have been tried for the misdemeanor of impersonation, he was not guilty of obtaining either the truck or the personal property within it under false pretenses.[174] The defendant was acting within the parameters of Tennessee Code Annotated section 47-9-503, and the repossession was peaceful.

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actly that. And if the housewife, who is invariably pregnant and subject to miscarriages, sits on the sofa, stove, washing machine or television set and refuses to move, the finance company man will make a serious mistake if he dumps the lady or carries her screaming into the front yard. Juries love to award punitive damages for that sort of thing and the verdict will often be allowed to stand.

2 G. GILMORE, *supra* note 76, § 44.1, at 1212-13 (footnote omitted).

170. Harris Truck & Trailer Sales v. Foote, 58 Tenn. App. 710, 436 S.W.2d 460 (1968); Morrison v. Galyon Motor Co., 16 Tenn. App. 394, 64 S.W.2d 851 (1932). Professors White and Summers have concluded that entry into the debtor's residence or garage without permission is ipso facto a breach of the peace. J. WHITE & R. SUMMERS, *supra* note 9, § 26-6, at 967-69. The secured party who repossesses too vigorously or in breach of the peace risks potential tort liability for trespass, assault and battery, conversion, or invasion of privacy, and, possibly, criminal penalties. Thrasher v. First Nat'l Bank, 288 So. 2d 288 (Fla. App. 1974); Stone Machinery Co. v. Keesler, 1 Wash. App. 750, 463 P.2d 651 (1970); J. WHITE & R. SUMMERS, *supra* note 9, § 26-13; Annot., 35 A.L.R.3d 1016 (1971); Annot., 99 A.L.R.2d 358 (1965).

171. White v. State, No. 1868 (Tenn. Crim. App. Dec. 8, 1976).

172. *Id.*, slip op. at 2.

173. *Id.* at 3.

174. *Id.* at 4-5.

The debtor's remedy, if any, was civil, not criminal.[175]

Occasionally the parties will substitute for repossession and foreclosure a voluntary reconveyance to the secured party. Although this solution seems simple, it can create problems. First, the reconveyance does not terminate junior encumbrances but may, in fact, raise them to the status of senior encumbrances under the theory that the reconveyed legal title and the equitable title merge in the hands of the secured party and destroy the secured party's first lien. Second, the secured party may inadvertently become liable for the debts of the debtor. For example, when in lieu of formal foreclosure a bank accepts from a debtor an assignment and bill of sale conveying directly to the bank the debtor's inventory in which the bank has a security interest, the bank becomes a "successor" within the meaning of Tennessee Code Annotated section 67-3025[176] and is personally liable for the debtor's unpaid sales taxes.[177]

In the case of a wrongful repossession, which is, of course, a conversion, the correct measure of damages is the fair market value of the property at the time of conversion, with no damages for loss of use.[178] Interest, but not attorney's fees, can and should be awarded.[179]

### 2. Actions to Recover Personal Property

Although *Fuentes* was not applied to self-help repossession in Tennessee,[180] it was applied to the Tennessee replevin law.[181] In 1972 a special three-judge federal court entered a decree, consented to by the Attorney General of Tennessee, declaring unconstitutional the Tennessee statutes that authorized reple-

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175. *Id.* at 6 n.4.

176. TENN. CODE ANN. § 67-3025 (1976).

177. Bank of Commerce v. Woods, 585 S.W.2d 577 (Tenn. 1979). The court implied that the way to avoid becoming liable for the debtor's taxes is to foreclose. *Id.* at 582.

178. Massey-Ferguson, Inc. v. First Nat'l Bank, Appeal from Franklin Equity, slip op. at 20-23 (Tenn. Ct. App. Aug. 25, 1978) (per Drowota, J.).

179. *Id.* at 24-25.

180. 407 U.S. 67 (1972); *see* notes 165-69 *supra* and accompanying text.

181. TENN. CODE ANN. §§ 23-2301 to -2328 (1955) (repealed 1973) (current version at TENN. CODE ANN. §§ 23-2341 to -2351 (1979)).

vin.[182] The postjudgment remedy of detinue, however, was not invalidated.[183] In 1973 the Tennessee General Assembly responded to the decree with a new statute drafted to comply with the requirements of *Fuentes*.[184] The statute created a new "action to recover personal property."[185] This action is brought by filing a sworn complaint in circuit or chancery court, or a sworn civil warrant in general sessions court. The complaint or warrant must be accompanied by a copy of the security agreement, must explain why the plaintiff is entitled to possession, and must describe the collateral and state its value.[186] Upon filing of the complaint or warrant, the clerk is required to issue process giving notice that a possessory hearing will be held before a judge or chancellor on a specified date.[187] This hearing is neither final nor on the merits, but merely affords the plaintiff an opportunity to obtain a writ of possession entitling him to gain physical possession of the property pending trial on the merits. By posting a bond in the amount of the value of the property, the plaintiff also may obtain from the judge or chancellor, but not from the clerk, an order restraining the defendant from damaging, concealing, or removing the property from the court's jurisdiction.[188] The defendant may waive his right to the possessory hearing by giving the property to the sheriff or other officer when process is served.[189]

Alternatively, the plaintiff may begin the repossession action by delivering to the defendant personally or by certified mail notice of the time and place for the hearing on the plain-

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182. Mitchell v. Tennessee, 351 F. Supp. 846 (W.D. Tenn. 1972).

183. *Id.* at 848.

184. Act of May 7, 1973, ch. 365, §§ 1-9, 11, 13, 1973 Tenn. Pub. Acts 1316 (codified at TENN. CODE ANN. §§ 23-2341 to -2351 (1979) (repealing TENN. CODE ANN. §§ 23-2301 to -2328 (1955)).

185. TENN. CODE ANN. § 29-30-101 (1980).

186. *Id.* § 29-30-103.

187. *Id.* § 29-30-104.

188. *Id.* § 29-30-105. In Knox County, the practice is to couple the restraining order with an order directing the defendant to show cause why the restraining order should not be continued and why the requested relief should not be granted. This practice has no statutory basis, but coincides with the general rules regarding *ex parte* and extraordinary relief. *See* TENN. R. CIV. P. 65.

189. TENN. CODE ANN. § 29-30-104 (1980).

tiff's application for a writ of possession.[190] The notice must be accompanied by a copy of the complaint and necessary attachments[191] and must be mailed or delivered at least five days before the hearing.[192] At the hearing the court must order the issuance of an immediate writ of possession if it finds (1) that the plaintiff is entitled to possession of the property and (2) that the plaintiff gave the defendant notice at least five days prior to the hearing.[193] The writ of possession, if issued, also serves as a summons for the full hearing on the merits to be held at a later date.

Upon application by the plaintiff, the court may order an immediate writ of possession without notice to the defendant if it finds that the debtor obtained the property by fraud, misrepresentation, or theft, or if it finds that the defendant is concealing the property, is likely to remove the property from the jurisdiction of the court, is likely to dispose of it, is endangering it by unusually hazardous use, or is impairing the plaintiff's security interest by actions such as failure to maintain hazard insurance.[194] A writ of possession issued pursuant to this section is conditioned upon the plaintiff's posting a bond in an amount fixed by the court but no less than the value of the property.[195] Unlike the statutes rejected by the Supreme Court in *Fuentes*,[196] the Tennessee statute allowing *ex parte* issuance of a writ of possession requires (1) extraordinary circumstances and (2) a judicial hearing before issuance of the writ. In upholding the constitutionality of this portion of the statute, a three-judge federal court pointed out that pre-hearing repossession is permissible only when a lien holder who is in danger of losing the secured property posts a bond and obtains an order from a judge, as under the Tennessee statute, rather than from a mere clerk, as under the statutes struck down in *Fuentes*.[197]

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190. *Id.* § 29-30-104(1).
191. *Id.* § 29-30-106(1)(A)(ii).
192. *Id.* § 29-30-106(1)(A).
193. *Id.* § 29-30-106(2).
194. *Id.* § 29-30-106(1)(B).
195. *Id.*
196. Fuentes v. Shevin, 407 U.S. 67 (1972); *see* notes 165-69 *supra* and accompanying text.
197. Woods v. Tennessee, 378 F. Supp. 1364 (W.D. Tenn. 1974). The

In addition to seeking recovery of the property, the plaintiff may include a prayer for recovery of the balance due on the underlying debt.[198] Unfortunately, the Tennessee General Assembly limited the availability of this dual remedy by providing that no deficiency judgment may be obtained until the plaintiff has complied with "all requirements of the Uniform Commercial Code applicable thereto."[199] Presumably, a judgment on the debt must await disposal of the collateral. The legislature also increased the original jurisdiction of the general sessions court by raising the maximum permissible dollar amount for actions to recover personal property from $3,000 to $7,500.[200] The maximum dollar amount refers to the value of either the collateral or the debt, and the effect of the higher amount is to bring some mobile home transactions within the jurisdiction of the general sessions court.

### 3. Bankruptcy Restraints on Repossession

The most potent restraint on the secured party's right to repossess arises when the debtor files a petition in bankruptcy under Chapter 7, 11, or 13. By virtue of section 362 of the Bankruptcy Code,[201] the filing of the petition automatically acts as a

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court relied on Mitchell v. W.T. Grant Co., 416 U.S. 600, 605-06 (1974), in which the Supreme Court distinguished *Fuentes*. 378 F. Supp. at 1365-66. In *Fuentes* the Florida and Pennsylvania replevin statutes were held invalid because they permitted the sale of repossessed goods without a hearing or notice to the debtor and without judicial order or supervision. In *Mitchell* the constitutional guarantee of procedural due process was found to be satisfied because the Louisiana law required, as a precondition to the sequestration of property from a defaulting debtor, that the creditor (1) furnish adequate security and (2) make a specific factual showing to obtain judicial authorization. 416 U.S. 611. The court in *Woods* also referred to the Tennessee provisions allowing the award of punitive damages plus attorney's fees to the defendant if the plaintiff wrongfully brings a possessory action or fails to prosecute. TENN. CODE ANN. § 29-30-110 (1980), *cited in* 378 F. Supp. at 1365. Defendant's remedies such as these were deemed important by the Supreme Court in sustaining the Louisiana statute in *Mitchell*. 416 U.S. at 611.

198. TENN. CODE ANN. § 29-30-108(a) (1980).

199. *Id.* § 19-30-108(b).

200. Act of May 7, 1973, ch. 365, § 10, 1973 Tenn. Pub. Acts 1316. The limit is now $10,000. TENN. CODE ANN. § 16-15-501(d)(1980).

201. 11 U.S.C. § 362 (Supp. III 1979).

stay of, *inter alia*, "any act to obtain possession of property of the estate"[202] and "any act to create, perfect, or enforce any lien against property of the estate."[203] Although under prior law the stay in a "straight" bankruptcy was inapplicable if the secured party had already obtained possession of the collateral prior to the filing of the petition,[204] the section 362 stay also applies to secured parties who have possession of the collateral.[205] The only recourse for a secured party is to obtain relief from the stay from the bankruptcy court or to await the closing of the case.[206]

The automatic aspect of the stay deserves special attention because a repossessing creditor might become ensnared inadvertently in the thicket of contempt. If the creditor attempts to repossess the collateral at any time after the petition in bankruptcy is filed, the creditor may be held in contempt by the bankruptcy judge even though the creditor had no actual knowledge of the filing and acted in good faith. Although the U.C.C. abhors the secret lien, the Bankruptcy Code embraces the secret stay.[207] The creditor's dilemma is best illustrated by the bankruptcy court's decision in *Moore v. United States National Bank (In re Tallyn)*.[208] In *Tallyn* the bankrupt filed a petition on the morning of October 2. On October 3, the bank, acting without actual knowledge of the filing, repossessed the bankrupt's automobile.[209] The bank subsequently sold the car after contacting the trustee but without taking any action in the bankruptcy court.[210] In finding the bank in contempt of court

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202. *Id.* § 362(a)(3).

203. *Id.* § 362(a)(4).

204. *E.g.*, Heine-Geldern v. ESIC Capital, Inc. (*In re* Magnum Opus Elecs. Ltd.), 2 Bankr. Ct. Dec. 545 (S.D.N.Y. 1976).

205. 11 U.S.C. § 362 (Supp. III 1979).

206. For the proper procedures to obtain a lifting or modification of the stay, see 11 U.S.C. § 362(d) (Supp. III 1979) and Rules of Bankruptcy Procedure Part VII and Interim Bankruptcy Rule 4001(a)(as amended Sept. 27, 1979). The secured party must comply with the procedures required by each of these three authorities.

207. *Compare* U.C.C. art. 9 *with* 11 U.S.C. § 362 (Supp. III 1979).

208. 1 Bankr. Ct. Dec. 487 (E.D. Va. 1975). Although *Tallyn* was decided under the superceded Rule of Bankruptcy Procedure 601, its principle should be equally applicable under Section 362 of the Bankruptcy Code.

209. *Id.* at 487.

210. *Id.*

and assessing a fine of one hundred dollars, the bankruptcy judge made these observations:

> Few things are any clearer in bankruptcy: even a lien creditor may do nothing on its own to enforce its lien. There is automatic injunction [stay]. Frequently creditors will argue that they received no notice of bankruptcy, as here, or that they repossessed the property before receipt of the notice from the court. They feel they may do anything they wish until they receive a notice from the Bankruptcy Court. This is not so!
>
> Creditors must understand that the very "filing of a petition" activates the injunction and notice has nothing whatsoever to do with it. Therefore, the instant injunction fully obtained on October 2, 1974, at 9:20 A.M., without notice.
>
> . . . .
>
> Bankruptcy Rule 601 is an injunction [stay] which automatically goes into effect at the moment of the filing of the petition. *No notice for this purpose is required.* It is a lien creditor's duty and responsibility to ascertain whether a bankruptcy petition has been filed and upon inquiry, even by telephone, the Court will furnish that information relative to the name or names given by the inquirer.
>
> Here the lien creditor violated Bankruptcy Rule 601 in two respects:
>
> 1—Repossession of the vehicle after the filing of the petition and
>
> 2—Sale of the vehicle after the filing of the petition.
>
> Let it clearly be noted that a lien creditor is not without remedy. He may file a complaint for the recovery of his property and if entitled to the same, upon entry of an order, may recover the property from both the trustee and the bankrupt.[211]

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211. *Id.* at 487-88. Secured creditors have been denied the right to repossess in corporate reorganization cases when the debtor needed the collateral to operate or to make reorganization possible. Fruehauf Corp. v. Yale Express System, Inc. (*In re* Yale Express System, Inc.), 384 F.2d 990 (2d Cir. 1967); *In re* Bermec Corp., No. 71-B-291 (S.D.N.Y. 1971), *aff'd*, 445 F.2d 367 (2d Cir. 1971). In *Yale Express*, the court of appeals did not require the debtor to make payments equal to the depreciation in value of the collateral. The case has been criticized as exceeding constitutional limits on the extent to which a secured creditor can be enjoined from repossessing property, while not being compensated for its use by the debtor. Murphy, *Restraint and Reimbursement: The Secured Creditor in Reorganization and Arrangement Proceedings*,

### 4. Reclamation of Goods Under Article Two

Conventional legal wisdom holds that (1) a seller on open account holds no enforceable lien in merchandise after relinquishing possession and (2) Article Nine of the Uniform Commercial Code exclusively governs the rights of U.C.C. lienors. Like so many other bits of conventional wisdom, these propositions have exceptions, the most important of which is the right of a defrauded seller to reclaim the goods under Code section 2-702.[212] Subsections (2) and (3) of section 2-702 provide:

> (2) Where the seller discovers that the buyer has received goods on credit while insolvent he may reclaim the goods upon demand made within ten (10) days after the receipt, but if misrepresentation of solvency has been made to the particular seller in writing within three (3) months before delivery the ten (10) day limitation does not apply. Except as provided in this subsection the seller may not base a right to reclaim goods on the buyer's fraudulent or innocent misrepresentation of solvency or of intent to pay.
>
> (3) The seller's right to reclaim under subsection (2) is subject to the rights of a buyer in ordinary course or other good faith purchaser or lien creditor under this chapter . . . . Successful reclamation of goods excludes all other remedies with respect to them.[213]

The statute represents only a slight departure from the common law. Prior law in Tennessee and in numerous other jurisdictions provided that the seller of goods which were deliv-

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30 BUS. LAW. 15 (1974).

The Rule 601 stay is similar to section 362 of the Bankruptcy Code, and the *Tallyn* approach is equally applicable under section 362. Bankruptcy Judge Ralph Kelley, however, adopted a middle ground when, although the bank had notice of the petition, its collection department did not and tried to collect a discharged debt. He refused to cite the bank for contempt, but did order it to pay the attorney's fees of the debtor incident to the contempt proceeding. Womack v. City Bank & Trust Co. (*In re* Womack), 6 Bankr. Ct. Dec. 543 (E.D. Tenn. 1980).

212. TENN. CODE ANN. § 47-2-702 (1979). For a thorough and thoughtful analysis of the conflict between Code § 2-702 and the Bankruptcy Act, see Sebert, *The Seller's Right to Reclaim: Another Conflict Between the Uniform Commercial Code and the Bankruptcy Act?* 52 NOTRE DAME LAW. 219 (1976).

213. TENN. CODE ANN. § 47-2-702 (1979).

ered on credit had the power to rescind and recover the goods if the buyer fraudulently had misrepresented his solvency.[214] The Code continues this protection in modified form. If a buyer receives goods while insolvent, the seller may reclaim them by making a demand within ten days of the buyer's receipt.[215] No proof of misrepresentation by the buyer or of the buyer's intent not to pay is required, but the power to rescind expires in ten days from the buyer's receipt of the goods. The ten-day limit does not apply, however, if the misrepresentation is made in writing within the three-month period preceding delivery.[216] Thus, speed on the part of the seller and his lawyer is essential, although the process of actual repossession may be commenced later if the demand is timely made.[217]

Although the statute clearly acknowledges the right of the "defrauded"[218] seller to reclaim from the buyer, it also provides that the seller's right to recover goods "is subject to the rights of a buyer in ordinary course"[219] or "other good faith purchaser *or lien creditor* under this chapter (§ 47-2-403)."[220] The Fifth Circuit upheld the principle that the rights of a reclaiming seller are subordinate to the rights of a perfected secured creditor in the same goods.[221] On the other hand, the Sixth Circuit applied

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214. Richardson v. Vick, 125 Tenn. 532, 145 S.W. 174 (1912); *see* 3 S. WILLISTON, THE LAW GOVERNING SALES OF GOODS §§ 636-637 (rev. ed. 1948). *See also* P. COOGAN, W. HOGAN & D. VAGTS, *supra* note 162, (1B BENDER'S UNIFORM COMMERCIAL CODE SERVICE) § 18.02[2][a] (1981).

215. TENN. CODE ANN. § 47-2-702(2) (1979).

216. *Id.*

217. Johnston & Murphy Shoes, Inc. v. Meinhard Commercial Corp. (*In re* Mel Golde Shoes, Inc.), 403 F.2d 658 (6th Cir. 1968); *In re* Childress, 6 U.C.C. Rep. 505 (E.D. Tenn. 1969). In *Childress* the court emphasized that an intervening bankruptcy petition in straight bankruptcy does not toll the ten-day period or excuse demand. The demand can be made on the debtor or upon the trustee in possession of the goods. *Id.* at 506-07.

218. "Subsection (2) takes as its base line the proposition that any receipt of goods on credit by an insolvent buyer amounts to a tacit business misrepresentation of solvency and therefore is fraudulent as against the particular seller." TENN. CODE ANN. § 47-2-702, Comment 2 (1979).

219. *Id.* § 47-2-702(3); *see id.* § 47-9-307.

220. *Id.* § 47-2-702(3) (emphasis added); *see* English v. Ralph Williams Ford, 17 Cal. App. 3d 1038, 95 Cal. Rptr. 501 (1971).

221. Stowers v. Mahon (*In re* Samuels & Co.), 526 F.2d 1238 (5th Cir. 1976) (en banc), *rev'g* 510 F.2d 139 (5th Cir. 1975); *accord*, *In re* Daley, Inc., 17

Kentucky law and found that the seller's right to reclaim takes priority over an attachment lien.[222]

A more common conflict has arisen between the reclaiming seller and the buyer's trustee in bankruptcy. In a case arising under the old Bankruptcy Act,[223] Bankruptcy Judge Clive W. Bare, relying on Tennessee law, held in *In re Royalty Homes, Inc.*[224] that the buyer's bankruptcy does not terminate a seller's reclamation rights. And in *In re Federal's Inc.*[225] the Sixth Circuit, applying Michigan law, held that a receiver in bankruptcy did not prevail over a reclaiming seller even if the receiver was viewed as an "intervening lien creditor." The court looked to pre-Code Michigan law and concluded that since a trustee as hypothetical judgment lien creditor acquires only such title to property as the debtor had, a trustee's claim is subordinate to that of a reclaiming seller.[226] Therefore, the law seems clear, especially in the Sixth Circuit, that the reclaiming seller prevails over the trustee.[227] This rule has been codified in the new Bankruptcy Code: Section 546(c) recognizes the validity of Code section 2-702, subject to the power of the court to deny reclamation but still protect the seller by granting an administrative expense priority to the seller's claim arising from the sale of the goods.[228]

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U.C.C. Rep. 433 (D. Mass. 1975).

222. Johnston & Murphy Shoes, Inc. v. Meinhard Commercial Corp. (*In re* Mel Golde Shoes, Inc.), 403 F.2d 658, 661 (6th Cir. 1968).

223. 11 U.S.C. §§ 1-1103 (1976) (repealed 1978) (current version at 11 U.S.C. §§ 101-1330 (Supp. III 1979)).

224. 8 U.C.C. Rep. 61 (E.D. Tenn. 1970); *accord,* Johnston & Murphy Shoes, Inc. v. Meinhard Commercial Corp. (*In re* Mel Golde Shoes, Inc.), 403 F.2d 658 (6th Cir. 1968).

225. 553 F.2d 509 (6th Cir. 1977), *rev'g* 402 F. Supp. 1357 (E.D. Mich. 1975). Although the district court also had held that Code § 2-702 conflicts with the Bankruptcy Act, the Sixth Circuit found no such conflict. *Id.* at 515-18. *See also* Lewis v. Holzman (*In re* Telemart Enterprises, Inc.), 524 F.2d 761 (9th Cir. 1975) (seller prevailed over trustee, and no conflict between Code § 2-702 and Bankruptcy Act was found).

226. 553 F.2d at 513-14. The Sixth Circuit had also looked to pre-Code law in *Mel Golde.* 403 F.2d at 660-61.

227. Apparently the Code's Permanent Editorial Board agrees. In 1966 it amended Code § 2-702 by deleting the language "or lien creditors" following "good faith purchaser" in the first sentence of § 2-702(3). Tennessee has not yet adopted the proposed amendment.

228. 11 U.S.C. § 546(c) (Supp. III 1979).

Two other rights of repossession deserve notice. In *Richards & Associates, Inc. v. Tennessee Forging Steel Corp. (In re Tennessee Forging Steel Corp.),*[229] Bankruptcy Judge Clive W. Bare in a Chapter XI case under the old Bankruptcy Act[230] expanded the rights of the buyer of goods vis-a-vis the debtor. In order to settle a lien lawsuit, the debtor in the fall of 1977 agreed to produce and deliver to its creditor 268 tons of specially fabricated steel. The debtor produced the steel, set it aside, and instead of delivering the steel, tagged it for the creditor to pick up. Twice the debtor told the creditor to come and get the steel, but before the creditor did so the debtor filed a bankruptcy petition under Chapter XI. The creditor then filed a complaint demanding its 268 tons of steel. The debtor defended on the grounds that (1) the creditor did not have a perfected security interest in the steel and (2) the agreement to deliver the steel was an executory contract which the trustee would reject, leaving the creditor with a mere unsecured claim.[231]

The court did not accept either defense. First, Judge Bare held that the deal was a "transaction, even if not technically a sale, and article 2 of the Code applies generally to 'transactions in goods.' "[232] Because under Code section 2-401(1), when goods are identified to a contract, the "buyer" acquires a "special property," not a security interest[233]—that is, title passes—Article Nine does not apply.[234] Under Code section 2-716 specific performance may be decreed in "proper circumstances";[235] therefore, judgment for the creditor directing delivery of the steel was entered, and no appeal was taken.

An additional repossession right is conferred by Tennessee Code Annotated section 64-1114,[236] which gives the seller of building materials on open account the right to repossess those materials if the construction job is abandoned and the materials

229. No. BK-3-77-722 (E.D. Tenn. Feb. 28, 1978).

230. 11 U.S.C. §§ 101-1103 (1976) (repealed 1978) (current version at 11 U.S.C. §§ 101-1330 (Supp. III 1979)).

231. No. BK-3-77-722, slip op. at 6.

232. *Id.* at 7 (quoting TENN. CODE ANN. § 47-2-102 (1979)).

233. *Id.* at 8 (quoting TENN. CODE ANN. § 47-2-401(1) (1979)).

234. *Id.* at 12.

235. *Id.*

236. TENN. CODE ANN. § 64-1114 (1976).

have not yet been incorporated into the improvement. This right to repossess, which is not a lien, is superior to a perfected security interest in the materials granted to a third party by the contractor who bought them.[237]

5. Rights of Junior Lien Holders to Compel Marshaling

A secured party's right to repossess the collateral may be frustrated by the holder of a junior security interest who invokes the equitable principle of marshaling of liens. In the usual case, the secured party with a prior lien is entitled to possession as against a secured party with a subordinate lien.[238] The Code, however, also provides that "[u]nless displaced by the particular provisions [of the Code], the principles of law and equity . . . shall supplement its provisions."[239] One such principle is marshaling of liens,

> a rule which courts of equity sometimes invoke to compel a creditor who has the right to make his debt out of either of two funds to resort to that one of them which will not interfere with or defeat the rights of another creditor who has recourse to only one of these funds.[240]

The principle arose primarily in cases of land transactions and has been explained by the Tennessee Supreme Court as follows: If *A* has a mortgage on lots 1 and 2, and *B* levies on lot 2, the Chancellor, applying the marshaling doctrine, will require *A* to foreclose first on lot 1 and satisfy the claim, insofar as possible, from the proceeds of lot 1 so as to give both *A* and *B* maximum

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237. General Electric Supply Co. v. Pioneer Bank, Appeal from Hamilton Chancery, slip op. at 6 (Tenn. Ct. App. June 18, 1980).

238. Priorities are determined initially by reference to Tennessee Code Annotated § 47-9-312 (Supp. 1979). The Federal Tax Lien Act of 1966, Pub. L. No. 89-719, § 101, 80 Stat. 1125 (amending I.R.C. of 1954 §§ 6323 & 6325), may have considerable impact on the question of priorities between the secured party and the tax collector. For a comprehensive discussion of the Act, see P. COOGAN, W. HOGAN & D. VAGTS, *supra* note 162, (1B BENDER'S UNIFORM COMMERCIAL CODE SERVICE) §§ 12.07-.13 (1981).

239. TENN. CODE ANN. § 47-1-103 (1979).

240. Farmer's Loan & Trust Co. v. Kip, 192 N.Y. 266, 283, 85 N.E. 59, 64 (1908).

protection.[241] The principle should be equally applicable to conflicting secured parties.[242] A junior lien holder should investigate a repossessing party's other collateral in order to invoke the marshaling of liens principle to protect his own security interest.

The Eighth Circuit has extended the marshaling of liens principle by requiring a senior secured creditor to pursue collateral securing a guaranty before resorting to collateral owned by the bankrupt borrower. In *Berman v. Green (In re Jack Green's Fashions for Men—Big & Tall, Inc.)*[243] the lender held a security interest in all of the business assets of the borrower and liens in real estate owned by the guarantors, who were the principal shareholders of the borrower.[244] The court ordered the secured creditor to look first to the collateral securing the guaranty, thus enabling creditors of the bankrupt debtor to receive something in distribution.[245]

### 6. Good Faith

The Tennessee Court of Appeals for the Western Section has superimposed a good faith requirement upon the right to repossess, at least by court process. In *Memphis Bank & Trust Co. v. Tindall*[246] the court held that while under the terms of a security agreement the secured party may have the right to immediate possession of the collateral if a payment is even one day late, the secured party, in order to obtain an immediate writ of possession, must comply with the provisions of Tennessee Code Annotated section 47-1-208.[247] Failure to comply with this sec-

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241. Parr, Nolen & Co. v. Fumbanks, 79 Tenn. 391, 394-95 (1883); *accord*, Gilliam v. McCormack, 85 Tenn. 597, 4 S.W. 521 (1887). *See generally* G. BOGERT & G. BOGERT, TRUSTS AND TRUSTEES § 930, at 377-79 (2d ed. 1962).

242. *Cf.* Hope v. Wilkinson, 82 Tenn. 16, 14 Lea 21 (1884) (where creditors have recovered debts from personalty, legatee is entitled to recover depletion of legacy from realty in hands of heir).

243. 597 F.2d 130 (8th Cir. 1979).

244. *Id.* at 131-32.

245. *Id.* at 132-33. For a fuller discussion of the rationale and implications of this case, see Schimberg, *Secured Transactions*, 35 BUS. LAW., 1165, 1191 (1980).

246. Appeal from the Circuit Court of Shelby County at Memphis (Tenn. Ct. App. Apr. 3, 1980).

247. TENN. CODE ANN. § 47-1-208 (1979).

tion exposes the secured party to an action for damages for the wrongful commencement of the possessory action; that is, even if the secured party has the right to accelerate the note, he does not necessarily have the right to immediate possession of the collateral. In taking possession of the collateral the secured party is required to exercise "good faith."[248]

### C. *Disposition of Collateral*

Obtaining possession of the collateral is only part of the secured party's battle. The secured party also must dispose of the collateral in a way that maximizes the return to the secured party while avoiding the many pitfalls of the Uniform Commercial Code.[249] The remainder of this Article focuses upon the various restraints placed on the secured party's right to sell the collateral and upon the consequences of the secured party's failure to comply with the standards of the Code.

#### 1. Obligations While in Possession of the Collateral

Code section 9-207 imposes certain duties on the secured party during the period between repossession and sale or at any time before sale if the secured party has perfected the security interest by possession.[250] Not surprisingly, the secured party is required to "use reasonable care in the custody and preservation of collateral in his possession"[251]—the duty of a pledgee at common law.[252] This duty cannot be disclaimed or waived,[253] but the security agreement may spell out different standards of care that "are not manifestly unreasonable."[254] The collateral may be used or operated to preserve its value—for example, a plant may be operated in order to maintain its value as a going concern[255] or a

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248. Appeal from the Circuit Court of Shelby County at Memphis, slip op. at 15. The court's holding may not be applicable to self-help repossession.

249. TENN. CODE ANN. §§ 47-9-504, -9-505, -9-507 (1979).

250. *Id.* § 47-9-207.

251. *Id.* § 47-9-207(1).

252. *Id.* § 47-9-207, Comment 1; *see* note 161 *supra* and accompanying text.

253. *Id.* § 47-9-207, Comment 4; § 47-9-501(3).

254. *Id.* § 47-9-501(3).

255. In Southern States Dev. Co. v. Robinson, 494 S.W.2d 777 (Tenn. Ct.

debilitated herd of swine may be fattened[256]—or the collateral may be used in a manner authorized by the security agreement or by a court of competent jurisdiction.[257] During the time the secured party is in possession of the collateral, the risk of loss remains with the debtor to the extent of any deficiency in the debtor's insurance coverage, but the secured party also has an obligation to obtain insurance.[258] Any nonmonetary increase in the collateral may be held as additional security.[259] Finally, the collateral may not be commingled with the secured party's goods unless it is fungible.[260]

### 2. Retention in Satisfaction

Although a foreclosure sale of the collateral usually follows repossession, the drafters of the Code observed, "Experience has shown that the parties are frequently better off without a resale of the collateral . . . ."[261] Code section 9-505 embodies this alternative by permitting the secured party, after default, to propose in writing retention of the collateral in full satisfaction of the debtor's obligation.[262] Again, however, there is an exception for consumer goods: if the debtor has paid sixty percent of the obligation secured by the collateral, the secured party must dis-

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App. 1972), *cert. denied, id.* (Tenn. 1973), the secured party took possession of and operated a manufacturing plant pursuant to a security agreement. He was held liable to trade creditors for inventory sold and used while operating the factory.

256. Sparkle Laundry & Cleaners, Inc. v. Kelton, 595 S.W.2d 88 (Tenn. Ct. App. 1979), *cert. denied, id.* (Tenn. 1980).

257. TENN. CODE ANN. § 47-9-207(4) (1979). Nevertheless the collateral cannot be used for an inordinate period, Moran v. Holman, 514 P.2d 817 (Alaska 1973), nor can a security agreement covering consumer goods provide for the manner and extent of acceptable use of the collateral. TENN. CODE ANN. § 47-9-207(4) (1979).

258. TENN. CODE ANN. § 47-9-207(2)(b) (1979); *see* Harvard Trust Co. v. Racheotes, 337 Mass. 73, 147 N.E.2d 817 (1958).

259. TENN. CODE ANN. § 47-9-207(2)(c) (1979).

260. *Id.* § 47-9-207(2)(d). For a comprehensive discussion of the creditor's rights and duties regarding collateral in the secured party's possession, see 2 G. GILMORE, *supra* note 76, §§ 42.1-.14.

261. TENN. CODE ANN. § 47-9-505, Comment 1 (1979).

262. *Id.* § 47-9-505.

pose of the collateral under section 9-504[263] within ninety days of taking possession unless the debtor has waived his rights in writing after default.[264]

Written notice of the secured party's proposal must be sent to the debtor and, except in the case of consumer goods, also must be sent to any other secured party who has properly filed a financing statement or to any unperfected security interest holder of whose interest the retaining party has actual notice. If no one objects within thirty days, the secured party may retain the collateral in satisfaction of the debtor's obligation, without selling it[265] and without regard to its actual value.[266] If any secured party raises a timely objection, of course, the creditor must dispose of the collateral in accordance with the rules set forth below. Thus it is incumbent on the secured party to research the records to discover other secured parties in order to give them notice.

### 3. Sale of Collateral

The heart of part five of Article Nine is section 9-504,[267] which provides a relatively flexible and simple guide to the disposition of collateral, with the goal of producing the maximum possible amount from the disposition. The drafters rejected the Uniform Conditional Sales Act approach of detailed statutory regulation and opted for "a loosely organized, informal, anything-goes type of foreclosure pattern, subject to ultimate judicial supervision and control . . . ."[268]

#### a. "Commercially Reasonable"

Although the Code confers considerable discretion on the secured party in selling the collateral, the Code imposes one

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263. *Id.* § 47-9-504.

264. *Id.* § 47-9-505(1).

265. *Id.* § 47-9-505(2). Notice to junior lien holders is not required in consumer goods transactions. *Id.*

266. Cerasoli v. Schneider, 311 A.2d 880 (Del. Super. Ct. 1973). The safeguard in such a case is the right of the debtor to object and thereby to require sale of the collateral. *Id.* at 883.

267. TENN. CODE ANN. § 47-9-504 (1979).

268. 2 G. GILMORE, *supra* note 76, § 43.1, at 1183.

overriding requirement: "[E]very aspect of the disposition including the method, manner, time, place and terms must be commercially reasonable."[269] The phrase "commercially reasonable" is not defined in the Code, but its goal is to assure the highest possible realization from the sale,[270] for the benefit of both the secured party and the debtor. The Code thus remits to the courts the task of determining appropriate standards.

> These requirements place upon the creditor the good faith duty to the debtor to use reasonable means to see that a reasonable price is received for the collateral. . . . Obviously, each case will turn on its particular facts . . . . Generally, evidence as to every aspect of the sale including the amount of advertising done, normal commercial practices in disposing of particular collateral, the length of time elapsing between repossession and resale, whether deterioration of the collateral has occurred, the number of persons contacted concerning the sale, and even the price obtained, is pertinent.[271]

The Tennessee Court of Appeals has furnished certain additional guidelines. "[T]he disposition shall be made in keeping with prevailing trade practices among reputable and responsible business and commercial enterprises engaged in the same or a similar business."[272] To clients who inquire how they should sell the repossessed collateral, this question should be posed: "Assuming you owned the collateral and wanted to sell it for as much as you could get out of it, how would you sell it? Then that's how to sell it." Few clients would respond that they would take three bids from three automobile dealers or would limit advertising to a notice at the front door of the courthouse.[273]

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269. TENN. CODE ANN. § 47-9-504(3) (1979).

270. TENN. CODE ANN. § 47-9-504, Comment 1 (1979); *see* 2 G. GILMORE, *supra* note 76, § 43.1.

271. Clark Leasing Corp. v. White Sands Forest Prods., Inc., 87 N.M. 451, 454-55, 535 P.2d 1077, 1080-81 (1975).

272. Mallicoat v. Volunteer Fin. & Loan Corp., 57 Tenn. App. 106, 111, 415 S.W.2d 347, 350 (1966). Professor Gilmore states that "[t]he obligation on the secured party is to use his best efforts to see that the highest possible price is received for the collateral." 2 G. GILMORE, *supra* note 76, § 44.5, at 1234.

273. Old habits die hard, however. Although the Code has been the law of Tennessee for 16 years, many creditors still seem content merely to comply with the pre-Code notice-of-sale procedure, first enacted in 1889, that required

A sale is not ipso facto commercially unreasonable because the sale price is too low, although according to the New Mexico Supreme Court, price is one factor to be considered.[274] Indeed, Code section 9-507(1) states that the availability of a better price "is not of itself sufficient to establish that the sale was not made in a commercially reasonable manner."[275] Professor Epstein cautions, however, that, although "low resale price alone is not enough, the primary issue in most cases seems to be the sufficiency of the price. . . . [L]ittle more than an unusually low resale price is needed to establish that the sale was not commercially reasonable."[276]

In Tennessee a low resale price may void the sale if the courts extend the real property rule to chattels. In *Jordan v. Mosely*[277] two houses and a lot worth $16,000 were bought at the foreclosure sale for $2,000 by the beneficiary of the trust deed. The court of appeals affirmed the chancellor's decision to set the sale aside and endorsed his conclusion that the purchase at one-eighth of the property's value "would shock the conscience of any right-thinking person."[278] Although the Code provides that such a purchaser takes free and clear of the debtor's rights in the collateral, it requires the purchaser to act "in good faith."[279] A purchaser for an amount absurdly small in relation to the value of the collateral may have great difficulty in establishing his bona fides.[280]

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advertising by printed poster at as many as three public places in the county. Act of Mar. 20, 1889, ch. 81, § 1, 1889 Tenn. Pub. Acts 117. That procedure cannot be reconciled with the standards mandated in *Mallicoat*, and creditors who rely on the old forms foreclose on borrowed time.

274. Clark Leasing Corp. v. White Sands Forest Prods., Inc., 87 N.M. 451, 454-55, 535 P.2d 1077, 1080-81 (1975).

275. TENN. CODE ANN. § 47-9-507(2) (1979).

276. D. EPSTEIN, CONSUMER PROTECTION IN A NUTSHELL 312 (1976); *see, e.g.*, Atlas Constr. Co. v. Dravo-Doyle Co., 3 U.C.C. Rep. 124 (Pa. Ct. C.P. 1965). *See also* Mercantile Financial Corp. v. Miller, 292 F. Supp. 797, 801 (E.D. Pa. 1968); Goodin v. Farmers Tractor & Equip. Co., 249 Ark. 30, 458 S.W.2d 419 (1970); Frankline State Bank v. Parker, 136 N.J. Super. 476, 346 A.2d 632 (1975).

277. Appeal from Knox Equity (Tenn. Ct. App. Aug. 14, 1973).

278. *Id.*, slip op. at 4.

279. TENN. CODE ANN. § 47-9-504(4)(b) (1979).

280. For a discussion of the evidentiary considerations in establishing the

A question frequently posed by clients is whether the solicitation of sealed bids, or private sale, is an acceptable alternative to sale by public auction. The question must be analyzed by asking which of the two alternatives is more commercially reasonable and by determining which type of sale would yield a better return. Professors White and Summers consider it "unwise to require a public sale by auction if the same or a higher price can be obtained by the submission of sealed bids."[281] The two commentators go on, however, to caution that, whereas "Article Nine does not require a specific number of bidders, every single-bid sale invites scrutiny."[282] White and Summers conclude that "[i]t may well be that multiple invitations to bid are a prerequisite of a commercially reasonable sale."[283] Whichever route is chosen, a bona fide effort must be made to advertise the sale properly and to solicit bidders,[284] and a lawyer inexperienced in conducting sales of the particular type of property to be sold should not conduct the sale.[285] Perhaps the best approach is to sell the collateral in a manner recommended by persons experienced in selling similar items.[286]

Although the Code is flexible in allowing the secured party to sell the chattel in one of several possible markets, the Code does not permit the secured party to use inflexibly a given method of disposition in every case, if there is no established market for the chattel. The good faith provision of the Code requires the secured party to take into consideration (1) the condi-

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relationship between price and value, see J. WHITE & R. SUMMERS, *supra* note 9, § 26-11, at 989-92. Professor Gilmore believes that, despite proper notification and publicity, if only the secured party appears at the sale, the secured party can bid the property in for 10% of its value and that, absent fraud, the transaction should be unassailable. 2 G. GILMORE, *supra* note 76, § 44.6, at 1245. In light of *Mosely*, *see* notes 277-78 *supra* and accompanying text, a higher bid is recommended.

281. J. WHITE & R. SUMMERS, *supra* note 9, § 26-11, at 993.

282. *Id.*

283. *Id.* at 993-94.

284. *See, e.g.*, California Airmotive Corp. v. Jones, 415 F.2d 554 (6th Cir. 1969); Stewart v. Taylor Chevrolet, Inc. (*In re* Webb), 17 U.C.C. Rep. 627 (S.D. Ohio 1975).

285. Liberty Nat'l Bank & Trust Co. v. Acme Tool Div. of Rucker Co., 540 F.2d 1375, 1377 (10th Cir. 1976).

286. *See id.*

tion of the chattel, (2) the demand for the chattel, (3) the availability of a ready market at the place of repossession, and (4) the reasonableness of a retail sale as opposed to a wholesale disposition.[287] For example, the sale of an automobile at wholesale may be desirable and commercially reasonable, but in a deficiency suit the secured party must carry the burden of persuasion that the particular sale was commercially reasonable.[288]

One can avoid the trap of conducting a commercially unreasonable sale by proving that the collateral was sold at the price current in the market at the time of the sale.[289] The eastern section of the Tennessee Court of Appeals has even implied that one test of a commercially reasonable sale is a "fair price" for the collateral,[290] although the commentators tend to minimize this test in favor of an examination of the manner in which the sale was conducted.[291]

One consideration in favor of a public, or auction, sale[292] rather than a private sale, is that many foreclosure sales actually involve two sales. At the first sale, after attempting to comply with the technical requirements of the Code, such as giving proper notice to the debtor, the secured party buys the property himself. If the purchase price is less than the amount of the debt, the creditor, having now disposed of the collateral, is entitled to a deficiency claim against the debtor.[293] For the second sale, the creditor refurbishes the collateral and uses the selling techniques best calculated to maximize the return on the sale. Although one could argue that the effort that went into the

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287. Ford Motor Credit Co. v. Maxwell, Appeal from Knox Law (Tenn. Ct. App. Mar. 28, 1979).

288. *Id.*, slip op. at 5.

289. TENN. CODE ANN. § 47-9-507(2) (1979); Morrell Employees Credit Union v. Uselton, Appeal from the Circuit Court of Shelby County at Memphis, slip op. at 6 (Tenn. Ct. App. Nov. 19, 1979). For a lengthy discussion of the elements of a commercially reasonable sale, see Bank of Hartsville v. Williams, Appeal from Trousdale Law (Tenn. Ct. App. Aug. 25, 1978). The opinion by Judge Lewis contains the text of acceptable notices. *Id.*, slip op. at 4.

290. Nolan v. American Nat'l Bank & Trust Co., Appeal from the Circuit Court of Hamilton County, slip op. at 8-9 (Tenn. Ct. App. Mar. 12, 1980).

291. *See* note 280 *supra*.

292. *See* TENN. CODE ANN. § 47-9-504, Comment 1; § 47-2-706, Comment 4 (1979).

293. *See* notes 122-26 *supra* and accompanying text.

second sale should have gone into the first sale, secured parties will continue to seek the increased financial benefits of the two-sale procedure as long as it is permitted. Therefore, the first sale should be a public sale, because the secured party can buy the collateral only at a public sale, unless the collateral is of a type customarily sold in a recognized market, such as listed stock, or is the subject of "widely distributed standard price quotations."[294]

When the stakes are large enough, the secured party may desire assurance that an intended sale will be commercially reasonable. Code section 9-507(2) provides the creditor with such assurance: "A disposition which has been approved in any judicial proceeding or by any bona fide creditors' committee . . . shall conclusively be deemed to be commercially reasonable . . . ."[295] Note that the statute is applicable only to approval obtained prior to the sale.[296]

### b. Notice to the Debtor

Although the Code vests the secured party with considerable discretion in arranging for the sale of the collateral, it does require notice to the debtor of the time and place of the sale.[297] The purpose of this requirement is "to enable the debtor to protect his interest in the property by paying the debt, finding a buyer or being present at the sale to bid on the property . . . to the end that it be not sacrificed by a sale at less than its true value."[298] The Code does not specify the form of the notice, although written rather than oral notice is probably called for

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294. TENN. CODE ANN. § 47-9-504(3) (1979).

295. *Id.* § 47-9-507(2).

296. *Id.* at 47-9-507, Comment 2. *But see* Grant County Tractor Co. v. Nuss, 6 Wash. App. 830, 496 P.2d 966 (1972) (determination of reasonableness may be made in a deficiency suit).

297. TENN. CODE ANN. § 47-9-504(3) (1979). This right to notice cannot be waived by the debtor. Bob Bales Ford, Inc. v. Martin, Appeal from Hamblen Circuit, slip op. at 3, 4-5 (Tenn. Ct. App. Feb. 4, 1981) (by implication).

298. Mallicoat v. Volunteer Fin. & Loan Corp., 415 S.W.2d 347 (Tenn. Ct. App. 1966). White and Summers quite realistically refer to this goal as a "forlorn hope" that the debtor will find either the money with which to bid or friends to bid on the debtor's behalf. J. WHITE & R. SUMMERS, *supra* note 9, § 26-9, at 982.

since the statute requires that notice be "sent."[299] Certified or registered mail is the most desirable medium because it provides (1) a written record of the type of notice sent, (2) proof of mailing, and (3) written proof of receipt if the debtor signs the return receipt. All of these items are extremely valuable evidence if the question of notice is subsequently litigated. In order to avoid the plea that the registered letter never was picked up and that the debtor thus did not receive actual notice of the sale, a copy of the notice also should be sent to the debtor by ordinary first class mail. This technique allows the creditor to take advantage of the evidentiary presumption of delivery.[300]

The Code also requires that notice of the proposed sale be sent to the "debtor."[301] The term includes not only the principal debtor but also co-signors, co-makers, sureties, guarantors—anyone "who owes payment or other performance of the obligation secured."[302] Except when the collateral is consumer goods, notice also must be sent to other perfected secured parties who have interests in the collateral or who are known to have security interests in the collateral even though unperfected.[303]

Prior to default, the debtor cannot waive the notice requirement even in a business or commercial context.[304] The Code itself, however, waives notice to the debtor in three special situations: (1) when the collateral is perishable; (2) when the collateral is of a kind threatening to decline in value rapidly, such as Christmas trees repossessed on December 20; and (3) when the collateral is of a type customarily sold on a recognized

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299. TENN. CODE ANN. § 47-9-504(3) (1979). *But see* A.J. Armstrong Co. v. Janburt Embroidery Corp., 97 N.J. Super. 246, 234 A.2d 737 (1967).

300. TENN. CODE ANN. § 47-1-201(38) (1979).

301. *Id.* § 47-9-504(3).

302. *Id.* § 47-9-105(1)(d).

303. *Id.* § 47-9-504(3).

304. Ennis v. Atlas Fin. Co., 120 Ga. App. 849, 850, 172 S.E.2d 482, 484 (1969); C.I.T. Corp. v. Hayes, 161 Me. 353, 212 A.2d 436 (1965); Commercial Credit Corp. v. Holt, 17 U.C.C. Rep. 316, 323 (Tenn. Ct. App. 1975). If a debtor voluntarily surrenders collateral under circumstances suggesting that he does not care what happens to it, the debtor may be deemed to have waived post-default notice. Commercial Credit Corp. v. Nuss, 6 Wash. App. 866, 496 P.2d 966 (1972) (citing Nelson v. Monarch Ins. Plan of Henderson, Inc., 452 S.W.2d 375 (Ky. Ct. App. 1970)). The prudent secured party still should give notice to avoid litigation of the waiver issue.

market, such as listed stock.[305] Nevertheless, the prudent secured party will attempt to give notice even in these circumstances in order to avoid a later argument over whether the collateral fits into one of the excepted categories.

The Code requires "reasonable" notification, but does not indicate when notice must be given in order to be "reasonable."[306] The parties may stipulate, as they often do in the security agreement, what will constitute a reasonable period. Professor Henson argues that five days' notice generally is recognized as reasonable, apparently because that phrase so often appears in security agreements.[307] The reasonableness of notice is really a jury question and depends upon the time a reasonably prudent debtor would need to act to protect his interests. Henson suggests that five days is reasonable only if the period is measured from the time of anticipated receipt.[308] The better practice is to give at least ten days' notice, and prudence dictates two to three weeks' notice if the amounts involved are large.[309]

The general rule requires only that the notice be properly posted and addressed, not that it be received.[310] The Tennessee Court of Appeals modified this general rule, however, in *Mallicoat v. Volunteer Finance & Loan Corp.*[311] In *Mallicoat* the creditor mailed written notification to the debtor. Although the letter was returned undelivered, the creditor sold the collateral. The court held that the creditor had not given proper notice be-

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305. TENN. CODE ANN. § 47-9-504(3) (1979). The disposition still must be commercially reasonable. In addition, the "recognized market" exception does not apply to sellers of used cars. J. WHITE & R. SUMMERS, *supra* note 9, § 26-10, at 984; Bob Bales Ford, Inc. v. Martin, Appeal from Hamblen Circuit, slip op. at 4 (Tenn. Ct. App. Feb. 4, 1981).

306. TENN. CODE ANN. § 47-9-504(3) (1979).

307. R. HENSON, HANDBOOK ON SECURED TRANSACTIONS §§ 10-11, at 248-49 (1973).

308. *Id.*

309. Notice not received before the sale is certainly inadequate. Cities Serv. Oil Co. v. Ferris, 9 U.C.C. Rep. 899 (Mich. Dist. Ct. 1971); Conti Causeway Ford v. Jarossy, 114 N.J. Super. 382, 276 A.2d 402 (1971).

310. TENN. CODE ANN. § 47-1-201(38) (1979); Randolph v. Frankline Inv. Co., 21 U.C.C. Rep. 348 (D.C. Ct. App. 1977); Steelman v. Associates Discount Corp., 121 Ga. App. 649, 175 S.E.2d 62 (1970); Hawkins v. General Motors Acceptance Corp., 250 Md. 146, 242 A.2d 120 (1968).

311. 57 Tenn. App. 106, 415 S.W.2d 347 (1966).

cause the creditor knew where the debtor worked, where his parents lived, and that the debtor had not received the notice.[312] The court emphasized the creditor's affirmative duty to follow up on a notice that comes back unopened.[313] A secured party in Tennessee, therefore, is well advised to try to ensure that the debtor actually receives notice of the sale. If the creditor takes additional steps to notify the debtor after the first notice is returned unclaimed, the requirement of notification is met "regardless of whether the debtor actually received the notice."[314]

The contents of the notice depend upon whether the sale is to be public or private. If it is to be private, the notice must specify only the time after which the private sale or disposition will be made.[315] For a public sale, the notice must set forth the exact date, time, and place of the sale.[316]

### c. Application of Proceeds of Disposition

Pursuant to Code section 9-504(1) proceeds from the disposition of the collateral are distributed in the following order:

> (a) the reasonable expenses of retaking, holding, preparing for sale, selling and the like and, to the extent provided for in the agreement and not prohibited by law, the reasonable attorneys' fees and legal expenses incurred by the secured party;
> (b) the satisfaction of indebtedness secured by the security interest under which the disposition is made;
> (c) the satisfaction of indebtedness secured by any subordinate security interest in the collateral if written notifica-

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312. *Id.* at 350.

313. *Id.* at 350-51.

314. Commercial Credit Corp. v. Cutshall, Appeal from Sullivan Law, slip op. at 6 (Tenn. Ct. App. June 20, 1979).

315. TENN. CODE ANN. § 47-9-504(3) (1979); Provident Employees Credit Union v. Austin, Appeal from Hamilton Law, slip op. at 3 (Tenn. Ct. App. Feb. 4, 1981); Morrell Employees Credit Union v. Uselton, Appeal from the Circuit Court of Shelby County at Memphis, slip op. at 4 (Tenn. Ct. App. Nov. 19, 1979). In Ford Motor Credit Co. v. Maxwell, Appeal from Knox Law (Tenn. Ct. App. Mar. 28, 1979), the court approved the following language: "You are hereby notified that the above described property will be sold . . . at a private sale at any time after 10 days from the date shown above unless redeemed by you prior to such date." *Id.*, slip op. at 2.

316. TENN. CODE ANN. § 47-9-504(3) (1979).

> tion of demand therefor is received before distribution of the proceeds is completed. If requested by the secured party, the holder of a subordinate security interest must seasonably furnish reasonable proof of his interest, and unless he does so, the secured party need not comply with his demand.[317]

Subsection (a) includes commercially reasonable expenses incurred in preparing the collateral for sale.[318] Some authority supports the proposition that a secured party is obligated in certain instances to condition or maintain collateral in his possession,[319] but generally the court permits the secured party to sell the collateral in the condition it was in at the time of repossession.[320] Although in Tennessee the parties may provide for attorneys' fees in the security agreement, the amount is within the reserved discretion of the trial court.[321] Appellate courts will not interfere with the amount set by the trial court unless "some injustice has been perpetrated."[322] Subsection (b), satisfaction of the debt secured, should pose no problem to the secured party. The third category, satisfaction of subordinate security interests, is more vexing. A junior secured creditor whose lien is discharged by the sale[323] can participate in the distribution only by delivering to the selling secured party a written notification of a demand for his share and by furnishing, upon request, reasonable proof of his security interest.[324] A photocopy should suffice. Finally, the secured party must account to the debtor for any surplus, and unless otherwise agreed, the debtor is liable for any deficiency.[325]

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317. *Id.* § 47-9-504(1).

318. *Id.*; Davis v. Small Business Inv. Co., 535 S.W.2d 740, 744 (Tex. Civ. App. 1976).

319. *E.g.*, Harris v. Bower, 266 Md. 579, 295 A.2d 870 (1972).

320. *See* Sparkle Laundry & Cleaners, Inc. v. Kelton, 595 S.W.2d 88 (Tenn. Ct. App. 1979), *cert. denied, id.* (Tenn. 1980).

321. *See* Dole v. Wade, 510 S.W.2d 909 (Tenn. 1974).

322. *Id.*; Harpole v. Bank of Dyer, Appeal from Gibson Law & Equity, slip op. at 9 (Tenn. Ct. App. Aug. 5, 1975) (quoting McBride v. Jackson, Appeal from Knox Equity, slip op. at 6 (Tenn. Ct. App. Feb. 8, 1972) (quoting Holston Nat'l Bank v. Wood, 125 Tenn. 6, 17 (1911))).

323. TENN. CODE ANN. § 47-9-504(4) (1979).

324. *Id.* § 47-9-504(1)(c).

325. *Id.* § 47-9-504(2).

4. Consequences of Failure to Comply with Disposition Rules

If the secured party fails to comply with the Code standards for disposition of collateral—for example, by failing to give proper notice or by failing to sell in a commercially reasonable manner—a number of courts will punish the secured party by denying the right to a deficiency judgment.[326] This arbitrary approach was rejected by the Tennessee Court of Appeals in *Commercial Credit Corp. v. Holt*.[327] In *Holt*, Commercial Credit Corporation had failed to give notice of the sale of collateral to Holt, the debtor. Judge Drowota, speaking for the court, set out a more flexible rule for violations of the "Tennessee" Commercial Code standards. He summarized the law as follows: In seeking a deficiency the creditor must prove, as part of his case-in-chief, that he complied with the notice and "commercially reasonable" requirements of section 47-9-504(3). If the plaintiff does not persuade the trial court that these requirements have been satisfied, the defendant is entitled to a set-off or credit against the deficiency. The set-off is the difference between what was received and what would have been received had the plaintiff complied with the Code; the difference will be presumed to be at least the amount of the deficiency unless the creditor proves otherwise.[328]

The Code sets out a special rule for failure to comply with notice and commercial reasonableness in consumer goods transactions. Code section 9-507(1) gives the debtor the right to recover, in any event, the finance charge plus ten percent of the principal or cash price.[329] Note that the debtor might recover a sum substantially greater than the actual loss as calculated in

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326. For a collection of these cases and a trenchant analysis of the reasoning (or lack of reasoning) of the various courts, see J. WHITE & R. SUMMERS, *supra* note 9, § 26-15, at 1000-07.

327. 17 U.C.C. Rep. 316 (Tenn. Ct. App. 1975). But in Provident Employees Credit Union v. Austin, Appeal from Knox Law (Tenn. Ct. App. May 20, 1981), the Eastern Section, speaking through Presiding Judge Parrott, declared that in a deficiency suit the secured party must credit the note with "the fair value of the collateral," *id.*, slip op. at 4, as opposed to the amount it actually brought at the foreclosure sale—a subtle but important change from the *Holt* rule, which merely requires that the sale be commercially reasonable.

328. 17 U.C.C. Rep. at 322.

329. TENN. CODE ANN. § 47-9-507(1) (1979).

*Holt*, since the penalty is calculated on the basis of the original principal and total finance charge.

In Tennessee, however, the failure to comply with the commercially reasonable standard does not void the sale. One who purchases collateral at a foreclosure sale takes free and clear of the security interest being foreclosed even if the legal formalities are not satisfied.[330] This rule applies even if the successful purchaser at the sale is an accommodation party on the note secured, but if the secured party simply transfers the collateral to the guarantor, without going through a sale, the lien survives and the guarantor becomes subrogated to the secured party's lien.[331] In any event, the purchaser at a foreclosure sale must buy "in good faith" in order to obtain indefeasible title to the collateral.[332]

## V. CONCLUSION

While the Code is a masterfully crafted and integrated statutory scheme for commercial transactions, it does not exist in a vacuum. To paraphrase Holmes: The Code says only what the courts say it says.[333] The careful practitioner must always consider the Code's judicial gloss and the myriad of other statutes which supplement it or are antagonistic to it. There is at least as much secured transactions law outside Article Nine as within it. "[L]egal rules are never clear, and, if a rule had to be clear before it could be imposed, society would be impossible."[334] In dealing with a secured transaction, the lawyer must therefore examine the totality of the applicable law. It is hoped that this Article will provide a starting point.

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330. Bob Rutherford Ford, Inc. v. Hartford Ins. Co., Appeal from the Circuit Court for Jefferson County, slip op. at 4 (Tenn. Ct. App. Oct. 21, 1980).

331. *Id.* at 3. The guarantor must then take steps to re-perfect the lien, however. Star Chrysler-Plymouth, Inc. v. Phillips, Appeal from Davidson Equity, slip op. at 10-12 (Tenn. Ct. App. Oct. 29, 1980).

332. Pippin Way, Inc. v. Four Star Music Co. (*In re* Four Star Music Co.), 29 U.C.C. Rep. 343 (B.C.M.D. Tenn. 1979).

333. *See* Holmes, *The Path of the Law*, 10 HARV. L. REV. 457 (1897).

334. E. LEVI, AN INTRODUCTION TO LEGAL REASONING 1 (1948).

# *WRIGHT LINE*—AN END TO THE KALEIDOSCOPE IN DUAL MOTIVE CASES?

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## I. INTRODUCTION

One of the difficulties for labor law practitioners is that determinations of whether particular actions affecting employees are unfair labor practices often must turn on the issue of employer motivation. Motivation is, of course, an intangible factor, and rarely is there a direct statement by an employer of an anti-union intent behind a decision. Therefore, it falls to the Na-


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tional Labor Relations Board to determine whether the real reason for an employer's action is a legitimate or illegitimate one under the National Labor Relations Act.[1] The section of the statute most frequently at issue in cases involving questions of motivation is section 8(a)(3),[2] which prohibits discrimination in incidents of employment based on union membership or activities.

If the Board decides that the action of an employer was motivated by both lawful and unlawful reasons, it is faced with a dual motive case. Dual motive cases are particularly troublesome, not only because of the difficulty of resolving disputed factual issues, but also because the conflicting legitimate interests of employers and employees are involved. Recently, after a long period of "intolerable confusion,"[3] the Board in *Wright Line, A Division of Wright Line, Inc.*,[4] specifically adopted a new method of analysis to be applied in section 8(a)(3) dual motivation cases.

## II. Prologue to Wright Line

### A. *Link Between the Board and the Courts*

The intolerable confusion referred to by the Board in *Wright Line* has resulted from a long history of opaque and oscillating decisions by the Board's administrative law judges (who act as its trial judges), the Board itself, and the United States courts of appeals, which have appellate jurisdiction over the Board. Under the accepted standard of judicial review of Board decisions, the Board's findings of fact are, at least in theory, con-

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1. 29 U.S.C. §§ 151-169 (1976).

2. 29 U.S.C. § 158(a)(3) (1976). Similar considerations may arise under other sections of the Act. NLRB v. Elias Bros. Rests., 496 F.2d 1165 (6th Cir. 1974) (construing 29 U.S.C. § 158(a)(1) (1976)). There are also instances in which an 8(a)(3) violation may be found without proof of anti-union motivation, *see* Republic Aviation Corp. v. NLRB, 324 U.S. 793 (1945); however, these situations are beyond the scope of this Article.

3. Wright Line, A Division of Wright Line, Inc., 251 N.L.R.B. No. 150, 105 L.R.R.M. 1169, 1174 (1980), *enforced*, ___ F.2d ___, 108 L.R.R.M. 2513 (1st Cir. 1981).

4. *Id.*, 105 L.R.R.M. 1169 (1980), *enforced*, ___ F.2d ___, 108 L.R.R.M. 2513 (1st Cir. 1981).

clusive if supported by substantial evidence on the record considered as a whole.[5] Underlying the standard is a recognition of the Board's expertise in the field.

Some courts of appeals, however, have been reluctant to accord the Board the deference which the Board feels it is due in dual motivation cases.[6] Whether the conclusions reached by the Board in dual motive situations are held to be supported by substantial evidence has often depended on the approach utilized by the reviewing court of appeals in analyzing the Board decision and the method of analysis articulated by the Board in arriving at its conclusions.[7]

### *B. Array of Tests Applied*

Once both a legitimate and an anti-union motive are found, the question of how significant a role anti-union animus must play in order to constitute a violation of section 8(a)(3) becomes vitally important. This issue has produced a variety of opinions that have been articulated as a variety of tests. At one end of

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5. Universal Camera Corp. v. NLRB, 340 U.S. 474, 491 (1951).

6. For example, the Board's "expertise" in dual motive cases came under direct attack in NLRB v. Eastern Smelting & Ref. Corp., 598 F.2d 666 (1st Cir. 1979), *denying enforcement of* 237 N.L.R.B. 1312, 99 L.R.R.M. 1110 (1978), where the Court said:

> Unfortunately, however, the Board all too often has either disregarded altogether the valid reasons for the employers' conduct, or has labeled the good reason pretextual, although it was apparent that it was a good reason of substance. In one of the cases at bar the Board has reached the ultimate: the employer is criticized for making a judgmental decision which in a case we heard the month before the employer was criticized for not making. . . . It is difficult to accept such an approach as "expertise."

*Id.* at 671 (citation omitted) (footnotes omitted).

7. The First Circuit, long one of the most outspoken critics of the Board's handling of dual motive cases, has often chided the Board on its analysis of record evidence: "We have only too frequently had to remind the Board that a decision on the issue of motive is particularly one which requires consideration of all the evidence, and not bits and pieces which support a decision unfavorable to the employer." NLRB v. Billen Shoe Co., 397 F.2d 801, 803 (1st Cir. 1968), *denying enforcement in part of* 166 N.L.R.B. 57, 65 L.R.R.M. 1597 (1967) (citing Raytheon Co. v. NLRB, 326 F.2d 471 (1st Cir. 1964), *denying enforcement of* 140 N.L.R.B. 883, 52 L.R.R.M. 1129 (1963)).

the spectrum is the "in part" test, which results in the finding of a violation if an employer's action was even partially motivated by an employee's protected union activity.[8] At the other end lies the "dominant motive" standard, which requires a showing that the improper motive predominated in the employer's decision.[9] Occupying a middle ground is the "reasonably equal" test, which holds that the threshold of illegality is crossed if the improper motive was reasonably equal to the lawful motive prompting an employer's action.[10]

Unfortunately, decisions do not fall neatly into these three categories. Throughout the spectrum are variations of each of these tests, and while some decisions appear merely to refer to previously established tests by another name, others incorporate different shades of meaning by using phrases such as "substantial part"[11] and "material part."[12] Nor have the several jurisdictions been internally consistent.[13] The Board itself conceded in *Wright Line* that a number of variations in wording existed in its own opinions, although it claimed to have abided by the "in part" causation test "[f]or a number of years now."[14]

### C. *The Board's Approach Prior to Wright Line*

Under the traditional "in part" standard,[15] if any part, no matter how minute, of an employer's action in discharging[16] an

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8. *See, e.g.*, Youngstown Osteopathic Hosp. Ass'n, 224 N.L.R.B. 574, 92 L.R.R.M. 1328 (1976); Erie Sand Steamship Co., 189 N.L.R.B. 63, 76 L.R.R.M. 1542 (1971); Tursair Fueling, Inc., 151 N.L.R.B. 270, 58 L.R.R.M. 1426 (1965).

9. *See, e.g.*, Coletti's Furniture, Inc. v. NLRB, 550 F.2d 1292 (1st Cir. 1977); NLRB v. Billen Shoe Co., 397 F.2d 801 (1st Cir. 1968); NLRB v. Lowell Sun Publishing Co., 320 F.2d 835 (1st Cir. 1963).

10. *See, e.g.*, NLRB v. Aero Corp., 581 F.2d 511 (5th Cir. 1978); NLRB v. Longhorn Transfer Serv., Inc., 346 F.2d 1003 (5th Cir. 1965); NLRB v. Hudson Pulp & Paper Corp., 273 F.2d 660 (5th Cir. 1960).

11. Central Casket Co., 225 N.L.R.B. 362, 92 L.R.R.M. 1547 (1976).

12. M.S.P. Indus., Inc. v. NLRB, 568 F.2d 166 (10th Cir. 1977), *enforcing as modified* 222 N.L.R.B. 220, 91 L.R.R.M. 1379 (1976).

13. *See* notes 27-52 *infra* and accompanying text.

14. 251 N.L.R.B. No. 150, 105 L.R.R.M. at 1170.

15. *See* note 8 *supra* and accompanying text.

16. For the sake of simplicity, "discharge" is used throughout this Article as an example of an incident of employment. In reality, virtually any employment practice may be the subject of an alleged section 8(a)(3) violation.

employee was motivated by the employee's union activity, the discharge violated the National Labor Relations Act, even though the employer might have had more than ample legitimate cause for the discharge.[17] The analysis under the "in part" rationale ends once the General Counsel, the "prosecutor" of unfair labor practice charges, establishes a prima facie case by showing a causal connection between the employer's anti-union motivation and the employee's discharge.[18] Notwithstanding the existence of valid grounds for the employee's dismissal, a violation is found with no further inquiry.[19]

Although favoring the "in part" test for dual motive cases, the Board at times in its opinions referred to anti-union animus as the "substantial" or "motivating" factor in the employer's decision.[20] At the same time, the Board continued to find violations in situations in which the evidence of anti-union motivation was considerably less than substantial. In most of these cases, the Board did not even attempt to rationalize its analysis as following the "substantial part" test.[21] Particularly confusing, however, was the Board's occasional use of a "but for" line of reasoning[22] or a combination of standards.[23]

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17. *See* Wright Line, A Division of Wright Line, Inc., 251 N.L.R.B. No. 150, 105 L.R.R.M. 1169, 1170 (1980), *enforced*, ___ F.2d ___, 108 L.R.R.M. 2513 (1st Cir. 1981).

18. *Id.*, 105 L.R.R.M. at 1173.

19. *Id.*, 105 L.R.R.M. at 1171.

20. O & H Rest., Inc., 232 N.L.R.B. 1082, 1083, 96 L.R.R.M. 1348, 1350 (1977) ("[T]he decision to terminate [the employee] was based in substantial part on [the employee's] support for the Union."); Tursair Fueling, Inc., 151 N.L.R.B. 270, 271 n.2 (1965) ("[C]oncerted activities . . . were the motivating factor for that discharge.").

21. *See* Youngstown Osteopathic Hosp. Ass'n, 224 N.L.R.B. 574, 575, 92 L.R.R.M. 1328, 1330 (1976) ("Under Board precedent if part of the reason for terminating an employee is unlawful, the discharge violates the Act."), *enforcement denied*, 574 F.2d 891 (6th Cir. 1978).

22. *See* Waterbury Community Antenna, Inc., 233 N.L.R.B. 1312, 1313, 92 L.R.R.M. 1057, 1058 (1977) ("[B]ut for [the employee's] role as the leading union advocate, he would have been retained to perform other work . . . ."), *enforced in part*, 587 F.2d 90 (2d Cir. 1978).

23. *See* Polynesian Cultural Center, Inc., 222 N.L.R.B. 1192, 91 L.R.R.M. 1435 (1976) ("[P]articipation in protected, concerted activities was the motivating factor . . . ." *Id.* at 1192 n.2, 91 L.R.R.M. at 1437 n.2. "The basic question is whether [the employer] would have continued [the employees] in its

To further complicate matters, the Board, while paying lip service to the concept of dual motivation, tended to analyze many mixed-motive cases under a "pretext" rationale,[24] refusing to recognize any legitimacy in an employer's asserted reason.[25] By dismissing an employer's justification for a discharge as a mere pretext or sham concealing an illegal motivation, the Board spared itself the task of weighing the role that each motive played in the discharge. The Board's practice of ignoring the employer's valid reason led to frequent rebuffs by the courts.[26]

In short, despite assertions to the contrary, the Board has not been consistent in its approach to dual motive situations. For the parties caught in this labyrinth there was no sure means of predicting either the result the Board and the courts would reach or the method of analysis they would apply in a dual motive case.

### *D. Divisions Among the Circuit Courts*

#### 1. "In Part" Proponents

The Board was not without allies in its application of the "in part" standard. Supporters of this test included the Third,[27] Sixth,[28] Seventh,[29] Eighth,[30] and Tenth[31] Circuits. The courts,

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employ, . . . but for their participation in those protected, concerted activities." *Id.* at 1204 app.), *enforced in part*, 582 F.2d 467 (9th Cir. 1978).

24. In a pretext situation, there can be no valid motive. Once the General Counsel establishes a prima facie case and the Board finds the employer's justification to be a pretext, the General Counsel wins. *See* text accompanying note 18 *supra*.

25. *See* Edgewood Nursing Center, Inc., 230 N.L.R.B. 1021, 95 L.R.R.M. 1505 (1977) (Discharge of an employee for a second error in administering overdose of medication to a patient was found to be a pretext for illegal motivation), *enforced in part*, 581 F.2d 363 (3d Cir. 1978).

26. *See, e.g.*, NLRB v. Eastern Smelting & Ref. Corp., 598 F.2d 666 (1st Cir. 1979); NLRB v. Billen Shoe Co., 397 F.2d 801 (1st Cir. 1968); NLRB v. Lowell Sun Publishing Co., 320 F.2d 835 (1st Cir. 1963).

27. *See* Jeannette Corp. v. NLRB, 532 F.2d 916 (3d Cir. 1976), *enforcing* 217 N.L.R.B. 653, 89 L.R.R.M. 1224 (1975); NLRB v. Princeton Inn Co., 424 F.2d 264 (3d Cir. 1970), *enforcing* 174 N.L.R.B. 1193, 70 L.R.R.M. 1423 (1969).

28. *See* NLRB v. Retail Store Employees Union, Local 876, 570 F.2d 586, 590 (6th Cir.), *cert. denied*, 439 U.S. 819 (1978), *enforcing* 219 N.L.R.B. 1188, 90 L.R.R.M. 1113 (1975); NLRB v. Elias Bros. Rests., 496 F.2d 1165, 1167 (6th Cir. 1974), *enforcing* 204 N.L.R.B. 686, 83 L.R.R.M. 1722 (1973).

however, also referred frequently to "substantial" or "material" part in their analyses.[32] While the "substantial" and "material" part standards would seem to demand a greater quantum of anti-union animus to constitute a violation, it was never clear at what point the impermissible motive became substantial, for there were no fixed percentages for determining the motivational ingredients of a discharge. Often the use of such terminology appeared to be more of a camouflage for a purely "in part" rationale.[33] In enforcing the Board's decisions the courts seemed to express a judgmental preference for the Board's result rather than for its reasoning.[34]

### 2. "Reasonably Equal" Exponent

The Fifth Circuit, originator of the "reasonably equal" test, found a violation where "the force of invidious purpose was 'reasonably equal' to the lawful motive prompting conduct."[35] In

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29. *See* NLRB v. Gogin, 575 F.2d 596, 601 (7th Cir. 1978), *enforcing* 229 N.L.R.B. 529, 95 L.R.R.M. 1205 (1977); NLRB v. Townhouse T.V. & Appliances, Inc., 531 F.2d 826, 828 (7th Cir. 1976), *denying enforcement of* 213 N.L.R.B. 716 (1974).

30. *See* Singer Co. v. NLRB, 429 F.2d 172, 179 (8th Cir. 1970), *enforcing in part* 176 N.L.R.B. 1089, 71 L.R.R.M. 1559 (1969).

31. *See* NLRB v. Montgomery Ward & Co., 554 F.2d 996, 1002 (10th Cir. 1977), *enforcing as modified* 220 N.L.R.B. 373, 90 L.R.R.M. 1430 (1975).

32. *See* M.S.P. Indus., Inc. v. NLRB, 568 F.2d 166, 174 (10th Cir. 1977), *enforcing as modified* 222 N.L.R.B. 220, 91 L.R.R.M. 1379 (1976); NLRB v. Gentithes, 463 F.2d 557, 560 (3d Cir. 1972), *enforcing in part* 184 N.L.R.B. 816, 74 L.R.R.M. 1613 (1970).

33. *See* M.S.P. Indus., Inc. v. NLRB, 568 F.2d 166 (10th Cir. 1977). In *M.S.P. Industries, Inc.* the Tenth Circuit, while purporting to apply a "material part" test, stated, "If it is established that an unlawful discrimination against those active in union affairs was a partial motive for discharge, there is a violation." *Id.* at 173-74.

34. In Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951), the Supreme Court held that the proper standard of review of Board decisions by the courts of appeals was "[w]hether on the record as a whole there is substantial evidence to support agency findings." *Id.* at 491 (interpreting § 10(e) of the Taft-Hartley Act, codified at 29 U.S.C. § 160(e) (1976)).

35. NLRB v. Aero Corp., 581 F.2d 511, 514-15 (5th Cir. 1978), *enforcing* 233 N.L.R.B. 401, 96 L.R.R.M. 1539 (1977); NLRB v. Big Three Indus. Gas & Equip. Co., 579 F.2d 304, 315 (5th Cir. 1978), *enforcing* 230 N.L.R.B. 392, 95 L.R.R.M. 1379 (1977).

earlier articulations of the standard, the Fifth Circuit held: "[If] there are two grounds for discharge, one proper and the other unlawful, and the evidence as a whole would make the inferences as to which was the motivating cause reasonably equal, the conclusion reached by the Board should be sustained."[36] Where the inference of unlawful motive fell short of being reasonably equal to the inference that a discharge was prompted by a legitimate motive, the court found that the Board had failed to carry its burden of proof.[37]

Although other circuits may have reached the same conclusion under their methods of analysis, the Fifth Circuit was apparently unique in referring to its test as "reasonably equal." Notwithstanding its obvious preference for the "reasonably equal" standard, however, the Fifth Circuit at times resorted to a "but for" analysis.[38]

### 3. "Dominant Motive" Advocates

The "dominant motive" test was conceived by the First Circuit and was adopted in some form by the Courts of Appeals for the Second,[39] Fourth,[40] Ninth,[41] and District of Columbia[42] Circuits. The underpinnings of this test were laid down by the First

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36. NLRB v. Longhorn Transfer Serv., Inc., 346 F.2d 1003, 1006 (5th Cir. 1965), *enforcing* 144 N.L.R.B. 945, 54 L.R.R.M. 1171 (1963) (quoting NLRB v. Hudson Pulp & Paper Corp., 273 F.2d 660, 666 (5th Cir. 1960), *enforcing in part* 121 N.L.R.B. 1146, 43 L.R.R.M. 1007 (1958)).

37. NLRB v. Hudson Pulp & Paper Co., 273 F.2d 660, 666 (5th Cir. 1960).

38. NLRB v. Whitfield Pickle Co., 374 F.2d 576, 582 (5th Cir. 1967), *enforcing in part as modified* 153 N.L.R.B. 1162, 59 L.R.R.M. 1640 (1965) ("We reiterate that all that need be shown by the Board is that the employee would not have been fired but for the antiunion animus of the employer.").

39. Waterbury Community Antenna, Inc. v. NLRB, 587 F.2d 90 (2d Cir. 1978), *enforcing in part as modified* 233 N.L.R.B. 1312, 92 L.R.R.M. 1057 (1977).

40. Neptune Water Meter Co. v. NLRB, 551 F.2d 568 (4th Cir. 1977), *enforcing* 221 N.L.R.B. 428, 90 L.R.R.M. 1588 (1975).

41. Western Exterminator Co. v. NLRB, 565 F.2d 1114 (9th Cir. 1977), *enforcing in part* 223 N.L.R.B. 1270, 92 L.R.R.M. 1611 (1976).

42. Midwest Regional Joint Board, Amalgamated Clothing Workers v. NLRB, 564 F.2d 434 (D.C. Cir. 1977), *enforcing in part* Head Ski Division, AMF, Inc., 222 N.L.R.B. 161, 91 L.R.R.M. 1207 (1976).

Circuit in 1953 in *NLRB v. Whitin Machine Works*,[43] in which the court held that a discharge "may become discriminatory if other circumstances reasonably indicate that the union activity weighed more heavily in the decision."[44] It was not until ten years later that this quantum of proof was labeled "dominant motive" by Judge Aldrich of the First Circuit in his concurring opinion in *NLRB v. Lowell Sun Publishing Co.*[45] Judge Aldrich stated, "Where a party has two motives, one permissible and the other impermissible, the better rule is . . . that the improper motive must be shown to have been the dominant one."[46]

Under the dominant motive test, where dual motives for discharge exist, "the burden which is on the Board is not simply to discover some evidence of improper motive, but to find an affirmative and persuasive reason why the employer rejected the good cause and chose a bad one."[47] This test is considerably more exacting for the Board than either the "in part" or "reasonably equal" test.[48] It also recognizes the employer's genuine business motives in disciplining employees who may also be engaged in union activity.

As the dominant motive rationale gained support among the circuits, so did the varying articulations of the theme. The term "moving cause" became synonymous with "dominant motive," with some courts describing the test as "whether the business reason for the protected union activity is the moving cause behind the discharge."[49] Used by courts in many decisions as a synonym for "dominant motive" was the "but for" analysis. Ex-

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43. 204 F.2d 883 (1st Cir. 1953).

44. *Id.* at 885.

45. 320 F.2d 835, 842 (1st Cir. 1963).

46. *Id.* at 842.

47. NLRB v. Billen Shoe Co., 397 F.2d 801, 803 (1st Cir. 1968).

48. As might be expected, the Board has been reluctant to embrace this burden, a reticence that prompted the First Circuit to comment, "Over the years we have observed that our decisions restricting the Board are rarely cited by it, no matter how pertinent, a seeming symbolic bookburning difficult to ascribe to oversight." NLRB v. Eastern Smelting & Ref. Co., 598 F.2d 666, 670 n.7 (1979).

49. NLRB v. Ayer Lar Sanitarium, 436 F.2d 45, 50 (9th Cir. 1970), *enforcing* 179 N.L.R.B. 580, 72 L.R.R.M. 1404, *reaffirming* 175 N.L.R.B. 751, 71 L.R.R.M. 1077 (1969).

pressed in these terms, in order to find a section 8(a)(3) violation the Board must establish that the employee would not have been discharged *but for* his or her union activity.[50] Here again, however, the courts did not always adhere to their stated preferred standard.[51] While most courts equated "but for" and "dominant motive," the Fifth Circuit found a distinction between the two, imputing a higher quantum of animus under the dominant motive standard.[52]

Thus, like the Board, the courts were not consistent in their approach to dual motivation cases. The lack of uniformity among the circuits meant that similar factual situations could be decided differently depending upon the circuit in which the case

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50. Coletti's Furniture, Inc. v. NLRB, 550 F.2d 1292, 1293 (1st Cir. 1977), *enforcing in part* 224 N.L.R.B. 1547, 92 L.R.R.M. 1585 (1976); NLRB v. Klaue, 523 F.2d 410, 413 (9th Cir. 1975), *enforcing as modified* 207 N.L.R.B. 769, 84 L.R.R.M. 1652 (1973); NLRB v. Ayer Lar Sanitarium, 436 F.2d 45, 50 (9th Cir. 1970), *enforcing* 179 N.L.R.B. 580, 72 L.R.R.M. 1404, *reaffirming* 175 N.L.R.B. 751, 71 L.R.R.M. 1077 (1969).

51. For example, in Midwest Regional Joint Board, Amalgamated Clothing Workers v. NLRB, 564 F.2d 434, 440 (D.C. Cir. 1977), the District of Columbia Circuit held, "In order to establish a section 8(a)(3) violation the Board must find that the employee would not have been discharged but for his union activity." One month later the District of Columbia Circuit in Allen v. NLRB, 561 F.2d 976 (D.C. Cir. 1977), stated, "As to whether the discharge of [the employee] was lawful or unlawful under Section 8(a)(3), there is no question concerning the relevant test. 'A discharge is unlawful if motivated even in part by anti-union animus . . . .' " *Id.* at 982 (quoting Ridgely Mfg. Co. v. NLRB, 510 F.2d 185, 186 (D.C. Cir. 1975)). Interestingly, the same court cited the same case, Ridgely Mfg. Co. v. NLRB, 510 F.2d 185 (D.C. Cir. 1975), in support of its differing conclusion concerning the test to be applied in each case. Compare the Ninth Circuit's decision in Western Exterminator Co. v. NLRB, 565 F.2d 1114, 1118 n.3 (9th Cir. 1977), in which the court said, "[O]ur position, that antiunion animus must be the dominant or moving cause, is the better rule," with Penasquitos Village, Inc. v. NLRB, 565 F.2d 1074 (9th Cir. 1977), *denying enforcement of* 217 N.L.R.B. 878, 89 L.R.R.M. 1166 (1975), in which the Ninth Circuit applied an "in part" analysis.

52. In Sweeney & Co. v. NLRB, 437 F.2d 1127, 1133 (5th Cir. 1971), *enforcing in part as modified* 176 N.L.R.B. 208, 71 L.R.R.M. 1197 (1969), the Fifth Circuit stated, "[I]t need not be shown that the proscribed motive was 'dominant'—for general counsel carries his burden when it is shown that the employee would not have been discharged but for the antiunion animus of the employer . . . ." In reality, this may have been a distinction without a difference.

arose.

### *E. The Mt. Healthy Standard*

While the courts of appeals were battling with the Board over the proper test to apply in section 8(a)(3) dual motive cases, the Supreme Court in 1977 issued a decision that set forth a test for causality in the first amendment area: *Mt. Healthy City School District Board of Education v. Doyle.*[53] Although *Mt. Healthy* was not a labor case, the factual situation was analogous to circumstances giving rise to the dual motive problem under section 8(a)(3) of the Act.

In *Mt. Healthy* a board of education cited two reasons for refusing to renew a teacher's employment contract.[54] One reason involved activity protected under the first amendment to the United States Constitution[55] while the other involved unprotected activity. In a decision that applied "in part" reasoning, the district court found that the board of education had violated the teacher's first amendment rights because the protected activity played a substantial part in the decision not to rehire the teacher.[56] The Sixth Circuit, a devotee of the "in part" test, affirmed per curiam.[57]

A unanimous Supreme Court, stating that employees should not be immune from actions based on their records because they also engaged in protected activity,[58] reversed the lower courts[59] and set out an analytical framework to be used in judging dual motivation situations. The Court held that once the employee had shown that his or her conduct constituted protected activity

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53. 429 U.S. 274 (1977).

54. The board of education cited (1) the teacher's notable lack of tact in handling professional matters, which caused the board of education to question the teacher's sincerity in establishing good school relationships, *id.* at 282, and (2) the teacher's conveying the substance of a school memorandum relating to teacher dress and appearance to a radio station and the teacher's obscene gestures to two female students, *id.* at 283.

55. "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ." U.S. CONST. amend. I.

56. 429 U.S. at 284.

57. 529 F.2d 524 (6th Cir. 1975).

58. 429 U.S. at 285.

59. *Id.*

and that it was a substantial or motivating factor in the decision not to rehire, "the District Court should have gone on to determine whether the Board [of Education] had shown by a preponderance of the evidence that it would have reached the same decision as to respondent's reemployment even in the absence of the protected conduct."[60]

The shifting burden of proof imposed in the dual motive context was further elaborated by the Supreme Court in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*,[61] a case decided the same day as *Mt. Healthy*[62] and cited by the Court in the *Mt. Healthy* decision.[63] In *Arlington Heights* the Court noted that proof that a decision is motivated in part by a discriminatory purpose does not necessarily require invalidation of the challenged decision, but rather shifts to the initiator of the decision the burden of establishing that the same decision would have resulted even had the impermissible purpose not been considered.[64]

The first court to apply *Mt. Healthy* in the context of a section 8(a)(3) dual motivation case was the First Circuit. Approximately two months after *Mt. Healthy* issued, the First Circuit cited it in *Coletti's Furniture, Inc. v. NLRB*[65] as reinforcement for its "but for" line of reasoning.[66] Buttressed by the Supreme Court's decision, the First Circuit gave fair warning to the Board that it was sounding the death knell for future reliance by the Board on the "substantial part" or any other variation of the "in part" test:

> Now that the Supreme Court in *Doyle*, in the analogous first amendment area, has held that an improper consideration is not "substantial" if the discharge would have occurred in any

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60. *Id.* at 287.

61. 429 U.S. 252 (1977).

62. Both *Arlington Heights* and *Mt. Healthy* were decided on January 11, 1977.

63. 429 U.S. at 287.

64. *Id.* at 270-71 n.21. *Arlington Heights* involved a challenge to an allegedly racially motivated zoning decision. The Supreme Court held that plaintiffs had "failed to carry their burden of proving that discriminatory purpose was a motivating factor in the . . . decision." *Id.* at 270.

65. 550 F.2d 1292, 1293 (1st Cir. 1977).

66. *See* text accompanying notes 50-52 *supra*.

> event, marrying *Doyle* to our previous cases, there can be little reason for us to rescue the Board hereafter if it does not both articulate and apply our rule. Where there are both proper and allegedly improper grounds for discharge, its burden is to find affirmatively that the discharge would not have occurred but for the improper reason.[67]

While *Mt. Healthy* was used in *Coletti's Furniture* merely as support for another test, the First Circuit two years later relied directly upon the *Mt. Healthy* test in *NLRB v. Eastern Smelting & Refining Corp.*[68] Citing *Mt. Healthy*,[69] the First Circuit held that "once the Board has shown a 'significant' improper motivation, the burden is on the employer to prove that it had a good reason, sufficient in itself, to produce the discharge."[70] This holding represented a deviation from the traditional "but for" analysis under which the Board had the burden of showing that the discharge would not have occurred in the absence of union activity; instead, the First Circuit placed the burden of establishing an independent valid reason for the discipline on the employer.

Although the First Circuit had no hesitation in employing the principles set forth in *Mt. Healthy* in the labor relations setting, at least one judge in the Fifth Circuit questioned the appropriateness of applying *Mt. Healthy* to section 8(a)(3) cases. Judge Thornberry, in his concurring opinion in *Federal-Mogul Corp. v. NLRB*,[71] termed the *Mt. Healthy* test of causality a "but for" test and stated that such a standard is contrary to congressional labor policy and case law in the Fifth Circuit.[72] In Judge Thornberry's view, the balance between competing interests in the first amendment area involved in *Mt. Healthy* is misplaced in the labor context; by enacting the National Labor Relations Act Congress has already established a balance, one that is intended to favor the employee.[73] The "but for" standard, ac-

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67. 550 F.2d at 1293-94.
68. 598 F.2d 666 (1st Cir. 1979).
69. *Id.* at 671.
70. *Id.*
71. 566 F.2d 1245 (5th Cir. 1978).
72. *Id.* at 1263 (Thornberry, J., concurring).
73. *Id.* at 1265 (Thornberry, J., concurring).

cording to Judge Thornberry, restrikes this balance in favor of the employer, contrary to congressional intent.[74]

Precisely the opposite view was expressed by the Second Circuit in *Waterbury Community Antenna, Inc. v. NLRB.*[75] In *Waterbury* the court concluded that without a "but for" test, employees would be placed in a better position because of their organizational efforts. Such a result would undermine the purpose of the National Labor Relations Act by inducing employers to tread lightly when a union activist is involved, thereby violating the Act's prohibition against employers' encouragement of pro-union activity.[76] The Second Circuit saw no conflict between the causation test formulated in *Mt. Healthy* and the principles underlying the Act.[77] The court noted that "it is doubtful whether a test which is adequate to protect First Amendment rights would prove inadequate to protect organizational rights."[78] The Board apparently agreed with this conclusion in its decision in *Wright Line.*

## III. WRIGHT LINE

### *A. The Board's New Approach*

The opinion in *Wright Line*[79] differed markedly in form and substance from the usual Board decision. The first three-quarters of the lengthy (by Board standards) opinion[80] was devoted entirely to a comprehensive discussion of the reasons for its adoption of the *Mt. Healthy* test in section 8(a)(3) cases.[81] Relatively little attention was given to the facts of the case.

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74. *Id.* (Thornberry, J., concurring).

75. 587 F.2d 90 (2d Cir. 1978).

76. *Id.* at 99.

77. *Id.*

78. *Id.*

79. 251 N.L.R.B. No. 150, 105 L.R.R.M. 1169 (1980), *enforced*, ___ F.2d ___, 108 L.R.R.M. 2513 (1st Cir. 1981). The opinion was signed by Chairman Fanning and Members Penello and Truesdale. Member Jenkins added in a concurring opinion that in cases where it is not possible to separate motives, he will continue to apply the "in part" test. *Id.*, 105 L.R.R.M. at 1176 (Jenkins, Mem., concurring). Member Zimmerman did not participate in the decision.

80. *Id.*, 105 L.R.R.M. at 1169-77.

81. *Id.*, 105 L.R.R.M. at 1169-75.

Although the Board tried to avoid admitting any past error on its own part and traced with obvious relish the divisions among the circuit courts of appeals, the Board explicitly "abandon[ed]"[82] the "in part" test. The new method of analysis was set forth in an equally straightforward fashion:

> First, we shall require that the General Counsel make a *prima facie* showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer's decision. Once this is established, the burden will shift to the employer to demonstrate the same action would have taken place even in the absence of the protected conduct.[83]

The employer's burden is described elsewhere in the opinion as that of an affirmative defense.[84] Thus, unlike the courts which applied a "but for" test and placed the burden on the General Counsel to prove that without the improper motivation the action would not have occurred,[85] the Board used a new approach which places the burden on the employer to prove the existence of a proper motive for the action. The Board pointed out in a footnote, however, that despite the shifting of burdens, the General Counsel retains the ultimate burden of establishing the unfair labor practice by a preponderance of the evidence.[86]

### *B. Perceived Benefits of the New Test*

According to the Board, application of this new test in dual motivation cases will bring to the forefront the legitimate competing motives inherent in such cases.[87] Protection is afforded to employees in that they are required only to show that protected activities played a role in the employer's decision.[88] The employer, under the "formal framework"[89] of *Wright Line*, is then obliged to demonstrate a legitimate justification for its deci-

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82. *Id.*, 105 L.R.R.M. at 1175.
83. *Id.*, 105 L.R.R.M. at 1175.
84. *Id.*, 105 L.R.R.M. at 1174 n.11.
85. *See* text accompanying note 50 *supra*.
86. 251 N.L.R.B. No. 150, 105 L.R.R.M. at 1174 n.11.
87. *Id.*, 105 L.R.R.M. at 1174.
88. *Id.*, 105 L.R.R.M. at 1174.
89. *Id.*, 105 L.R.R.M. at 1174.

sion.[90] While the Board specifically stated that it is the employer's duty to "make the proof,"[91] the logical effect of the decision appears to be that the Board will be required to give more attention to an employer's explanation of legitimate business reasons for the action at issue, rather than simply determining that an action was based at least "in part" on an illegal reason. There are, however, disquieting factors in the decision which raise doubts that any real change of attitude is intended by the Board.

### C. *Doubts About the New Test*

At least three times in the *Wright Line* opinion, the Board asserted that the new method of analysis was in accord with Board precedent.[92] Moreover, the Board contended in the opinion that its traditional process had involved a two-step inquiry into the role of protected activities and then, if necessary, a decision whether the valid motivation asserted by the employer was sufficient to negate the first step.[93] "Thus, while the Board's process has not been couched in the language of *Mt. Healthy*, the two methods of analysis are essentially the same."[94] These statements are difficult to reconcile with the recognition elsewhere in the opinion that "it is evident that *Mt. Healthy* represents a rejection of an 'in part' test which stops with the establishment of a prima facie case or at consideration of an improper motive."[95]

The concluding section of the discussion of the new test further reflected the apparent difficulty the Board had in relinquishing the "in part" analysis. The Board stated that while

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90. *Id.*, 105 L.R.R.M. at 1174.

91. *Id.*, 105 L.R.R.M. at 1174.

92. "[A]pplication of the Mt. Healthy test will maintain a substantial consistency with existing Board precedent . . . ." *Id.*, 105 L.R.R.M. at 1170 (footnote omitted); "We do not view Mt. Healthy as at odds with our previous construction of the Act." *Id.*, 105 L.R.R.M. at 1170 n.3; "Treating the employer's plea of a legitimate business reason for discipline as an affirmative defense is consistent with the Board's method of deciding such cases." *Id.*, 105 L.R.R.M. at 1170 n.5 (citation omitted).

93. *Id.*, 105 L.R.R.M. at 1174.

94. *Id.*, 105 L.R.R.M. at 1174.

95. *Id.*, 105 L.R.R.M. at 1173.

there was an advantage in "clearing the air" by abandoning the "in part" language, its use of different words did not mean that it was abandoning any "well-established principles and concepts" which had been applied in the past.[96] Nowhere did the Board specify which well-established principles and concepts were the subject of this caveat. While the warning might have been intended for other purposes, the Board's reiteration that *Mt. Healthy* is consistent with its prior handling of dual motivation cases[97] suggested that it had simply substituted one set of words for another.

A further cause for concern is the opinion's unnecessarily extended discussion of pretext. The opinion opened by drawing a distinction between pretext cases and dual motive cases,[98] yet the Board concluded in two separate footnotes[99] that the *Mt. Healthy* analysis eliminated the need to distinguish between them. It is true, as the opinion noted, that usually only after presentation of all the proof can a decision be made whether the facts present a pretext or a dual motive situation;[100] for this reason, it may be convenient that the *Mt. Healthy* analysis is applicable to both situations. It is equally true, however, that in any given case the Board may simply decide that the reasons given by the employer are pretextual and thus avoid any real analysis of the issue. This is the heart of the criticism of the previous "in part" test,[101] and much of the language in *Wright Line* indicates that the Board has no real interest in overcoming such criti-

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96. *Id.*, 105 L.R.R.M. at 1175.

97. *Id.*, 105 L.R.R.M. at 1175.

98. In pretext cases, an employer will advance what it claims to be a legitimate business reason for its action. Examination of the reason, however, may reveal that it is a sham in that the reason never existed or was not actually relied upon by the employer.

In dual motivation cases, there are two reasons ascribed by the Board to an employer's action. One reason is a legitimate business reason; the other is not. The existence of legitimate and nonlegitimate motives requires a further examination of the role played by each motive. Where a pretext has been shown, no legitimate business justification exists; therefore, there is no dual motive and no further analysis of the employer's motive is necessary. *Id.*, 105 L.R.R.M. at 1170.

99. *Id.*, 105 L.R.R.M. at 1170 n.4, 1174 n.13.

100. *Id.*, 105 L.R.R.M. at 1170 n.5.

101. *Id.*, 105 L.R.R.M. at 1171.

cism.[102] In fact, if anything, the opinion perhaps demonstrates that the Board is determined to follow essentially the same path it has previously trod.

### *D. The Holding in Wright Line*

The portion of the opinion entitled "Application of the *Mt. Healthy* Test to the Facts of the Instant Case"[103] provides all too much support for this apprehension. In *Wright Line*, the employer discharged an employee ostensibly for violating a plant rule against altering or falsifying production time reports.[104] The evidence was clear that the employee had not performed jobs at the times he had indicated on his time sheet, although he claimed that the work had been performed on the date given on the sheet.[105]

The General Counsel's proof was that the employee had been a leading union advocate in two union representation elections, one of which took place two months before his discharge.[106] On the basis of the employer's campaign references to the murder indictment of an official of another local of the same union and "an unsupported claim that [the employer's] 'chances for survival and growth would be seriously hurt by the presence of a union,' "[107] the Board concluded that an anti-union animus was present.[108]

Finding indications of pretext both in the handling of earlier incidents involving other employees and in the record of the discharged employee, the Board concluded that the General

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102. For example, the Board stated:

> Until now, in making this determination [of the relationship between employer action and protected employee conduct] we frequently have employed the term "in part." But in doing so it only was a term used in pursuit of our goal which is to analyze thoroughly and completely the justification presented by the employer.

*Id.*, 105 L.R.R.M. at 1175.

103. *Id.*, 105 L.R.R.M. at 1175-76.

104. *Id.*, 105 L.R.R.M. at 1175.

105. *Id.*, 105 L.R.R.M. at 1175.

106. *Id.*, 105 L.R.R.M. at 1175.

107. *Id.*, 105 L.R.R.M. at 1176 (quoting anti-union campaign remarks of Respondent).

108. *Id.*, 105 L.R.R.M. at 1175-76.

Counsel had made out a prima facie case, based on the employer's anti-union animus and the timing of the discharge.[109] Once more relying on indications of pretext in the employer's handling of the incident, the Board also held that the employer had failed to demonstrate that it would have discharged the employee in the absence of his union activities.[110]

Thus, while the Board in *Wright Line* paid lip service to the *Mt. Healthy* form of analysis, it treated the case from the outset as a pretext case. Since the Board chose to announce its adoption of the new standard in what is essentially a pretext situation, it is unclear how the Board will apply *Mt. Healthy* in a true dual motive situation and what the impact of the new method of analysis will be.

## IV. The Reaction of the Appellate Courts

The attitude of the appellate courts toward the Board's adoption of the *Mt. Healthy* reasoning has not yet been fully expressed. The First Circuit, which was the innovator in applying *Mt. Healthy* to section 8(a)(3) dual motive situations,[111] and the Ninth Circuit, a former "dominant motive" advocate,[112] initially appeared to welcome the decision. Both courts viewed the change as an alignment of the Board's thinking with their own stance.[113] The Seventh Circuit, which traditionally applied an

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109. *Id.*, 105 L.R.R.M. at 1176.

110. *Id.*, 105 L.R.R.M. at 1176.

111. *See* NLRB v. Eastern Smelting & Ref. Corp., 598 F.2d 666 (1st Cir. 1979), *denying enforcement of* 237 N.L.R.B. 1312, 99 L.R.R.M. 1110 (1978).

112. *See* note 41 *supra* and accompanying text.

113. In enforcing *Wright Line*, the First Circuit expressed disagreement with the Board on the "exact nature of the burden" that an employer bears once the General Counsel establishes a prima facie case. NLRB v. Wright Line, A Division of Wright Line, Inc., ___ F.2d ___, 108 L.R.R.M. 2513, 2516 (1st Cir. 1981). The court noted that "the employer . . . has no more than the limited duty of producing evidence to balance, not to outweigh, the evidence produced by the general counsel." *Id.* at ___, 108 L.R.R.M. at 2517. Thus the court overruled Statler Indus., Inc. v. NLRB, 644 F.2d 902 (1st Cir. 1981). ___ F.2d at ___, 108 L.R.R.M. at 2518 n.10.

The Ninth Circuit saw *Wright Line* as in step with its decision in L'Eggs Products, Inc. v. NLRB, 619 F.2d 1337 (9th Cir. 1980). NLRB v. International Medication Systems, Ltd., 640 F.2d 1110, 1113 n.2 (9th Cir. 1981).

"in part" test in dual motive cases,[114] has now adopted *Wright Line*'s method of analysis. In *Peavey Co. v. NLRB*,[115] the Seventh Circuit stated, "We have reviewed the decisions and have decided to follow the Mt. Healthy/Wright Line test in 'dual motive' cases in this Circuit."[116]

On the other hand, the Third Circuit, an "in part" proponent,[117] in *NLRB v. General Westinghouse Corp.*[118] reaffirmed the test set forth in its pre-*Wright Line* decision, *Edgewood Nursing Center, Inc. v. NLRB*.[119] Interestingly, the court failed to mention *Wright Line*. In another decision, *NLRB v. Permanent Label Corp.*,[120] the Third Circuit cited *Edgewood Nursing Center* in support of its finding of a violation, and mentioned *Wright Line* merely in a footnote with a "see also" signal.[121]

The Fourth Circuit also has expressed a preference for its own test. In *NLRB v. Burns Motor Freight, Inc.*,[122] citing pre-*Wright Line* decisions, the court held that the Board had failed to carry its burden of showing an "affirmative and persuasive reason why the employer rejected the good cause and chose a bad one."[123] Although the Fourth Circuit stated that it was unnecessary to decide whether the burden-shifting test adopted in *Wright Line* was more appropriate for dual motivation cases than its own test, it noted that "even under Wright Line, the Company has demonstrated that its actions would have been the same in the absence of . . . protected conduct."[124] Subsequent to *Burns Motor Freight, Inc.*, the Fourth Circuit again was faced

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114. *See* note 18 *supra* and accompanying text.

115. ___ F.2d ___, 107 L.R.R.M. 2359 (7th Cir. 1981).

116. *Id.* at ___, 107 L.R.R.M. at 2360.

117. *See* note 27 *supra* and accompanying text.

118. 643 F.2d 965 (3d Cir. 1981).

119. 581 F.2d 363, 368 (1978) ("If two or more motives are behind a discharge, the action is an unfair labor practice if it is partly motivated by reaction to the employee's protected activity.").

120. ___F.2d___, 106 L.R.R.M. 2211 (3d Cir. 1981).

121. *Id.* at ___, 106 L.R.R.M. at 2216.

122. 635 F.2d 312 (4th Cir. 1980).

123. *Id.* at 314 (quoting NLRB v. Patrick Plaza Dodge, Inc., 522 F.2d 804, 807 (4th Cir. 1975) (quoting NLRB v. Billen Shoe Co., 397 F.2d 801, 803 (1st Cir. 1968))).

124. *Id.* at 315.

with a dual motive situation in *NLRB v. Kiawah Island Co.*[125] Although the court did not refer to *Wright Line*, it acknowledged that a shifting of the burden of proof is beneficial in situations in which evidence of both impermissible and valid reasons for an employer's actions exists:

> If initial evidence of union membership and employer animus is unrebutted by evidence of proper employer motive, the Board may well rest on that evidence to find an 8(a)(3) violation. The introduction by the employer of evidence of proper motive casts a greater responsibility on the Board—to weigh all the evidence; and, in this sense, a shifting burden concept might be useful.[126]

Thus, the Fourth Circuit may well be applying the *Wright Line* formula under another name.

Contrary to the Board's prediction in *Wright Line* that the new method of analysis could be used in both pretext and dual motive cases,[127] both the courts and the Board[128] have continued to distinguish between the two situations. For example, in *NLRB v. Charles Batchelder Co.*[129] the Second Circuit considered it unnecessary to engage in the type of "but for" analysis set forth in *Wright Line* since the court found that "the question before the Board was not the extent to which the Company relied on valid grounds for its action, but whether the stated grounds were the real ones."[130] In his concurring opinion[131] Judge Newman described the analytical process in pretext and dual motive situations as involving different factual inquiries: "Simply stated, 'pretext' analysis asks, 'What happened?' 'But for' analysis asks, 'What would have happened?' "[132] Elaborating on the *Mt. Healthy* method of analysis in section 8(a)(3) cases, Judge Newman said:

> The point is that the *Mt. Healthy* "but for" formula does

125. 650 F.2d 485 (4th Cir. 1981).
126. *Id.* at 490.
127. 251 N.L.R.B. No. 150, 105 L.R.R.M. at 1175.
128. *See* note 136 *infra*.
129. 646 F.2d 33 (2d Cir. 1981).
130. *Id.* at 39 (footnote omitted).
131. *Id.* at 41 (Newman, J., concurring).
132. *Id.* at 42 (Newman, J., concurring).

> not always eliminate the distinction between "pretext" and "dual motivation" cases. The further point is that analysis of any § 8(a)(3) case can begin with either the "pretext" inquiry as to what actually happened or the "but for" inquiry as to what would have happened. Whichever inquiry is first made, a no answer ends the case, and the employer loses; a yes answer obliges the Board to move on to the other inquiry, or implicitly to have considered it.[133]

It is apparent that *Wright Line* has not been universally accepted by the circuit courts as the panacea for resolving dual motivation cases that the Board intended it to be. Perhaps consistent application of the *Wright Line* analysis by the Board and the circuits which have adopted it will persuade the courts which have not yet addressed *Wright Line* to adopt it and will convert those courts that have been reluctant to depart from their preferred tests. History provides little reason for optimism, however.

## V. CONCLUSION

It was apparent for some time not only that the Board's use of its "in part" test was unpersuasive to many courts, but also that the "in part" test was unsatisfactory in an equitable sense. Too often, application of the "in part" analysis allowed employees who were guilty of egregious conduct to escape discipline simply because they were union activists. The realities of the workplace made it all too easy under an "in part" test to find a section 8(a)(3) violation in virtually every discharge involving union activists.

It is encouraging that the Board went to such lengths in its *Wright Line* decision to articulate the reasons for its adoption of the *Mt. Healthy* standard. Despite the Board's obvious reluctance to concede past error, it would be virtually impossible for the Board to return explicitly to the "in part" test, and political realities indicate that an early return to such a test is unlikely as changes occur in the membership of the Board.[134]

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133. *Id.* at 43 (Newman, J., concurring).

134. Since *Wright Line* issued, Members Penello and Truesdale have resigned from the Board and will be replaced by appointees of the Reagan Administration.

Although some courts of appeals from opposite ends of the previous spectrum have relied upon *Wright Line*, the popularity which the decision is expected to enjoy does not necessarily herald a new trend in dual motive cases. As always, the real measure of the effect of the Board's announced shift will be the number of decisions ultimately affected. At least in the immediate future, the Board may tend to apply the new standard in the same fashion as the old and may reach the same result by avoiding the second part of the test.[135] It is already apparent that the supposed elimination of distinctions between pretext and dual motive cases in Board opinions simply has not occurred.[136]

Moreover, while the *Wright Line* analysis initially may appear to favor the employer, it may in fact have the opposite effect in circuits that previously employed the "but for" test. The adoption of the *Wright Line* standard by those courts will remove from the General Counsel the burden of proving that the

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135. The majority of available Board decisions applying *Wright Line* as of this writing appear to conform to this prediction. While stating that its analysis is in accord with *Wright Line* and different from the administrative law judge's reasoning, the Board in each of the following cases has upheld findings of administrative law judges who applied the old standard in concluding that violations of the Act had occurred. Sanitas Cura, Inc., 255 N.L.R.B. No. 149, 107 L.R.R.M. 1241 (1981); Associated Milk Producers, Inc., 255 N.L.R.B. No. 104, 106 L.R.R.M. 1459 (1981); Board of Trustees of City Hospital, Inc., 254 N.L.R.B. No. 97, 106 L.R.R.M. 1200 (1981); Lummus Indus., Inc., 254 N.L.R.B. No. 79, 106 L.R.R.M. 1147 (1981); Magnetics Int'l, Inc., 254 N.L.R.B. No. 62, 106 L.R.R.M. 1133 (1981); Russ Togs, Inc., 253 N.L.R.B. No. 99, 106 L.R.R.M. 1067 (1980); Newport News Shipbuilding & Dry Dock, 253 N.L.R.B. No. 96, 106 L.R.R.M. 1026 (1980); Weather Tamer, Inc. & Tuskegee Garment Corp., 253 N.L.R.B. No. 36, 105 L.R.R.M. 1569 (1980); Motor Convoy, Inc., 252 N.L.R.B. No. 175, 105 L.R.R.M. 1519 (1980); United Parcel Serv., Inc., 252 N.L.R.B. No. 145, 105 L.R.R.M. 1484 (1980); Herman Bros., 252 N.L.R.B. No. 121, 105 L.R.R.M. 1374 (1980); Taylor-Dunn Mfg. Co., 252 N.L.R.B. No. 118, 105 L.R.R.M. 1548 (1980); Behring Int'l, Inc., 252 N.L.R.B. No. 55, 105 L.R.R.M. 1452 (1980). In each case the Board gave short shrift to the employer's explanations of legitimate reasons. These cases indicate that the Board has not scrupulously applied its new test and generally continues to be unreceptive to the employer's presentation of affirmative defenses that show a valid, legal purpose.

136. *See, e.g.*, Quality Broadcasting Corp., 254 N.L.R.B. No. 118, 106 L.R.R.M. 1238 (1981); Concord Furniture Indus., Inc., 254 N.L.R.B. No. 109, 106 L.R.R.M. 1240 (1981).

discharge would not have occurred without the illegal motive and will instead place on the employer the burden of proving that the discharge would have occurred without the illegal motive. At least for employers in "but for" circuits, the net effect of the shift may be negative.

In short, while *Wright Line* has not completely eliminated variations in the standards applied in dual motivation cases, it represents a step forward. It remains to be seen whether future decisions will further clarify the dual motive area or will only create confusion by altering the applicable test. At least it appears that the Board is finally on the right track in the dual motive area.

# COMMENT

## THE MENTAL STEPS DOCTRINE

### I. INTRODUCTION

The mental steps doctrine, a relatively recent and unfortunate development in the field of patent law, has been used to deny patent protection to certain processes or methods that involve human intervention.[1] It is an inexact concept that has been used as a simplistic rationale for the rejection of various process patent applications that would otherwise have failed for any one of several different statutory reasons. Because the doctrine permits facile patent rejection without the articulation of appropriate statutory reasons, it also may have been used to deny patents to claims entirely deserving of protection. The mental steps doctrine is invoked in decisions on process or method patents that involve some degree of human activity or, as a result of recent technological advances, computer-simulated mental activity. The doctrine is the product of some unclear thinking in the 1940s which confused the requirement that an applicant's discovery be exactly described with the requirement that patentable subject matter be restricted to the physical embodiment or application of abstract concepts. This Comment examines the general requirements of patentability for those processes particularly susceptible to the mental steps exclusion, traces the development of the doctrine, its modification, and its partial abandonment, and recommends a very restricted future application.

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1. A patent can be granted for a process or method, such as a technique for determining the location of an obstruction in an oil well. Halliburton Oil Well Cementing Co. v. Walker, 146 F.2d 817 (9th Cir. 1944). Difficulties arise when one of the steps in the method is performed by a human being rather than by a machine. The human intervention, necessarily involving the intellect, is the "mental step" that renders the process vulnerable to patent rejection.

## II. BACKGROUND: STATUTORY CONDITIONS FOR PATENTABILITY

The United States Constitution authorized Congress to promote the progress of the useful arts by securing to inventors limited monopolies on their discoveries.[2] Congress responded almost immediately by enacting the Patent Act of 1790 in the second session of the First Congress.[3] From the inception of the patent law, a pervasive problem was determining which discoveries would receive patent protection. The current patent act defines the field of patentable subject matter in these very broad terms: "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."[4] Section 100 of the Act, which offers a few definitions, does not clarify the terms "new" or "useful," but does explain that "[t]he term 'process' means process, art or method, and includes a new use of a known process, machine, manufacture, composition of matter, or material."[5] To determine whether a process application meets the statutory criteria of being "new and useful," one must examine it in terms of two further requirements, novelty and nonobviousness, found in sections 102 and 103.

Section 102 requires that the patent be novel in the sense that it not have been anticipated by some other inventor.[6] It is primarily a requirement that the work be original to the inventor and not be described in a publication or another patent application.[7] Section 103 provides that, to be patentable, an inven-

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2. U.S. CONST. art. I, § 8, cl. 8.

3. Act of Apr. 10, 1790, ch. 7, 1 Stat. 109 (current version at 35 U.S.C. §§ 1-293 (1952)). See Justice Clark's capsule history of the patent statutes in Graham v. John Deere Co., 383 U.S. 1, 6 (1966).

4. 35 U.S.C. § 101 (1976).

5. *Id.* § 100(b).

6. *Id.* § 102(g). Section 102 also prescribes conditions under which an applicant may lose his right to a patent; these provisions are not pertinent to this Comment.

7. See Don Lee, Inc. v. Walker, 61 F.2d 58 (9th Cir. 1932), in which a patent claim for a method of computation for determining the position of weights necessary to counterbalance an engine main shaft was rejected because it was neither new (statutory subject matter within the meaning of what is now 35 U.S.C. § 101 (1976)) nor novel (section 102), since it was "merely a special

tion must not be obvious at the time of invention to a person having ordinary skill in the prior art to which the patent pertains.[8] Generally, neither of these explicit statutory limitations is at issue when a court denies or invalidates a patent on mental steps grounds.

The concepts of novelty and nonobviousness, however, are only part of what is implied by the word "new" in the section 101 phrase "new and useful." The term "new" is broader and excludes all things presumed to have always existed in the public domain, whether or not they were recognized previously. Congress may not constitutionally authorize the issuance of patents whose effects are to remove existing knowledge from the public domain or to restrict free access to materials already available.[9] Scientific truths, mathematical formulas,[10] and laws of nature[11] are not patentable subject matter. These are "the basic tools of scientific and technological work,"[12] and subjecting them to private monopoly would not promote progress. For this sound policy reason, a newly discovered natural phenomenon, law of nature, or algorithm, even though entirely novel under section 102 in the sense that it has not been anticipated by other scientists and even though nonobvious under section 103, will be treated by the courts as if "it were a familiar part of the prior art."[13] Since it is assumed that the principle or discovery always existed, the patent will fail the test of newness under section 101. Thus, the patent law is preoccupied with *means*—a patent will issue for any novel, nonobvious, technological *use or application* of a newly discovered principle as long as the applicant does not attempt to preempt the use of the principle itself.[14]

Another condition for patentability is found not in the definition of statutory subject matter but rather in the requirements of the patent application. Section 112 of the Act requires that

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case already covered by a general case, or formula." 61 F.2d at 67.

8. 35 U.S.C. § 103 (1976).

9. Graham v. John Deere Co., 383 U.S. 1, 6 (1966).

10. MacKay Radio & Tel. Co v. Radio Corp. of America, 306 U.S. 86, 94 (1939).

11. Funk Bros. Seed Co. v. Kalo Inoculant Co., 333 U.S. 127, 130 (1948).

12. Gottschalk v. Benson, 409 U.S. 63, 67 (1972).

13. Parker v. Flook, 437 U.S. 584, 592 (1978).

14. Gottschalk v. Benson, 409 U.S. 63, 71-72 (1972).

the patent claim be written in terms so exact that any person skilled in the art may employ the process, and that the specifications distinctly claim the subject matter which the applicant regards as his invention.[15] Thus, although the invention might be new, useful, nonobvious, and original to the inventor, patent protection might be denied if the claim were either fatally vague or so broad that it attempted to cover more than what the applicant actually invented.

The distinction between satisfaction of the requirements of statutory subject matter, novelty, and nonobviousness and satisfaction of the requirement that the application be sufficiently exact was clearly articulated in the landmark case of *O'Reilly v. Morse*:[16]

> Whoever discovers that a certain useful result will be produced, in any art, machine, manufacture, or composition of matter, by the use of certain means, is entitled to a patent for it; provided he specifies the means he uses in a manner so full and exact, that any one skilled in the science to which it appertains, can, by using the means he specifies, . . . produce precisely the result he describes.[17]

Cases that antedated the birth of the mental steps doctrine held that a patent could not issue for a process involving variables that made the results of the application of the process unpredictable.[18] These early cases also recognized the impossibility of

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15. 35 U.S.C. § 112 (1976) provides, in part:

> 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.
>
> The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

16. 56 U.S. 402, 15 How. 62 (1853).

17. *Id.* at 425, 15 How. at 119.

18. See, for example, Morton v. New York Eye Infirmary, 17 F. Cas. 879 (C.C.S.D.N.Y. 1862) (No. 9, 865), in which a patent for the surgical use of ether as an anesthetic was denied because of the uncertainty of consistent results when dealing with the variable "natural functions of an animal." *Id.* at

describing exactly the steps of a process that required subjective judgments on the part of a human operator.[19] Patent applications with either of these two weaknesses were properly rejected under section 112.

Because the human brain is a biological apparatus whose functioning is not fully understood, the way the mind reaches a decision or solves a simple problem is incapable of precise description and undoubtedly varies from person to person. If the mental steps doctrine had been applied only to those patent applications involving human mental activity, the doctrine would have been a very useful and appropriate shorthand term for patents failing to meet the section 112 requirement of precise description. Unfortunately, almost from its inception, the mental steps doctrine also was used to deny patents to claims which failed the section 101 statutory subject matter test of "new and useful."

The term "useful" in section 101 signifies that patent protection is to be granted in the field of applied technology rather than in the more abstract or academic fields of the arts and sciences. "All that is necessary . . . to make a sequence of operational steps a statutory 'process' within 35 U.S.C. § 101 is that it be in the technological arts so as to be in consonance with the Constitutional purpose to promote the progress of 'useful arts.' "[20] For some time courts interpreted dicta in the landmark case of *Cochrane v. Deener*[21] to mean that patentable processes

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19. *See* Greenwalt v. Stanley Co. of America, 54 F.2d 195 (3d Cir. 1931) (method of combining music and light for aesthetic expression); Johnson v. Duquesne Light Co., 29 F.2d 784 (W.D. Pa. 1928) (method of testing the insulators on transmission wires required lineman to recognize a characteristic sound and determine the length of a visible arc caused by the testing device on which the patent was sought); *In re* Bolongaro, 62 F.2d 1059 (C.C.P.A. 1933) (method of determining by mathematical formula how many printed pages a typed manuscript would cover); *Ex parte* Clarke, 97 U.S.P.Q. (BNA) 165 (Pat. Off. Bd. App. 1952) (method of matching an artificial eye with a natural eye dependent on the accuracy of human operator's sense of color).

20. *In re* Musgrave, 431 F.2d 882, 893 (C.C.P.A. 1970).

21. 94 U.S. 780 (1876). "A process is a mode of treatment of certain materials to produce a given result. It is an act, or a series of acts, performed upon the subject-matter to be transformed and reduced to a different state or thing." *Id.* at 788.

must operate on physical substances, and the courts therefore denied patents to methods requiring only the use of the human mind and writing implements.[22] It was not until 1969 that the Court of Customs and Patent Appeals expressly laid this misconception to rest.[23] It is now clear that a process may be "useful" in the technological sense regardless of whether it operates on a physical substance. What now needs to be made clear is that the term "useful" should be applied in section 101 questions of statutory subject matter *only*, and not in section 112 questions of exactness, even though, concededly, a fatally vague process is also not useful.

## III. The Mental Steps Doctrine

The mental steps doctrine has been used to deny patent protection to claims that were not "new" because they were for mathematical formulas that, by definition, were "prior art" and to reject claims that were not "useful" in the applied technological sense because they did not involve processes which operated on physical substances. The doctrine also has been used to deny patents for processes that involved fatally vague steps performed in the human mind. The doctrine often has been applied so imprecisely that the underlying statutory basis for patent re-

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22. *See Ex parte* Meinhardt, [1907] Dec. Com. Pat. 237 (system for spacing freehand letters on a page using a spacing guide divided into units).

23. *In re* Prater, 415 F.2d 1393 (C.C.P.A. 1969), *modifying* 415 F.2d 1378 (C.C.P.A. 1968). In discussing its narrow reading of *Cochrane*, the *Prater* court said:

> Such a result misapprehends the nature of the passage quoted as dictum, in its context, and the question being discussed by the author of the opinion. To deduce such a rule from the statement would be contrary to its intendment which was *not to limit* process patentability *but to point out that a process is not limited to the means used in performing it.*

*Id.* at 1403 (emphasis in original) (footnote omitted). The *Prater* court appears to have based its interpretation on earlier statutory process cases such as Tilghman v. Proctor, 102 U.S. 707 (1880), which states:

> A process is an act, or a mode of acting. The one is visible to the eye,—an object of perpetual observation. The other is a conception of the mind, seen only by its effects when being executed or performed. Either may be the means of producing a useful result.

*Id.* at 728.

jection has been obscured. A closer look at the origin and development of the mental steps doctrine is relevant to its future meaningful applicability.

The mental steps doctrine appears to have been articulated first in 1943 in a Patent Office Board of Appeals decision written by Examiner in Chief Shaffer. In *Ex parte Read*[24] the Board rejected a claim to a method for determining the rate of speed of a vehicle by using two concentric logarithmic scales. The operator was required to move one scale relative to another and correlate two readings.[25] Although the operator's role was mainly manipulative, and the mental activity required was of a routine, nonsubjective type that today could be performed by a machine, the process failed to receive a patent because it involved "purely a mental act."[26] The *Read* Board cited only *Ex parte Meinhardt*[27] as authority. *Meinhardt* involved a wholly mental process which could be performed entirely with the human mind and writing implements;[28] it was not proper authority for an application involving the use of concentric logarithmic scales and a timing mechanism. In relying on *Meinhardt* the Board ignored landmark Supreme Court precedent on the subject of human intervention in process steps. For example, in *O'Reilly v. Morse*[29] the Court had allowed a claim that required the operator to use a system of symbols (the Morse Code) in connection with the telegraph apparatus. Presumably, the human intervention was not deemed fatal to the patent because it was neither subjective nor indefinite and because consistent, predictable results were assured. The *Read* decision, however, seemed to suggest that a process involving *any* use of the human mind is not patentable subject matter, even if the human intervention is routine enough to assure consistent, predictable results.

Examiner Shaffer persisted in his reasoning the following year in *Ex parte Toth.*[30] Although the Board rejected Toth's

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24. 123 U.S.P.Q. (BNA) 446 (Pat. Off. Bd. App. 1943).
25. *Id.* at 447.
26. *Id.*
27. [1907] Dec. Com. Pat. 237.
28. *Id.* at 237.
29. 56 U.S. 402, 15 How. 62 (1853).
30. 63 U.S.P.Q. (BNA) 131 (Pat. Off. Bd. App. 1944).

claim for a process for determining the maximum productivity of a pumped oil well ostensibly because it failed the test of non-obviousness,[31] it gave an alternative reason for rejecting the claim: The acts of "correcting" the indicated pressure and "determining" the well pressure were found to be purely mental and therefore not statutory subject matter.[32] Both the *Toth* and *Read* applications involved technological processes which were described with sufficient precision to ensure consistent results; their holdings heralded an unnecessarily narrow view of patentable subject matter.

In the following year, the misconception reflected in *Read* and *Toth* was adopted by the Ninth Circuit Court of Appeals. In *Halliburton Oil Well Cementing Co. v. Walker*[33] the court examined claims for both a method and an apparatus for determining the location of an obstruction in an oil well. To perform the method, the operator was required to observe the lapse of time between the arrival of echoes, determine the velocity of a pressure wave through the well, and measure the lapse of time between the creation of the pressure impulse and the arrival of the echo. The operator obtained the three values and inserted them into a simple equation.[34] Although the court upheld the apparatus patent, it rejected the process claim because "these mental steps, even if novel, are not patentable."[35] The court relied on the *Cochrane* dicta[36] in determining what constituted statutory subject matter.

In 1945 the mental steps doctrine was adopted by the Court of Customs and Patent Appeals. *In re Heritage*[37] involved a claim for a method of coating porous, sound-insulating fiberboard with a minimum reduction in insulating quality. The operator was required to make a selection of the coating material in accordance with a predetermined system.[38] Apparently the claim was sufficiently precise and routine to ensure consistent

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31. *Id.* at 132.
32. *Id.*
33. 146 F.2d 817 (9th Cir. 1944).
34. *Id.* at 821.
35. *Id.*
36. *See* notes 21 & 23 *supra* and accompanying text.
37. 150 F.2d 554 (C.C.P.A. 1945).
38. *Id.* at 556.

results; however, it is possible that the process properly was rejected because it involved too subjective and inexact a mental step under section 112 criteria of precision. The court, citing three cases of dubious relevance,[39] simply found that the purely mental steps were not proper subject matter for patent protection.

The mental steps cases of the 1940s appear to hold that any human activity in the performance of a process renders the claim nonstatutory even when the patent application attempts to claim what otherwise should have been statutory subject matter. In none of these cases did the court give supporting policy reasons for its holding or cite any of the seminal Supreme Court decisions on patentable processes.

After the birth of the mental steps doctrine, the exclusion was used repeatedly to deny patent claims to methods requiring mental activity. An important case that purported to clarify the existing law in the area was *In re Abrams*.[40] Abrams' claim for a petroleum prospecting method had failed to receive patent protection because of its purely mental character.[41] Abrams' attorney made an extensive survey of the mental process case law then extant and deduced three rules of law which he urged upon the Court of Customs and Patent Appeals:

> "1. If all the steps of a method claim are purely mental in character, the subject matter thereof is not patentable within the meaning of the patent statutes.
>
> "2. If a method claim embodies both positive and physical steps as well as so-called mental steps, yet the alleged novelty or advance over the art resides in one or more of the so-called mental steps, then the claim is considered unpatentable for the same reason that it would be if all the steps were purely mental in character.

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39. *Id.* The court relied on *In re* Cooper, 134 F.2d 630 (C.C.P.A. 1943) (not a process claim, but involved a formula for determining the carbon content of steel), Don Lee, Inc. v. Walker, 61 F.2d 58 (9th Cir. 1932) (lack of novelty determinative, although dicta to the effect that methods requiring human activity not patentable subject matter), and *In re* Bolongaro, 62 F.2d 1059 (C.C.P.A. 1933) (method of laying out a format for a printed publication nonstatutory subject matter, although lack of novelty also at issue).

40. 188 F.2d 165 (C.C.P.A. 1951).

41. *Id.* at 168.

> "3. If a method claim embodies both positive and physical steps as well as so-called mental steps, yet the novelty or advance over the art resides in one or more of the positive and physical steps and the so-called mental step or steps are incidental parts of the process which are essential to define, qualify or limit its scope, then the claim is patentable and not subject to the objection contained in 1 and 2 above."[42]

Although the *Abrams* court did not adopt these rules expressly, it implicitly accepted them by finding that Abrams' claim fell within the second rule.[43] The rules of *Abrams* insinuated themselves into the law and perpetuated the confusion whether the rejection of a particular patent was due to its use of a mathematical formula, which by definition was prior art, or its use of mental steps of such a subjective nature that the patent would fail for inexact disclosure under the requirements of section 112. It was almost twenty years before the Court of Customs and Patent Appeals freed itself from the logical problems caused by the *Abrams* rules.[44] It is now clear that whether the first rule would lead to a correct result on the ultimate question of patentability depends upon the interpretation of the phrase "purely mental." If it were construed to encompass only steps incapable of being performed by a machine, it would lead to a correct result because the patent properly should fail for vagueness under section 112.[45]

A month after *Abrams*, the Court of Customs and Patent

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42. *Id.* at 166 (quoting appellant's brief).

43. *Id.* at 170.

44. *See In re* Musgrave, 431 F.2d 882, 889-90 (C.C.P.A. 1970); *In re* Prater, 415 F.2d 1393, 1401-02 (C.C.P.A. 1969).

Another unfortunate legacy of *Abrams* was that it fostered a method of examining a claim by breaking it down into its components and testing each one against the prior art. If the only portion of a process that was novel was a "mental" step, the entire process was rejected as nonstatutory. *See* text accompanying note 42 *supra*. Once again, it was not until the 1970s that the Court of Customs and Patent Appeals expressly corrected this misunderstanding. The court required that a claim be considered as a whole and specifically rejected the notion that a whole claim is ipso facto nonstatutory if a portion of the claim is nonstatutory. *See In re* Chatfield, 545 F.2d 152, 158 (C.C.P.A. 1976), *cert. denied sub nom.* Dann v. Chatfield, 434 U.S. 875 (1977) (petition untimely filed). *See also In re* de Castelet, 562 F.2d 1236, 1240 (C.C.P.A. 1977).

45. *In re* Musgrave, 431 F.2d 882, 889-90 (C.C.P.A. 1970).

Appeals decided *In re Shao Wen Yuan*,[46] in which the court rejected a claim involving a novel and technologically useful means for determining the profile of an airfoil[47] using a mathematical formula for calculating the final form. All the steps in the claim were to be carried out by the human operator with pencil and paper according to the mathematical formula.[48] It was precisely the type of claim which in a few years would be presented as a computer program—there was nothing subjective required of the operator once the process was learned. The court rejected the patent on the basis of the mental steps doctrine and insisted, on the basis of *Cochrane*, that to be patentable the steps of the process must be performed on physical materials and must produce some change in their condition.[49]

After the relatively extreme applications of the mental steps doctrine in *Abrams* and *Shao Wen Yuan*, there was a general retreat from its severity. A distinction was drawn between those claims which were purely mental, involving interpretation or judgment, and those which involved more routine human intervention. One example of this trend is *Ex parte McNabb*.[50] Although *McNabb* did not overrule *Toth*,[51] *Read*,[52] and *Heritage*,[53] it is clear from the distinction drawn by the *McNabb* Board that claims such as those might no longer be viewed in the same way.

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46. 188 F.2d 377 (C.C.P.A. 1951).

47. An airfoil is "a body (as an airplane wing or propeller blade) designed to provide a desired reaction force when in motion relative to the surrounding air." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 46 (1976).

48. 188 F.2d at 378.

49. *Id.* at 381-82.

50. 127 U.S.P.Q. (BNA) 456 (Pat. Off. Bd. App. 1959). *See also Ex parte* Tripp, 141 U.S.P.Q. (BNA) 918 (Pat. Off. Bd. App. 1963) (patent allowed for a process involving human manipulative steps in a method for automatically controlling a machine by a drive mechanism); *Ex parte* Bond, 135 U.S.P.Q. (BNA) 160 (Pat. Off. Bd. App. 1960) (patent allowed for a method of recovering oil from subsurface geological formations, involving correlation of the analyses of various gases for their constituents); *Ex parte* Egan, 129 U.S.P.Q. (BNA) 23 (Pat. Off. Bd. App. 1960) (patent allowed for a graphical processing of data involving instructions so precise that an unskilled worker could solve relevant problems in solid geometry using a precalculated chart).

51. *See* notes 30-32 *supra* and accompanying text.

52. *See* notes 24-29 *supra* and accompanying text.

53. *See* notes 37-39 *supra* and accompanying text.

The Patent Office Board of Appeals explained:

> Any method or step in a method which can be manually performed and requires the use of the human eyes for detection or determination of any condition, such as temperature, pressure, time, etc., and/or the use of the hands for the purpose of manipulating, such as turning off or on or regulating a given device . . . necessarily involves the human mind and hence can be classed as a mental step. Such steps, however, are not purely mental or interpretive steps and are not the kind which are prohibited by the decisions relating to purely mental steps.[54]

This distinction between interpretive, purely mental steps and more ministerial human intervention eventually led to the major curtailment of the mental steps doctrine in the landmark case of *In re Prater*.[55] Although Prater's claim was not for a computer program per se, his process, which used a mathematical relationship for a more accurate analysis of the composition of gas mixtures, could be practiced on a properly programmed general-purpose computer in the complete absence of human intervention.[56] The Patent Office found that because, in theory at least, it also could be performed in the human mind with only the aid of pencil and paper, and because the only novelty in the invention lay in the mental or mathematical parts of the claim,[57] it involved nonstatutory subject matter.[58] In rejecting the process claim on the narrow ground of overbreadth under section 112, the Court of Customs and Patent Appeals concluded that if a claim disclosed an apparatus for performing a process wholly without human intervention, the process by definition would not be subject to the mental steps rejection.[59] In effect, therefore, it limited the application of the mental steps doctrine to section

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54. 127 U.S.P.Q. (BNA) at 457-58.

55. 415 F.2d 1393 (C.C.P.A. 1969).

56. *Id.* at 1399.

57. *Id.* at 1405. *See* note 44 *supra*.

58. 415 F.2d at 1398.

59. *Id.* at 1402-03 & n.22. After holding that the process claims were not patentable, the Court of Customs and Patent Appeals reversed the Examiner on the single apparatus claim and allowed a patent for an analog device capable of implementing the process. *Id.* at 1405.

112 issues of vagueness in disclosure. The *Prater* court did not seem to recognize this limitation, however, and indicated that it considered still undecided the question whether a process involving purely mental steps comes within the bounds of statutory subject matter under section 101.[60] The court nevertheless did reject the long-standing misconception based on *Cochrane* that to be patentable a process must operate on physical substances.[61]

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60. *Id.* at 1402 n.23. In *In re* Mahony, 421 F.2d 742 (C.C.P.A. 1970), the court reiterated that it had not yet decided whether a claim which "reads on both mental and nonmental implementation of a process . . . is drawn to nonstatutory subject matter." *Id.* at 745.

61. *See* notes 21 & 23 *supra*. Since the court eliminated the requirement that a process act on physical substances, and since it protected from the mental steps exclusion any mental process capable of being carried out exclusively by a computer, it definitely opened the floodgates to patent applications for computer software. The *Prater* court indicated its awareness of this implication:

> No reason is now apparent to us why, based on the Constitution, statute, or case law, apparatus *and* process claims broad enough to encompass the operation of a programmed general-purpose digital computer are necessarily unpatentable. In one sense, a general-purpose digital computer may be regarded as but a storeroom of parts and/or electrical components. But once a program has been introduced, the general-purpose digital computer becomes a special-purpose digital computer (i.e., a specific electrical circuit with or without electromechanical components) which, along with the process by which it operates, may be patented subject, of course, to the requirements of novelty, utility, and non-obviousness. Based on the present law, we see no other reasonable conclusion.

415 F.2d at 1403 n.29 (emphasis in original).

The question whether computer software (such as the *process* in Prater's application) as opposed to computer hardware (such as the *apparatus* in Prater's application) should receive patent protection is a pressing one. On the basis of *Prater*, there appears to be no theoretical difficulty with granting such protection. The practical difficulties are immense, however. The Patent Office apparently lacks the requisite files to adequately search the computer software prior art, and the sheer volume of material defies any economical attempt to amass and classify the requisite library. The Supreme Court has had several opportunities to simply exclude computer programs from patent protection, but has declined to do so, deferring to Congress for such an important policy decision. See Dann v. Johnston, 425 U.S. 219 (1976), in which the Court avoided the issue whether computer programs are statutory subject matter under § 101 by rejecting the patent application on § 103 grounds of obvi-

The final logical step came in *In re Musgrave*,[62] which involved a process patent application relating to a means for correcting seismic data to determine the nature of subsurface formations in the earth's crust. In *Musgrave* the Court of Customs and Patent Appeals answered the question it had reserved in *Prater*: the mere fact that a process involves mental steps does not render it nonstatutory subject matter. The court concluded that the sole prerequisite of statutory subject matter under section 101 is that a process be in the technological arts[63] and appropriately restricted the mental steps doctrine to section 112 questions of the specificity of patent disclosure.[64] In addition, the court expressly discarded the limited reading of statutory subject matter based on the *Cochrane* dicta[65] and denied the utility of the rules of *Abrams*.[66] By implication, the decision allows patent protection for processes that are purely mental in character (capable of being performed in the human mind with the aid of pencil and paper) so long as they are so definite that they can be performed by a properly programmed machine. The *Musgrave* decision was, in effect, the culmination of the tortured evolution of the mental steps doctrine; it swept away old misconceptions and provided the basis for devising a new test for determining the patentability of process patents involving human intervention.

## IV. Proposed Test for Determining Patentability of Processes

In summary, the test for determining whether a process claim should receive patent protection should entail a sequence of questions. The first is whether the claim involves statutory subject matter. Is it "new" in the sense that it is an advance

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ousness, and Gottschalk v. Benson, 409 U.S. 63 (1972), in which the Court denied a patent that preempted all practical use of both the underlying mathematical formula and the algorithm involved and presumably, therefore, encompassed "prior art" under § 101.

62. 431 F.2d 882 (C.C.P.A. 1970).

63. *Id.* at 893.

64. *Id.*

65. *Id.*

66. *Id.* at 889.

over the prior art and does not attempt to remove from the public domain any abstract idea, law of nature, or physical phenomenon that is presumed to have always existed? Is it novel under section 102 (original to the inventor and not anticipated in the literature) and nonobvious under section 103? Finally, is it useful in that it is applied technology? If these questions are answered in the affirmative, the patent involves statutory subject matter. The next step should be to examine the specifications of the application under section 112. Is the applicant's claim specifically limited to the subject matter which he regards as his invention? Is the process disclosed so exactly that one skilled in the art could follow the process and produce the same result? If the process involves something incapable of exact description, such as a discretionary judgment, belief, or feeling on the part of the human operator, or any mental step of such sophistication that it could not be performed by a machine, then and only then should the process fail to receive a patent on the strength of the mental steps doctrine.

## V. CONCLUSION

Clearly, this proposed redefinition and narrowing of the mental steps doctrine renders the doctrine unnecessary to the field of patent law. Those processes involving subjective human mental activity will properly fail under section 112 for inexactness, while those processes in which the human mind could be replaced by a machine will be acceptable. The mental steps doctrine should play no role in determining statutory subject matter. Once the conceptual fog created by the diverse applications of the mental steps doctrine has lifted, it becomes clear that there are no logical impediments, though there may be practical ones, to the patenting of appropriate computer programs.

KATHARINE P. AMBROSE

# RECENT DEVELOPMENTS

## Constitutional Law— Equal Protection— The Right of Mental Patients in Public Institutions to Receive Supplemental Security Income

*Schweiker v. Wilson*, 450 U.S. 221 (1981)

Plaintiffs, who resided in public mental institutions and were not eligible to receive Medicaid funds for their care, brought a class action challenging their exclusion from benefits under the Supplemental Security Income program (SSI).[1] The

1. The Supplemental Security Income program (SSI) was a 1972 amendment to the Social Security Act. Social Security Amendments of 1972, Pub. L. No. 92-603, § 301, 86 Stat. 1329. One of the purposes of the program is to "assist those who cannot work because of age, blindness, or disability" by setting a federal guaranteed minimum income level for these classes of people. S. REP. No. 1230, 92d Cong., 2d Sess. 4, 383 (1972). Effective January 1, 1974, the SSI program repealed three provisions of the Social Security Act that had provided federal funds to state programs for aid to the aged, blind, and disabled: Grants to States for Old-Age Assistance and Medical Assistance for the Aged, 42 U.S.C. §§ 301-306 (1970); Grants to States for Aid to the Blind, 42 U.S.C. §§ 1201-1206 (1970); and Grants to States for Aid to the Permanently and Totally Disabled, 42 U.S.C. §§ 1351-1355 (1970). Social Security Amendments of 1972, Pub. L. No. 92-603, § 303, 86 Stat. 1329. The SSI program amended Title XVI of the Social Security Act, Grants to States for Aid to the Aged, Blind, or Disabled, or for Such Aid and Medical Assistance for the Aged, 42 U.S.C. §§ 1381-1385 (1970). Social Security Amendments of 1972, Pub. L. No. 92-603, § 301, 86 Stat. 1329. Under the old federally matched welfare programs, each state established a minimum standard of living called a "needs standard," upon which assistance payments were based. Any person whose income fell below the state needs standard was eligible for some assistance. The state, however, did not have to pay the full difference between the individual's in-

SSI program provided a subsistence allowance to needy aged, blind, and disabled persons, but generally denied aid to otherwise eligible persons who were "inmates" of public institutions.[2] Congress made a partial exception to this exclusion by providing a reduced amount of benefits, or comfort allowance, to these people if they were receiving Medicaid benefits.[3] The eligibility provisions of the Medicaid program, however, specifically excluded residents of public mental institutions between the ages of twenty-one and sixty-five.[4] Since the plaintiffs did not qualify

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come and the needs standard. S. REP. No. 1236, 93d Cong., 2d Sess. 383 (1974).

2. 42 U.S.C. § 1382(e)(1)(A) (1976) provides: "Except as provided in subparagraph (B) and (C), no person shall be an eligible individual or eligible spouse for purposes of this subchapter with respect to any month if throughout such month he is *an inmate of a public institution.*" (emphasis added).

The term "inmate" in § 1382(e)(1)(A) has been interpreted to mean any resident in a public institution. Thus, in Baur v. Mathews, 578 F.2d 228 (9th Cir. 1978), the Ninth Circuit Court of Appeals rejected the plaintiff's claim that "inmates" referred only to prisoners in penal institutions and that residents of public alcoholic treatment centers were therefore entitled to full SSI benefits. *Id.* at 232-33.

3. The comfort allowance consists of a small cash benefit, not to exceed $25 per month, to pay for "small personal expenses" other than maintenance and medical care. H.R. REP. No. 451 (pt. 1), 96th Cong., 1st Sess. 153 (1979). The applicable statutory provision provides:

> In any case where an eligible individual or his eligible spouse (if any) is, throughout any month, in a hospital, extended care facility, nursing home, or intermediate care facility receiving payments . . . under a State plan approved under subchapter XIX of this chapter [Medicaid], the benefit under this subchapter for such individual for such month shall be payable—
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> (i) at a rate not in excess of $300 per year . . . .

42 U.S.C.§1382(e)(1)(B) (1976). Congress determined that since most of the subsistence needs of persons meeting these criteria are met by the institution, full benefits are not necessary. The comfort allowance, however, was deemed appropriate to enable them to purchase "items not supplied by the institution." H.R. REP. No. 231, 92d Cong., 1st Sess. 150 (1971).

4. 42 U.S.C. § 1396d(a)(16)-(17)(A)-(B) (1976 & Supp. III 1979). Section 1396d(a)(16) states that Medicaid will pay for part or all of the cost of "inpatient psychiatric hospital services for individuals under age 21." Section 1396d(a)(17)(A) states that Medicaid will not provide "any such payments with respect to care or services for any individual who is an inmate of a public institution (except as a patient in a medical institution)." Furthermore, § 1396d(a)(17)(B) states that Medicaid will not provide for "any such payments with respect to care or services for any individual who has not attained

for Medicaid, they were ineligible for SSI benefits. Plaintiffs argued that this exclusion denied mental patients the equal protection of the laws guaranteed by the due process clause of the fifth amendment.[5] After determining initially that the SSI provision created a suspect classification based on mental health, the United States District Court for the Northern District of Illinois held the provision unconstitutional because the classification did not bear a substantial relation to the purpose of the SSI program.[6] On appeal to the United States Supreme Court, *held*, reversed.[7] Federal exclusion of publicly institutionalized mental

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65 years of age and who is a patient in an institution for tuberculosis or mental diseases." Since the plaintiffs were between the ages of 21 and 65 and were residents in public mental institutions, they did not qualify for Medicaid benefits.

5. The fourteenth amendment provides that no state shall "deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1. Since the fourteenth amendment applies exclusively to the states, the question arose whether an equal protection challenge could be sustained against a federal statute. In Bolling v. Sharpe, 347 U.S. 497 (1954), the Supreme Court held that due process in the fifth amendment incorporates the principles of equal protection. *Accord*, Vance v. Bradley, 440 U.S. 93 (1979); Richardson v. Belcher, 404 U.S. 78 (1971).

6. Sterling v. Harris, 478 F. Supp. 1046, 1052-54 (N.D. Ill. 1979), *rev'd sub nom.* Schweiker v. Wilson, 450 U.S. 221 (1981). In holding the SSI provision unconstitutional, the United States District Court for the Northern District of Illinois applied an intermediate level of judicial scrutiny, *see* note 22 *infra*, requiring that there be a legitimate governmental purpose involved in the SSI program and that the classification of mental patients be substantially related to this purpose. *Id.* at 1053. After determining that the purpose of the SSI comfort allowance was to enable the needy to purchase personal items not provided by the institution, the court concluded that the exclusion of certain mental patients was not substantially related to this purpose. Since the mental patients were equally in need of the allowance regardless of the source of their maintenance payments, the court could find no legitimate rationale for such a classification. *Id.* at 1053-54.

7. The procedural history of this case is very complex. The case was first instituted in 1973, prior to the effective date of the SSI program, as a challenge to the federal and Illinois assistance schemes. Wilson v. Edelman, No. 75-2005 (N.D. Ill. Sept. 17, 1975). After the SSI program came into effect, *see* note 1 *supra*, the plaintiffs amended their complaint to include a challenge to the new program. Since the plaintiffs were requesting injunctive relief, a three-judge court was convened under 28 U.S.C. §§ 2281-2282 (1970) (repealed 1976). *See* Wilson v. Edelman, 542 F.2d 1260, 1266 (7th Cir. 1976). Another case, which

patients from SSI benefits rationally advances legitimate legislative goals and, therefore, does not violate the equal protection guarantee of the fifth amendment. *Schweiker v. Wilson*, 450 U.S. 221 (1981).

Since the choice of standard seems outcome determinative in equal protection analysis,[8] the standard of review applied in *Wilson* is important as an indication of the vulnerability of social legislation to equal protection challenges. To determine whether a statutory provision violates the equal protection clause, the Supreme Court must proceed through two levels of analysis. First, the Court must determine the nature of the classification that the statute in question has created.[9] The Court

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challenged the exclusion from SSI benefits of pretrial detainees, was consolidated with *Wilson*. Sterling v. Edelman, No. 75-2006 (N.D. Ill. Sept. 17, 1975); *see* 542 F.2d at 1262-67.

Citing Weinberger v. Salfi, 422 U.S. 749 (1975), the district court granted Edelman's motion to dismiss for lack of subject matter jurisdiction. *See* 542 F.2d at 1268. The basis for this holding was that the plaintiffs had failed to exhaust available administrative remedies under the Social Security Act. *Id.* at 1272-73. After abandoning their claims under the prior federal statutes and the Illinois statute, the plaintiffs appealed to the Seventh Circuit Court of Appeals, challenging only the SSI program. Wilson v. Edelman, 542 F.2d 1260 (7th Cir. 1976). The court in *Wilson* held that Edelman, the Secretary of the Illinois Department of Public Aid, had waived any requirement of exhaustion by submitting the case to the district court for summary disposition. *Id.* at 1274-75. The court then remanded the case to the district court. In Sterling v. Harris, 478 F. Supp. 1046 (N.D. Ill. 1979), *rev'd sub nom.* Schweiker v. Wilson, 450 U.S. 221 (1981), the district court granted the plaintiffs' motion for summary judgment, holding that the statutory exclusion under the SSI program was unconstitutional. *See* note 6 *supra*. The court also held that the exclusion of pretrial detainees was not unconstitutional, since Congress expressed an intent to exclude all inmates in penal institutions from SSI benefits. 478 F. Supp. at 1055. The defendant then appealed to the United States Supreme Court only on the issue of the constitutionality of the exclusion of publicly institutionalized mental patients. Schweiker v. Wilson, 450 U.S. 221, 230 (1981).

8. *See* note 25 *infra*.

9. *See* Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 264-65 (1977) (whether classification was based on wealth or on race). *See also* J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 519 (1978).

A common misconception is that classifications created by social welfare legislation are necessarily based on wealth, a quasi-suspect classification. *See* note 22 *infra*. Most welfare classifications, however, distinguish among persons

must then decide what level of judicial scrutiny to apply in determining whether the classification is sufficiently related to a legitimate legislative purpose.[10] Using this two-step analysis, the Supreme Court in *Wilson* first determined that the SSI program had classified on the basis of residency in a public institution, not on the basis of mental health.[11] The Court then determined that the rational basis test was the appropriate standard of judicial review.[12]

While a distinction has not been acknowledged by the Supreme Court, Professor Canby has suggested that two different standards have been applied by the Court under the rubric of the rational basis test: an "inactive rational basis standard" and an "active rational basis standard."[13] Under the inactive rational

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not on the basis of wealth but on some other basis. *See, e.g.,* Dandridge v. Williams, 397 U.S. 471 (1970) (classification based on family size). *See* Coven & Fersh, *Equal Protection, Social Welfare Litigation, The Burger Court,* 51 NOTRE DAME LAW. 873, 889 (1976) [hereinafter cited as Coven & Fersh].

10. *See* J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 9, at 522-23. *See also* notes 21-23 *infra.*

11. Schweiker v. Wilson, 450 U.S. 221, 231 (1981). The Court stated:

> At the most, this legislation incidentally denies a small monthly comfort benefit to a certain number of persons suffering from mental illness; but in so doing it imposes equivalent deprivation on other groups who are not mentally ill, while at the same time benefiting substantial numbers of the mentally ill.

*Id.* In support of this conclusion the Court pointed out that in 1975, for example, 30.7% of blind and disabled persons receiving SSI benefits were mentally ill. *Id.* n.14 (citing Kochhar, *Blind and Disabled Persons Awarded Federally Administered SSI Payments, 1975,* SOCIAL SECURITY BULL., June 1979, at 13, 15). The Court also noted that the exclusion of mental patients from SSI benefits has only a minimal impact upon these people, because the average stay in state and county mental hospitals is only 25.5 days. *Id.* at 233 n.17 (citing Witkin, *Characteristics of Admissions to Selected Mental Health Facilities, 1975: An Annotated Book of Charts and Tables, National Institute of Mental Health* _, DHHS Publication No. (ADM) 80-1005 (1981)).

12. "In the area of economics and social welfare, . . . [i]f the classification has some 'reasonable basis,' it does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequality.' " Dandridge v. Williams, 397 U.S. 471, 485 (1970) (quoting Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78 (1911)), *quoted in* Schweiker v. Wilson, 450 U.S. 221, 234 (1981).

13. Canby, *The Burger Court and the Validity of Classifications in Social Legislation: Currents of Federalism,* 1975 ARIZ. ST. L.J. 1, 4-11 [hereinaf-

basis standard the Court gives extreme deference to legislative decisions and will uphold a statutory classification if " 'any state of facts reasonably may be conceived to justify it.' "[14] Under the active rational basis standard the Court reexamines legislative judgments and makes its own determination of reasonableness, instead of accepting any plausible justification offered by the legislature.[15] While in a 1969 case[16] the Court applied an inactive standard of rationality in reviewing social legislation,[17] subsequent decisions indicated that the Court might be applying an active rational basis standard.[18] Thus, the ultimate issue in *Wilson* was whether, under the active or inactive rational basis test, the SSI classification of publicly institutionalized persons was rationally related to a legitimate statutory purpose.[19]

Since 1911 the Supreme Court has responded to constitutional challenges based on the equal protection clause by examining the relationship between the legislative purpose asserted and the statutory classification created.[20] In making this exami-

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ter cited as Canby]. *See* Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 20-24 (1972) [hereinafter cited as Gunther]. Professor Gunther, in his leading article, was the first to recognize a disparity between the standards applied under the rational basis test. Professor Canby, however, was responsible for analyzing this disparity in the context of social legislation and for articulating the terminology commonly used when describing these standards.

14. Dandridge v. Williams, 397 U.S. 471, 485 (1970) (quoting McGowan v. Maryland, 366 U.S. 420, 426 (1961)); *see* Canby, *supra* note 13, at 4.

15. Canby, *supra* note 13, at 8.

16. Dandridge v. Williams, 397 U.S. 471 (1970).

17. *See id.* at 485.

18. *See, e.g.*, Califano v. Boles, 443 U.S. 282 (1979) (involving a classification under the Social Security Act); United States Dep't of Agriculture v. Moreno, 413 U.S. 528 (1973) (invalidating a classification under the Food Stamp Act); United States Dep't of Agriculture v. Murry, 413 U.S. 508 (1973) (invalidating a classification under the Food Stamp Act).

19. 450 U.S. at 237 n.19. The exclusion of some mental patients from SSI benefits was based on Congress' understanding that the care of these people "had traditionally been accepted as a responsibility of the States." S. REP. No. 404 (pt. 1), 89th Cong., 1st Sess. 144 (1965); H.R. REP. No. 213, 89th Cong., 1st Sess. 126 (1965).

20. See Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61 (1911), in which the Court defined a set of applicable principles for use in analyzing cases under the equal protection clause.

nation the Court traditionally has used one of three tests, depending upon the class of persons affected or the particular right asserted: the rational basis test,[21] the intermediate test,[22] or the strict scrutiny test.[23] Unless an independent fundamental right

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21. The rational basis test is the traditional form of review and historically was used " 'to protect interests of business and property against discriminatory state action.' " Comment, *Equal Protection in Transition: An Analysis and A Proposal*, 41 FORDHAM L. REV. 605, 607 (1973) (quoting R. HARRIS, THE QUEST FOR EQUALITY 58 (1960)). The standard to be applied under this test has been a dominant question in the area of social legislation. As a general rule, however, the Court exercises extreme judicial restraint and applies a very minimal standard of judicial scrutiny under the inactive rational basis test. *See* text accompanying note 14 *supra*. *See also* L. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 6-2 to -5, at 994-1000 (1978); Note, *Legislative Purpose, Rationality, and Equal Protection*, 82 YALE L.J. 123 (1972). When this standard is applied, the rational basis test is also referred to as the "minimum scrutiny" test, Canby, *supra* note 13, at 11; the "mere rationality" test, Gunther, *supra* note 13, at 11; the "minimal rationality" standard, L. TRIBE, *supra*, § 6-2, at 994 (1978); and the "passive" standard of review, 58 VA. L. REV. 1489, 1492 (1972).

On occasion, however, when reviewing social legislation, the Court appears to have applied the active rational basis test. *See* note 18 *supra*. This standard has also been referred to as a "means-oriented scrutiny." Gunther, *supra* note 13, at 23. Thus, there appear to be two separate standards of review operating under the name "rational basis test." Canby, *supra* note 13, at 5. Analysis of these standards is somewhat difficult because the Supreme Court's opinions do not acknowledge this dichotomy.

22. The intermediate level of review requires a higher degree of judicial scrutiny than does the rational basis test. Under the intermediate standard a classification " 'must serve important governmental objectives and must be *substantially related* to achievement of those objectives.' " Califano v. Webster, 430 U.S. 313, 316-17 (1977) (quoting Craig v. Boren, 429 U.S. 190, 197 (1976)) (emphasis added). This test was not clearly formulated until 1971 in Craig v. Boren, 429 U.S. 190 (1976). For the most part, the intermediate test has been employed to scrutinize legislation that serves to discriminate against groups that possess certain characteristics in common with suspect classes of persons. *See* note 23 *infra*. The classifications that are analyzed under this test are often referred to as "quasi-suspect classes." *See* Trimble v. Gordon, 430 U.S. 762 (1977) (illegitimacy held to be a quasi-suspect class); Frontiero v. Richardson, 411 U.S. 677 (1973) (plurality opinion) (sex held to be a quasi-suspect class). *See generally* Wilkinson, *The Supreme Court, the Equal Protection Clause, and the Three Faces of Constitutional Equality*, 61 VA. L. REV. 945 (1975).

23. The most rigid standard is the "strict scrutiny test," which is almost always fatal to a statute. Gunther, *supra* note 13, at 8. If a suspect class of persons or a fundamental right is affected by a statute, the Court will require

or a suspect class of persons has been affected, the Court has consistently analyzed social welfare legislation under some form of the rational basis test.[24]

The equal protection clause did not become a viable tool for challenging social legislation until the 1960s, during the last decade of the Warren Court.[25] Initially, the Warren Court applied

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that a statute challenged on equal protection grounds be a necessary means of furthering a compelling state interest. *See* San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1973). This test had its genesis in Chief Justice Stone's famous footnote in United States v. Carolene Prods. Co., 304 U.S. 144 (1938), in which he noted that "[t]here may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments . . . ." *Id.* at 152 n.4.

Some examples of suspect classifications are alienage, Graham v. Richardson, 403 U.S. 365 (1971), race, Loving v. Virginia, 388 U.S. 1 (1967), and national origin, Korematsu v. United States, 323 U.S. 214 (1944). Fundamental interests include, among others, interstate travel, Shapiro v. Thompson, 394 U.S. 618 (1969), voting, Harper v. Virginia Board of Elections, 383 U.S. 663 (1966), and the right of access to meaningful civil adjudication, Boddie v. Connecticut, 401 U.S. 371, 375-76 (1971).

The Court has also articulated various characteristics of a suspect class. In Frontiero v. Richardson, 411 U.S. 677 (1973), the Court noted that one attribute of a suspect class is an "immutable characteristic determined solely by the accident of birth." *Id.* at 686. In United States v. Carolene Prods. Co., 304 U.S. 144 (1938), the Court said that strict scrutiny would be applied if the classification involved "discrete and insular minorities." *Id.* at 152 n.4. Finally, in San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1973), the Court stated that an essential indicia of a suspect class is a "history of purposeful unequal treatment" of the group involved. *Id.* at 28.

24. *See* Dandridge v. Williams, 397 U.S. 471, 485 (1970). Since the issue in *Wilson* concerned a discriminatory classification under the Social Security Act, the case is properly discussed with the line of equal protection cases involving social welfare legislation.

25. Before the 1960s, there was virtually no judicial intervention on equal protection grounds except in racial discrimination cases. *See* Gunther, *supra* note 13, at 8. Justice Holmes summed up the importance of the equal protection clause in 1927 by remarking that it was the "last resort of constitutional arguments." Buck v. Bell, 274 U.S. 200, 208 (1927). When the Warren Court did begin to use the equal protection clause in new areas, it applied a rigid two-tiered analysis: the rational basis test and the strict scrutiny test. Gunther, *supra* note 13, at 8. The determination of the standard was largely an indication of the ultimate outcome of the case, since a statute was very rarely struck down under the rational basis test and almost never survived the strict

an inactive standard of review to social legislation under the rational basis test. In *Flemming v. Nestor*,[26] for example, the Court utilized the rational basis test in analyzing a Social Security Act provision that disqualified any alien from benefits if he or she had been deported from the United States for certain specified reasons.[27] Without scrutinizing the facts underlying the legislative purpose, the Court upheld the provision by concluding that Congress might have believed that benefits given to deported aliens would have hurt the national economy because the money would have been spent abroad.[28] Thus, under the *Flemming* standard, the Court did not require affirmative proof that the classification was in fact rationally related to the legislative purpose. Moreover, *Flemming* established that Social Security benefits were not to be construed as accrued rights[29] and that there must be a presumption of constitutionality even when dealing with social legislation.[30]

After *Flemming*, however, the 1960s marked the emergence of the Court's new, more expansive concept of equal protection.[31] This trend toward a more expansive interpretation of the equal protection clause affected many areas of the law, including social welfare legislation.[32] In 1967 and 1968 there were several successful lower court challenges to the constitutionality of state residency requirements under the Aid to Families with Dependent Children program (AFDC).[33] One of these challenges

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scrutiny test. *Id.*

26. 363 U.S. 603 (1960).

27. 42 U.S.C. § 402(n) (1976).

28. 363 U.S. at 612.

29. *Id.* at 611. The Supreme Court has never held that there is a general right to receive welfare benefits. *See* Graham v. Richardson, 403 U.S. 365 (1971). *But see* Goldberg v. Kelly, 397 U.S. 254 (1970) (recognizing recipients' right to a due process hearing before welfare benefits are terminated).

30. 363 U.S. at 617.

31. *See* Gunther, *supra* note 13, at 8; Canby, *supra* note 13, at 6.

32. *See* Gunther, *supra* note 13, at 9.

33. *See, e.g.*, Robertson v. Ott, 284 F. Supp. 735 (D. Mass. 1968) (residency requirement held unconstitutional under the rational basis test because no showing of any reasonable basis for the classification); Harrell v. Tobriner, 279 F. Supp. 22 (D.D.C. 1967) (residency requirement held unconstitutional because it was unreasonable to classify in order to deter the influx of people seeking more generous public assistance); Smith v. Reynolds, 277 F. Supp. 65

reached the Supreme Court in *Shapiro v. Thompson.*[34] In holding that the classification involved was unconstitutional, Justice Brennan, writing for the Court, dealt with the case as a deprivation of the constitutional right to interstate travel, thus requiring strict judicial scrutiny of the statute.[35] In dictum, however, Justice Brennan remarked that the residency test would have failed "even under traditional equal protection tests."[36] This statement appears to be a reference to the rational basis test, since *Flemming v. Nestor*[37] is cited in support of the conclusion.[38] Moreover, Justice Harlan, dissenting, suggested that the majority applied the strict scrutiny test only because the result of the classification was to deny the appellees " 'food, shelter, and other necessities of life.' "[39]

Thus, after *Shapiro* the standard of judicial scrutiny to be applied to social legislation was unclear. Despite the Court's reference to *Flemming,* the rational basis standard discussed in the dictum in *Shapiro* appeared to involve a much higher level of scrutiny by the Court than that applied under the inactive rational basis test.[40] Therefore, one possible interpretation of the decision is that the right to travel was only one basis for the holding and that a stricter standard of review than that used in economic regulation cases is proper when analyzing social welfare classifications, even when no independent constitutional

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(E.D. Pa. 1967) (financial expediency held not a sufficient reason for a classification based on residency); Green v. Dep't of Public Welfare, 270 F. Supp. 173 (D. Del. 1967) (protection of the public purse held not a sufficient reason to classify on basis of residency).

The AFDC program, 42 U.S.C. §§ 601-606 (1976 & Supp. III 1979), is part of the Social Security Act and provides partial federal funding for state assistance plans which meet certain specifications.

34. 394 U.S. 618 (1969).

35. *Id.* at 629-30.

36. *Id.* at 638.

37. 363 U.S. 603 (1960).

38. 394 U.S. at 638 n.20.

39. *Id.* at 661 (Harlan, J., dissenting) (quoting the opinion of the Court at 627).

40. *See* Reinstein, *The Welfare Cases: Fundamental Rights, The Poor, and The Burden of Proof in Constitutional Litigation,* 44 TEMPLE L.Q. 1, 23 (1970) [hereinafter cited as Reinstein].

right is affected.[41] The other possible reading of the case, and the one ultimately adopted by the Court in *Dandridge v. Williams*,[42] was that strict scrutiny is applied to social legislation only if an independent constitutional right is affected by the classification.[43]

The *Dandridge* decision momentarily halted the Court's use of the active rational basis test and returned the Court to the standard of inactive rationality applied in *Flemming v. Nestor*.[44] The issue before the Court in *Dandridge* was the constitutionality of Maryland's scheme of welfare distribution, which imposed an upper limit upon the amount of assistance that large families received.[45] In upholding the constitutionality of the classification, the Court distinguished *Shapiro*[46] on the narrow basis that the Court there "found state interference with the constitutionally protected freedom of interstate travel."[47] Since no independent constitutional right was burdened by the maximum grant regulation[48] and since there was no showing of racial discrimina-

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41. *Id.* The fact that the Court discussed the rational basis test when such a discussion was not necessary to decide the case and the Court's references to the severe plight of the plaintiffs also lend credence to this interpretation. 394 U.S. at 627. At least one commentator viewed *Shapiro* as a building block for the future expansion of the rational basis test. *See* Reinstein, *supra* note 40, at 23.

42. 397 U.S. 471 (1970).

43. *See* Reinstein, *supra* note 40, at 23-24.

44. 363 U.S. 603 (1960); *see* notes 26-30 *supra* and accompanying text. It is arguable, however, that *Dandridge* and *Shapiro* can be reconciled, thereby suggesting that no change in the standard of rationality has actually occurred. An obvious distinction between the two cases is that *Shapiro* involved an application of the strict scrutiny test instead of the rational basis test. Furthermore, the dictum in *Shapiro* referring to the rational basis test may indicate merely that a classification which denies certain persons their constitutional rights may be invalidated under the rational basis test—but no constitutional right was involved in *Dandridge*. Even granting these differences, however, at least one commentator has argued that the standard of rationality mentioned in *Shapiro* was essentially the same as that applied under the active rational basis test. Reinstein, *supra* note 40, at 23.

45. 397 U.S. at 472-73.

46. 394 U.S. 618 (1969); *see* notes 34-39 *supra* and accompanying text.

47. 397 U.S. at 484 n.16.

48. *Id.* at 484.

tion,[49] the Court in *Dandridge* applied an inactive rational basis standard to the statute.[50] Although Justice Stewart, writing for the majority, acknowledged that "[t]he administration of public welfare assistance . . . involves the most basic economic needs of impoverished human beings,"[51] he could find no basis for applying a different standard to social legislation than that applied to economic regulations.[52] After finding that a minimal level of rationality supported the classification, the Court stated that "the intractable economic, social, and even philosophical problems presented by public welfare assistance programs are not the business of this Court."[53]

Several commentators concluded that *Dandridge* had brought an end to equal protection challenges to social legislation under the rational basis test.[54] Subsequently, *Dandridge* became the critical precedent used by the Court in upholding the reduction of benefits under the Social Security Act for those receiving workers' compensation, but not for those receiving tort

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49. *Id.* at 485 n.17.

50. The Court in *Dandridge* stated that "[i]f the classification has some 'reasonable basis,' it does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequality.'" *Id.* at 485 (quoting Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78 (1911)). Working from this principle, the Court, per Justice Stewart, concluded, "We see nothing in the federal statute that forbids a State to balance the stresses that uniform insufficiency of payments would impose on all families against the greater ability of large families . . . ." *Id.* at 479.

51. *Id.* at 485.

52. The equation of social legislation with economic regulation for purposes of the equal protection clause seems to indicate that the Court was expressing an unwillingness to review social legislation. Only one economic classification since 1930 has been held unconstitutional under the rational basis test, Morey v. Doud, 354 U.S. 457 (1957), and *Morey* was overruled in New Orleans v. Dukes, 427 U.S. 297, 306 (1976). *See* Kirby, *Expansive Judicial Review of Economic Regulation under State Constitutions: The Case for Realism*, 48 TENN. L. REV. 241, 250-51 (1981).

53. 397 U.S. at 487.

54. Some commentators compared the effect of *Dandridge* on the rational basis test with the devastating effect of Nebbia v. New York, 291 U.S. 502 (1934), on economic substantive due process. *See, e.g.*, 58 VA. L. REV. 1489 (1972); 58 *id.* 930; Reinstein, *supra* note 40, at 35.

awards.[55] The Court also relied heavily upon *Dandridge* in upholding as constitutional Texas' practice of meeting a lower percentage of recipients' financial need in the AFDC program than in other welfare programs.[56] However, Justice Marshall, dissenting in *Dandridge*, challenged the majority's "sweeping refusal to accord the Equal Protection Clause any role" in analyzing social legislation and argued that this type of legislation should be afforded a higher level of judicial scrutiny than that used for economic regulations.[57] Justice Marshall then argued for what was essentially a balancing test between " 'the interests which the State claims to be protecting, and the interests of those who are disadvantaged by the classification.' "[58]

Justice Marshall's dissent was evidence of a new trend toward revitalization of the equal protection clause in many areas of the law. Between 1971 and 1972 a raft of legislation was declared unconstitutional under what appeared to be an active rational basis test.[59] Professor Gunther described this heightened level of review under the rational basis test as a means-end scrutiny[60] that required the legislative means to substantially further

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55. Richardson v. Belcher, 404 U.S. 78, 83-84 (1971) (construing 42 U.S.C. § 424a (1970)).

56. Jefferson v. Hackney, 406 U.S. 535, 549 (1972).

57. 397 U.S. at 509 (Marshall, J., dissenting).

58. *Id.* at 521 (Marshall, J., dissenting) (quoting Kramer v. Union School Dist., 395 U.S. 621, 626 (1969) (quoting Williams v. Rhodes, 393 U.S. 23, 30 (1968))). Justice Marshall's balancing test later found support in the majority opinion by Justice Powell in Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 173 (1972). After discussing the various applications of the rational basis test and the strict scrutiny test, Justice Powell stated that "[t]he essential inquiry in all the foregoing cases is, however, inevitably a dual one: What legitimate state interest does the classification promote? What fundamental personal rights might the classification endanger?" *Id.*

59. *See, e.g.*, James v. Strange, 407 U.S. 128, 140 (1972) (Kansas statute that empowered the state to recoup legal defense fees from indigent defendants violated the equal protection clause because it failed to satisfy the requirement of some rationality); Eisenstadt v. Baird, 405 U.S. 438, 452 (1972) (statute forbidding the sale of contraceptives held invalid under rational basis test because the Court did not believe that the legislature had suddenly developed an interest in citizens' health); Reed v. Reed, 404 U.S. 71 (1971) (statute giving automatic preference to males as estate administrators held unconstitutional under the rational basis test because the classification was "arbitrary").

60. Gunther, *supra* note 13, at 20; *see* note 21 *supra*.

the legislative ends.[61] In 1971 the active rational basis test was applied to social legislation with the Court's decisions in *United States Department of Agriculture v. Murry*[62] and *United States Department of Agriculture v. Moreno.*[63] In invalidating a classification under the Food Stamp Act, the Court in *Murry* rejected the presumptions made by the Department of Agriculture and made its own determination that a rational basis for the classification did not exist. The Court concluded that there was no rational correlation between one household's ineligibility for food stamps and the presence in that household of a person claimed as a dependent for the previous year by a member of another ineligible household.[64] As Justice Rehnquist implied in the dissenting opinion, however, a sufficient correlation did exist to satisfy the inactive rational basis standard.[65] Thus, a reasonable conclusion is that the Court was applying an active standard of rationality. In *Moreno,* a companion case, the Court upheld a section of the Food Stamp Act that limited food stamp eligibility to households whose members were all related to one another.[66] After agreeing that the government's asserted interest in minimizing fraud was legitimate, the Court stated that "even if we were to accept as rational the Government's . . . assumptions . . . , we still could not agree with the Government's conclusion

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61. Gunther, *supra* note 13, at 20.

62. 413 U.S. 508 (1973).

63. 413 U.S. 528 (1973).

64. 413 U.S. at 514. The Food Stamp Act provides:

> Any household which includes a member who has reached his eighteenth birthday and who is claimed as a dependent child for Federal income tax purposes by a taxpayer who is not a member of an eligible household, shall be ineligible to participate in any food stamp program . . . during the tax period such dependency is claimed and for a period of one year after expiration of such tax period.

7 U.S.C. § 2014(b) (1976). The Department of Agriculture presumed that a household containing such a member "is not needy and has access to nutritional adequacy." 413 U.S. at 511. The Court, however, stated, "*We conclude* that the deduction taken for the benefit of the parent in the prior year is not a rational measure of the need of a different household with which the child of the tax-deducting parent lives . . . ." *Id.* at 514 (emphasis added).

65. *Id.* at 525 (Rehnquist, J., dissenting).

66. 413 U.S. at 538 (construing 7 U.S.C. § 2012(e) (1970)).

. . . ."[67] This was a clear example of the Court's active review of legislative decisions under the rational basis test.

Although *Murry* and *Moreno* appeared to indicate that the Court had finally turned to the active rational basis test to analyze social legislation, subsequent decisions belied this conclusion.[68] During the period between 1973 and 1980 it was impossible to determine which standard of rationality the Court was applying. Ten months after *Moreno*, the Court rejected arguments that a New York land use ordinance that prohibited households of three or more unrelated persons violated the equal protection clause.[69] Applying a rational basis test that was much less rigorous than that applied in *Moreno*, the Court again emphasized that the exercise of discretion in making classifications "is a legislative, not a judicial, function."[70]

In 1973 the Supreme Court began upholding classifications created under the Social Security Act, including some made under the SSI program. In one decision, the Court summarily affirmed a district court decision upholding the exclusion of persons under the age of sixty-five from Medicaid and Medicare

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67. *Id.* at 535; *see* New Jersey Welfare Rights Organization v. Cahill, 411 U.S. 619 (1973) (per curiam) (striking down a classification in a state public assistance program, Justice Rehnquist dissenting and arguing that a higher level of rationality was being applied).

68. *See, e.g.*, United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166, (1980); Califano v. Jobst, 434 U.S. 47 (1977); Maher v. Roe, 432 U.S. 464 (1977).

There is also an alternative explanation for both the *Murry* and *Moreno* decisions. In *Moreno* Justice Brennan inferred from the legislative history that the Food Stamp Act was an attempt to discriminate against hippies. 413 U.S. at 534. Since both cases involved classifications under the Food Stamp Act, the Court may have viewed those classifications as discriminating against a politically unpopular group—a quasi-suspect group. Coven & Fersh, *supra* note 9, at 887.

A distinguishing characteristic in *Murry* and *Moreno* is that they involved federal legislation, and therefore, considerations of federalism may be present in the Court's equal protection analysis. One commentator stated that "[a] federal classification that falls into the *Moreno* category is therefore entitled to less judicial deference than a similar classification in state legislation." Canby, *supra* note 13, at 10.

69. Village of Belle Terre v. Boraas, 416 U.S. 1, 9 (1974).

70. *Id.* at 8.

benefits covering inpatient mental hospital treatment.[71] Subsequently, in *Califano v. Aznavorian*,[72] the Court upheld the constitutionality of the exclusion from SSI benefits of persons who spend more than a specified period of time outside the United States.[73] Although the petitioner in *Aznavorian* made a strong argument that a constitutional right to interstate travel was involved and that therefore the strict scrutiny test should be applied, the Court determined that the case involved merely "governmental payments of monetary benefits that [had] an incidental effect on a protected liberty."[74] In applying an inactive rational basis standard, the Court stated, "Unless the limitation imposed by Congress is wholly irrational, it is constitutional in spite of its incidental effect on international travel."[75]

Finally, in *Califano v. Torres*,[76] the Court also applied an inactive rational basis test in upholding the constitutionality of Congress' exclusion of residents of Puerto Rico from SSI eligibility.[77] Viewing the statute as a provision for governmental payments of monetary benefits, and again dismissing the argument that the constitutional right of interstate travel was involved, the Court said that " '[s]o long as its judgments are rational, and not invidious, the legislature's efforts to tackle the problems of the poor and the needy are not subject to a constitutional straitjacket.' "[78]

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71. Legion v. Richardson, 354 F. Supp. 456 (S.D.N.Y.) (construing 42 U.S.C. §§ 1395d & 1396d (1970)), *aff'd sub nom.* Legion v. Weinberger, 414 U.S. 1058 (1973); *see* Mathews v. DeCastro, 429 U.S. 181 (1976). In upholding a statutory distinction between divorced and married women in determining eligibility for Social Security benefits, the Court in *Mathews* noted that there is a "strong presumption of constitutionality" of legislation conferring monetary benefits. *Id.* at 185.

72. 439 U.S. 170, 178 (1978).

73. 42 U.S.C. § 1382(f) (1976).

74. 439 U.S. at 177.

75. *Id.*

76. 435 U.S. 1, 5 (1978).

77. 42 U.S.C. §§ 1382(f) & 1382c(e) (1976).

78. 435 U.S. at 5 (quoting Jefferson v. Hackney, 406 U.S. 535, 546 (1972)); *see* Califano v. Jobst, 434 U.S. 47 (1977) (upholding provision of Social Security Act requiring that benefits under the Act received by a disabled dependent child of a covered wage earner terminate when the child married an individual not entitled to benefits under the Act); Maher v. Roe, 432 U.S. 464

This line of cases suggested a possible trend on the part of the Court toward future application of a standard of minimal rationality in social welfare classification cases. In other Supreme Court decisions, however, the standard applied could not be classified so easily as inactive rationality.[79] Moreover, because *Murry*[80] and *Moreno*[81] had not been overruled, there was still support for Justice Marshall's balancing test.[82] The lower courts had continued to invalidate social welfare classifications under an active rational basis test.[83] Thus, by 1980 it was impossible to

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(1977) (a state participating in Medicaid program does not have to pay expenses incident to nontherapeutic abortions); Weinberger v. Salfi, 422 U.S. 749 (1975) (upholding duration-of-relationship requirement for eligibility under Social Security Act); Kantrowitz v. Weinberger, 388 F. Supp. 1127 (D.D.C. 1974) (upholding Medicaid exclusion also upheld in *Legion*), *aff'd*, 530 F.2d 1034 (D.C. Cir.), *cert. denied*, 424 U.S. 519 (1976).

Lower courts have also denied equal protection challenges to the SSI program. In Slavin v. Secretary of Dep't of HEW, 486 F. Supp. 204 (S.D.N.Y. 1980), for example, the United States District Court for the Southern District of New York held that it was not a violation of equal protection to reduce a son's SSI benefits when the father made payments to the institution for the son's care. The Court concluded that it was rational to reduce the SSI payments to the extent that those needs were being met through payments from other sources. *Id.* at 209-10. Also, in Termini v. Califano, 611 F.2d 367 (2d Cir. 1979), the Second Circuit Court of Appeals held that the statutory differential in SSI benefits between those living alone and those living with others had a rational basis, since those living with others might use the same items and, therefore, have fewer expenses. *Id.* at 370. Finally, in Patterson v. Mathews, 413 F. Supp. 687 (W.D. Pa. 1976), the United States District Court for the Western District of Pennsylvania held that the SSI program did not deny a surviving husband equal protection by denying him the benefits due his deceased wife because he was not personally eligible for benefits. *Id.* at 692.

79. While the language in some of the Court's recent opinions implied that the inactive rational basis test was being used, the opinions as a whole seemed to indicate that an active rational basis test was being applied. Barrett, *The Rational Basis Standard for Equal Protection Review of Ordinary Legislative Classifications*, 68 KY. L.J. 845, 858-59 (1979-1980); *see, e.g.*, Califano v. Boles, 443 U.S. 282 (1979) (involving the Social Security Act); Vance v. Bradley, 440 U.S. 93 (1979) (involving the mandatory retirement age for employees of the Foreign Service); Holt Civic Club v. Tuscaloosa, 439 U.S. 60 (1978) (involving Alabama's "police jurisdiction" statutes).

80. 413 U.S. 508 (1973); *see* notes 64-65 *supra* and accompanying text.

81. 413 U.S. 528 (1973); *see* notes 66-67 *supra* and accompanying text.

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

83. *See* Medora v. Colautti, 602 F.2d 1149 (3d Cir. 1979). In *Medora* the

accurately predict which standard the Court would use in reviewing social legislation challenged on equal protection grounds.

In *Schweiker v. Wilson*[84] a bare majority of the Court applied an inactive rational basis standard in upholding a classification under the SSI program that denied benefits to mental patients in public institutions.[85] Before reaching the ultimate issue in the case, however, the Court dismissed the important question whether mentally ill persons qualify as a suspect class by holding that the SSI provision had not classified on the basis of mental illness.[86] In reaching this conclusion, the Court reasoned that there was no statistical support for the contention that the mentally ill as a class were burdened disproportionately as compared with any other class affected by the statutory classification.[87] The Court also attached importance to the defendants' failure to show that the intent of Congress was to classify on the basis of mental health.[88]

After determining that the statute had not classified on the basis of mental health, the Court was free to analyze the social welfare classification of publicly institutionalized persons under the rational basis test. The Court's rationale for upholding this

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Third Circuit Court of Appeals held unconstitutional a Pennsylvania regulation under which eligibility for state general assistance benefits was conditioned upon eligibility for federal SSI benefits. Relying on *Moreno, see* notes 62-67 *supra* and accompanying text, the court concluded that the exclusion of some persons from general welfare benefits despite their need was not rationally related to the state's purpose of providing for all needy individuals. *Id.* at 1155. The court also cited Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 172 (1972), for the proposition that if a discriminatory classification involves a denial of all aid rather than allocation of amounts of aid, the courts should more closely examine the rationality of the underlying classification. 602 F.2d at 1154; *see* Buffington v. Beal, 430 F. Supp. 1281 (W.D. Pa. 1977) (invalidating a similar provision under the SSI program); Morales v. Minter, 393 F. Supp. 88 (D. Mass. 1975) (holding state welfare statute unconstitutional because it barred persons of certain ages from receiving general benefits pending receipt of their initial SSI payments).

84. 450 U.S. 221 (1981).

85. *Id.* at 238-39 (construing 42 U.S.C. §§ 1382(e)(1)(A)-(B) & 1396d(a)(16)-(17)(A)-(B) (1976 & Supp. III 1979)).

86. *Id.* at 231.

87. *Id.* at 231-32.

88. *Id.* at 233-34.

classification was that since the states already had the responsibility for providing treatment and minimal care to mental patients, Congress rationally could decide that the states should bear the responsibility for providing any additional benefits.[89] In making this determination, the Court did not rely upon an affirmative finding of rational purpose in the statute or legislative history, but accepted the *post hoc* statements made by the Secretary of Health and Human Services.[90] The Court then clearly applied the inactive rational basis standard: *"We cannot say* that the belief that the States should continue to have the primary responsibility for making this small 'comfort money' allowance available to those residing in state-run institutions is an irrational basis for withholding from them federal general welfare funds."[91] Moreover, the Court dismissed all of the plaintiffs' arguments as "legislative, and not . . . legal argument[s],"[92] reasoning that Congress could choose to shoulder any or no part of the burden of supplying the allowance.[93]

In the dissenting opinion, Justice Powell, joined by Justices

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89. *Id.* at 236-37.

90. *Id.* at 237.

91. *Id.* (emphasis added) (footnote omitted).

92. *Id.* at 238. Implicit in the Court's rationale is an extreme hesitancy to review legislative policy decisions, similar to that shown toward review of legislative economic judgments. *See* Nebbia v. New York, 291 U.S. 502 (1934). In fact, some commentators have asserted that it is the Court's fear that substantive due process will be resurrected under the equal protection clause that prevents the Court from applying an active rational basis test. *See* Gunther, *supra* note 13, at 8; 3 FORDHAM URB. L.J. 311 (1975). Since the active rational basis standard involves a probing judicial inquiry into the policy decisions behind a legislative classification, it is essentially the same standard as that applied under substantive due process. The Court's recognition of this similarity has surfaced in some of its previous opinions. In Dandridge v. Williams, 397 U.S. 471 (1970), the Court noted that "the Fourteenth Amendment gives the federal courts no power to impose upon the States their views of what constitutes wise economic or social policy." *Id.* at 486 (footnote omitted). Furthermore, in dissent in Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972), Justice Rehnquist recalled the abuses of the *Lochner* era and urged a return to minimal scrutiny. *Id.* at 177-85 (Rehnquist, J., dissenting). The overlap between equal protection and due process is seen most clearly in Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 651 (1974) (Powell, J., concurring), and Eisenstadt v. Baird, 405 U.S. 438, 454 (1972).

93. 450 U.S. at 238.

Brennan, Marshall, and Stevens, concluded that the classification of publicly institutionalized persons was irrational because it bore no relation to any policy of the SSI program.[94] In making this determination, Justice Powell applied what appeared to be an active rational basis test. After reviewing the majority's rationale for upholding the classification, he stated that since

> SSI pays a cash benefit relating to personal needs other than maintenance and medical care, it is irrelevant whether the State or the Federal Government is paying for the maintenance and medical care; the patients' need remains the same, [and] the likelihood that the policies of SSI will be fulfilled remains the same.[95]

The primary effect of *Wilson* on the present state of the law is to make clear that, absent a suspect class or a fundamental right, the standard of review to be used in challenges to social legislation is the inactive rational basis test. After *Wilson* it seems unlikely that the Court will actively review the purpose behind a social welfare classification as it did in *Murry*[96] and *Moreno*.[97] In fact, the Court apparently has now reverted to the minimal standard of review applied previously in *Flemming*[98] and *Dandridge*.[99] *Wilson* is certainly consistent with the line of decisions, including *Califano v. Aznavorian*[100] and *Califano v. Torres*,[101] in which the Court upheld classifications under the SSI program against equal protection challenges. Thus, the decision may be part of a trend toward rejecting equal protection challenges to social welfare classifications under the rational basis test.

Furthermore, the decision indicates that classifications created by the federal legislature, as well as classifications created by the state legislatures, will be given great deference by the

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94. *Id.* at 239-40 (Powell, J., dissenting).

95. *Id.* at 247 (Powell, J., dissenting).

96. 413 U.S. 508 (1973); *see* notes 64-65 *supra* and accompanying text.

97. 413 U.S. 528 (1973); *see* notes 66-67 *supra* and accompanying text.

98. 363 U.S. 603 (1960); *see* notes 26-30 *supra* and accompanying text.

99. 397 U.S. 471 (1970); *see* notes 44-56 *supra* and accompanying text.

100. 439 U.S. 170, 178 (1978); *see* notes 72-75 *supra* and accompanying text.

101. 435 U.S. 1 (1978); *see* notes 76-78 *supra* and accompanying text.

Court. Several commentators had previously argued that a federal classification was entitled to less judicial deference than a similar classification by a state legislature, implying that the Court would be more likely to apply the active rational basis test when a federal classification was involved.[102] The Court in *Wilson*, however, applied the inactive rational basis standard to a classification under the SSI program, which is part of a federal statutory scheme.[103] Thus, a reasonable conclusion is that the Court will not actively review the policies behind social welfare classifications, regardless of whether the classifications were created by a state legislature or by the federal legislature.

*Wilson* also represents a further restriction of the scope of equal protection analysis in that *post hoc* assertions of legislative purpose were held to satisfy an inactive rationality test.[104] Moreover, by accepting as valid the legislative conclusion that the benefits in question were a responsibility of the states, the Court broadened the range of acceptable legislative purposes under the rational basis test.[105] The scope of this decision, however, is limited to the holding that the classification of publicly institutionalized persons under the SSI program survives the equal protection challenge under the inactive rationality test. Since the Court made the initial determination that the statute did not classify directly on the basis of mental health, the Court did not reach the important question "whether classifications drawn in part on the basis of mental health require heightened

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102. *See* note 68 *supra*.

103. 450 U.S. at 237.

104. *Id.*; *see* note 21 *supra*. Prior to this decision the Court usually derived the purpose behind a statutory scheme from the statute itself, *see* Califano v. Aznavorian, 439 U.S. 170 (1978), or from the legislative history, *see* Califano v. Boles, 443 U.S. 282 (1979).

105. While the Supreme Court has never identified the characteristics of an acceptable purpose, it has usually upheld on the rational basis standard statutes supported by specific and articulated legislative goals. *See, e.g.*, Califano v. Jobst, 434 U.S. 47 (1977) (purpose to provide persons dependent on a wage earner with protection against economic hardship occasioned by loss of wage earner's support); San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1973) (statutory scheme involved must rationally further an articulated state purpose); Dandridge v. Williams, 397 U.S. 471 (1970) (purpose was to sustain as many families as possible under the AFDC program).

scrutiny."[106] Nor did the Court decide whether a higher standard of review would have served to invalidate the SSI program given the facts in *Wilson*.

Thus, significantly, the Court in *Wilson* did not foreclose the possibility that mental patients may be viewed as a suspect,[107] or a quasi-suspect, class.[108] Because the dissenting Justices found the classification based on public institutionalization to be irrational, they also failed to reach the question of which standard of review to apply to mental illness classifications.[109] They did, however, contend that the argument that the SSI program had classified on the basis of mental health was dismissed "too quickly."[110] Since the dissenting Justices thus attached importance to the majority's failure to deal with the issue of mental illness and since they would have applied an active rational basis test to the classification based on public institutionalization,[111] a reasonable inference is that the dissenting Justices would support an even higher standard of review for a classification based on mental health.

Another implication of *Wilson* is that the use of the rational basis test as a viable tool for challenging social legislation may be substantially foreclosed. Three aspects of the opinion support this conclusion. First, by adopting an inactive rational basis test to review social legislation, the Court applied a standard that has, in practice, amounted to an irrebuttable presumption of constitutionality.[112] Very few classifications have ever been declared unconstitutional by the Supreme Court under the rational basis standard of review.[113] Second, by equating social legislation with economic regulations for the purpose of equal protection analysis,[114] the Court has clearly demonstrated a reluctance to review social welfare classifications. With only one exception, the

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106. 450 U.S. at 241 n.2 (Powell, J., dissenting).

107. *See* note 23 *supra*.

108. *See* note 22 *supra*.

109. 450 U.S. at 241 n.2 (Powell, J., dissenting).

110. *Id.* (Powell, J., dissenting); *see* note 122 *infra* and accompanying text.

111. 450 U.S. at 246-47 (Powell, J., dissenting).

112. Reinstein, *supra* note 40, at 35.

113. Gunther, *supra* note 13, at 8, 19.

114. 450 U.S. at 234.

Court has never upheld an equal protection challenge to an economic classification under any form of the rational basis test.[115] Third, by upholding the constitutionality of the SSI program under the facts in *Wilson*, when the only justification offered for the classification was arguably refuted by the dissenting Justices,[116] the Court left the impression that no challenge to social legislation would be successful. Even though the classification was upheld by a bare majority of the Court, the facts of *Wilson* were so egregious that if the Court would ever apply the inactive rational basis test to invalidate a classification, it would have done so in this case.

Likewise, the Court's acceptance of the legislative conclusion that providing additional benefits to mental patients was a state responsibility[117] has broad implications. It now appears Congress will be allowed to create classifications in many types of social welfare legislation and withstand judicial scrutiny by asserting that the classification relates to a state responsibility.[118] While the Court could examine the subject of the classification involved to determine whether it has in fact traditionally been viewed by the legislature as a state responsibility, such an extensive examination would be inconsistent with the inactive rational basis standard of review. Thus, the decision suggests a general justification that may frequently be asserted to satisfy the Court's minimal standard of rationality.

Finally, the dissenting opinion suggests an argument that may be capable of gaining acceptance by a majority of the Jus-

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115. *See* note 52 *supra*.

116. 450 U.S. at 246-47 (Powell, J., dissenting); *see* notes 94-95 *supra* and accompanying text.

117. *Id.* at 238.

118. The following are examples of social welfare programs which might be susceptible to this argument: Grants to States for Medical Assistance Programs, 42 U.S.C. §§ 1396-1396i (1976 & Supp. III 1979); Health Insurance for the Aged and Disabled, 42 U.S.C. §§ 1395-1395pp (1976 & Supp. III 1979); Aid to Families with Dependent Children, 42 U.S.C. §§ 601-610 (1976 & Supp. III 1979). Moreover, the Court has already upheld a classification under the Medicaid program based on this argument. *See* Legion v. Richardson, 354 F. Supp. 456 (S.D.N.Y.) (upholding exclusion from Medicaid benefits of mental patients between the ages of 21 and 65 based on the assumption that care for such persons was properly a responsibility of the states), *aff'd sub nom.* Legion v. Weinberger, 414 U.S. 1058 (1973).

tices. In the dissent, Justice Powell stated that "[w]hen no indication of legislative purpose appears other than the current position of the Secretary, the Court should require that the classification bear a 'fair and substantial relation' to the asserted purpose."[119] This argument had previously been made by Justice Stevens in a concurring opinion,[120] and Justices Brennan and Marshall, concurring in a subsequent decision, affirmed their support for this argument.[121] By conditioning the level of judicial review in certain cases on the trustworthiness of the evidence of legislative purpose, the Court could often avoid the problem of deciding whether to recognize new suspect classes.

The majority opinion is subject to criticism on four grounds. First, as the dissent points out, "The Court too quickly dispatches the argument that [the applicable SSI provision] classifies on the basis of mental illness."[122] While it is true that other groups were denied benefits under the SSI program, it is inescapable that these particular plaintiffs were denied the benefits because they were patients in mental institutions. Since SSI eligibility is directly tied to eligibility for Medicaid[123] and since the Medicaid statute excludes persons residing in public mental health institutions,[124] the plaintiffs had been classified, for purposes of equal protection analysis, as mental patients. Thus, the ultimate issue the Court should have addressed was which standard of review to apply to classifications based on mental impairment.[125]

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119. 450 U.S. at 244-45 (Powell, J., dissenting) (citing F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920)).

120. United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166, 180-82 (1980) (Stevens, J., concurring).

121. Kassel v. Consolidated Freightways Corp., 101 S. Ct. 1309, 1322 n.3 (1981) (Brennan, J., concurring). In *Kassel* an attorney for one of the parties, rather than the secretary of a federal agency, as in *Wilson*, made an assertion concerning legislative purpose. After discussing the principle of separation of powers, Justice Brennan stated, "[W]e defer to the elected lawmakers' judgment as to the appropriate means to accomplish an end, not . . . to the arguments of lawyers." *Id.* (Brennan, J., concurring).

122. 450 U.S. at 241 n.2 (Powell, J., dissenting).

123. *See* note 3 *supra*.

124. *See* note 4 *supra*.

125. The Supreme Court has never dealt with the issue of which level of judicial scrutiny should apply to classifications based upon mental illness.

Second, the application of an inactive rational basis stan-

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Three district court decisions, however, support the conclusion that at least the intermediate level of judicial scrutiny should be applied. Sterling v. Harris, 478 F. Supp. 1046, 1052-54 (N.D. Ill. 1979), *rev'd on other grounds sub nom.* Schweiker v. Wilson, 450 U.S. 221 (1981), *see* notes 6-7 *supra*; Frederick L. v. Thomas, 408 F. Supp. 832, 836 (E.D. Pa. 1976); Fialkowski v. Shapp, 405 F. Supp. 946, 958-59 (E.D. Pa. 1975). In *Sterling* the district court concluded that the intermediate test should be applied because the mentally ill possess the significant indicia of suspect classifications recognized in other cases. 478 F. Supp. at 1052; *see* note 23 *supra*. The court attached importance to three characteristics in particular. First, the court determined that the mentally ill are a "politically impotent, insular minority." 478 F. Supp. at 1052. In reaching this conclusion, the court pointed out that the mentally ill have only a limited right of association "and necessarily have difficulty combining with other groups in our society to further their interests." *Id.* Second, the court stated that the mentally ill have been "subject to a 'history of unequal protection.'" *Id.* (quoting San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 28 (1973) (school children from poor families in low property tax districts did not have a history of unequal protection)). Third, the court found that because of the classification, the mentally ill have "'a feeling of inferiority as to their status in the community.'" 478 F. Supp. at 1052 (quoting Brown v. Board of Educ., 347 U.S. 483, 494 (1954)). According to the court, denial of the comfort allowance served to perpetuate a feeling of inferiority. *Id.*

In Frederick L. v. Thomas, 408 F. Supp. 832 (E.D. Pa. 1976), the district court was presented with the issue whether children with specific learning disabilities were discriminated against by the failure of defendants to provide instruction specially suited to each child's handicap. In applying the equal protection clause the court noted that while the children were not members of a suspect class, they did "exhibit some of the essential characteristics of suspect classes—minority status and powerlessness." *Id.* at 836. Thus, the court stated that the intermediate level of scrutiny was the appropriate level of judicial review. *Id.* In a similar fashion, in Fialkowski v. Shapp, 405 F. Supp. 946 (E.D. Pa. 1975), the district court recognized the need to apply "greater judicial scrutiny" to the claims of the mentally retarded. *Id.* at 959. The court in *Fialkowski* even suggested that the mentally retarded may be a suspect class. *Id.* The precedential value of both *Frederick L.* and *Fialkowski* is limited, however, because the pertinent language in each case appears to be dictum. *See* Brief for Appellants at 18, Schweiker v. Wilson, 450 U.S. 221 (1981).

The question of which equal protection standard to apply to mental patients is still open. The Court seems unwilling to extend new constitutional rights to the mentally ill. *See* Pennhurst State School & Hosp. v. Halderman, 101 S. Ct. 1531, 1540 (1981) (mentally retarded persons do not have a right to treatment and services in the setting least restrictive of personal liberty). Several commentators, however, have suggested that a high level of judicial scrutiny should be applied to classifications based upon mental illness. *See, e.g.*,

dard in this case is the application of a standard that involves "minimal scrutiny in theory and virtually none in fact."[126] While the Court states that the "rational-basis standard is 'not a toothless one,' "[127] opinions in which the inactive rationality test have been applied suggest that it is virtually impossible to successfully challenge a statute under this standard.[128] The Court's obvious reluctance to function as a superlegislature is understandable, but it does not justify the Court's foreclosing all possible avenues for redress under the rational basis test.

Third, the Court is subject to criticism for accepting "*post hoc* hypotheses about legislative purpose, unsupported by the legislative history."[129] Where there is no evidence bearing on the actual purpose for a legislative classification in the statute itself or in the legislative history, the Court must necessarily turn to the suggestions of other sources, such as the secretary of the department involved. It is unreasonable, however, to apply a minimal standard of rationality to the secretary's assertions. If a higher standard of review is not applied, there is a substantial risk that *post hoc* justifications which bear no relation to actual legislative purpose may be used to deny valid equal protection claims.[130] As the dissent indicates, the Court should receive the secretary's hypotheses "with some skepticism . . . [and] should require that the classification bear a 'fair and substantial relation' to the asserted purpose,"[131] which is the standard for the intermediate test.

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Burgdorf & Burgdorf, *A History of Unequal Treatment: The Qualifications of Handicapped Persons as a "Suspect Class" Under the Equal Protection Clause*, 15 SANTA CLARA L. REV. 855, 902-08 (1975); Note, *Mental Illness: A Suspect Classification*, 83 YALE L.J. 1237 (1974); 86 HARV. L. REV. 1282, 1294 n.62 (1972).

126. Gunther, *supra* note 13, at 8 (footnote omitted).

127. 450 U.S. at 234 (quoting Mathews v. Lucas, 427 U.S. 495, 510 (1976)).

128. *See* Califano v. Torres, 435 U.S. 1 (1978); Dandridge v. Williams, 397 U.S. 471 (1970); Flemming v. Nestor, 363 U.S. 603 (1960); notes 26-29, 43-55 & 75-76 and accompanying text.

129. 450 U.S. at 244 (Powell, J., dissenting) (footnote omitted).

130. *See* Kassel v. Consolidated Freightways Corp. 450 U.S. 662, 682 n.3 (1981) (Brennan, J., concurring).

131. 450 U.S. at 244-45 (Powell, J., dissenting) (citing F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920)).

Fourth, even if the inactive rational basis standard, which requires that the statutory classification be rationally related to any conceivable purpose behind the SSI program, is accepted as the proper test in *Wilson*, the classification arguably still did not satisfy this test. The majority approved the argument that the states should accept responsibility for any comfort allowance because they already have the responsibility for treatment and care.[132] This argument would support an assertion that residence in a public mental hospital is rationally related to federal payment for the patients' treatment.[133] The same argument does not, however, support the assertion that residence in a public institution is rationally related to federal payment for SSI benefits. As the dissent pointed out, "[R]esidence in a *public mental* institution, as opposed to residence in a state *medical* hospital or a *private* mental hospital, bears no relation to any policy of the SSI program."[134] The congressional history clearly suggests that the monthly payment from SSI was to pay for personal expenses beyond the care provided by Medicaid.[135] Thus, the patients' need for SSI payments is the same regardless of who is paying for their treatment and care.

The *Wilson* decision virtually foreclosed the possibility of a successful challenge to social welfare classifications under the equal protection clause in cases in which the Court determines that a fundamental right or a suspect class of persons is not affected by the classification. The preferable course in *Wilson* would have been to invalidate the applicable SSI provision under the intermediate standard of review, which requires that there be a legitimate state interest and that the classification involved be substantially related to that interest. Even under the inactive rational basis standard, however, the provision should have been invalidated since the only legislative purpose asserted for the classification was convincingly discredited by the dissent.[136] If the Court was unwilling to act in *Wilson*, where the legislature offered no plausible justification for the classification,

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132. *Id.* at 246 (Powell, J., dissenting).
133. *Id.* (Powell, J., dissenting).
134. *Id.* (Powell, J., dissenting) (emphasis in original).
135. *Id.* at 246-47 (Powell, J., dissenting).
136. *See* notes 132-35 *supra* and accompanying text.

it is difficult to imagine a set of facts in which the rational basis test would be applied to invalidate a discriminatory classification.

The very essence of the equal protection clause is found in the principles encompassed by the rational basis test: a legislature must act reasonably and must refrain from drawing arbitrary classifications.[137] As Justice Stevens remarked, "[I]f any 'conceivable basis' for a discriminatory classification [the inactive rational basis standard] will repel a constitutional attack on the statute, judicial review will constitute a mere tautological recognition of the fact that Congress did what it intended to do."[138] Presently the Court is paying homage to a standard of rationality that, in practice, has been construed as an irrebuttable presumption of constitutionality. Redress under the equal protection clause in the area of social legislation is, therefore, available only to those groups that the Court has previously characterized as suspect, or quasi-suspect, classes of persons.

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137. *See* F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920).

138. United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166, 180 (1980) (Stevens, J., concurring).

# Constitutional Law—Equal Protection—Validity of Gender-Specific Statutory Rape Law

*Michael M. v. Superior Court*, 450 U.S. 464 (1981)

Petitioner, a seventeen-year-old male, was charged with a felony violation of California's statutory rape law[1] after allegedly engaging in sexual intercourse with a sixteen-year-old female.[2] Prior to trial[3] petitioner sought to set aside the information charge[4] on both state and federal constitutional grounds,[5] argu-

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1. CAL. PENAL CODE § 261.5 (West Supp. 1981): "Unlawful sexual intercourse is an act of sexual intercourse accomplished with a *female* not the wife of the perpetrator, where the female is under the age of 18 years." (emphasis added).

2. Justice Mosk, writing the dissent for the California Supreme Court, elaborated on the evening's activities:

> On the evening in question, Sharon [the victim] and her 21-year-old sister bought half a pint of whiskey . . . . Michael [the petitioner] and two other male youths rode by on their bicycles, then returned and asked the girls if they would like to drink some wine. The girls replied affirmatively . . . . Sharon and Michael then went into the bushes, lay down, and began kissing and hugging half an hour. . . . With remarkable impartiality, and on her own initiative, Sharon then began kissing the third boy. After he . . . departed, Sharon and Michael . . . resumed their sexual activities. In due course Michael told Sharon to remove her pants, and when at first she demurred he allegedly struck her twice. Sharon testified she then said to herself, "Forget it," and decided to let him do as he wished. The couple then had intercourse.

Michael M. v. Superior Court, 25 Cal. 3d 608, 615-16, 601 P. 2d 572, 577, 159 Cal. Rptr. 340, 345 (1979) (Mosk, J., dissenting), *aff'd*, 450 U.S. 464 (1981).

3. The juvenile court, pursuant to CAL. WELF. & INST. CODE § 707.1 (West Supp. 1981), concluded that the petitioner was not a proper subject to be dealt with by the juvenile court. The statute provides in part: "If the minor is declared not a fit and proper subject to be dealt with under the juvenile court law, the district attorney or other appropriate prosecuting officer shall acquire the authority to file an accusatory pleading against the minor in a court of criminal jurisdiction." *Id.*

4. In general, an information is a written accusation of a misdemeanor or felony brought by a public prosecuting officer without the intervention of a

ing that the statute unlawfully discriminated on the basis of gender because only males were criminally liable.[6] Both the trial court and the California Court of Appeal denied relief. On review, the California Supreme Court, applying a strict scrutiny analysis, upheld the statute and concluded that there existed a compelling state interest[7] that justified the gender-based classification.[8] On certiorari in the United States Supreme Court, in a plurality opinion, *held*, affirmed. The California statutory rape provision, which punishes only males, does not violate equal protection because it is sufficiently related to the important state

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grand jury. BLACK'S LAW DICTIONARY 701 (5th ed. 1979). California Penal Code § 995 (West Supp. 1981) provides in part: "The indictment or information must be set aside by the court in which defendant is arraigned, upon his motion, in either of the following cases: . . . 2. That the defendant had been committed without reasonable or probable cause." The petitioner moved, pursuant to this section, to set aside the information on the ground that he was indicted without reasonable or probable cause because California's statutory rape law on its face and as applied violated the equal protection clause of both the United States and California Constitutions.

5. Article 1, § 7 of the California Constitution provides: "A person may not be deprived of life, liberty, or property without due process of law or denied equal protection of the laws; . . . ."

Section 1 of the fourteenth amendment to the United States Constitution provides:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

6. Michael M. v. Superior Court, 450 U.S. 464, 467 (1981). Petitioner also argued that the statute was impermissibly underinclusive and must be broadened to hold the female as criminally liable as the male. *Id.* at 473. Petitioner further argued that the statute was impermissibly overbroad because it proscribed intercourse with females so young that they were incapable of becoming pregnant. *Id.* at 475. Finally, the petitioner contended that the statute was unconstitutional as applied to him because he, like the girl involved, was under 18 at the time of the incident. *Id.; see* notes 125-27 *infra* and accompanying text.

7. The California Supreme Court has held that gender-based classifications are inherently "suspect" and hence are subject to strict scrutiny under the compelling interest test. Sail'er Inn, Inc. v. Kirby, 5 Cal. 3d 1, 485 P.2d 529, 95 Cal. Rptr. 329 (1971).

8. Michael M. v. Superior Court, 25 Cal. 3d 608, 601 P.2d 572, 159 Cal. Rptr. 340 (1979).

objective of preventing illegitimate teenage pregnancy and the social, medical, and economic consequences of such pregnancies. *Michael M. v. Superior Court*, 450 U.S. 464 (1981).

Following some uncertainty about the proper standard of review applicable in determining the constitutionality of gender-based classifications, the United States Supreme Court developed an intermediate standard that required the classification to be substantially related to the achievement of an important governmental objective.[9] Notwithstanding this development, however, there was a split of authority among the United States courts of appeals on the applicability of the intermediate standard to statutory rape laws that punished only males.[10] Because of the uncertainty about the standard of review to be applied in such cases, the Supreme Court in *Michael M.* was faced with two questions. First, the Court had to decide which standard of review was applicable.[11] Second, the Court had to determine whether California's statutory rape law, which imposed criminal sanctions only upon males, violated equal protection under the applicable standard.

Although it is generally accepted that states have broad discretion to adopt laws which conform to the mores of the community,[12] no state has the power to enact laws that deny an individual the equal protection of the laws.[13] "[I]t may be said generally that the equal protection clause means that the rights of all persons must rest upon the same rules under similar circumstances."[14] The equal protection clause does not, however,

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9. *See* notes 64-69 *infra* and accompanying text.

10. *See* notes 92-106 *infra* and accompanying text.

11. The Court has traditionally applied either the rational basis test, *see* text accompanying notes 19-24 *infra*, or the compelling interest test, *see* text accompanying notes 25-34 *infra*, to statutes challenged on equal protection grounds. In recent years, however, the Court has adopted an intermediate test for reviewing gender-based classifications, *see* text accompanying notes 60-66 *infra*, but the Court has had difficulty agreeing upon the proper approach and analysis in applying this standard.

12. *See, e.g.*, Levy v. Louisiana, 391 U.S. 68, 71 (1968); Ferguson v. Skrupa, 372 U.S. 726, 731-32 (1963); McGowan v. Maryland, 366 U.S. 420, 425-26 (1961); Williamson v. Lee Optical of Oklahoma Inc., 348 U.S. 483, 489 (1955).

13. U.S. CONST. amend. XIV, § 1.

14. Louisville Gas & Elec. Co. v. Coleman, 277 U.S. 32, 37 (1928) (citing

proscribe necessary classifications. Indeed, decisions in the area of equal protection have long recognized the principle that a state cannot function efficiently absent some necessary classifications of its citizens with the inevitable effect of treating some differently than others.[15] In order to survive a constitutional challenge upon equal protection grounds, however, the statutory classification must be reasonable.[16]

Before 1971 the United States Supreme Court used one of two tests in analyzing the constitutionality of statutes challenged upon equal protection grounds: the rational basis test[17] or the strict scrutiny test.[18] At one extreme, the rational basis test presumes the validity of the statute.[19] Under this test the Court does not second-guess state regulation of its citizens' activities.[20] This minimal scrutiny standard has been applied to nonsuspect classifications, such as those created under economic regula-

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Kentucky Railroad Tax Cases, 115 U.S. 321, 337 (1885)). *See also* Magoun v. Illinois Trust & Saving Bank, 170 U.S. 283, 293 (1898).

15. *See* Snowden v. Hughes, 321 U.S. 1, 8 (1944); Louisville Gas & Elec. Co. v. Coleman, 277 U.S. 32, 37 (1928); Stebbins v. Riley, 268 U.S. 137, 142 (1925). *See generally Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065 (1969) [hereinafter cited as *Developments in the Law*].

16. *See* Village of Belle Terre v. Boraas, 416 U.S. 1, 8 (1974); Rinaldi v. Yeager, 384 U.S. 305, 308-09 (1966); F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920). The rational basis test was originally formulated in *F.S. Royster*, in which the Court stated that "the classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation so that all persons similarly circumstanced shall be treated alike." 253 U.S. at 415.

17. *See, e.g.*, McGowan v. Maryland, 366 U.S. 420, 425-26 (1961); Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78-79 (1911); *see* notes 19-24 *infra* and accompanying text. *See generally Developments in the Law*, *supra* note 15, at 1077.

18. *See, e.g.*, Regents of the Univ. of Calif. v. Bakke, 438 U.S. 265, 357 (1978) (Brennan, White, Marshall & Blackmun, J.J., concurring in part and dissenting in part); Frontiero v. Richardson, 411 U.S. 677, 688 (1973); Korematsu v. United States, 323 U.S. 214, 216 (1944); *see* notes 25-34 *infra* and accompanying text. *See generally Developments in the Law*, *supra* note 15, at 1087.

19. *See* Dandridge v. Williams, 397 U.S. 471, 486-87 (1970); McDonald v. Board of Election Comm'rs, 394 U.S. 802, 808-09 (1969).

20. Dandridge v. Williams, 397 U.S. 471, 487 (1970).

tions,[21] as well as those classifications not involving fundamental rights.[22]

In determining a statute's constitutionality under the rational basis test, the court must determine whether the purpose of the statute is rationally related to a legitimate state interest.[23] Because legislatures will rarely create a statutory classification that does not bear a rational relation to the objective of the classification, the application of the rational basis analysis will almost always result in the classification's being deemed reasonable.[24]

At the other extreme, the strict scrutiny test requires not only that the classification be necessary to promote a compelling state interest but also that it be the least burdensome alternative possible.[25] Under this test strict scrutiny has been applied to "suspect"[26] classifications: those based upon race,[27] alienage,[28]

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21. Railway Express Agency v. New York, 336 U.S. 106 (1949) (regulation of business advertisements on certain vehicles held constitutional).

22. *See* notes 23-24 *infra* and accompanying text.

23. *See, e.g.*, Dandridge v. Williams, 397 U.S. 471, 487 (1970) (application of rational basis test to administration of public welfare assistance program); McGowan v. Maryland, 366 U.S. 420, 425-26 (1961) (statute limiting sales by vendor on Sunday not unconstitutional under the rational basis test); Allied Stores, Inc. v. Bowers, 358 U.S. 522, 528 (1959) (taxation of merchandise belonging to nonresident not violative of equal protection under the rational basis test).

24. *See* Village of Belle Terre v. Boraas, 416 U.S. 1, 8 (1974); Reed v. Reed, 404 U.S. 71, 76 (1971). This reasonableness test has been given various names. *See* Frontiero v. Richardson, 411 U.S. 677, 683 (1973) ("traditional approach"); Reed v. Reed, 404 U.S. 71, 76 (1971) ("rational relationship" test); *Developments in the Law, supra* note 15, at 1108 ("permissive test").

25. Roe v. Wade, 410 U.S. 113 (1973). Moreover, the test places the burden of justifying the classification upon the state or upon the party who relies upon the statute. *See, e.g.*, Shapiro v. Thompson, 394 U.S. 618, 633 (1969); Griswold v. Connecticut, 381 U.S. 479, 497 (1965) (Goldberg, J., concurring); Bates v. Little Rock, 361 U.S. 516, 524 (1960).

26. Legal restrictions that infringe upon a person's civil rights, while not necessarily unconstitutional, are nevertheless considered suspect. Korematsu v. United States, 323 U.S. 214, 216 (1944).

27. McLaughlin v. Florida, 379 U.S. 184, 192 (1964) (state did not have a compelling interest that justified a statute prohibiting an unmarried interracial couple from habitually living in the same room at night); Korematsu v. United States, 323 U.S. 214, 216 (1944) (compelling interest justified order directing persons of Japanese ancestry to detention centers).

and national origin.[28] In addition to suspect classifications, certain personal rights, classified as fundamental, have been held to trigger the strict scrutiny analysis: the right of privacy,[30] interstate travel,[31] voting,[32] association,[33] and procreation.[34]

In resolving equal protection challenges to gender-based classifications, however, the Supreme Court in 1971 began to develop an intermediate standard of review. This standard requires more scrutiny than does the rational basis test, but less scrutiny than does the strict scrutiny test. In *Reed v. Reed*[35] the Court held unconstitutional an Idaho gender-specific classification[36] that expressed a preference for males as estate adminis-

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28. Sugarman v. Dougall, 413 U.S. 634, 641-43 (1973) (no compelling state interest to justify civil service rules restricting permanent position to United States citizens); Graham v. Richardson, 403 U.S. 365, 372 (1971) (no compelling state interest to justify denial of welfare benefits to resident aliens).

29. *See* Korematsu v. United States, 323 U.S. 214, 216 (1944) (compelling state interest justified directive placing Japanese in detention centers); Yick Wo v. Hopkins, 118 U.S. 356, 374 (1886) (no compelling state interest to justify refusal to issue laundry license to Chinese).

30. Roe v. Wade, 410 U.S. 113, 153-55 (1973) (in a challenge to an anti-abortion statute the Court held that a woman's fundamental right to privacy was not subject to state intervention during the first trimester of her pregnancy); Planned Parenthood v. Danforth, 428 U.S. 52, 60 (1976) (the Court extended the right of privacy to mature and emancipated females in decisions on abortions during first trimester).

31. Shapiro v. Thompson, 394 U.S. 618, 634 (1969) (Court held state's classification of welfare applicants according to residence in state for one year unconstitutional because it infringed the fundamental right to travel).

32. Harper v. Virginia Bd. of Elections, 383 U.S. 663, 667 (1966) (the Court held that state-imposed voting fee violated equal protection by infringing the fundamental right to vote).

33. NAACP v. Button, 371 U.S. 415, 430 (1963) (state's attempt to obtain access to a membership list of civil rights organization held violative of members' fundamental rights of association).

34. Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) (state law providing for sterilization of persons convicted more than twice of felonies involving moral turpitude held an unconstitutional infringement of the fundamental right of procreation).

35. 404 U.S. 71 (1971).

36. IDAHO CODE §§ 15-312, -314 (1948). Section 15-312 designated persons who were entitled to administer the estate of one who died intestate. Section 15-314 provided: "Of several persons claiming and equally entitled [under § 15-312] to administer, males must be preferred to females, and relatives of the

trators.[37] While recognizing that the state's interest in achieving administrative efficiency was "not without some legitimacy,"[38] the *Reed* Court said that "[t]o give a mandatory preference to members of either sex over members of the other, is to make the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause of the Fourteenth Amendment . . . ."[39] In reaching this conclusion, the Court found the classification invalid because the statute did not advance the state's objectives in a way that demonstrated a "fair and substantial relation" to the classification.[40] Although the Court did not expressly define the "fair and substantial relation" test as a new standard, the holding suggested to commentators the creation of an intermediate standard in determining the constitutionality of gender-based classifications.[41]

The expected significance of *Reed* was confirmed in *Frontiero v. Richardson*,[42] in which the Supreme Court attempted to formulate a more specific standard for reviewing gender-based classifications. In holding unconstitutional a classification that required servicewomen, but not servicemen, to prove their spouses' dependency in order to secure medical and dental benefits, a plurality of the Court found that *Reed* implicitly supported the proposition that "classifications based upon sex, like classifications based upon race, alienage, and national origin, are inherently suspect, and must therefore be subjected to close judicial scrutiny."[43]

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whole to those of the half blood."

37. 404 U.S. at 76.

38. *Id.*

39. *Id.*

40. *Id.*

41. *See* Gunther, *The Supreme Court 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 29-30 (1972).

42. 411 U.S. 677 (1973). *Frontiero* involved the right of a female member of the armed services to claim her husband as a dependent in order to secure medical and dental benefits under the same criteria as those used by male personnel in claiming their wives as dependents. Servicemen were entitled to claim their wives as "dependent" whether or not there was an actual dependency. A servicewoman could claim her husband only if he was actually dependent upon her for more than one-half of his support. *Id.* at 678.

43. *Id.* at 688. Moreover, the plurality found that sex has no direct corre-

The scope of *Frontiero* was limited, however, not only because a majority of the Court refused to characterize sex as a suspect classification[44] but also because of an additional limitation that the plurality imposed upon the test. The plurality noted that the strict scrutiny test should not be applicable to gender-based classifications that have a remedial effect promoting the interests of females:

> It should be noted that these statutes are not in any sense designed to rectify the effect of past discrimination against women. . . . On the contrary, these statutes seize upon a group—women—who have historically suffered discrimination in employment, and rely on the effects of this past discrimination as a justification for heaping on additional economic disadvantages.[45]

In two subsequent decisions, *Kahn v. Shevin*[46] and *Schlesinger v. Ballard*,[47] the Supreme Court was faced with the question of what standard was applicable to remedial gender-based classifications that had been recognized in *Frontiero*. In *Kahn* the Court passed upon the constitutionality of a Florida statute that granted an annual property tax exemption to widows, but not to widowers.[48] The Court, applying its *Frontiero* remedial-effect rationale, adopted the "fair and substantial" test of *Reed*[49] and stated that the statute was "reasonably designed to further the state policy of cushioning the financial impact of spousal loss upon the sex for which that loss imposes a disproportionately

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lation to a person's ability to contribute to society because, like race and national origin, it is determined solely by birth. *Id.* at 686 (citing Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972)).

44. Justice Powell, joined by Chief Justice Burger and Justice Blackmun, concurred in the result, but stated that it was "unnecessary for the Court in this case to characterize sex as a suspect classification, with all of the far-reaching implications of such a holding." *Id.* at 691-92 (Powell, J., concurring). Justice Powell went on to note, however, that if the Equal Rights Amendment were adopted, gender should indeed be considered a suspect classification. *Id.* at 692 (Powell, J., concurring).

45. 411 U.S. at 689 n.22 (citations omitted).

46. 416 U.S. 351 (1974).

47. 419 U.S. 498 (1975).

48. FLA. STAT. ANN. § 196.202 (West Supp. 1981).

49. 416 U.S. at 355.

heavy burden."[50] In upholding the statute, the Court intimated that classifications with a remedial effect would not be given the close judicial scrutiny given other gender-based classifications challenged on equal protection grounds.

Accordingly, in *Ballard* the Supreme Court applied the rational basis test and upheld a gender-based classification that was found to have a remedial effect. The classification challenged was a federal statute[51] that gave female naval officers a thirteen-year tenure of commissioned service before mandatory discharge for want of promotion, but required all male officers twice passed over for promotion to be discharged regardless of whether they had thirteen years commissioned service. The Court reasoned that the different treatment afforded men and women under the statute was not reflective of archaic and overbroad generalizations as in *Frontiero* and *Reed*, but rather illustrated "that male and female line officers in the Navy are *not* similarly situated with respect to opportunities for professional service."[52]

The unpredictability of the standard of review to be applied to gender-based classifications challenged on equal protection grounds continued in *Weinberger v. Wiesenfeld*[53] and *Stanton v. Stanton*.[54] In *Weinberger* the Supreme Court held invalid a federal statute[55] that granted social security benefits to widows and their minor children but did not grant the same benefits to widowers. The Court, while not articulating the applicable standard of review, nevertheless found that the gender-specific statute "operate[d] . . . to deprive women of protection for their families which men receive as a result of their employment,"[56]

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50. *Id.*

51. 10 U.S.C. § 6382(a) (1976).

52. 419 U.S. at 508. Justice Brennan, with whom Justices Douglas, Marshall and White joined, dissenting, stated that suspect classifications can be upheld only if they serve compelling interests that could not otherwise be achieved. *Id.* at 511. "Here, the Government as much as concedes that the gender-based distinctions in separation provisions for Navy officers fulfill no compelling purpose." *Id.* (Brennan, J., dissenting).

53. 420 U.S. 636 (1975).

54. 421 U.S. 7 (1975).

55. 42 U.S.C. § 402(g) (1976).

56. 420 U.S. at 645. While the Court undoubtedly could have analyzed

and thus served only to perpetuate archaic, constitutionally impermissible sex-role stereotyping.[57]

Similarly, in *Stanton* the Supreme Court failed to define the appropriate standard of review in holding unconstitutional a Utah statute setting the age of majority at eighteen for females and at twenty-one for males.[58] The Court found that the statute was a violation of equal protection "under any test—compelling state interest, or rational basis, or something in between."[59] The Court's decisions subsequent to *Frontiero* and *Reed* illustrated the difficulty the Court was having in ascertaining a predictable standard of review for gender-based classifications. Furthermore, these arguably inconsistent decisions made apparent to the Court the constitutional desirability of settling upon a single test that lower courts could apply to gender-based statutes.

Accordingly, in *Craig v. Boren*[60] the Court, in a plurality decision,[61] established an intermediate standard for determining the constitutionality of a gender-based classification. In *Craig* the Court struck down an Oklahoma statute which prohibited the sale of 3.2 percent beer to males under the age of twenty-one years and to females under the age of eighteen years.[62] While three Justices who concurred in the plurality decision could not

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this gender-specific classification with respect to its discriminatory effect upon males, the Court's rationale reflected a trend toward application of the intermediate test only in cases in which the classification had a discriminatory impact upon females.

57. 420 U.S. at 643 (citing Schlesinger v. Ballard, 419 U.S. 498 (1975)).

58. UTAH CODE ANN. § 15-2-1 (1973) (current version at UTAH CODE ANN. § 15-2-1 (Supp. 1979)). The statute, the Court believed, reflected the antiquated notion that the female's role was that of homemaker and childrearer, while the male's primary responsibility was to provide a home. The statute thus assumed the male's need for a prolonged education before he undertook this responsibility.

59. *Id.* at 17.

60. 429 U.S. 190 (1976).

61. Justice Brennan delivered the opinion of the Court, in which Justices White, Marshall, and Blackmun joined.

62. OKLA. STAT. ANN. tit. 37, §§ 241, 245 (West 1958). The State alleged that the gender classification was necessary for traffic safety because more males were arrested yearly for driving under the influence of alcohol than were females. 429 U.S. at 200.

agree upon the appropriate standard,[63] the four-member plurality articulated a two-part test for determining the constitutionality of a gender-based classification. First, the classification "must serve important governmental objectives,"[64] and second, the classification "must be substantially related to the achievement of those objectives."[65] Under this intermediate test the government has the burden of proving not only the importance of the asserted objective but also the substantial relationship between the classification and that objective.[66] Although the dissent argued that the Court was creating a new test,[67] the *Craig* plurality contended that it was merely following the *Reed* standard: "[T]he relationship between gender and traffic safety becomes far too tenuous to satisfy *Reed*'s requirement that the

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63. Justice Powell concurred in the result, but objected to further subdividing the equal protection analysis into a third standard. Justice Powell noted, however, that the rational basis standard of review normally applied takes on a "sharper focus" when addressing gender-based classification. 429 U.S. at 211 n.* (Powell, J., concurring). Justice Stevens, also concurring with the result, rejected the equal protection analyses of both the plurality and Justice Powell and would focus instead upon the motivation of legislative enactment in determining the proper standard of review. *Id.* at 212 (Stevens, J., concurring). Justice Stewart, concurring only in the judgment, refused to address the issue of the applicable standard. *Id.* at 214-16 (Stewart, J., concurring). Chief Justice Burger and Justice Rehnquist, in separate dissents, argued that the plurality was creating a new standard for gender-based classifications without citation to any source. *Id.* at 215 (Burger, C.J., dissenting); *id.* at 217 (Rehnquist, J., dissenting). Further, Justice Rehnquist stated, "The only redeeming feature of the Court's opinion, to my mind, is that it apparently signals a retreat by those who joined the plurality opinion of *Frontiero v. Richardson*, 411 U.S. 677 (1973), from their view that sex is a 'suspect' classification for purposes of equal protection analysis." *Id.* at 217 (Rehnquist, J., dissenting).

64. 429 U.S. at 197; *see, e.g.*, Kirchberg v. Feenstra, 101 S. Ct. 1195, 1198 (1981); Wengler v. Druggists Mutual Ins. Co., 446 U.S. 142, 150 (1980); Califano v. Westcott, 443 U.S. 76, 85 (1979); Caban v. Mohammed, 441 U.S. 380, 388 (1979); Orr v. Orr, 440 U.S. 268, 279 (1979); Califano v. Goldfarb, 430 U.S. 199, 210-11 (1977); Califano v. Webster, 430 U.S. 313, 316-17 (1977).

65. 429 U.S. at 197.

66. *See* Kirchberg v. Feenstra, 101 S. Ct. 1195, 1199 (1981); Wengler v. Druggists Mutual Ins. Co., 446 U.S. 142, 151 (1980); Personnel Adm'r v. Feeney, 442 U.S. 256, 273 (1979); Caban v. Mohammed, 441 U.S. 380, 393 (1979); Craig v. Boren, 429 U.S. 190, 197 (1976).

67. 429 U.S. at 217 (Rehnquist, J., dissenting).

gender-based difference be substantially related to achievement of the statutory objective."[68] Finally, the plurality intimated that the substantial relationship test should be applied whether the challenged classification discriminated against males or females.[69] Although this suggestion did not have an immediate impact upon the Court's decisions in the area of remedial gender-based classifications,[70] the substantial relationship test was later applied in *Orr v. Orr*[71] to strike down a gender-based classification that had a discriminatory impact upon males.

In *Orr* the Supreme Court struck down on equal protection grounds an Alabama statutory scheme under which husbands, but not wives, could be required to pay alimony upon divorce.[72]

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68. *Id.* at 204. The plurality "accepted for purposes of discussion" that the state's objective in enacting the statute was truly traffic safety, but intimated that perhaps the state merely selected "a convenient, but false, post-hoc rationalization." *Id.* at 199 & n.7.

Finally, the *Craig* Court noted that the legislative intent offered by the state should be viewed with skepticism since the proffered objective was supported by statistics rather than legal authority. The Court stated that "proving broad sociological propositions by statistics is a dubious business, and one that inevitably is in tension with the normative philosophy that underlies the Equal Protection Clause." *Id.* at 204. Moreover, in Weinberger v. Wiesenfeld, 420 U.S. 636 (1975), the Court stated that the mere recitation by the state of a remedial purpose is "not an automatic shield which protects against any inquiry into the actual purposes underlying a statutory scheme." *Id.* at 648. Indeed, in equal protection cases the Court does not even have to accept the state's determination of its legislative intent. *Id.* at 648 n.16. *See also* Eisenstadt v. Baird, 405 U.S. 438, 443 (1972) (the Court did not accept Massachusetts' finding that deterrence of premarital sex was the objective of a criminal statute that prohibited the distribution of contraceptives to any unmarried person).

69. 429 U.S. at 204; *see, e.g.*, Caban v. Mohammed, 441 U.S. 380, 390-91 (1979); Orr v. Orr, 440 U.S. 268, 278-79 (1979).

70. In Califano v. Goldfarb, 430 U.S. 199 (1977), decided several months after *Craig*, the Court, although applying the substantial relationship test to uphold a statute, suggested that if a challenged gender-based classification had a remedial effect, as in *Kahn* and *Ballard*, *see* notes 46-52 *supra* and accompanying text, the rational basis test would be applied in determining its constitutionality. *Id.* at 210-12. *But see* Califano v. Webster, 430 U.S. 313 (1977) (involving a gender-based classification with a remedial effect to which the Court nevertheless applied the *Craig* substantial relationship test).

71. 440 U.S. 268 (1979).

72. ALA. CODE §§ 30-2-51 to -53 (1975) (current version at ALA. CODE

In applying the substantial relationship test the Court stated, "The fact that the classification expressly discriminates against men rather than women does not protect it from scrutiny."[73] Further, the Court noted that the statute actually produced "perverse results" because a needy husband could be required to provide alimony payments to a financially secure wife.[74] Thus, although a financially secure wife might be liable for alimony payments under a gender-neutral statute, the Alabama statute exempted her from that liability.[75] Finally, the *Orr* Court said that statutes which distribute benefits and burdens on a gender-specific basis carry with them the risk of perpetuating archaic stereotypes "about the 'proper place' of women and their need for special protection."[76]

Less than one year later, the Supreme Court in *Caban v. Mohammed*[77] similarly held that a New York statute[78] which permitted an unwed mother, but not an unwed father, to block the adoption of their child merely by withholding her consent violated the equal protection clause. Again, applying the *Craig* substantial relationship test,[79] the Court found that the classification "both excludes some loving fathers from full participation in the decision whether their children will be adopted and, at the same time, enables some alienated mothers arbitrarily to cut off the paternal rights of fathers."[80] As a result, the Court concluded that the state's alleged objective of furthering the interests of illegitimate children was not substantially related to a gender-based classification that gave only unwed mothers veto power over the adoption of the child.[81]

In short, as the decisions in *Orr* and *Caban* illustrated, the Court applied the *Craig* intermediate test to gender-based clas-

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§§ 30-2-51 to -53 (Supp. 1980)).

73. 440 U.S. at 279 (citing Craig v. Boren, 429 U.S. 190 (1976)).

74. *Id.* at 282.

75. *Id.*

76. *Id.* at 283 (citation omitted).

77. 441 U.S. 380 (1979).

78. N.Y. DOM. REL. LAW § 111 (McKinney 1977) (current version at N.Y. DOM. REL. LAW § 111 (McKinney 1980-1981)).

79. 441 U.S. at 388.

80. *Id.* at 394.

81. *Id.*

sifications that discriminated against males. The Court's decisions in *Ballard* and *Kahn*, however, also reflected the theory that some discriminatory gender-based classifications might be upheld if they had a remedial effect by reasonably reflecting the fact that the sexes are not similarly situated in certain circumstances.[82] These two seemingly opposed theories needed to be reconciled in the area of gender-based statutory rape laws that imposed criminal sanctions upon only males. These statutes reflected the belief that the sexes were not similarly situated in the area of sexual relations and, accordingly, protected only young females from illicit acts of sexual intercourse[83] by making their consent legally impossible.[84]

The elements of statutory rape tended to be merely the act of sexual intercourse by a male with a female under the statutory age of consent.[85] Since the male's age was not an element of the crime, traditional statutory rape laws failed to distinguish the consensual acts of peers from the sexual exploitation of adolescent females by older men. Consent was not a defense, and lack of consent was not an essential ingredient of the crime,[86] for the law declared that young females were incapable of consenting.[87] While statutory rape laws were traditionally accepted as a necessary means by which a state could regulate certain sexual activity upon gender-based grounds,[88] the recent trend has

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82. *See* notes 46-52 *supra* and accompanying text.

83. People v. Courtney, 180 Cal. App. 2d 61, 4 Cal. Rptr. 274 (1960); Ledbetter v. State, 184 Tenn. 396, 199 S.W.2d 112 (1947); State v. Huntsman, 115 Utah 283, 204 P.2d 448 (1949).

84. Stevens v. State, 231 Ark. 734, 332 S.W.2d 482 (1960); Paige v. State, 219 Ga. 569, 134 S.E.2d 793 (1964); State v. David, 226 La. 268, 76 So. 2d 1 (1954).

85. Wheeler v. United States, 211 F.2d 19 (D.C. Cir. 1953); State v. Ragland, 173 Kan. 265, 246 P.2d 276 (1952); State v. Gauthier, 113 Or. 297, 231 P. 141 (1924); State v. Horton, 209 S.C. 151, 39 S.E.2d 222 (1946).

86. State v. Upton, 65 Ariz. 93, 174 P.2d 622 (1946); People v. Davis, 10 Ill. 2d 430, 140 N.E.2d 675 (1957); Commonwealth v. Ellis, 321 Mass. 669, 75 N.E.2d 241 (1947); State v. Ross, 96 Ohio App. 157, 121 N.E.2d 289 (1954).

87. Stevens v. State, 231 Ark. 734, 332 S.W.2d 482 (1960); State v. Nagel, 75 N.D. 495, 28 N.W.2d 665 (1947); State v. Oldham, 56 Wash. 2d 696, 355 P.2d 9 (1960).

88. Deen v. State, 216 Ga. 387, 116 S.E.2d 595 (1960); State v. David, 226 La. 268, 76 So. 2d 1 (1954); Commonwealth v. Ellis, 321 Mass. 669, 75 N.E.2d

been to challenge these statutes as violating equal protection.[89] Moreover, many state legislatures have sought to enact gender-neutral statutory rape laws that protect both males and females from physical and psychological abuse by imposing criminal sanctions upon the perpetrator regardless of gender. Currently, more than thirty-five states have enacted such laws.[90] The majority of these laws serve to protect young persons of either gender from sexual abuse by older persons, but the laws of three states impose criminal liability upon both minor females and mi-

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241 (1947); State v. Daniels, 169 Ohio St. 87, 157 N.E.2d 736 (1959).

89. State v. Kelly, 111 Ariz. 181, 526 P.2d 720 (1974); People v. Medrano, 24 Ill. App. 3d 429, 321 N.E.2d 97 (1974); State v. Price, 215 Kan. 718, 529 P.2d 85 (1974).

90. Alaska (ALASKA STAT. § 11.41.410(a)(3)-(4) (Supp. 1980)); Arizona (ARIZ. REV. STAT. ANN. § 13-1405 (1978)); Arkansas (ARK. STAT. ANN. § 41-1803(1)(c) (1977)); Colorado (COLO. REV. STAT. § 18-3-403(1)(e) (1978)); Connecticut (CONN. GEN. STAT. ANN. §§ 53a-71(a)(1) (West Supp. 1981)); Florida (FLA. STAT. ANN. § 794.05 (West 1976)); Hawaii (HAWAII REV. STAT. §§ 707-730(1)(b), -731(1)(b) (Supp. 1979)); Illinois (ILL. ANN. STAT. ch. 38, §§ 11-5 to -6 (Smith-Hurd 1979)); Indiana (IND. CODE ANN. § 35-42-4-3 (Burns 1979)); Iowa (IOWA CODE ANN. §§ 709.3(2), .4(3), (5) (West 1979)); Kansas (KAN. STAT. ANN. § 21-3503 (Supp. 1980)); Kentucky (KY. REV. STAT. §§ 510.040(1)(b)(2), .050(1) (1975)); Maine (ME. REV. STAT. ANN. tit. 17-A, §§ 252(1)(A), 253(1)(B), 254 (Supp. 1980)); Maryland (MD. CRIM. LAW CODE ANN. art. 27, §§ 463(a)(3), 464A(a)(3) (Supp. 1980)); Massachusetts (MASS. GEN. ANN. LAWS ch. 265, §§ 22A, 23 (West Supp. 1980)); Michigan (MICH. COMP. LAWS ANN. §§ 750.520.b(1)(a), .520.d(1)(a) (Supp. 1981)); Minnesota (MINN. STAT. ANN. §§ 609.342-.345 (West Supp. 1981)); Missouri (MO. ANN. STAT. § 560.030(3) (Vernon 1981)); Montana (MONT. REV. CODES ANN. § 94-5-503(3) (1979)); Nebraska (NEB. REV. STAT. § 28-319(1)(c) (1979)); New Hampshire (N.H. REV. STAT. ANN. §§ 632-A:2(XI) to -A:3 (Supp. 1979)); New Jersey (N.J. STAT. ANN. § 2C:14-2(a)(1) (West Supp. 1981)); New Mexico (N.M. STAT. ANN. §§ 30-9-11(A)(1), -13, 40A-9-23 (1978)); North Dakota (N.D. CENT. CODE §§ 12.1-20-03(1)(d), -05, -07(1)(f) (Supp. 1979)); Ohio (OHIO REV. CODE ANN. §§ 2907.02(3), .04 (Page 1975 & Supp. 1980)); Pennsylvania (PENN. CONS. STAT. ANN. § 3122 (Purdon Supp. 1980)); Rhode Island (R.I. GEN. LAWS § 11-37-2(A) (Supp. 1980)); South Carolina (S.C. CODE § 16-3-655 (Supp. 1980)); South Dakota (S.D. COMP. LAWS ANN. § 22-22-1(4)-(5) (Supp. 1980)); Tennessee (TENN. CODE ANN. §§ 37-3703(4), -3711 (Supp. 1980)); Utah (UTAH CODE ANN. §§ 76-5-401, -402(2) (Supp. 1979)); Vermont (VT. STAT. ANN. tit. 13, § 3252(3) (Supp. 1980)); Washington (WASH. REV. CODE ANN. §§ 9A.44.070 - .090 (Supp. 1981)); West Virginia (W. VA. CODE §§ 61-8B-3(3), -5(a)(2) (1977)); Wisconsin (WIS. STAT. ANN. § 940.225 (West Supp. 1980)); Wyoming (WYO. STAT. § 6-4-303(a)(V), (c) (1977)).

nor males for participating in consensual sexual relations.[91] These laws evidently reflect the theory that young males and young females are similarly situated with respect to the capacity to consent to the act of sexual intercourse. Often, however, legislators have been slow to act, and the courts have increasingly had to address these issues.

Accordingly, in subsequent United States courts of appeals decisions, the courts had to consider not only the constitutionality of a state's gender-based statutory rape law but also which standard of review to apply to such laws. In *Meloon v. Helgemoe*[92] the Court of Appeals for the First Circuit applied the rational basis test and concluded that New Hampshire's statutory rape law,[93] which made it a felony for a male to have sexual intercourse with a female under the age of fifteen but did not impose sanctions upon females who engaged in the same act with males, violated the equal protection clause.[94] While conceding that a female's unique ability to bear children is a difference that could justify certain gender-specific legislation, the court expressed the fear that "the very uniqueness of this characteristic makes it an available hindsight catchall rationalization for laws that were promulgated with totally different purposes in mind."[95]

In *Rundlett v. Oliver*[96] the First Circuit faced the issue whether Maine's gender-specific statutory rape provision[97] violated the equal protection clause. Adopting the *Craig* test, the court held that Maine's statute was not unconstitutional because

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91. Arizona (ARIZ. REV. STAT. ANN. § 13-1405 (1978)); Florida (FLA. STAT. ANN. § 794.05 (West 1976)); Illinois (ILL. STAT. ANN. ch. 38, § 11-5 (Smith-Hurd 1979)).

92. 564 F.2d 602 (1st Cir. 1977).

93. N.H. REV. STAT. ANN. § 632:1(I)(c) (1974).

94. 564 F.2d at 603.

95. *Id.* at 607. The *Meloon* court found the pregnancy prevention objective offered by the state too tenuous to survive even the rational basis test. *Id.* at 608.

96. 607 F.2d 495 (1st Cir. 1979).

97. ME. REV. STAT. ANN. tit. 17, § 315 (1964): "Whoever ravishes and carnally knows any female who has attained her 14th birthday, by force and against her will, or unlawfully and carnally knows and abuses a female child who has not attained her 14th birthday, shall be punished by imprisonment for any term of years."

it was substantially related to achievement of the government's objective of preventing physical injury to females under fourteen years of age.[98] The court distinguished *Meloon* by reasoning that in *Rundlett*, the State had supported its contention with substantial statistical and medical evidence.[99]

In *Navedo v. Preisser*,[100] however, the Court of Appeals for the Eighth Circuit held that an Iowa statute[101] that prohibited males more than twenty-five years old from engaging in sexual intercourse with females less than sixteen years old, but not *vice versa*, was a denial of equal protection under the *Craig* standard.[102] In *Navedo* the State contended that it had three important governmental objectives: the prevention of pregnancy, the prevention of physical injury caused by intercourse, and the prevention of the emotional trauma caused by sexual intercourse with an older man.[103] The court found that the State had failed to produce evidence of the "frequency and severity of *physical injury* to sixteen-year-old females from consensual intercourse with males over twenty-five."[104] Further, the court found that the State had produced no evidence "demonstrating the frequency and severity of *emotional trauma* to sixteen-year-old females caused by consensual sexual intercourse with males over

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98. 607 F.2d at 502.

99. *Id.* Judge Bownes, however, stated in his dissenting opinion that

> [w]hile I am willing to give due deference to the interpretation that the highest court of a state gives to its own statute, I am not willing to follow it backwards in time and thought to the 19th century when the sexual differences between male and female fostered the almost universally accepted but unproven myth that women were inferior to men in all respects and had to be protected by them and from them.

*Id.* at 506 (Bownes, J., dissenting).

100. 630 F.2d 636 (8th Cir. 1980). *See also* United States v. Hicks, 625 F.2d 216 (9th Cir. 1980) (federal criminal carnal knowledge statute that identified the victim and offender on a sex-specific basis was not substantially related to the proffered governmental interest in the prevention of teenage pregnancies and physical injuries).

101. IOWA CODE § 698.1 (1975) (repealed 1976) (current version at IOWA CODE §§ 709.1(3), .3(2) (1979)).

102. 630 F.2d at 638.

103. *Id.*

104. *Id.* at 640 (emphasis added).

twenty-five . . . ."[105] Finally, with respect to the state's purported objective of the prevention of pregnancy, the *Navedo* court found that the State had failed to offer any legislative history demonstrating that a purpose for the statute was the prevention of pregnancy. "Although a court should accept the purpose of a statute offered by the state or its courts, . . . we remain free to inquire into the actual purpose of the statute if the proffered justification is not plausible."[106]

After the enactment of California's statutory rape law,[107] the courts primarily decided issues concerning the consent of the victim as a defense.[108] In considering this issue, the courts examined the legislative history and apparently concluded that the law's primary purpose was the protection of female virtue.[109] Moreover, the California Supreme Court stated that the goal of the statutory rape law was "not accomplished by penalizing the

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105. *Id.* (emphasis added).

106. *Id.* The *Navedo* court also noted that the purpose of pregnancy prevention for laws of this kind is suspect because pregnancy is a fundamental characteristic distinguishing the sexes and thus can be used as an " 'available hindsight catchall rationalization' " for almost any gender-specific classification. *Id.* at 640 (quoting Meloon v. Helgemoe, 564 F.2d 602, 607-08 (1st Cir. 1977)). Finally, the court noted that Iowa's statutory rape legislation traditionally had included very young females for whom pregnancy is no threat. *Id.*

107. California's first statutory rape law, a prototype of the English statute, 18 Eliz. 1, ch. 7, § 4 (1576), adopted ten years as the age of consent. In later years the age of consent was raised, until in 1913 it was fixed at the current age of eighteen. CAL. PENAL CODE § 261.5 (West Supp. 1981); *see* note 1 *supra.*

108. *See* text accompanying notes 85-88 *supra.*

109. People v. Hernandez, 61 Cal. 2d 529, 393 P.2d 673, 39 Cal. Rptr. 361 (1964):

> The law's concern with her capacity or lack thereof to so understand is explained in part by a popular conception of the social, moral and personal values which are preserved by the abstinence from sexual indulgence on the part of a young woman. An unwise disposition of her sexual favor is deemed to do harm both to herself and to the social mores by which the community's conduct patterns are established.

*Id.* at 531, 393 P.2d at 674, 39 Cal. Rptr. at 632; People v. Verdegreen, 106 Cal. 211, 39 P. 607 (1895): "[t]he obvious purpose of [the statute] is the protection of society by protecting from violation the virtue of young and unsophisticated girls." *Id.* at 214-15, 39 P. at 608. *See also* People v. Courtney, 180 Cal. App. 2d 61, 62-63, 4 Cal. Rptr. 274, 276 (1960) (court did not even mention pregnancy prevention in describing the purpose of the statutory rape law).

naive female but by imposing criminal sanctions against the male, who is conclusively presumed to be responsible for the occurrence."[110]

In *Michael M. v. Superior Court*[111] the United States Supreme Court was faced with interpreting California's gender-based statutory rape law in light of petitioner's equal protection challenge. The Court, in a plurality decision, held that the statute, which punished only males, was sufficiently related to an important governmental objective—the problem of teenage sexual intercourse and the prevention of teenage pregnancy—and thus did not violate the equal protection clause of the fourteenth amendment.[112] In holding that the statute was *sufficiently* related, however, the plurality did not make clear precisely which test it was applying. The Court noted its past applications of the *Craig* "substantial relationship" test[113] and admitted that the standard "takes on a somewhat 'sharper focus' when gender-based classifications are challenged."[114] Justice Rehnquist, writing for the plurality, nevertheless stated that "this Court has consistently upheld statutes where the gender classification is not invidious, but rather realistically reflects the fact that the sexes are not similarly situated in certain circumstances."[115] Thus, according to the plurality, it was clear that under any intermediate standard the "legislature may 'provide for the special problems of women.' "[116]

In applying these principles, the plurality accepted the state's alleged objectives for the statute, as well as the State's proffered statistics on the social, medical, and economic effects

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110. People v. Hernandez, 61 Cal. 2d at 531, 393 P.2d at 674, 39 Cal. Rptr. at 362.

111. 450 U.S. 464 (1981). Justice Rehnquist wrote the plurality opinion in which Chief Justice Burger, Justice Stewart, and Justice Powell joined. Justice Stewart filed a separate concurring opinion as did Justice Blackmun, who concurred only in the judgment.

112. *Id.* at 472-73.

113. *Id.* at 469.

114. *Id.* at 468 (quoting Craig v. Boren, 429 U.S. 190, 210 n.* (Powell, J., concurring)).

115. *Id.* (citing Schlesinger v. Ballard, 419 U.S. 498 (1975), and Kahn v. Shevin, 416 U.S. 351 (1974)).

116. *Id.* (quoting Weinberger v. Wiesenfeld, 420 U.S. 636, 653 (1975)).

of teenage pregnancy upon the female victim and the state.[117] The Court found that "[o]f particular concern to the State is that approximately half of all teenage pregnancies end in abortion. And of those children who are born, their illegitimacy makes them likely candidates to become wards of the State."[118] Further, the plurality stated that because "[o]nly women may become pregnant," the sexes are not similarly situated.[119] The female is naturally subject to much greater economic, physical, and psychological harm than is the male as a result of the sexual activity.[120] The Court therefore found that since no "natural sanction" deters males, a criminal sanction which punishes only males simply serves to " 'equalize' the deterrents on the sexes" and is not based upon the assumption that males are generally the aggressors.[121]

After accepting the California Supreme Court's finding that the prevention of pregnancy was the true objective of the law, the plurality addressed the issue whether the gender-based classification was sufficiently or realistically related to this objective, or whether a gender-neutral statute would serve this goal equally well. In rejecting petitioner's argument that a gender-based statute was unnecessary to deter teenage pregnancy because a gender-neutral statute, under which both sexes would be subject to criminal liability, would serve that purpose equally well,[122] the plurality stressed that the issue was "not whether the

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117. *Id.* at 470-71. Justice Rehnquist stated: "We are satisfied not only that the prevention of illegitimate pregnancy is at least one of the 'purposes' of the statute, but also that the State has a strong interest in preventing such pregnancy." *Id.* at 470.

118. *Id.* at 471 (footnotes omitted).

119. *Id.*

120. *Id.* Justice Rehnquist also pointed out that pregnant teenagers under the age of 15 have a maternal death rate 60% higher than women in their twenties, and that most teenage mothers are school dropouts and thus face a bleak economic future. *Id.* at 470 n.4.

121. *Id.* at 473. In his separate concurring opinion, Justice Stewart noted that while gender-based classifications may not be based upon administrative convenience or upon archaic stereotyping about the proper roles of the sexes, "the Equal Protection Clause does not mean that the physiological differences between men and women must be disregarded." *Id.* at 481 (Stewart, J., concurring).

122. *Id.* at 473.

statute is drawn as precisely as it might have been, but whether the line chosen by the California Legislature is within constitutional limitations."[123] Moreover, the plurality accepted the State's contention that a gender-based statute was necessary for effective enforcement in that a female participant, if herself subject to criminal liability under a gender-neutral statute, would be less likely to report a violation. The plurality stated, "[W]e decline to hold that the Equal Protection Clause requires a legislature to enact a statute so broad that it may well be incapable of enforcement."[124]

Similarly, the plurality rejected petitioner's argument that the statute was unconstitutionally overbroad because it prohibited intercourse "with prepubescent females, who are, by definition, incapable of becoming pregnant."[125] The plurality said not only that very young females are especially susceptible to physical injury from sexual intercourse but also that it would be "ludicrous to suggest that the Constitution requires the California Legislature to limit the scope of its rape statute to older teenagers and exclude young girls."[126] Finally, the plurality rejected petitioner's contention that the statute was invalid as applied to him because he, like the girl involved, was less than eighteen years old at the time of the incident. The plurality found that California's statute, holding males under eighteen as well as those over eighteen criminally liable, was based not upon a belief that the male is the culpable aggressor, but rather upon a belief that "young men are as capable . . . of inflicting the harm sought to be prevented" as are older men.[127]

Justice Stewart, in a separate concurring opinion, framed the issue as whether the Constitution prohibits a state legislature from imposing an *additional* sanction on a gender-specific basis.[128] He concluded that gender-based classifications do not

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123. *Id.*

124. *Id.* at 474 (footnote omitted).

125. *Id.* at 475.

126. *Id.*

127. *Id.*

128. *Id.* at 477. Justice Stewart noted that California's statutory rape provision should be viewed as part of a wider scheme of California law which does not exculpate females from criminal liability for engaging in harmful sexual activity and which, therefore, protects all minors from the damage of ado-

violate the equal protection clause when, as here, "[y]oung women and men are not similarly situated with respect to the problems and risks associated with intercourse and pregnancy, and the statute is *realistically* related to the legitimate state purpose of reducing those problems and risks."[129] Finally, Justice Blackmun, concurring only in the judgment,[130] stated that although a state's power is limited in the abortion context, where the pregnancy has already occurred,[131] the California statute should be upheld because "it is a sufficiently reasoned and constitutional effort to control the problem at its inception."[132]

Justice Brennan, in dissent,[133] argued that the plurality placed too much emphasis on the purported statutory goal of preventing teenage pregnancy and failed to address the "fundamental question" whether California's gender-based statute "is *substantially* related to . . . that goal."[134] As a result, Justice Brennan argued, the three-member plurality opinion, as well as

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lescent sexual activity. "All persons are prohibited from committing 'any lewd or lascivious act,' including consensual intercourse, with a child under 14." *Id.* (Stewart, J., concurring) (footnote omitted) (quoting CAL. PENAL CODE § 288 (West 1970 & Supp. 1981)). "And members of *both* sexes may be convicted for engaging in deviant sexual acts with anyone under 18." *Id.* (Stewart, J., concurring) (footnote omitted) (citing CAL. PENAL CODE §§ 286(b)(1), 288(b)(1) (West Supp. 1981) (emphasis added)). "Finally, *females* may be brought within the proscription of § 261.5 itself, since a female may be charged with aiding and abetting its violation." *Id.* (Stewart, J., concurring) (emphasis added) (footnote omitted) (citing CAL. PENAL CODE § 31 (West 1970)).

129. *Id.* at 479 (Stewart, J., concurring) (emphasis added). Justice Stewart's language suggests that he will continue to apply only a rational basis test to gender-based classifications.

130. Justice Blackmun, concurring with the plurality's judgment only, stated with respect to the facts in *Michael M.*, *see* note 2 *supra*, that the case should be "an unattractive one to prosecute at all, and especially to prosecute as a felony, rather than as a misdemeanor." 450 U.S. at 485-86 (Blackmun, J., concurring).

131. 450 U.S. at 482-83 (Blackmun, J., concurring).

132. *Id.* at 482 (Blackmun, J., concurring).

133. Justice Brennan was joined in his dissent by Justices White and Marshall.

134. *Id.* at 488-89 (Brennan, J., dissenting) (footnote omitted). Justice Brennan further stated, "None of the three opinions upholding the California statute fairly applies the equal protection analysis this Court has so carefully developed since *Craig* v. *Boren* . . . ." *Id.* at 489 n.2 (Brennan, J., dissenting).

the two separate concurring opinions, had a "common failing"[135] in that "[t]hey overlook[ed] the fact that the State has not met its burden of proving that the gender discrimination . . . is *substantially* related to the achievement of the State's asserted statutory goal."[136] Moreover, Justice Brennan stated, the mere assertion by a state that its gender-specific classification is substantially related to an important governmental objective is "not enough to meet its burden of proof under *Craig* v. *Boren*."[137] Instead, he argued, the State must persuade the Court that its *purported* objectives are *truly* objectives.[138] In Justice Brennan's view California had proven neither that a gender-neutral statute might "well be incapable of enforcement,"[139] nor that those enforcement problems, if they did exist, would make a gender-neutral statute less effective than a gender-specific statute in deterring female sexual intercourse.[140] Justice Brennan argued that a gender-neutral statute is in fact a potentially greater deterrent to sexual activity than is a gender-based law because "twice as many persons would be *subject* to arrest."[141] In addition, Justice Brennan argued that at no time during the history of California's statutory rape law had the legislature or any court, other than the California Supreme Court and the *Michael M.* plurality, expressed the notion that the objective of the statute was the prevention of teenage pregnancy.[142] Rather, the statute appeared to have been prompted by then-popular sex stereotypes.[143]

Arguably, the scope of the *Michael M.* plurality decision is narrowed substantially by the separate concurring opinions of

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135. *Id.* at 489 n.2 (Brennan, J., dissenting).

136. *Id.* (Brennan, J., dissenting) (emphasis in original).

137. *Id.* at 492 (Brennan, J., dissenting).

138. *Id.* (Brennan, J., dissenting).

139. *Id.* at 492-93 (Brennan, J., dissenting).

140. *Id.* (Brennan, J., dissenting). Justice Stevens, in a separate dissenting opinion, stated that he felt the only justification for a law "requiring disparate treatment of the two participants in a joint act must be a legislative judgment that one is more guilty than the other." *Id.* at 500 (Stevens, J., dissenting).

141. *Id.* at 494 (Brennan, J., dissenting) (emphasis in original).

142. *Id.* at 494-96 (Brennan, J., dissenting). *See* note 109 *supra*.

143. 450 U.S. at 494-96 (Brennan, J., dissenting).

Justice Stewart and Justice Blackmun, who noted the significance of the "wider scheme" of California law which does not exculpate all females from criminal liability for engaging in harmful sexual activity.[144] Thus, a controlling majority of the Court did not address the constitutionality of a statutory scheme that taken as a whole protects only minor females, and not males of like years, from the problems and risks associated with premature sexual activity. Nevertheless, the implication of the plurality's decision in *Michael M.* is readily apparent. The Court's implicit assumption is that males of all ages are more sexually aggressive and less likely to suffer physical or psychological injury from sexual contact than are young females.[145]

Unfortunately, the Court's decision in *Michael M.* seems to reflect and perpetuate invidious sexual discrimination. The traditional view of the role of each sex has formed the basis for the much criticized "double standard." The fact that female chastity has been valued more than male chastity reflects an attitude comparable to a sexual double standard.[146] In short, premarital sexual activity by the male is considered normal while the same activity by the female renders her promiscuous. Under the Court's rationale in *Michael M.*, females as old as eighteen are conclusively presumed to be helpless paragons of virtue and literally incapable of consent.[147] In the past, however, the perpetuation of traditional sexual stereotypes was recognized by the Court as violative of constitutional equal protection guarantees. In *Frontiero* the Court acknowledged the negative impact of sex discrimination upon this country. "There can be no doubt that our Nation has had a long and unfortunate history of sex discrimination. Traditionally, such discrimination was rationalized by an attitude of 'romantic paternalism' which, in practical ef-

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144. *Id.* at 476-77 (Stewart, J., concurring); *id.* at 483 (Blackmun, J., concurring). *See also* text accompanying note 128 *supra*.

145. This conclusion is supported by Justice Mosk's vigorous dissent in the California Supreme Court decision. Michael M. v. Superior Court, 25 Cal. 3d 608, 621-25, 601 P.2d 572, 580-83, 159 Cal. Rptr. 340, 348-51 (1979) (Mosk, J., dissenting), *aff'd*, 450 U.S. 464 (1981).

146. *See* Comment, *The Constitutionality of Statutory Rape Laws*, 27 U.C.L.A. L. REV. 757, 769 (1980).

147. *See* notes 85-87 *supra* and accompanying text.

fect, put women, not on a pedestal, but in a cage."[148] More importantly, however, the discrimination that the statute perpetuates, and the Court approves, stigmatizes all women, not just those under the statutorily proscribed age. As the Court said in *Orr*, "Legislative classification which distributes benefits and burdens on the basis of gender carry the inherent risk of reinforcing stereotypes about the 'proper place' of women and their need for special protection."[149]

In addition to the perpetuation of sexual stereotypes, the practical effect of *Michael M.* will doubtless be to permit courts to lessen the degree of judicial scrutiny when applying the *Craig* test to gender-based classifications that are allegedly "sufficiently related" to the physiological and psychological attributes of the female. Assuming that the purpose of the statute is indeed the prevention of teenage pregnancy, and that this is an important governmental objective so as to meet the first part of the *Craig* test, the Court's rationale in *Michael M.* did not demonstrate that the statute is "substantially" or "sufficiently" related to the objective of preventing pregnancy among young females. The prevention of teenage pregnancy simply cannot justify the dissimilar treatment of the sexes. California's statute operates even when pregnancy is physiologically impossible or when reliable birth control devices are used. For example, a male who has had a vasectomy violates the statute notwithstanding the near impossibility that his conduct will result in the female's becoming pregnant.[150] Similarly, the male member

148. Frontiero v. Richardson, 411 U.S. 677, 684 (1973). *See* notes 42-45 *supra* and accompanying text.

149. Orr v. Orr, 440 U.S. 268, 283 (1979). *See* notes 71-76 *supra* and accompanying text.

150. Moreover, because many statutes define the elements of the crime as "any penetration, however slight," and expressly state that "emission is not required," statutory rape includes conduct unlikely to result in pregnancy. The statutory rape laws of the following states contain such language: Alabama (ALA. CODE § 13-1-131 (1975)); Colorado (COLO. REV. STAT. § 18-3-401(6) (1973)); Connecticut (CONN. GEN. STAT. ANN. § 53a-65(2) (West Supp. 1981)); Hawaii (HAWAII REV. STAT. § 707-700(7) (1976)); Idaho (IDAHO CODE § 18-6103 (1979)); Kentucky (KY. REV. STAT. § 510.010(8) (1975)); Maine (ME. REV. STAT. ANN. tit. 17-A, § 251(1)(B) (West Supp. 1978)); Maryland (MD. CRIM. LAW CODE ANN. art. 27, § 461(g) (Supp. 1980)); Michigan (MICH. COMP. LAWS ANN. § 750.520a(h) (Supp. 1981)); Minnesota (MINN. STAT. ANN. § 609.341(12) (Supp.

of a responsible teenaged couple, having sought and obtained birth control counseling and reliable contraceptives, is as criminally liable as a male who refuses to accept the responsibility for birth control.[151] Thus, because the equation of maleness with causation of teenage pregnancy is incongruent, California's statute appears to be neither substantially, sufficiently, nor realistically related to the objective of preventing teenage pregnancy.

Finally, the plurality's rationale in *Michael M.* that California's statutory rape law reflects the fact that "young men and young women are *not* similarly situated with respect to the problems and the risks of sexual intercourse"[152] because "[o]nly women may become pregnant,"[153] fails to perceive that this is a *consequence* rather than a *cause* of the act of sexual intercourse. The mere possibility that the female may become pregnant is totally irrelevant in determining her moral blame or degree of culpability. Indeed, it is a foundation of our system of justice that offenders not be deemed less blameworthy merely because they are affected adversely by social, economic, or in this case, physiological forces over which they have no control. Accordingly, Justice Stevens, in a separate dissenting opinion in *Michael M.*, stated that "the only acceptable justification for a general rule requiring disparate treatment of the two participants in a joint act must be a legislative judgment that one is more guilty than the other."[154] In short, in the context of the

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1981)); Missouri (MO. ANN. STAT. § 566.010.1(1) (Vernon 1979)); Nebraska (NEB. REV. STAT. § 28-319(5) (1979)); New Mexico (N.M. STAT. ANN. § 30-9-11 (1978)); North Carolina (N.C. GEN. STAT. § 1427.10 (Supp. 1979)); North Dakota (N.D. CENT. CODE § 12.1-20-02(1) (Supp. 1979)); Ohio (OHIO REV. CODE ANN. § 2907.01(A) (Page Supp. 1980)); Oklahoma (OKLA. STAT. ANN. tit. 21, § 1113 (1958)); Tennessee (TENN. CODE ANN. § 39-3702(11) (Supp. 1979)); Wisconsin (WIS. STAT. ANN. § 940.225(5)(b) (West Supp. 1980)); Wyoming (WYO. STAT. § 6-4-301(a)(ix) (1977)).

151. As Justice Mosk pointed out in his dissent, "certain pregnancy prevention devices are both efficacious and widely available to 17 year old men and women. The majority disregard of this well-known fact does not make it any less true." Michael M. v. Superior Court, 25 Cal. 3d 608, 620 n.3, 601 P.2d 572, 580 n.3, 159 Cal. Rptr. 340, 348 n.3 (1979) (Mosk, J., dissenting), *aff'd*, 450 U.S. 464 (1981).

152. 450 U.S. at 471 (emphasis added).

153. *Id.*

154. *Id.* at 500 (Stevens, J., dissenting).

consensual behavior prohibited by the statutory rape laws, both sexes should be deemed similarly situated in regard to the capacity to consent to sexual intercourse. Thus, the principles enunciated by the Court in *Orr* and *Caban*, in which the Court struck down statutes having a discriminatory impact upon males,[155] should have been controlling in the *Michael M.* decision.

The intermediate standard of review is a relatively new test for determining the constitutionality of gender-based classifications. Because it incorporates the amorphous terms "substantially" and "sufficiently," the test must be construed and applied clearly, logically, and objectively. The *Michael M.* plurality appears to have applied the test in an unprincipled manner. As evidenced by the *Michael M.* decision, application of this test can have far-reaching effects. Even though the decision can be read to apply only to statutory schemes similar to California's, the Court has given no indication of its unwillingness to use the same sort of analysis in other cases in which gender-based classifications are challenged. The Court should forgo the kind of illogical and subjective analysis reflected in the *Michael M.* plurality opinion. The *Michael M.* decision does no more than confirm deep-seated sexual prejudices at a time when the Court should be acting to eradicate antiquated sexual stereotypes from the law.

RANDY J. OGDEN

155. *See* notes 70-80 *supra* and accompanying text.

# Constitutional Law—Right to Privacy—Parental Notice Requirements in Abortion Statutes

*H.L. v. Matheson*, 450 U.S. 398 (1981)

Plaintiff was an unmarried pregnant minor living with parents who supported her. Plaintiff sought an abortion and consulted a physician who told her that an abortion was medically advisable. The physician, however, refused to perform the abortion without first notifying plaintiff's parents, as required by a Utah statute.[1] While in the first trimester of her pregnancy, plaintiff brought a class action[2] challenging the statute in the

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1. UTAH CODE ANN. § 76-7-304 (1978) provides:

To enable a physician to exercise his best medical judgment [in considering a possible abortion], he shall:

(1) Consider all factors relevant to the well-being of the woman upon whom the abortion is to be performed including, but not limited to,

(a) Her physical, emotional and psychological health and safety,

(b) Her age,

(c) Her familial situation,

(2) Notify, if possible, the parents or guardian of the woman upon whom the abortion is to be performed, if she is a minor or the husband of the woman, if she is married.

2. Plaintiff sued on her own behalf and purportedly on behalf of a class consisting of "unmarried 'minor women who are suffering unwanted pregnancies and desire to terminate the pregnancies but may not do so' " because their physicians insist on notifying parents in compliance with the challenged statute. H. L. v. Matheson, 450 U.S. 398, 401 (1981). The trial judge concluded that plaintiff was an appropriate representative of this class. *Id.* at 404. The Utah Supreme Court held that the statute could validly be applied to all members of the class, but made no mention of the limits of the class. H. L. v. Matheson, 604 P.2d 907 (Utah 1979). On appeal to the United States Supreme Court, however, Chief Justice Burger, writing for the Court, narrowly defined the class that plaintiff represented to include only those minors in circumstances similar to those of plaintiff. The Court rejected the broad language of the class definition accepted by the lower courts and defined the class to exclude mature or emancipated minors. 450 U.S. at 405-07. The three dissenting Justices, however, maintained that the majority misapplied federal law by

Third Judicial District Court of Utah. She sought a declaration of the statute's unconstitutionality and an injunction prohibiting its enforcement. Plaintiff stated that " 'for [her] own reasons' " she believed her abortion should be performed without parental notification.[3] She claimed that the statute violated her right to privacy under the fourteenth amendment[4] of the United States Constitution.[5] The trial judge rejected this claim, refused to grant a temporary restraining order or a preliminary injunction, and dismissed the complaint.[6] The Supreme Court of Utah, in a unanimous decision, found the statute constitutional.[7] On appeal

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changing the class definition approved by the trial court. They believed that a more appropriate procedural disposition and one more protective of the rights of class members would have been to remand the case to allow the trial court to redefine or dismiss the class, add parties whose interests plaintiff did not represent, or create subclasses with additional representatives. *Id.* at 431-33 (Marshall, J., dissenting). The dissenters maintained alternatively, however, that either procedural disposition was unnecessary since plaintiff was, in their view, an adequate representative of the class as broadly defined. *Id.* at 426-33 (Marshall, J., dissenting).

3. *Id.* at 401. Plaintiff's attorney insisted that plaintiff's specific reasons were irrelevant to the constitutional issue. Despite promptings by the trial judge, plaintiff's attorney refused to introduce evidence of plaintiff's relationship to her parents. *Id.* at 402-04.

4. The fourteenth amendment provides that no state shall "deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

5. Plaintiff also challenged the statute as unconstitutional on its face. She contended that the statute was overbroad since it could be construed to apply to mature and emancipated minors as well as to immature minors who depend on their parents for support. The United States Supreme Court did not reach this question. The Court concluded that plaintiff did not have standing to advance the overbreadth claim since no evidence had been offered that she, or any member of the class she represented, was mature or emancipated. 450 U.S. at 405-07. *See* notes 2-3 *supra*. The issue whether plaintiff had standing to challenge the Utah statute as overbroad is generally beyond the scope of this Note.

6. The trial judge also construed the statutory language, "[n]otify, if possible," UTAH CODE ANN. § 76-7-304(2) (1978), *see* note 1 *supra*, to mean that a physician must notify a minor's parents if it is physically possible to do so. 450 U.S. at 404.

7. The Utah Supreme Court held that the statute was constitutional because (1) it allowed no veto by the parents over the minor's decision, (2) the parent was in a position to provide important information to the physician

to the United States Supreme Court, *held*, affirmed. A state statute requiring that a physician notify the parents or guardian of a minor on whom an abortion is to be performed serves important state interests; if the statute is narrowly drawn to protect only those interests, it does not violate any guarantees of the United States Constitution when applied to an unemancipated minor who (1) lives with parents who support her, (2) does not claim or demonstrate her maturity, and (3) fails to present extenuating circumstances in her relationship to her parents. *H.L. v. Matheson*, 450 U.S. 398 (1981).

The United States Supreme Court has held that a pregnant woman has a fundamental right to choose whether to terminate her pregnancy or to carry it to term.[8] She is protected from undue state intervention by the right to privacy.[9] The Supreme Court has also determined that this right extends to minors.[10] The right to privacy is not absolute, however. A state statute restricting the privacy rights of pregnant minors may be justified if a "significant state interest" supports the regulation.[11] In *H.L.*

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that the physician could use in exercising his or her "best medical judgment," UTAH CODE ANN. § 76-7-304 (1978), *see* note 1 *supra*, and (3) it furthered a significant state interest—supporting the role of parents in child-rearing—by encouraging an unmarried pregnant minor to seek her parents' advice in making a decision about terminating her pregnancy. 604 P.2d at 912. The court construed the "[n]otify, if possible" language to require notification when the physician is able to identify and locate the parents using reasonable diligence under the circumstances and when giving notice is practical. *Id.* at 913. The court noted the importance of the time factor in this determination. *Id.* at 912-13.

8. Roe v. Wade, 410 U.S. 113 (1973); Doe v. Bolton, 410 U.S. 179 (1973). *See* notes 36-39 *infra* and accompanying text.

9. *See* notes 25-28 & 34 *infra* and accompanying text.

10. Bellotti v. Baird (Bellotti II), 443 U.S. 622 (1979); Planned Parenthood v. Danforth, 428 U.S. 52 (1976).

11. In Planned Parenthood v. Danforth, 428 U.S. 52 (1976), the Court reviewed a state regulation that impinged on the privacy right of a pregnant minor. The Court required that the state justify its regulation with a "significant state interest." *Id.* at 75. In reviewing the state regulation that restricted the privacy right of a pregnant adult in Roe v. Wade, 410 U.S. 113 (1973), the Court held that a woman's right to privacy may only be restricted when justified by "important state interests." *Id.* at 154. In that case the Court ultimately applied the "compelling state interest" test used to review state interference with fundamental rights. *Id.* at 155. The different standards apparently

*v. Matheson* the issue before the Court was whether a state's requirement that a doctor notify the parents of a minor seeking an abortion violated the minor's right to privacy under the fourteenth amendment.[12]

Beginning with *Skinner v. Oklahoma*,[13] the earliest case dealing with the constitutional right to privacy in sexual matters,[14] the Court has struggled to identify the constitutional source from which the right springs.[15] Challenges to statutes impinging on rights of reproductive autonomy[16] have been brought primarily under the equal protection [17] and due process[18] clauses

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are the result of an assumption that a state may have interests that do not apply to pregnant adults but that nonetheless justify restricting the privacy right of pregnant minors. 428 U.S. at 74-75.

12. 101 S. Ct. at 1166.

13. 316 U.S. 535 (1942).

14. *See* J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 624 (1978).

15. *See* notes 27-28 *infra* and accompanying text. Part of the Court's disagreement on the constitutional basis of these right-to-privacy cases can be traced to the unhappy history of the Court's use of the due process clause to strike down state economic legislation during the first third of this century. In Lochner v. New York, 198 U.S. 45 (1905), the Court, displeased with recent legislative trends toward greater worker protection, invalidated a state labor law prohibiting employment in bakeries for more than sixty hours per week or more than ten hours per day. Between 1899 and 1937 (usually referred to as the "Lochner era"), the Court struck down 159 state economic statutes, substituting its own judgment for that of the legislatures. W. LOCKHART, Y. KAMISAR & J. CHOPER, CONSTITUTIONAL LAW 439-41 (5th ed. 1980). The Court consistently acted to uphold property and contract interests. *Id.* This substantive use of the due process clause to strike down economic regulations, the "Lochner doctrine," was ultimately rejected. Lincoln Fed. Labor Union v. Northwestern Iron & Metal Co., 335 U.S. 525, 535 (1949); West Coast Hotel v. Parrish, 300 U.S. 379, 391 (1937). Thus, in early cases involving reproductive rights in which the plaintiff based his or her claim on the right to privacy, the Court struggled to avoid relying on the due process clause as a basis for validating the asserted right. *See* Skinner v. Oklahoma, 316 U.S. 535 (1942). The specter of the "Lochner doctrine" continues to haunt attempts by the Court to use substantive due process to resolve challenges to statutes. The Court does not want to appear once again to be substituting its wisdom for the judgment of legislatures.

16. Tribe uses this term to designate the right of an individual to be free of any government intervention when making the decision whether to bear a child. L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 15-10, at 932 (1978).

17. The equal protection clause provides that "No State shall . . . deny

of the fourteenth amendment. Often the Court could as easily have based its decision on one clause as on the other. This was true in *Skinner*, in which the Court struck down the Oklahoma Habitual Criminal Sterilization Act.[19] The Oklahoma Act al-

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to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1. This does not mean that everyone must be treated equally under the law at all times. Rather, it is a requirement that classifications made in a statute be reasonable. The traditional test of a statute's reasonableness is whether the classification has a rational basis, furthers a governmental purpose, and applies equally to all people within the class. *See* L. TRIBE, *supra* note 16, §§ 16-2 to 16-5, at 994-1000. This test is applied principally to economic legislation, J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 14, at 524, and is considered a permissive standard of review under which "legislatures are presumed to have acted within their constitutional power." McGowan v. Maryland, 366 U.S. 420, 425 (1961). If, however, the statutory classification affects a "fundamental" right or is based on "suspect criteria," the "strict scrutiny" test is applied; under this test a statute must promote a compelling state interest and must do so by the least intrusive means possible. Dunn v. Blumstein, 405 U.S. 330, 342-43 (1971); Shelton v. Tucker, 364 U.S. 479, 488 (1960). *See generally* L. TRIBE, *supra* note 16, §§ 16-6 to 16-13, at 1000-12. Strict strutiny is considered a very demanding standard. Because of the all-or-nothing quality of the rational basis and strict scrutiny tests (and perhaps because of the implication that the standards of review have become little more than labels for the Court's conclusion that a statute will be upheld or struck down), several Justices have called for an intermediate test. Indeed, such an intermediate test has been applied in cases involving gender-based classifications. *See, e.g.*, Craig v. Boren, 429 U.S. 190 (1976); Weinberger v. Wiesenfeld, 420 U.S. 636 (1975); Reed v. Reed, 404 U.S. 71 (1971). *See generally* L. TRIBE, *supra* note 16, at §§ 16-30 to 16-33, at 1082-99. This test requires that the statutory classifications "serve important governmental objectives and . . . be substantially related to the achievement of those objectives." Craig v. Boren, 429 U.S. at 197.

18. The due process clause of the fourteenth amendment provides: "No State shall . . . deprive any person of life, liberty, or property without due process of law." U.S. CONST. amend. XIV, § 1. Like the equal protection clause, it is a guarantee against unreasonable government action. In testing the reasonableness of a statute challenged substantively under the due process clause, the Court generally has considered whether the subject matter of the statute is proper for the exercise of legislative power and whether the means used to accomplish the legislative purpose bears a substantial relationship to the ends sought. If fundamental rights are affected by the statute, a more rigorous standard is used—the means used to achieve the legislative goal must serve a "compelling state interest." L. TRIBE, *supra* note 16, §§ 7-3 to 8-6, at 421-49.

19. Oklahoma Habitual Criminal Sterilization Act, ch. 26, art. 1, 1935 Okla. Sess. Laws 94 (1935). *See* Lupu, *Untangling the Strands of the Four-*

lowed the state to sterilize any person who had been convicted three times of "felonies involving moral turpitude."[20] The Act, however, excepted convictions for violations of "prohibitory laws, revenue laws, embezzlement or political offenses."[21] The Court could find no basis for the unequal treatment of those convicted three times for embezzlement, for example, and those convicted three times for grand larceny as petitioner Skinner had been; the Court therefore invalidated the statute on equal protection grounds.[22] The case could as easily have been a substantive due process decision, however, since the Court said that the right to choose to have children was fundamental.[23] "We are dealing here with legislation which involves one of the basic civil rights of [people]. Marriage and procreation are fundamental to the very existence and survival of the race. . . . [S]trict scrutiny of the classification which a State makes . . . is essential . . . ."[24]

Whereas *Skinner* upheld the right to choose to have children, *Griswold v. Connecticut*[25] sustained the right to choose *not* to have children. In *Griswold* the Court concluded that the state violated a fundamental right when it denied the use of contraceptives to married couples.[26] The Court found this right to

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*teenth Amendment*, 77 MICH. L. REV. 981, 1019 (1979) [hereinafter cited as *Untangling the Strands*]. W. LOCKHART, Y. KAMISAR & J. CHOPER, *supra* note 15, at 507-08.

20. Oklahoma Habitual Criminal Sterilization Act, ch. 26, art. 1, § 3, 1935 Okla. Sess. Laws 94 (1935).

21. *Id.* § 195.

22. 316 U.S. at 538, 542. The Court had previously held in Buck v. Bell, 274 U.S. 200 (1927), that to prevent the birth of imbeciles or the hereditarily insane, a state could sterilize a person against his or her wishes. The *Skinner* Court, however, distinguished Buck v. Bell, 316 U.S. at 542, and the Court has continued to cite *Buck v. Bell* for the proposition that one does not have an unlimited right to do with one's body as one pleases. *E.g.*, Roe v. Wade, 410 U.S. 113, 154 (1973). Tribe, however, notes that it is difficult to "square" the holding of *Buck v. Bell* with the basic philosophy of *Skinner*. L. TRIBE, *supra* note 16, § 15-10, at 293.

23. 316 U.S. at 541. *See* note 15 *supra* and accompanying text.

24. 316 U.S. at 541.

25. 381 U.S. 479 (1965).

26. Appellants Griswold, the Executive Director of the Planned Parenthood League of Connecticut, and Buxton, a licensed physician and Yale Medical School professor, had been convicted and fined for providing informa-

be protected "within the zone of privacy created by several fundamental constitutional guarantees."[27] Justice Douglas, writing for the Court, found a constitutional right to privacy in the "penumbras" of the Bill of Rights "formed by emanations from those guarantees that help give them life and substance."[28] Re-

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tion to married people on how to prevent conception. *Id.* at 480. The Court held that the state could not constitutionally make it a crime for married people to use contraceptives; therefore, it could not legitimately convict appellants for abetting such use. *Id.* at 485-86.

In a subsequent case, Eisenstadt v. Baird, 405 U.S. 438 (1972), the Court overturned defendant's conviction under a Massachusetts law making it a felony for anyone except physicians and registered pharmacists to distribute contraceptive articles to married persons. *Id.* at 440-43. The Court held that the statute treated similarly situated married and unmarried people dissimilarly and thus violated the equal protection clause of the fourteenth amendment. *Id.* at 454-55. *Eisenstadt v. Baird* recognized that the significant element in *Griswold* was the right to choose freely whether to have children. L. TRIBE, *supra* note 16, § 15-10, at 922. The Court noted, "If the right of privacy means anything, it is the right of the *individual,* married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." 405 U.S. at 453 (emphasis in original).

27. 381 U.S. at 485.

28. *Id.* at 484.

> Various guarantees create zones of privacy. The right of association contained in the penumbra of the First Amendment is one, as we have seen. The Third Amendment in its prohibition against the quartering of soldiers "in any house" in time of peace without the consent of the owner is another facet of that privacy. The Fourth Amendment explicitly affirms the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." The Fifth Amendment in its Self-Incrimination Clause enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment. The Ninth Amendment provides: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

*Id.*

The four opinions by the seven Justices forming the majority, however, revealed considerable disagreement among members of the Court about the source of constitutional protection for the right upheld. Justice Douglas referred to six amendments of the Constitution as sources of the right to privacy. These included the five amendments mentioned above as well as the fourteenth amendment. *Id.* at 481, 484. Justice Goldberg, joined by Chief Justice

viewing *Skinner* and *Griswold* as precursors of the abortion cases, Laurence Tribe stated:

> Taken together with *Griswold*, which recognized as equally protected the individual's decision *not* to bear a child, the meaning of *Skinner* is that *whether one person's body shall be the source of another life must be left to that person and that person alone to decide.* That principle collides in the abortion cases with a command that seems no less fundamental: *an innocent life may not be taken except to save the life of another.* Few decisions prove more difficult than those in which these two absolutes stand opposed.[29]

The first case in which the Court was required to reconcile these antithetic absolutes was *Roe v. Wade*.[30] In *Roe v. Wade* the United States Supreme Court voided Texas' criminal abortion statutes,[31] which were typical of those in effect in a majority of states at the time of the decision. The statutes prohibited abortions except "by medical advice for the purpose of saving the life of the mother."[32] With only two Justices dissenting,[33] the Court extended the right to privacy recognized in *Griswold* to encompass a woman's decision whether to have an abortion.[34] The Court stated that this right was "founded in the Fourteenth

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Warren and Justice Brennan, believed the source of the right to privacy to be the ninth amendment. *Id.* at 487 (Goldberg, J., concurring). Justice Harlan, however, relied on the due process clause of the fourteenth amendment, *id.* at 499-500 (Harlan, J., concurring), as did Justice White, *id.* at 502 (White, J., concurring). Justices Black and Stewart, dissenting separately, could find no general right to privacy in any of the sources designated by the majority's opinion. *Id.* at 508 (Black, J., dissenting); *id.* at 530 (Stewart, J., dissenting). One commentator has noted that although most of the Justices seemed determined to avoid "renewing the romance" with the doctrine of substantive due process, subsequent developments have confirmed the White-Harlan reliance on that clause and "not the magical mystery tour of the zones of privacy." *Untangling the Strands, supra* note 19, at 994.

29. L. TRIBE, *supra* note 16, § 15-10, at 923 (emphasis in original).

30. 410 U.S. 113 (1973).

31. TEX. PENAL CODE ANN. arts. 1191-1194, 1196 (Vernon 1961).

32. *Id.* art. 1196.

33. The dissenting Justices were Justice Rehnquist and Justice White. 410 U.S. at 171, 207, 221.

34. *Id.* at 153.

Amendment's concept of personal liberty";[35] thus the Court avoided stating directly that its holding was substantively based on the due process clause. The Court noted that a woman's right to an abortion was not absolute; it must be evaluated in light of "important state interests."[36] The standard actually applied to the statute, however, was the standard reserved for regulations impinging on fundamental rights—the state was required to justify its regulation by showing a "compelling state interest."[37] Interests of the state deemed legitimate in *Roe v. Wade* were "protection of health, medical standards, and prenatal life."[38] When considered in relationship to the woman's fundamental right to choose to abort, the Court held that these state interests become compelling at different stages during a pregnancy:

> (a) For the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician.
>
> (b) For the stage subsequent to approximately the end of the first trimester, the State, in promoting its interest in the health of the mother, may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health.
>
> (c) For the stage subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.[39]

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35. *Id.*

36. *Id.* at 154-55.

37. *Id.* at 155 (citing Kramer v. Union Free School Dist., 395 U.S. 621, 627 (1969); Shapiro v. Thompson, 394 U.S. 618, 634 (1969); Sherbert v. Verner, 374 U.S. 398, 406 (1963)).

38. *Id.*

39. *Id.* at 164-65. Concurring in the Court's opinion, Justice Stewart acknowledged *Griswold* as "one in a long line" of substantive due process decisions; he concluded that the Court was correct in finding that the right of a woman to terminate a pregnancy rested within the personal liberty protected by the due process clause of the fourteenth amendment. *Id.* at 168 (Stewart, J., concurring). Other members of the Court, however, continued to resist this characterization of their decision. *Id.* at 212 n.4 (Douglas, J., concurring). Note also Justice Blackmun's use of a quotation from one of the *Lochner* dissents in

Three years after *Roe v. Wade* the Court addressed the question whether the right to choose to have an abortion extended to minors. In *Planned Parenthood v. Danforth*[40] the Court reviewed a Missouri abortion law[41] requiring parental consent before an abortion could be performed on an unmarried minor.[42] Although the Court recognized that the state has broader authority to regulate the activities of minors than of adults, five members of the Court[43] agreed that Missouri's "blanket"[44] parental consent provision was invalid.[45] "[T]he State does not have the constitutional authority to give a third party an absolute, and possibly arbitrary, veto over the decision of the physician and his patient to terminate the patient's pregnancy, regardless of the reason for withholding the consent."[46] Moreover, the Court did not find the state's interests in safeguarding the family unit and parental authority "significant."[47] It noted that

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the opening section of the majority opinion. *Id.* at 117 (quoting Lochner v. New York; 198 U.S. 45, 76 (1905) (Holmes, J., dissenting)).

40. 428 U.S. 52 (1976).

41. H. Comm. Subst. for H.B. 1211, 77th Mo. Gen. Assembly, 2d Sess. (1974).

42. *Id.* § 3(4). The law also included a spousal consent provision. *Id.* § 3(3). Six members of the Court, Justices Blackmun, Brennan, Stewart, Marshall, Powell, and Stevens, agreed that the state could not constitutionally require the consent of the woman's spouse as a condition for abortion during the first 12 weeks of pregnancy. The Court reasoned that the state cannot " 'delegate to a spouse a veto power which the state itself is absolutely and totally prohibited from exercising.' " 428 U.S. at 69 (quoting Planned Parenthood v. Danforth, 392 F. Supp. 1362, 1375 (1975) (Webster, J., concurring in part, dissenting in part)). The Court noted that if the wife and husband disagree, the view of only one can prevail; since the woman bears the child, the balance must be struck in her favor. *Id.* at 71. Chief Justice Burger and Justices White and Rehnquist, dissenting, however, emphasized that "[a] father's interest in having a child—perhaps his only child—may be unmatched by any other interest in his life." *Id.* at 93 (White, J., dissenting). They concluded that nothing in the United States Constitution requires a state to assign greater value to the mother's decision than to the father's; therefore, they would leave this matter to each individual state to regulate. *Id.* (White, J., dissenting).

43. The five members were Justices Blackmun, Brennan, Stewart, Marshall, and Powell. *Id.* at 55.

44. 428 U.S. at 74.

45. *Id.*

46. *Id.* at 75.

47. *Id.*

giving a parent an absolute veto over the child's decision was unlikely to strengthen the family unit or enhance parental authority when the family was already so basically in conflict. "Any independent interest the parent may have in the termination of the minor daughter's pregnancy is no more weighty than the right of privacy of the competent minor mature enough to have become pregnant."[48] The Court, however, added the caveat that its holding did not "suggest that every minor, regardless of age or maturity, may give effective consent for termination of her pregnancy."[49]

Chief Justice Burger and Justices White and Rehnquist, dissenting, believed that Missouri was entitled to protect the minor from making an improvident decision by requiring parental consultation.[50] Justice Stevens, dissenting separately, was likewise concerned that the minor's decision be made "correctly."[51] He objected that "[t]he Court seems to assume that the capacity to conceive a child and the judgment of the physician are the only constitutionally permissible yardsticks for determining whether a young woman can independently make the abortion decision."[52] He believed a state could conclude otherwise and could set a minimum age at which a woman may independently decide whether to abort. Moreover, the standard of review he would apply to such a state regulation would be merely whether it had a rational basis.[53]

A year after the *Danforth* decision on parental consent, in *Carey v. Population Services International*[54] a plurality of only four Justices[55] invalidated a provision of a New York law[56] prohibiting anyone other than a physician from distributing contraceptives to those younger than sixteen.[57] Justice Brennan,

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48. *Id.*
49. *Id.*
50. *Id.* at 95 (White, J., concurring in part, dissenting in part).
51. *Id.* at 103-04 (Stevens, J., concurring in part, dissenting in part).
52. *Id.* at 105 (Stevens, J., concurring in part, dissenting in part).
53. *Id.* at 103 (Stevens, J., concurring in part, dissenting in part).
54. 431 U.S. 678 (1977).
55. The four Justices were Justices Brennan, Stewart, Marshall, and Blackmun. *Id.* at 681.
56. N.Y. EDUC. LAW § 6811(8) (McKinney 1972).
57. 431 U.S. at 681-82, 694.

writing for the plurality, noted that the standard of review for a regulation controlling the right to privacy of minors is less rigorous than the compelling state interest test applied to restrictions on adults' right to privacy. To justify regulating the privacy rights of minors, a state must show only a significant state interest.[58] Even this less demanding standard was not met by New York's regulation, however. New York asserted that its regulation discouraged promiscuous sexual intercourse among the young.[59] The Court disagreed.[60] Moreover, the plurality reasoned that prior cases had rejected the concept that a state can deter sexual activity by making it more hazardous.[61]

In *Bellotti v. Baird (Bellotti II)*[62] the Court returned to the issue of parental consent initially raised in *Danforth*. *Bellotti II* involved a challenge to a Massachusetts law that required an unmarried pregnant minor to obtain both parents' consent for an abortion.[63] Unlike the provision challenged in *Danforth*, the Massachusetts law provided that if the parents would not grant their consent, a state judge could authorize an abortion "for good cause shown."[64] Despite this ameliorating provision, the

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58. *Id.* at 693. Justice Brennan noted that this standard was the one applied in *Danforth*, although it was used without comment. *Id.*

59. *Id.* at 692.

60. *Id.* at 694, 696. New York introduced no evidence to support its assertion that the availability of contraceptives encouraged minors' sexual activity, but appellees did offer evidence that the availability of contraceptives had no effect on teenagers' sexual activity. Because the State had failed to offer any evidence of a relationship between the statute and its purpose of preventing sexual intercourse among minors, the Court invalidated the statute. *Id.* at 694-96.

61. *Id.* at 694-95. *E.g.*, Roe v. Wade, 410 U.S. 113, 148 (1973).

62. 443 U.S. 622 (1979). The statute challenged in *Bellotti II* previously had been found unconstitutional by a three-judge District Court for the District of Massachusetts. On appeal the United States Supreme Court held that the district court should have abstained from a decision on the merits and certified questions to the Massachusetts Supreme Judicial Court concerning the meaning of the statute. Bellotti v. Baird (Bellotti I), 428 U.S. 132 (1976). Following the Supreme Judicial Court's judgment, the district court again found the statute unconstitutional and enjoined its enforcement. The United States Supreme Court affirmed that decision in *Bellotti II*.

63. MASS. GEN. LAWS ANN. ch. 112, § 125 (West Supp. 1979).

64. 443 U.S. at 635-36.

statute was struck down in a four-four-one decision.[65] The Court held that if a state requires a pregnant minor to obtain parental consent for an abortion, it must also provide an "alternative procedure"[66] to "ensure that the provision requiring parental consent does not in fact amount to the 'absolute, and possibly arbitrary, veto' that was found impermissible in *Danforth*."[67] In such an alternative procedure the minor may show either that "she is mature enough and well enough informed to make her abortion decision, in consultation with her physician, independently of her parents' wishes"[68] or that the abortion would be "in her best interest."[69] The Massachusetts statute did not satisfy these standards for two reasons: First, it permitted a judge to deny an abortion even though the judge found that the minor was mature and fully competent to make her own decision,[70] and second, it forced the minor to notify her parents rather than allowing her the option of seeking a judge's ruling either that she was mature enough to make her own decision or that an abortion was in her best interest.[71]

The Powell plurality opinion[72] in *Bellotti II* distinguished *Danforth*.[73] In a separate concurring *Bellotti II* opinion joined by three other Justices,[74] however, Justice Stevens stated that *Danforth* controlled.[75] Under the Massachusetts statute a minor

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65. Justice White wrote the sole dissent. The opinion of the Court, written by Justice Powell, was joined by Justices Stewart and Rehnquist and Chief Justice Burger. Justice Rehnquist had dissented in *Danforth* and apparently believed that case should be overturned. He was willing, however, to join the opinion in *Bellotti II* until the Court was ready to reconsider its decision in *Danforth*. *Id.* at 651-52 (Rehnquist, J., concurring). Justice Stevens' concurring opinion was joined by Justices Brennan, Marshall, and Blackmun. *Id.* at 652 (Stevens, J., concurring).

66. *Id.* at 643. This procedure need not be a judicial proceeding. *Id.* n.22.

67. *Id.* at 644 (quoting Planned Parenthood v. Danforth, 428 U.S. 52, 74 (1976)).

68. *Id.* at 643.

69. *Id.* at 644.

70. *Id.* at 651.

71. *Id.*

72. *See* note 65 *supra*.

73. 443 U.S. at 641-42.

74. *See* note 65 *supra*.

75. 443 U.S. at 656 (Stevens, J., concurring).

could obtain an abortion only with the consent of a third party—either her parents or a judge. In Justice Stevens' view a judge's consent, like that of parents, was an absolute third-party veto and thus impermissible under *Danforth*.[76] He emphasized, however, that neither *Bellotti II* nor *Danforth* decided the constitutionality of a statute that did no more than require notice to parents.[77]

In *H.L. v. Matheson*[78] the Court addressed the parental notice issue. In upholding the notice requirement of a Utah abortion statute, the Court divided six to three.[79] The disunity char-

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76. *Id.* at 654-55 (Stevens, J., concurring).

77. *Id.* at 654 n.1 (Stevens, J., concurring).

78. 450 U.S. 398 (1981).

79. The Court had also divided six to three in two cases upholding regulations that severely limited the availability of funding for abortions. In Maher v. Roe, 432 U.S. 464 (1977), six members of the Court upheld Connecticut's Medicaid regulations. *Id.* at 479. The six were Justices Powell, Stewart, White, Rehnquist, and Stevens, joining in the opinion of the Court, *id.* at 465, and Chief Justice Burger, who concurred, *id.* at 481. Justices Brennan, Marshall, and Blackmun dissented. *Id.* at 482. These regulations made funds available to reimburse indigent women for the costs of childbirth and first trimester abortions that were "medically necessary." *Id.* at 466. The costs of abortions other than those deemed "medically necessary" were not recoverable. *Id.* The Court noted that *Roe v. Wade* did not recognize an unqualified right to an abortion. *Id.* at 473-74. A state may "favor childbirth over abortion," *id.* at 474, and may "implement that judgment by the allocation of public funds," *id.* Having concluded that Connecticut's regulation did not restrict the fundamental right of privacy and that a suspect class was not involved since the poor are not a suspect class, *see* San Antonio Ind. School Dist. v. Rodriguez, 411 U.S. 1 (1973), the Court did not require the state to show a compelling interest. 432 U.S. at 477. The Court found that the Medicaid regulation was "rationally related" to an acceptable goal: subsidizing the expense of childbirth encourages childbirth and thus furthers the state's interest in protecting potential life. *Id.* at 478-79. Dissenting Justices Brennan, Marshall, and Blackmun, however, viewed *Maher v. Roe* as a retreat from *Roe v. Wade* despite the majority's assurances to the contrary. *Id.* at 483 (Brennan, J., dissenting). They believed that the "decision seriously erode[d] the principles that *Roe* . . . announced to guide the determination of what constitutes an unconstitutional infringement of the fundamental right of pregnant women to be free to decide whether to have an abortion." *Id.* at 484 (Brennan, J., dissenting).

Relying heavily on *Maher*, the Court in Harris v. McRae, 448 U.S. 297 (1980), upheld the validity of the 1979 Hyde Amendment, Pub. L. No. 96-123, § 109, 93 Stat. 926 (1979), which severely limited federal funding of abortions under the Medicaid program. Only those abortions could be funded that were

acteristic of earlier decisions dealing with privacy rights of minors was still apparent in *H.L. v. Matheson*. Chief Justice Burger wrote the opinion of the Court and was joined by Justices White and Rehnquist.[80] Justice Powell, joined by Justice Stewart, concurred separately, as did Justice Stevens.[81] Justice Marshall dissented and was joined by Justices Brennan and Blackmun.[82] The Court narrowly limited the issue to the facts presented.[83] Indeed, it is unlikely the Court could have mustered six votes for a broader holding. Justices Powell and Stewart noted that they concurred with Chief Justice Burger's opinion for the Court only with the understanding that the opinion did not address the issue whether the statute applied to a "mature minor or a minor whose best interests would not be served by parental notification."[84] Thus, *H.L. v. Matheson* decided the constitutionality of a parental notice requirement only when applied to a minor who (1) lives at home and is dependent on her parents for support, (2) has not demonstrated maturity or any extenuating circumstances in her relationship to her parents

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necessary to save the life of the mother or were for victims of rape or incest (when the rape or incest had been promptly reported to officials). *Id.* at 302. In addition, the Court held that the states were not obligated to pay for the medically necessary abortions for which Congress had withheld federal funding. *Id.* at 326. The three dissenters of *Maher* dissented again in *Harris;* they believed the Hyde Amendment unconstitutionally infringed the right, which had been recognized in *Roe v. Wade*, to decide to terminate a pregnancy. *Id.* at 330 (Brennan, J., dissenting). Justice Stevens agreed. Although he had joined the majority in *Maher*, he dissented in *Harris*. Justice Stevens objected to withdrawal of funds for medically necessary abortions; he believed that the government's interest in protecting fetal life was not legitimate when it conflicted with preserving the health of the mother. *Id.* at 351-52 (Stevens, J., dissenting). *Roe v. Wade* required no less: "[*Roe v. Wade*] held that even after fetal viability, a State may 'regulate, and even proscribe, abortion *except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.*'" *Id.* at 351 (Stevens, J., dissenting) (emphasis in original) (quoting Roe v. Wade, 410 U.S. 113, 165 (1973)). Justice Stevens believed that the Court had a duty to respect the holding of *Roe v. Wade*. "The Court simply shirks the duty in this case." *Id.* (Stevens, J., dissenting).

80. 450 U.S. at 399.

81. *Id.* at 413, 420.

82. *Id.* at 425.

83. *See* notes 2 & 5 *supra*.

84. 450 U.S. at 414 (Powell, J., concurring).

that might obviate the desirability of parental notification, and (3) "is not emancipated by marriage or otherwise."[85]

Chief Justice Burger's opinion for the Court, which was joined by Justices White and Rehnquist, was short—perhaps even cursory. It devoted only two pages to discussing the right to privacy[86] and was noteworthy as much for what it omitted as for what it said. *Roe v. Wade* was not once cited. Moreover, Chief Justice Burger did not mention the background cases of *Skinner v. Oklahoma*[87] or *Griswold v. Connecticut*,[88] which were relied on in *Roe v. Wade*.[89] Indeed, one cannot discern from Chief Justice Burger's opinion exactly what constitutional claim was being made. He said only that plaintiff contended that the "statute violat[ed] the right to privacy recognized in our prior cases with respect to abortions."[90] One must look to the decision of the lower court to discover that plaintiff claimed a violation of her rights under the due process clause of the fourteenth amendment.[91]

Chief Justice Burger noted that previously in *Bellotti II* the Court had struck down a "blanket, unreviewable power of parents to veto their daughter's abortion."[92] But, he continued, "a statute setting out a 'mere requirement of parental notice' does not violate the constitutional rights of an immature, dependent minor."[93] He could cite as supporting authority, however, only the dissenting opinion in *Bellotti II* and a concurrence in *Danforth*.[94]

Given Chief Justice Burger's failure to rely on the major cases that have established as fundamental the right of both

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85. *Id.* at 407.

86. *Id.* at 407-10.

87. *See* notes 13-24 *supra* and accompanying text.

88. *See* notes 25-39 *supra* and accompanying text.

89. Roe v. Wade, 410 U.S. 113, 129, 152, 159 (1973).

90. 450 U.S. at 407.

91. H.L. v. Matheson, 604 P.2d 907, 909 (Utah 1979).

92. 450 U.S. at 409 (footnote omitted) (citing Bellotti v. Baird (Bellotti II), 443 U.S. 622, 642-43, 653-56 (1979)); *see* notes 76-77 *supra* and accompanying text.

93. *Id.* (footnote omitted) (quoting Bellotti v. Baird (Bellotti II), 443 U.S. 622, 640 (1979)).

94. *Id.* at 409 n.16.

adults and minors to seek abortions, it is not surprising that he failed to describe plaintiff's interest as fundamental. In fact, he did not discuss plaintiff's interest at all. While both the interest of the woman and the interests of the state were examined at length in *Roe v. Wade*, the Burger opinion in *H.L. v. Matheson* examined only the state's interests. Chief Justice Burger altogether avoided stating whether the Utah statute restricted a fundamental right of the plaintiff. If the statute had been found to restrict a fundamental right, presumably the Court would then determine whether the state's interests were significant enough to justify the restriction and would rely on the standard of review established in prior cases dealing with a minor's right to privacy.[95] If the statute were found not to restrict a fundamental right, a rational basis test could be applied.[96] Since Chief Justice Burger never stated whether a fundamental right was implicated, one might determine the answer to this query by looking to the standard applied. The Burger opinion, however, added obfuscation to confusion by failing to clarify exactly what standard was applied.

Early in the opinion the Court stated, "[T]he statute serves a *significant* state interest by providing an opportunity for parents to supply essential medical and other information to a physician."[97] In the holding, however, the standard appeared to be that the state must show an "important" interest: "As applied to the class properly before us, the statute plainly serves *important* state interests . . . ."[98] Although the Court may be using the words "significant" and "important" interchangeably, the standard applied was nonetheless unclear since the Court did not require that the significant or important interest it had identified be accomplished by means substantially related to the ends sought. Rather, the Court concluded that "[t]he Utah statute is *reasonably* calculated to protect minors in appellant's class . . . ."[99] Just before stating its holding, the Court referred

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95. *See* note 11 *supra*.

96. *See* notes 17-18 *supra*; Harris v. McRae, 448 U.S. 297, 324 (1980); Maher v. Roe, 432 U.S. 464, 478 (1977).

97. 450 U.S. at 411 (emphasis added).

98. *Id.* at 413 (emphasis added).

99. *Id.* at 412 (emphasis added).

to a rational basis standard:

> That the requirement of notice to parents may inhibit some minors from seeking abortions is not a valid basis to void the statute as applied to appellant and the class properly before us. The Constitution does not compel a State to fine-tune its statutes so as to encourage or facilitate abortions. To the contrary, state action "encouraging childbirth except in the most urgent circumstances" is *"rationally related* to the legitimate governmental objective of protecting potential life."[100]

Thus, we do not know whether, in order to justify a parental notification requirement, a state must show an important interest or a significant interest to which the legislative means selected are substantially related, or merely a legitimate legislative purpose to which the means selected are rationally related. Indeed, neither traditional standard seems to have been applied by the Court.[101] In *H.L. v. Matheson* Chief Justice Burger apparently created a heretofore unknown hybrid standard: A state must show a significant or important interest that can be achieved by legislative means that are merely rationally related to the end sought. The Court, however, has given no guidelines on what constitutes an important or significant interest. We only know that under the facts of *H.L. v. Matheson*, promoting family integrity, protecting adolescents, and providing an opportunity for parents to supply medical information to their daughters' physicians are adequate state interests.[102] Although the Court described the state interests asserted in *H.L. v. Matheson* as "significant" or "important," it appears that any legitimate state interest would have sufficed since the Court merely required that the legislative means selected—parental notification—be rationally related to the end sought. Although Chief Justice Burger paid lip service to precedent by labeling Utah's interests "important" or "significant," he avoided describing plaintiff's right as fundamental. Thus, the Court in effect

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100. *Id.* at 413 (emphasis added) (quoting Harris v. McRae, 448 U.S. 297, 325 (1980)).

101. Prior case law had clearly established that the compelling state interest standard applied in *Roe v. Wade* was inapplicable when a state's regulation restricted the privacy right of pregnant minors. *See* note 11 *supra*.

102. 450 U.S. at 411.

treated as no longer fundamental a minor's right to choose whether to have an abortion.

Although Chief Justice Burger in his plurality opinion was unwilling to describe the plaintiff's right as fundamental, other members of the Court were not similarly reluctant. Justice Powell, joined by Justice Stewart, concurring, acknowledged the prior cases establishing the fundamental right of a woman to choose whether to carry her pregnancy to term.[103] He made clear, however, that he joined the opinion of the Court only because of the narrowness of its holding.[104] Justice Powell objected to an absolute rule providing for parental notification in all cases or none. He proposed that an independent decisionmaker should determine on a case-by-case basis whether parental notification was appropriate.[105] This was consistent with his opinion in *Bellotti II* in which the Court required that the state provide an alternative decisionmaker who could authorize a minor's abortion when parental consent could not be obtained.[106] Justice Powell's overriding concern appeared to be the possibility that immature minors could easily obtain an abortion "on demand" without receiving pre-abortion counseling from any source. This concern seemed to underlie his statement that "abortion clinics, now readily available in most urban communities, may be operated on a commerical basis where abortions often may be obtained 'on demand.' "[107]

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103. *Id.* at 419 (Powell, J., concurring). These cases were *Bellotti II*, *see* notes 70-84 *supra* and accompanying text, *Danforth*, *see* notes 42-52 *supra* and accompanying text, and *Roe v. Wade*, *see* notes 30-40 *supra* and accompanying text.

104. 450 U.S. at 414 (Powell, J., concurring).

105. *Id.* at 420 (Powell, J., concurring).

106. *See* notes 70-84 *supra* and accompanying text.

107. 450 U.S. at 420 n.8 (citing Planned Parenthood v. Danforth, 428 U.S. 52, 91 n.2 (1976) (Stewart, J., concurring); Bellotti v. Baird (Bellotti II), 443 U.S. 622, 641 n.21 (1979)).

This concern also seemed to underpin Chief Justice Burger's opinion for the plurality. Since the plaintiff in *H.L. v. Matheson* had introduced no evidence on her maturity, she was presumed immature and thus in need of counseling and guidance from others in order to make her abortion decision. The logic of this presumption of immaturity is tenuous, however. One unstated corollary of the plurality's presumption is that a minor too immature to decide without counseling to have an abortion is nonetheless mature enough to give

Justice Stevens, concurring, likewise was concerned that counseling be available to the minor. Unlike Justices Powell and Stewart, however, his concern extended to mature and emancipated minors as well as immature and dependent ones. He was willing to address the broader question reserved by the Court and to hold that the parental notice provision was valid as applied to all minors regardless of individual circumstances.[108] He believed the state's interest in the welfare of the young was "fundamental and substantial" and justified the restriction on a minor's right to privacy.[109]

One of the disconcerting aspects of Justice Stevens' opinion is his use of words such as "correct" and "wise." He said, for example, "In my opinion, the special importance of a young woman's abortion decision . . . provides a special justification for reasonable State efforts intended to ensure that the decision be *wisely* made."[110] He noted that the possibility that parents may "*incorrectly* advise her" does not undercut the legitimacy of the state's interest in enhancing the probability of a "*wisely*" made abortion decision.[111] He spoke of the importance that " 'the decision be made *correctly* and with full understanding of the consequences' "[112] and of "the State's interest in protecting a young pregnant woman from the consequences of an *incorrect* abortion decision."[113] The essence of *Roe v. Wade* is that there is no "correct" or "wise" abortion decision. Rather, each woman has the constitutional right to determine the "correct" decision for herself without state interference. Although Justice Stevens' re-

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birth to a child and then either to rear the child or to make a decision to allow the child to be adopted. Common sense suggests, however, that a minor too immature to make an abortion decision on her own is almost certainly too immature to rear a child.

Moreover, the plurality's narrow holding suggests that the Court might not require parental notification if the minor shows that she is mature. The Court, however, gives no hint of how a plaintiff could successfully make such a showing and rebut the Court's presumption of immaturity.

108. *Id.* at 425 (Stevens, J., concurring).

109. *Id.* at 421 (Stevens, J., concurring).

110. *Id.* at 422 (Stevens, J., concurring) (emphasis added).

111. *Id.* at 424 (Stevens, J., concurring) (emphasis added).

112. *Id.* at 422 (emphasis added) (quoting Planned Parenthood v. Danforth, 428 U.S. 52, 103 (Stevens, J., concurring in part, dissenting in part)).

113. *Id.* at 425 (emphasis added).

peated use of these words might suggest an intentional disregard of precedent (or at least a misunderstanding of it), this evaluation is harsh in light of his opinions in earlier decisions that strongly supported the precedential value of *Roe v. Wade*.[114] Justice Stevens' apparently conflicting positions in earlier cases and in *H.L. v. Matheson* may be reconciled, however, by viewing his opinions in abortion cases as motivated by humanitarian concerns such as the welfare of minors or the health of the indigent mother who may need an abortion for medical reasons.[115]

In contrast to Chief Justice Burger's cursory treatment of the right asserted by the plaintiff in *H.L. v. Matheson*, Justice Marshall, writing for the dissent, examined that right in detail. After reviewing the Court's precedents establishing that plaintiff had a fundamental right to choose freely whether to terminate her pregnancy,[116] the dissenters concluded that Utah's mandatory parental notice requirement placed six restrictions on plaintiff's freedom of choice.[117] According to the dissenters, a notification requirement may (1) compel a minor to reveal a confidential decision, (2) limit a minor's ability to carry out an abortion decision because disapproving parents may interfere, (3) subject the minor to physical or emotional abuse and withdrawal of financial support, (4) cause some minors to wait past the first trimester of their pregnancies to seek an abortion, thus greatly increasing their health risks, (5) cause some minors to try to self-abort or to seek illegal abortions,[118] and (6) cause some minors to bear unwanted children.[119] Moreover, the dissent be-

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114. *See* note 79 *supra*.

115. *See id.*

116. 450 U.S. at 434-36 (Marshall, J., dissenting).

117. *Id.* at 437-40 (Marshall, J., dissenting).

118. A recent study showed that a quarter of the female minors who attempt suicide do so because they are pregnant or believe they are pregnant. Teicher, *A Solution to the Chronic Problem of Living: Adolescent Attempted Suicide*, CURRENT ISSUES IN ADOLESCENT PSYCHIATRY 129, 136 (J. Schoolar ed. 1973), *cited in* 450 U.S. at 439 n.26 (Marshall, J., dissenting).

119. The health risks to a minor are greater in carrying a child to term than in aborting during the first trimester of pregnancy. Cates, Schulz, Grimes & Tyler, *The Effect of Delay and Method Choice on the Risk of Abortion Morbidity*, 9 FAMILY PLANNING PERSPECTIVES 266 (1977), *cited in* 450 U.S. at 439 n.25 (Marshall, J., dissenting).

lieved that even if none of the six conditions existed in a particular case, the requirement of notice itself was an impermissible state-imposed obstacle to a minor's exercise of free choice in reaching her decision.[120]

Having determined that the Utah regulation impermissibly restricted a fundamental right, the dissent then examined the interests asserted by the state to justify the restriction. The dissenting opinion began with a statement of the standard to be applied. "[T]he statute cannot survive . . . challenge unless it is justified by a 'significant state interest.' Further, the State must demonstrate that the means it selected are closely tailored to serve that interest."[121] The dissenters concluded that the Utah regulation was not tailored to promote significant interests and thus should be held invalid. On its face, all the statute required was a communication from the physician to the parents mere moments before the abortion. Therefore, the regulation did not necessarily support the state's contention that the regulation allowed the parents to provide the physician with additional information.[122] Nor did it enhance the physician's medical judgment. A physician who did not believe it was in the minor's best medical interest to notify her parents would nonetheless be forced to do so under the statute.[123] Furthermore, the Utah regulation also failed to promote family integrity and parental authority. Rather than leaving the pattern of interaction chosen by the family unaltered, the statute injected the state into family privacy. The fact of a minor's pregnancy and her desire to obtain an abortion contrary to parental wishes indicate an already "fractured" family unit.[124] In the dissent's view, state intervention on behalf of the parents was unlikely to "resurrect parental authority that the parents themselves [were] unable to preserve."[125]

Chief Justice Burger's opinion for the Court and Justice

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120. 450 U.S. at 440-41 (Marshall, J., dissenting).

121. *Id.* at 441-42 (Marshall, J., dissenting) (quoting Planned Parenthood v. Danforth, 428 U.S. 52, 75 (1976)) (footnotes omitted).

122. *Id.* at 442-45 (Marshall, J., dissenting).

123. *Id.* at 452-53 (Marshall, J., dissenting).

124. *Id.* at 448 & n.45 (Marshall, J., dissenting) (quoting Planned Parenthood v. Danforth, 428 U.S. 52, 75 (1976)).

125. *Id.* at 448 (Marshall, J., dissenting) (footnote omitted).

Marshall's dissent in *H.L. v. Matheson* are apparently irreconcilable. The votes of Chief Justice Burger and Justices Rehnquist and White supporting the Burger opinion for the Court, as well as the votes of Justices Marshall, Brennan, and Blackmun supporting the Marshall dissent, are consistent with the opinions of these Justices in earlier cases.[126] A similar division along what might broadly be termed anti- and pro-abortion lines is to be expected in subsequent decisions. Thus, the votes of Justices Powell and Stevens, who concurred in *H.L. v. Matheson*, and the vote of Justice Stewart's successor, Justice O'Connor,[127] will be crucial in deciding future cases. It is possible, for example, that in a parental notification case in which the challenge is made not to the regulation *per se* but to the application of the statute based upon pertinent circumstances of the plaintiff, the Court could reach a five-four decision directly contrary to *H.L. v. Matheson*.[128]

Although the outcome of *H.L. v. Matheson* suggests a trend away from *Roe v. Wade* and its progeny, the basic positions of the key Justices do not support this conclusion. Justice Stevens in prior cases strongly endorsed the precedential value of *Roe v. Wade*.[129] Moreover, the Powell-Stewart and the Stevens concurrences in *H.L. v. Matheson* acknowledged as precedent[130] *Roe v. Wade* and subsequent cases and, more importantly, applied the standards and analyses evolved from those cases to the facts in *H.L. v. Matheson*. Although Justices Powell and Stevens in a

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126. *See* notes 42, 55, 65 & 79 *supra;* text accompanying notes 80-82 *supra*.

127. *See The Brethren's First Sister,* TIME, July 20, 1981, at 8-19.

128. Extrapolating from the concurring opinions in *H.L. v. Matheson*, it seems likely that given a different set of facts, Justice Powell could join the three dissenters to form a four-member minority. Justice Stevens indicated in *H.L. v. Matheson* that his views on the broader question were consistent with those expressed in Chief Justice Burger's opinion. Thus, Justice Stevens, voting with the three Justices who joined the opinion of the Court, also would form a four-member minority. Therefore, the Court is likely to divide four-four, and Justice O'Connor, Justice Stewart's successor, could well hold the determinative vote in future abortion cases. *See* note 127 *supra* and accompanying text.

129. *See* note 79 *supra*.

130. *See* 450 U.S. at 419 (Powell, J., concurring); *id.* at 422 (Stevens, J., concurring).

given case may unpredictably vary in how they weigh relative state interests, neither has yet indicated a willingness, or even an inclination, to abandon the Court's commitment to the concept that a woman has a right of privacy to decide whether to terminate her pregnancy without state intervention. As for the other members of the six-person majority of the Court in *H.L. v. Matheson*—Chief Justice Burger and Justices Rehnquist and White—it is hardly news that they doubt the wisdom of *Roe v. Wade* and its offspring.[131] Presently, however, it is only these three members of the Court who appear to entertain such doubts.[132]

The decision in *H.L. v. Matheson* leaves considerable uncertainty in its wake, however. The dissenters charged that the Court chose to dispose of the case so narrowly because of the Court's eagerness to avoid applicable precedent,[133] and there appears to be a good deal of truth to that charge. Nonetheless, many questions still remain. *H.L. v. Matheson* adopted neither a rule that notice must be given in every case nor a rule that notice cannot validly be given. While Chief Justice Burger and Justices Rehnquist, White, and Stevens apparently were willing to adopt an absolute notice rule, Justices Stewart and Powell were not. Thus the rule agreed on by the six-member majority of the Court was that notice could be required in every case identical to *H.L. v. Matheson*.[134] We do not know, then, whether a notice requirement is applicable to a mature minor, an emancipated minor, or a minor with extenuating circumstances in her family situation. An infinite number of fact situations different from the minor's situation in *H.L. v. Matheson* could arise. *H.L. v. Matheson* gives no answers and very little guidance whether a requirement of parental notice would be constitutional in such cases.

Considerable controversy is likely to surround any United States Supreme Court decision involving abortion. Justice

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131. *See* notes 42 & 79 *supra*.

132. Of course, the position of Justice O'Connor, Justice Stewart's successor, is unknown. *See The Brethren's First Sister*, TIME, July 20, 1981, at 8-19.

133. 450 U.S. at 454 (Marshall, J., dissenting); *see* notes 42-79 *supra*.

134. *See* note 2 *supra*.

Blackmun, writing for the majority in *Roe v. Wade,* summarized well the context of that decision and laid out the duty of the Court in resolving the issue before it:

> We forthwith acknowledge our awareness of the sensitive and emotional nature of the abortion controversy, of the vigorous opposing views, even among physicians, and of the deep and seemingly absolute convictions that the subject inspires. One's philosophy, one's experiences, one's exposure to the raw edges of human existence, one's religious training, one's attitudes toward life and family and their values, and the moral standards one establishes and seeks to observe are all likely to influence and to color one's thinking and conclusions about abortion. In addition, population growth, pollution, poverty, and racial overtones tend to complicate and not to simplify the problem. Our task, of course, is to resolve the issue by constitutional measurement, free of emotion and of predilection.[135]

Given the controversial nature of the issue and its complexity, it is especially important for the Court to explain in reasoned opinions that the decisions it makes in this area of the law are based on a valid theory derived from the Constitution. The interests involved in an abortion case with an adult plaintiff are complex. The Court must look at the right of the woman and the interests of the state. Always an express or implicit factor, too, is the interest of the fetus. When the plaintiff is a minor, however, the analysis becomes even more difficult since the interests of the parents must also be considered. Chief Justice Burger's opinion in *H.L. v. Matheson* attempts to simplify this complex configuration of interests by analyzing only the interests of the state and the parents; the opinion ignores the interest of the minor. This simplification of the interests at issue in addition to the inexplicable failure to analyze applicable precedent and the failure to enunciate the standard of review used suggest that the Burger opinion in *H.L. v. Matheson* lacks intellectual integrity. Chief Justice Burger's lack of reasoned analysis implies that, contrary to Justice Blackmun's advice, the issue has not been resolved by "constitutional measurement, free of emotion and predilection."[136]

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135. 410 U.S. at 116.
136. *Id.*

Moreover, *H.L. v. Matheson* may be so narrowly decided that it has minimal precedential value. Many states are now likely to pass parental notification statutes. These statutes, as well as statutes now in effect in Louisiana,[137] Massachusetts,[138] Maine,[139] North Dakota,[140] and Tennessee,[141] will be open to challenge except as applied to plaintiffs like the one in *H.L. v. Matheson*. By narrowing the class to which the holding in *H.L. v. Matheson* applied, the Court merely postponed making a definitive ruling. Unfortunately, pregnant minors whose circumstances are only slightly different from those of the plaintiff in *H.L. v. Matheson* still do not know if parental notice requirements in abortion statutes violate their constitutional right to privacy.

J.P. McCARTHY

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137. LA. REV. STAT. ANN. § 40:1299.35.5 (West Supp. 1980).

138. MASS. GEN. LAWS ANN. ch. 112, § 12S (West Supp. 1981).

139. ME. REV. STAT. ANN. tit. 22, § 1597 (1980).

140. N.D. CENT. CODE § 14-02.1-03 (Supp. 1979).

141. A Tennessee statute, TENN. CODE ANN. § 39-302 (Supp. 1981), is more narrowly drawn than the one challenged in *H.L. v. Matheson*. It differs from the Utah statute in several respects. Under the Tennessee statute it is unnecessary to notify the husband or the parents of a minor who is married. *Id.* § 39-302(f)(1). It is also unnecessary to notify the parents if, in the physician's judgment, the life of the minor would be threatened by continuing the pregnancy. *Id.* § 39-302(f)(2). Tennessee, however, imposes an absolute requirement of notice by using the word "shall," *id.* § 39-302(f), whereas Utah provides that the physician must "[n]otify, if possible," UTAH CODE ANN. § 76-7-304(2) (1978), *see* note 1 *supra*. In addition, Tennessee imposes a mandatory two-day waiting period following notice to the parents before an abortion may be performed. TENN. CODE ANN. § 39-302(f) (Supp. 1981).

# Criminal Law—Homicide—Self-Defense—Duty to Retreat

*State v. Kennamore*, 604 S.W.2d 856 (Tenn. 1980)

Defendant accompanied the deceased and another companion to a secluded spot beside a country road, where the three built a campfire for the purpose of spending the evening talking and drinking beer. While defendant was kneeling to tend the fire, the deceased struck him on the head from behind with a bottle. Seriously injured, defendant obtained his shotgun and fired, killing the deceased with a single blast.[1] Defendant was convicted of voluntary manslaughter. The Tennessee Court of Criminal Appeals affirmed the conviction,[2] rejecting defendant's contention that the trial judge erred in refusing to instruct the jury on the "true man" rule of self-defense,[3] under which a vic-

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1. The State's evidence differed significantly from that offered by defendant. Through the testimony of a third party, the State showed that after defendant was struck with the bottle, he attacked the deceased, beating him into submission. Defendant then ran to his pick-up truck parked nearby, took a shotgun from it, and shot the deceased, who was still trying to get to his feet after the beating. The witness stated that he entreated defendant not to shoot, but defendant stepped around the witness and fired anyway. State v. Kennamore, 604 S.W.2d 856, 858 (Tenn. 1980).

Defendant, on the other hand, testified that after being struck by the bottle, the deceased also kicked him. Defendant stated that he feared a further attack, and looking for his shotgun with which to protect himself, he discovered that it had been moved from the truck to the grass beyond the campfire. He then seized the weapon and fired upon the deceased in order to save his own life. By defendant's estimation, only three to five seconds elapsed from the assault upon him to the fatal shot; however, according to the State's proof, thirty seconds passed. *Id.* The Tennessee Supreme Court did not indicate which view of the facts was accepted by the trial court.

2. Kennamore v. State, No. 1, Hardeman Criminal (Tenn. Crim. App. Feb. 15, 1979), *aff'd*, 604 S.W.2d 856 (Tenn. 1980).

3. Defendant made two other assignments of error: the trial judge's failure to give defendant's suggested instructions on both the right to use deadly force in self-defense for a small period of time following the assault and the standard of reasonableness to which a victim of assault who suffers serious injury shall be held. 604 S.W.2d at 862 (Henry, J., dissenting).

tim of unprovoked assault that threatens death or serious bodily harm has no duty to retreat before responding with deadly force.[4] On writ of certiorari in the Tennessee Supreme Court, *held,* affirmed and remanded for execution of the judgment.[5] The "true man" rule is limited to the defense of home or habitation. *State v. Kennamore,* 604 S.W.2d 856 (Tenn. 1980).

The issue of retreat in self-defense has been a much-debated subject.[6] At common law, a victim of unprovoked assault had a duty to retreat "to the wall" before using deadly force against the aggressor,[7] unless the assault occurred at the victim's home or habitation[8] or during the exercise of the victim's official duty.[9] Several jurisdictions, however, have held that an innocent victim of assault has no duty to retreat before responding with deadly force, but may stand his ground and meet his aggressor.[10] This latter view, called the true man rule,[11] is more specifically stated as follows:

> "If [a person] when assaulted was without fault and in a place where he had a right to be and was placed in reasonable apparent danger of losing his life or of receiving great bodily harm, he need not retreat, but may stand his ground, and repel force by force, and if, in the reasonable exercise of his right of self-defense, he kills his assailant, he is justified and should be acquitted."[12]

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Justice Henry, dissenting, pointed out that defendant's suggested instructions were "correct statement[s] of the law and should have been charged." *Id.* at 862 (Henry, J., dissenting). Concerning the duty of the trial judge to instruct the jury on the law applicable to the facts of the case, *see* note 95 *infra.*

4. *See* text accompanying note 12 *infra.*

5. The court also ruled that the "offense for which [defendant] was convicted does not carry with it a rendition of infamy, and the recitation to that effect in the judgment of the trial court will be deleted." 604 S.W.2d at 860.

6. *See* notes 29-47 *infra* and accompanying text.

7. *See* note 30 *infra* and accompanying text.

8. *See* notes 48 & 82 *infra.*

9. *See* note 48 *infra.*

10. *See* notes 37-39 *infra* and accompanying text.

11. *See* note 36 *infra.*

12. 604 S.W.2d at 858 (quoting defendant's requested jury instruction). *See also* Morrison v. State, 212 Tenn. 633, 641, 371 S.W.2d 441, 444 (1963); 2 WHARTON'S CRIMINAL LAW § 126 (C. Torcia 14th ed. 1979).

The Tennessee law dealing with the subject of retreat in self-defense has been unclear. In 1852 the Tennessee Supreme Court declared that a successful plea of self-defense depended on whether the defendant had retreated "to the wall,"[13] but later the court apparently took a contrary position by holding the true man doctrine applicable in cases of self-defense.[14] As a result, members of the bench and bar and legal scholars had been unable to agree on the correct Tennessee law on the issue of retreat in self-defense,[15] and no Tennessee case had settled the controversy.[16] In *State v. Kennamore* the Tennessee Supreme Court was presented with the opportunity to clarify the law of retreat in self-defense.

The right of an innocent person to defend himself from assault, even by taking the life of the aggressor if necessary to protect himself from serious bodily harm or death, is well established in modern-day law.[17] So reasonable is the doctrine of self-defense that it is hard to believe that it has not always been the law.[18] The doctrine of self-defense, however, developed slowly in the English courts.[19] As late as 1258,[20] the taking of another's life was justified only when it occurred in the lawful prosecution of the King's writ, in the attempt to apprehend a fleeing felon, or in the attempt to protect oneself from robbery.[21] Any other killing of another person, even in self-defense, was judged to be homicide.[22] If, however, the jury was satisfied that the killing oc-

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13. Nelson v. State, 32 Tenn. 169, 181, 2 Swan 237, 255 (1852); *see* text accompanying notes 52 & 53 *infra*.

14. Morrison v. State, 212 Tenn. 633, 641, 371 S.W.2d 441, 444 (1963); *see* text accompanying notes 60-66 *infra*.

15. *See* State v. Kennamore, 604 S.W.2d 856, 860 (Tenn. 1980) (Henry, J., dissenting); note 81 *infra*.

16. *See* 604 S.W.2d at 860 (Henry, J., dissenting).

17. Beale, *Retreat from a Murderous Assault*, 16 HARV. L. REV. 567 (1903) [hereinafter cited as Beale].

18. R. MORELAND, LAW OF HOMICIDE 259 (1952); Beale, *supra* note 17, at 567.

19. Beale, *supra* note 17, at 567.

20. Pollock and Maitland noted that Bracton wrote concerning the English common law of homicide about 1250-1258. 2 F. POLLOCK & F. MAITLAND, THE HISTORY OF ENGLISH LAW 479 (2d ed. 1968).

21. *Id.*; Beale, *supra* note 17, at 567-68.

22. The situation was aptly described by Beale: "[W]here one in pursuit

curred in a necessary act of self-defense, a "special" verdict of guilty was rendered,[23] and upon proper application to the King, the King might issue a pardon, *"if it please[d] him."*[24] In time, however, application for a pardon became a mere formality, and the Chancellor, the keeper of the King's seal, signed the pardons as a matter of course. With the rise of the equity courts, the doctrine became an affirmative defense,[25] and soon thereafter, in accordance with public sentiment, the doctrine was recognized at law.[26]

Because the doctrine of self-defense originated as an act of the King's favor, the doctrine was not subject to any concrete principles of law. There was one rule, however, which limited the availability of self-defense from the beginning: the requirement

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of a robber escaping from arrest beheaded him as he ran, the act was justifiable; and one who in resisting a robber killed him was acquitted; but a woman who killed to defend herself from rape was not acquitted." Beale, *supra* note 17, at 568 (footnotes omitted).

23. 2 F. POLLOCK & F. MAITLAND, *supra* note 20, at 479, *cited in* R. MORELAND, *supra* note 18, at 260.

24. Statute of Gloucester, 1278, 6 Edw. 1, c. 9, 1 STATUTES OF THE REALM 45, *quoted in* Beale, *supra* note 17, at 568. The procedure to be followed in rendering a special verdict and making an application to the King was set out in the Statute of Gloucester in 1278. The statute made clear the common-law rule that the King's power to pardon was wholly discretionary. As stated by Beale, the King's issuance of a pardon was "*de gracia sua et non per judicium.*" Beale, *supra* note 17, at 568. The record of one medievel case reveals a typical scenerio:

> It was presented that a man killed another in his own house *se defendendo*. It was asked whether the deceased came to have robbed him; for in such case a man may kill another though it be not in self defense. *Quod nota*. And the twelve said not. Wherefore they were charged to tell the way how . . . it happened, whereby he should obtain the king's pardon.

Beale, *supra* note 17, at 569 (quoting F. Coron. 305 (3 Edw. III)).

25. Beale, *supra* note 17, at 570 (citing 4 H. VII 2, pl. 3); R. MORELAND, *supra* note 18, at 260.

26. Beale wrote about one of the first cases of self-defense at law:

> Though in a difference between the bench and the bar the bench triumphs for a time, the opinion of the bar, if tenaciously held, will in the end prevail. In 1534 the jury found that the accused killed his victim in his own defense. "Wherefore he should have his charter of pardon. And Port, J. adjudged that he should go *adieu*. *Quod nota*."

Beale, *supra* note 17, at 571 (quoting 26 H. VIII 5, pl. 21).

of "necessity."[27] If killing the aggressor was not essential to protect the accused from death or serious bodily harm, there would be no pardon.[28] The element of necessity is still the primary requirement for a claim of self-defense, and it has given rise to "one of the most interesting and most controversial problems in the law of self-defense":[29] the issue of retreat. English courts held that a killing in self-defense was not necessary if the slayer could have safely utilized an available avenue of retreat. At common law, therefore, an innocent victim of assault had a duty to retreat "to the wall" before using deadly force against an aggressor.[30] Although all English courts agreed that the victim of an unprovoked attack generally had a duty to retreat before killing in self-defense, the exceptions to this general rule remained a subject of dispute. The two conflicting viewpoints were expressed by two noted English legal scholars, Sir Edward Coke and Sir Michael Foster. Coke, writing in the late sixteenth and early seventeenth centuries, expressed the view that the assailed party had the right to stand his ground if necessary to prevent

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27. 2 BRACTON ON THE LAWS AND CUSTOMS OF ENGLAND 372 (S. Thorne trans. 1968); R. MORELAND, *supra* note 18, at 260.

28. R. MORELAND, *supra* note 18, at 260; Beale, *supra* note 17, at 567. This principle is clearly described by the record of an early English case:

> [A]t the delivery of Newgate . . . it was found that a chaplain *se defendendo* slew a man, and the justices asked how. And [the jurors] said that the man who was killed pursued the chaplain with a stick and struck him, and he struck back, and so death was caused. And they said that the slayer, had he so willed, might have fled from his assailant. And therefore the justices adjudged him a felon, and said that he was bound to flee as far as he could with safety of life.

Beale, *supra* note 17, at 570 (quoting 43 Ass. pl. 31).

29. R. MORELAND, *supra* note 18, at 261. The requirement of necessity in a claim of self-defense is not measured by an objective standard; its existence must be determined from the viewpoint of the slayer, with the understanding that he had to act quickly under great stress. Therefore, even if actual necessity did not exist, it is sufficient for a claim of self-defense if a reasonable person in like circumstances would have thought that necessity existed. Note, however, that the fear of bodily harm must be bona fide. Even if a reasonable person in like circumstances would have perceived a necessity to take the life of the aggressor, if the slayer himself did not entertain this thought, he cannot claim self-defense. *See generally id.* at 260-61.

30. BRACTON, *supra* note 27, at 372; R. MORELAND, *supra* note 18, at 261; Beale, *supra* note 17, at 569-73.

robbery, but no such right existed to defend oneself against other violent felonies such as murder or rape.[31] Foster, writing in the early eighteenth century, believed that the right to stand and fight should not be limited to defense against robbery only. He urged that one "may repel Force with Force in Defence of his Person . . . against . . . [any] known Felony."[32] While most courts agreed with Coke,[33] the subject of retreat remained a live issue in England, and to this day the question remains unsettled.[34]

When the English common law migrated to America via the colonies, the doctrine of self-defense was immediately accepted.[35] As in England, however, the issue of retreat provoked disagreement. Unlike Coke and Foster, who were concerned with the exception to the general common-law duty to retreat, many

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31. Sir Edward Coke wrote: "[I]f a thiefe offer to rob or murder B. either abroad, or in his house, and thereupon assault him, and B. defend himself without any giving back, and . . . killeth the thiefe this is no felony; for a man shall never give way to a thiefe . . . ." E. COKE, INSTITUTES (pt. 3) *56, *quoted in* Beale, *supra* note 17, at 572. Beale points out that the phrase "to rob or murder" is taken by the authorities to mean a thief who demands, "Your money or your life," and that Coke did not mean that the right to stand one's ground extended to one threatened with murder alone. No adequate reason has been given to explain why English courts would excuse an individual who kills a would-be robber but would not excuse an individual who kills to prevent murder. Beale, *supra* note 17, at 572.

32. M. FOSTER, A REPORT OF SOME PROCEEDINGS ON THE COMMISSION OF OYER AND TERMINER AND GAOL DELIVERY FOR THE TRIAL OF REBELS IN THE YEAR 1746 IN THE COUNTY OF SURRY, AND OF OTHER CROWN CASES TO WHICH ARE ADDED DISCOURSES UPON A FEW BRANCHES OF CROWN LAW 273 (Oxford 1762) (emphasis added), *quoted in* Beale, *supra* note 17, at 573. Beale pointed out that Foster's view resulted from his misunderstanding of Coke's statement that an individual was justified in killing one who "offers to rob or murder" him, *see* note 31 *supra*. Beale, *supra* note 17, at 573.

33. Beale, *supra* note 17, at 572. *See also* 3 J. STEPHEN, HISTORY OF THE CRIMINAL LAW OF ENGLAND 59 (1883).

34. R. MORELAND, *supra* note 18, at 262 (citing C. KENNY, OUTLINES OF CRIMINAL LAW 118 n.2 (15th ed. 1936)). Beale pointed out that today "the question has become . . . purely academic" because of the lack of cases on the subject. Beale, *supra* note 17, at 574. For a good discussion of the various English views on the subject of retreat, see Brown v. United States, 256 U.S. 335, 336-41 (1926).

35. *See generally* 12 WAKE FOREST L. REV. 1093, 1095 (1976).

American jurisdictions questioned the existence of the duty.[36] The South and the West were particularly averse to the notion that an innocent person must retreat from an attacker. In the South it was deemed a violation of a gentleman's code of honor to "seek dishonor in flight,"[37] and in the West, not only was it

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36. Two leading state supreme court cases that addressed the issue of retreat in self-defense were Erwin v. State, 29 Ohio St. 95 (1876), and Runyan v. State, 57 Ind. 80 (1877). In *Erwin* the Ohio Supreme Court posed the question of retreat in this way: "Does the law hold a man who is violently and feloniously assaulted responsible for having brought such necessity upon himself, on the sole ground that he failed to fly from his assailant when he might have safely done so?" 29 Ohio St. at 103. And the court answered itself: "[A] true man, who is without fault, is not obliged to fly from an assailant, who, by violence or surprise, maliciously seeks to take his life or do him enormous bodily harm." *Id.*

In *Runyan* the Indiana Supreme Court rejected a jury instruction that required an assaulted person to retreat " 'as far as he safely or conveniently [can], in good faith, with the honest intent to avoid the violence of the assault.' " 57 Ind. at 83 (quoting trial court's instruction). The court, taking judicial notice of what it perceived to be the tide of public opinion, stated, "Indeed, the tendency of the American mind seems to be very strongly against the enforcement of any rule which requires a person to flee when assailed, to avoid chastisement or even to save human life . . . ." *Id.* at 84.

37. Beale, *supra* note 17, at 577. An example of southern sentiment was displayed in State v. Bartlett, 170 Mo. 658, 71 S.W. 148 (1902). In *Bartlett* an elderly gentleman was accosted on the street by a younger man carrying a five-foot-long leaded horse whip. Unable to persuade the young man to stop beating him, the defendant drew a revolver and fatally wounded the attacker. The court rejected the contention that the defendant was under a duty to try to escape before firing on the deceased. The court stated:

> It is true, human *life* is sacred, but so is human *liberty;* one is as dear in the eye of the law as the other, and neither is to give way and surrender its legal status in order that the other may exclusively exist . . . . [W]e hold it a *necessary self-defense* to *resist, resent* and *prevent* such a *humiliating indignity;* such a violation of the sacredness of one's person; . . . .

*Id.* at 668-71, 71 S.W. at 151-52 (emphasis in original). Not all southern courts agreed with the *Bartlett* court. In Springfield v. State, 96 Ala. 81, 11 So. 250 (1891-92), the Alabama Supreme Court approved the following jury instruction: " 'In the system [of self-defense] so established, no balm or protection is provided for wounded pride or honor in declining combat, or sense of shame in being denounced as cowardly. Such thoughts are trash, as compared with the inestimable right to live.' " *Id.* at 85, 11 So. at 252 (quoting trial court's charge).

dishonorable to turn one's back on an aggressor, but with the popularity of the "six-shooter," it was also foolish.[38] There was also the notion, expressed by an Oklahoma court, of the inherent rights of the citizens of a free nation:

> Under the old common law, no man could defend himself until he had retreated, and until his back was to the wall; but this is not the law in free America. Here the wall is to every man's back. It is the wall of his rights; and when he is [assailed] at a place where he has a right to be, . . . he may stand and defend himself.[39]

In the Northeast, however, the duty to retreat was better received. In 1868 the Pennsylvania Supreme Court weighed the right of one to stand his ground in self-defense against the aggressor's right to live and found the balance favored the latter:

> It is certainly true that every citizen may rightfully traverse the street, or may stand in all proper places, and need not flee from every one who chooses to assail him. . . . But the law does not apply this right to homicide. . . . When it comes to a question whether one man shall flee or another shall live, the law decides that the former shall rather flee than the latter shall die.[40]

The Supreme Court of the United States has addressed the issue of retreat on several occasions. The Court has not, however, decided whether the victim of an assault has a duty to retreat. When the Court first faced the issue in *Beard v. United States*[41] in 1895, it expressed approval of the true man rule.[42]

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38. *See* State v. Gardner, 96 Minn. 318, 104 N.W. 971 (1905).

> The doctrine of "retreat to the wall" had its origin before the general introduction of guns. Justice demands that its application have due regard to the present general use and to the type of firearms. . . . [I]t would be rank folly to . . . require [retreat] when experienced men, armed with repeating rifles, face each other in an open space, removed from shelter, with an intent to kill . . . . Self-defense has not, by statute nor by judicial opinion, been distorted, by an unreasonable requirement of the duty to retreat, into self-destruction.

*Id.* at 327, 104 N.W. at 975.

39. Fowler v. State, 8 Okla. Crim. 130, 135, 126 P. 831, 833 (1912).

40. Commonwealth v. Drum, 58 Pa. 9, 22 (1868).

41. 158 U.S. 550 (1895).

One year later, however, in *Allen v. United States*,[43] the Court upheld the following charge by the district court judge: "[The accused] may lawfully kill the assailant . . . provided he use all the means in his power otherwise to save his own life or prevent the intended harm, such as retreating as far as he can, or disabling him without killing him . . . ."[44] Twenty-five years later, in *Brown v. United States*,[45] the Court had a chance to resolve the conflict between its two earlier decisions, but failed to do so. Instead, the Court struck a compromise: "Rationally the failure to retreat is a circumstance to be considered with all the others in order to determine whether the defendant went farther than he was justified in doing; not a categorical proof of guilt."[46] The *Brown* decision was an unsatisfactory resolution of a difficult issue, and as one commentator accurately pointed out, the Court's opinion "leaves the question of the duty to retreat wholly to the jury and would result in a great deal of variation in the cases depending upon the emotional reactions of the juries."[47]

Although Tennessee accepted the doctrine of self-defense without objection, the state has not been spared the confusion surrounding the issue of retreat that has afflicted the rest of the nation.[48] The development of necessity as the primary element

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42. The Court approved the words of the Ohio Supreme Court quoted in note 36 *supra*. 158 U.S. at 561.

43. 164 U.S. 492 (1896).

44. *Id.* at 497. The Court weakly distinguished *Beard* on the basis that the accused in *Beard* was attacked on his own property. This was an extention of the "castle doctrine," under which a person has no duty to retreat from attack at his own home. *See* note 48 *infra*. As stated by Beale, "This is an untenable distinction, for under no circumstances can one claim that mere land is his castle . . . ." Beale, *supra* note 17, at 580. For a good discussion of the castle doctrine see Wallace v. United States, 182 U.S. 466 (1896).

45. 256 U.S. 335 (1921).

46. *Id.* at 343.

47. R. MORELAND, *supra* note 18, at 263.

48. It should be noted that, in spite of the widespread disagreement among the jurisdictions about the duty of an assaulted party to retreat "to the wall" before taking the life of the aggressor, there are some principles relating to the issue of retreat agreed upon by virtually all courts. For instance, if a person is assaulted under circumstances such that he reasonably believes that a retreat will increase or at least will not diminish the danger, then all courts agree that he may stand his ground, even to the point of taking the life of the aggressor if necessary to save his own. *See generally* 40 AM. JUR. 2d *Homicide*

of self-defense came slowly in Tennessee. In *Grainger v. State*,[49]

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§ 167 (1968). Therefore, even in Alabama, which strictly adheres to the retreat doctrine, *see* note 37 *supra*, the state's highest court declared: "If it be made to appear that he was so obstructed by obstacles that he could not escape, or that, in attempting to do so, he would probably have increased the peril . . . , this would relieve him of all duty to attempt it." Hammill v. State, 90 Ala. 577, 582, 8 So. 380, 382 (1891).

Likewise, all courts agree that a person who is without fault in bringing on an assault has no duty to retreat from his own home and curtilage. This principle has been called the "castle doctrine" on the theory that one's home is his castle. *See generally* 40 AM. JUR. 2d *Homicide* § 167 (1968); *see also* Elder v. State, 69 Ark. 648, 65 S.W. 938 (1901). For Tennessee's treatment of the subject, see note 82 *infra*. There is some disagreement about the extent of the area surrounding the home that is included within the curtilage. *See, e.g.*, State v. Frizzelle, 243 N.C. 49, 89 S.E.2d 725 (1955) (curtilage deemed to include the yard around the dwelling as well as the area occupied by barns, cribs, and other outbuildings). *But see* Danford v. State, 53 Fla. 4, 43 So. 593 (1907) (curtilage did not include field surrounding the defendant's house). *See generally* Annot., 52 A.L.R. 2d 1458 (1957). There is also a lack of consensus about the right of a person to stand his ground in his own home against an assailant who is not an intruder but is himself entitled to be upon the premises. *See, e.g.*, State v. Grantham, 224 S.C. 41, 77 S.E. 291 (1953) (no duty of accused to retreat from his wife). *But see* People v. Tomlins, 213 N.Y. 240, 107 N.E. 490 (1919) (duty of father to retreat from son).

A majority of courts hold that an innocent party has no duty to retreat from an assault in his office or place of business. *See* 40 AM. JUR. 2d *Homicide* § 169 (1968). *But see* Wilson v. State, 69 Ga. 224 (1882) (an employee of a saloon, charged with killing a customer inside the saloon, was not entitled to an instruction that the employee was in his own place of business and under no duty to retreat, because the saloon was a public place, and anyone there for the purpose of drinking has equal rights with the employee). The general rule that there is no duty to retreat from an assault in one's office or place of business has been upheld even when the aggressor was a joint occupant, Jones v. State, 76 Ala. 8 (1884); a duty to retreat has, however, been found if the business is unlawful, such as the operation of a still, Hill v. State, 194 Ala. 11, 69 So. 941 (1915).

There is also no disagreement that a law enforcement officer is neither required nor permitted to retreat from an attacker. *See, e.g.*, Lynn v. People, 170 Ill. 527, 48 N.E. 964 (1897); State v. Smith, 127 Iowa 534, 103 N.W. 944 (1905).

49. 13 Tenn. 377, 5 Yer. 458 (1830). Other early Tennessee cases recognizing the doctrine of self-defense include Hull v. State, 74 Tenn. 195, 6 Lea 249 (1880) (doctrine of self-defense not available to defendant who precipitated the affray); Allsup v. State, 73 Tenn. 283, 290, 5 Lea 362, 370 (1880) (in self-defense cases the jury must view the killing in light of "all the facts and

the leading Tennessee self-defense case, the Tennessee Supreme Court did not even mention necessity. In *Grainger*, the aggressor backed the defendant against a wall and prepared to administer a severe beating. The defendant pulled his gun, to which the aggressor responded, "I am not afraid of your shooting; damn you, you would not shoot a cat . . . ."[50] Upon the aggressor's next step, the defendant fired. The Tennessee Supreme Court unhesitatingly reversed the trial court's conviction of murder, remanding the case with these instructions: "If the jury had believed that [the defendant] was in danger of great bodily harm from [the aggressor], or thought himself so, then the killing would have been in self-defense."[51]

The Tennessee Supreme Court again addressed the subject of self-defense twenty-two years later in *Nelson v. State*.[52] Unlike the *Grainger* court, the *Nelson* court hinted at the role of necessity in a successful plea of self-defense by emphasizing the duty of the defendant to avoid harm to the assailant. The court indicated that, in order for a person charged with homicide to maintain a successful plea of self-defense, he must prove that he had done everything within his power and consistent with his own safety to avoid the conflict. "In the language of the old writers," the court concluded, "he must give back to the wall."[53]

The Tennessee Supreme Court continued to define the boundaries of self-defense in *Rippy v. State*.[54] In *Rippy* the defendant appealed his murder conviction on the ground that, because the defendant had learned of the deceased's announced intention to kill him, the defendant was justified in taking the deceased's life on sight. The court summarily rejected this pro-

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circumstances of the entire transaction, taken as a series of events," and not "confine the attention to the very *moment*"); Copeland v. State, 26 Tenn. 394, 406, 7 Hum. 479, 493 (1846) (defendant, walking along the road in a "laudable pursuit," acted in self-defense when she killed her attacker after being assailed with a hickory stick). *See also* Bitner v. State, 130 Tenn. 144, 109 S.W. 565 (1914); Morgan v. State, 35 Tenn. 256, 3 Sneed 474 (1856).

50. 13 Tenn. at 378, 5 Yer. at 460.

51. *Id.* at 380, 5 Yer. at 462.

52. 32 Tenn. 169, 2 Swan 237 (1852).

53. *Id.* at 181, 2 Swan at 255.

54. 39 Tenn. 136, 2 Head 217 (1858).

position as "monstrous."[55] Relying on *Grainger*, the court pointed out that to excuse a homicide, the defendant must have had a reasonable fear of death or great bodily harm at the time of the killing.[56] The court went further than it had in *Grainger*, however. In the spirit of the *Nelson* decision, the court elaborated on the responsibility of the defendant: "[A] case must not only be made out to authorize the fear of death or great harm, but . . . the act [must be] done under an honest and well-founded belief that it is *absolutely necessary* to kill at that moment, to save himself from a like injury."[57] In *Rippy* the court clarified what it had intimated in *Nelson:* It was not enough to show that the defendant entertained a reasonable fear of death at the time of the killing; the defendant also had to prove that the killing was *necessary* to save his life.[58] Thus, the court established necessity as the primary element of the Tennessee law of self-defense. Every post-*Rippy* Tennessee case addressing the doctrine of self-defense has emphasized this requirement of necessity,[59] except one: *Morrison v. State.*[60]

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55. *Id.* at 138, 2 Head at 219.

56. *Id.*, 2 Head at 219.

57. *Id.* at 138, 2 Head at 220 (emphasis added).

58. *Id.*, 2 Head at 220.

59. Williams v. State, 50 Tenn. 321, 3 Heisk. 376 (1872). After noting that "[t]he law as laid down in Grainger v. The State, explained, analyzed, and defined, in the case of Rippy v. The State, must govern the case now before us," *id.* at 337, 3 Heisk. at 395, the court posed the issue of self-defense as follows: "[D]id [the defendant] shoot under an honest, and well founded belief, that it was absolutely necessary for him to kill . . . at that moment, to save himself from a like injury?" *Id.* at 339, 3 Heisk. at 397; *accord,* Couch v. State, 467 S.W.2d 835, 837 (Tenn. 1971) ("in rejecting the theory of self defense, the jury was justified in concluding that it was not necessary for the defendant to shoot" the deceased, who was unarmed and trying to escape); Nance v. State, 210 Tenn. 328, 358 S.W.2d 327 (1962) (voluntary manslaughter conviction of defendant who pleaded self-defense affirmed because defendant shot the victim a third time after the victim had retreated and was falling to the floor); Cathy v. State, 191 Tenn. 617, 235 S.W.2d 601 (1951) (defendant was not privileged to shoot the deceased in the course of arresting him for a supposed felony unless it became absolutely necessary); Frazier v. State, 117 Tenn. 430, 441-42, 100 S.W. 94, 97 (1906) (no error in trial judge's charge on the law of self-defense that "the situation at the time of the killing must have been such as to induce [a reasonable person] situated as the defendants were to believe it absolutely necessary . . . to kill the deceased"); Barnard v. State, 88 Tenn.

In *Morrison* the deceased was shot and killed when he violently broke into the defendant's home. The Tennessee Supreme Court overruled the defendant's conviction of voluntary manslaughter, holding that the trial judge erred in failing to instruct the jury on a person's right to defend his home against assault.[61] After addressing what should have been the appropriate charge,[62] the court turned its attention to the subject of retreat generally. The court pronounced as "the law"[63] a complete statement of the true man rule.[64] By declaring the true man rule to be the law in Tennessee, the court created a conflict in the state's law of self-defense. *Nelson* had impliedly stressed the element of necessity in self-defense, stating that the assaulted party must retreat "to the wall,"[65] whereas *Morrison* declared that "[one] need not retreat, but may stand his ground."[66]

For four years after *Morrison,* the Tennessee Supreme Court neither addressed the issue of retreat[67] nor confronted the

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183, 229, 12 S.W. 431, 442 (1889) (defendant's conviction of murdering " 'Big John,' the black-hearted rascal," 88 Tenn. at 189, 12 S.W. at 432, affirmed by upholding trial court's charge to the jury, which included the following language: "self-defense . . . rests upon necessity, actual or *apparent*"); Jackson v. State, 65 Tenn. 362, 366, 6 Bax. 452, 457 (1873) ("To excuse the slayer he must act under an honest belief that it is necessary at the time to take the life of his adversary in order to save his own . . . .").

60. 212 Tenn. 633, 371 S.W.2d 441 (1963).

61. *Id.* at 638, 371 S.W.2d at 443.

62. When an assault on a dwelling and an attempted forcible entry are made under such circumstances as to create a reasonable apprehension that it is the design of the assailant to commit a felony or to inflict on the inmates a personal injury which may result in loss of life or great bodily harm, . . . the lawful occupant of the dwelling may lawfully prevent the entry, even by the taking of the life of the intruder.

*Id.* at 638-39, 371 S.W.2d at 443 (quoting 1 WHARTON'S CRIMINAL LAW AND PROCEDURE § 220 (Anderson ed. 1957)).

63. *Id.* at 641, 371 S.W.2d at 444.

64. *Id.*, 371 S.W.2d at 444; *see* text accompanying note 12 *supra.* The *Morrison* court gave as authority 1 WHARTON'S CRIMINAL LAW AND PROCEDURE § 235 (Anderson ed. 1957). 212 Tenn. at 641, 371 S.W.2d at 444.

65. 32 Tenn. at 181, 2 Swan at 255.

66. 212 Tenn. at 641, 371 S.W.2d at 444.

67. Other Tennessee cases have dealt indirectly with the duty to retreat. *See, e.g.,* Murphy v. State, 188 Tenn. 583, 221 S.W.2d 812 (1949) (the aggressor

conflict between *Morrison* and *Nelson*. It soon decided, however, another case involving self-defense. In *May v. State*[68] the court affirmed the first degree murder conviction of a state prisoner accused of the stabbing death of a fellow inmate. Placing significance on the evidence showing that the defendant repeatedly stabbed the victim before being forcibly restrained by prison guards, the court ruled that the jury properly concluded that the defendant's actions were not excused by the doctrine of self-defense.[69] In articulating the rationale behind its decision, the court stated: "[O]ne cannot go further than is reasonably necessary in defense of his person. In other words, the right to kill in self-defense begins where necessity begins and ends where the necessity ends."[70] With this statement the court seemed to ignore *Morrison* and return to the emphasis of *Nelson* and *Rippy*.[71]

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in an argument which leads to homicide may not plead self-defense without first retreating from the conflict); Petty v. State, 65 Tenn. 488, 6 Bax. 610 (1872) (defendant's conviction of second degree murder reversed because he killed victim only after victim had swung a stick and a fence rail at him and had thrown a rock at him). *See also* Gann v. State, 214 Tenn. 711, 383 S.W.2d 32 (1964); Cooper v. State, 123 Tenn. 37, 138 S.W. 826 (1909); Foster v. State, 102 Tenn. 33, 49 S.W. 747 (1899); Hull v. State, 74 Tenn. 195, 6 Lea 249 (1880).

68. 220 Tenn. 541, 420 S.W.2d 647 (1967).

69. *Id.* at 545, 420 S.W.2d at 649.

70. *Id.* at 544, 420 S.W.2d at 649.

71. The Tennessee Court of Criminal Appeals soon followed the precedent established by *Nelson*, *Rippy*, and *May*. With cases such as McClain v. State, 1 Tenn. Crim. App. 499, 445 S.W.2d 942 (1969), and McGill v. State, 475 S.W.2d 223 (Tenn. Crim. App. 1971), the appellate court made its own contribution to the development of necessity as the pre-eminent element of self-defense. In *McClain* the defendant shot her husband between the eyes after he expressed his intention to beat her, but before he made any attempt to do so. The court of criminal appeals rejected the defendant's assertion of self-defense. Ruling that the killing was not necessary to save the defendant's life, the court pointed out that when the defendant aimed the loaded gun at her husband, "the odds shifted decidedly in her favor." 1 Tenn. Crim. App. at 505, 445 S.W.2d at 945. A similar statement was later made by the Tennessee Supreme Court in State v. McCray, 512 S.W.2d 263, 265 (Tenn. 1974). *See* text accompanying note 74 *infra*. The *McGill* case arose when the defendant, standing in the street, argued with the deceased, who was sitting in his car. In the heat of the quarrel, the defendant shattered the car window on the driver's side and shot the deceased twice with a handgun. As in *McClain* the appellate court

Seven years later, in *State v. McCray*,[72] the Tennessee Supreme Court reiterated the importance of necessity in the law of self-defense. In *McCray*, the defendant and the deceased were engaged in a poker game on the hood of a car. Angered by his repeated losses, the deceased accused the defendant of cheating. The latter chased the deceased around the car for several seconds before pulling out a revolver and fatally shooting him. In affirming defendant's conviction for murder, Justice Fones wrote: "[W]ell established in the law of excusable homicide is the requirement that the slayer must have employed all means in his power, consistent with his own safety, to avoid danger and avert the necessity of taking another's life."[73] Justice Fones explained the reason underlying the requirement of necessity in a successful plea of self-defense: "[A] person bent on combat . . . who suddenly finds himself looking into the barrel of a loaded pistol, must instantly lose all enthusiasm for the fray."[74] The principle derived from *McCray* and its predecessors that necessity is the cornerstone of self-defense, and the *Nelson* rule that a victim of unprovoked assault must retreat "to the wall" before responding with deadly force, run counter to the true man rule as stated in *Morrison*. Yet all three cases remain good law. The issue of the true man rule versus the duty of an assailed party to retreat to the wall before using deadly force against an aggressor remained unresolved following *McCray*.

No other Tennessee authority helped resolve this issue. For example, the Tennessee Pattern Jury Instructions and the Tennessee Code Annotated merely address the issue of self-defense in general terms.[75] The Pattern Instructions focus on the reasonableness of the force used, the fear actually created in the mind of the defendant, and the actions of the defendant taking into consideration all the circumstances of the case.[76] The Code

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found the element of necessity lacking. The court summarized the law of self-defense: "To excuse a homicide on the grounds of self-defense, . . . the killing [must be] done under an honest and well-founded belief that it is absolutely necessary . . . ." 475 S.W.2d at 226-27.

72. 512 S.W.2d 263 (Tenn. 1974).

73. *Id.* at 265 (citing 40 AM. JUR. 2d *Homicide* § 167 *et. seq.* (1968)).

74. 512 S.W.2d at 265.

75. *See* State v. Kennamore, 604 S.W.2d 856, 859 (Tenn. 1980).

76. Relevant portions of the Pattern Instructions are as follows:

merely states: "Resistance sufficient to prevent the offense may be made by the party about to be injured . . . to prevent an offense against his person."[77]

The Tennessee Supreme Court granted certiorari in *State v. Kennamore* in order to settle the issue of retreat.[78] In summary fashion the *Kennamore* court rejected the idea that the true man doctrine was the law in Tennessee: "the 'true man' doctrine, has never been adopted in previous decisions in this state, nor do we think it represents the better view."[79] The *Morrison* decision looms as an apparent contradiction to this rejection of the true man rule, but the *Kennamore* majority dealt with *Morrison* by simply limiting the case to its facts. While acknowledging the language in *Morrison* which suggests that the "true man" doctrine is "the law,"[80] the court pointed out that "[t]his language, however, was used in a case in which the accused was defending his residence or habitation, and the opinion must be read and construed in light of that fact situation."[81] The court

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> When a person is assaulted in such a way as to create in his mind a well-founded and reasonable belief that he is in imminent and actual danger of losing his life or suffering great bodily harm, he will be justified in using reasonable force to defend himself, even to the extent of killing another human being. The danger that creates the belief of imminent death or great bodily harm must either be real or honestly believed to be so at the time, and such belief of danger must be founded on reasonable grounds. . . .
>
> In determining whether the defendant's use of force in defending himself was reasonable, you may consider not only his actual use of force but also all the facts and circumstances surrounding and leading up to it.

T.P.I.-CRIM. 36.02, at 331 (1978).

77. TENN. CODE ANN. § 38-102 (1975). The statute in its entirety reads: "Resistance sufficient to prevent the offense may be made by the party about to be injured: (1) To prevent an offense against his person. (2) To prevent an illegal attempt by force to take or injure property in his lawful possession."

78. 604 S.W.2d 856 (Tenn. 1980). "The Court granted certiorari primarily to consider whether the so-called 'true man' rule of self-defense should be adopted in this state." *Id.* at 857.

79. *Id.* at 858-59. The court did not elaborate on its opinion that the true man doctrine is not the better view. *See* notes 96-107 *infra* and accompanying text.

80. 212 Tenn. at 641, 371 S.W.2d at 444.

81. 604 S.W.2d at 859; *see* notes 61-62 *supra* and accompanying text. Not

concluded that the true man rule does not obtain in Tennessee, except in defense of one's home or habitation.[82]

After its discussion of *Morrison*, the Tennessee Supreme Court turned to *McCray*[83] to support its decision that the true

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all judges and legal scholars have agreed with the court's interpretation of *Morrison*. *See* 604 S.W.2d at 860 (Henry, J., dissenting). In the court of criminal appeals' opinion in *Kennamore*, Judge Byers, in his dissent, forcefully urged: "[*Morrison*] does not limit the application of the retreat doctrine to the home. It adopts the broad general proposition that one who is where he has a lawful right to be is under no duty to retreat . . . .' " Kennamore v. State, No. 1, Hardeman Criminal, dissenting op. at 3 (Tenn. Crim. App. Feb. 15, 1979) (Byers, J., dissenting). Another legal scholar wrote that "[*Morrison*] classified Tennessee with the majority 'no-retreat rule' jurisdictions as to self-defense generally and does not limit application of the no-retreat rule to defense of the habitation." Kendrick, *Criminal Law and Procedure—1963 Tennessee Survey*, 17 VAND. L. REV. 977, 979 (1964). The majority in *Kennamore* did not discuss or even acknowledge these opposing views.

82. 604 S.W.2d at 859. Tennessee is no exception to the universally held rule that a victim of unprovoked assault is under no duty to retreat when attacked at or in his own home. *See* note 48 *supra*. Tennessee first recognized this rule in Fitzgerald v. State, 1 Shannon's Cas. 505 (Tenn. 1875), in which the defendant, upon hearing that his assailant was on his way to the defendant's house to assault him, armed himself and waited at his gate for the aggressor. The court ruled that a person assaulted in his own home is not obliged to retreat, but may advance and choose his position from which to meet and repel an attack. *Id.* at 510. In 1896 the Tennessee Supreme Court again addressed the issue of defense of habitation in State v. Foutch, 96 Tenn. 242, 34 S.W. 1 (1896). The court stated the general rule that

> [A person] has a right . . . to protect his own house and family . . . . If, while engaged in this duty, he is beset or menaced, he is entitled not only to the right of self-defense, but to use such force as may be necessary to protect himself and family, and eject the intruder. He is not required to retreat or escape from his own premises, but may stand his ground, and is not required to give back before he can plead self-defense.

*Id.* at 247, 34 S.W. at 2; *accord*, Wooten v. State, 171 Tenn. 362, 103 S.W.2d 324 (1937) (killing to prevent intruder with felonious intent from entering home is justified); Hudgens v. State, 166 Tenn. 231, 60 S.W.2d 153 (1933) (for killing in defense of habitation to be justified in Tennessee there must be danger to the killer or some occupant of the habitation). *See also* Drake v. State, 576 S.W.2d 593 (Tenn. Crim. App. 1978); Lay v. State, 501 S.W.2d 820 (Tenn. Crim. App. 1973); McClain v. State, 1 Tenn. Crim. App. 499, 445 S.W.2d 942 (1969); Fox v. State, 1 Tenn. Crim. App. 308, 441 S.W.2d 491 (1969).

83. 512 S.W.2d 263 (Tenn. 1974).

man rule has never been adopted in Tennessee. The part of *McCray* on which the *Kennamore* court focused was the proposition that "one can go no further than is reasonably necessary in defense of his person."[84] The *McCray* court had garnered this proposition from *May*[85] and had used it to support its own statement that "the law of excusable homicide [requires] that the slayer [use] all means in his power, consistent with his own safety, to . . . avert the necessity of taking another's life."[86] By singling out these statements from *McCray*, the court identified the heart of the *Rippy-May-McCray* line of cases. By its reference to *McCray* and "earlier authorities,"[87] the *Kennamore* court implied that the principle of necessity requires that a victim of unprovoked assault retreat as far as possible before using deadly force against an aggressor, because only with such a showing can the defendant establish necessity.[88]

Turning to the Tennessee Pattern Jury Instructions,[89] the *Kennamore* court found no specific authority either for or against the true man rule.[90] As the court pointed out, the Pattern Instructions treat self-defense in general terms, emphasiz-

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84. 604 S.W.2d at 859 (citing State v. McCray, 512 S.W.2d 263, 265 (Tenn. 1974) (quoting May v. State, 220 Tenn. 541, 544, 420 S.W.2d 647, 649 (1967))).

85. 512 S.W.2d at 265.

86. State v. McCray, 512 S.W.2d 263, 265 (Tenn. 1974).

87. 604 S.W.2d at 859.

88. Although the court did not refer to *Nelson v. State*, the *Kennamore* court clearly agreed with the statement that the defendant "must give back to the wall." Nelson v. State, 32 Tenn. 169, 181, 2 Swan 237, 255 (1852); *see* text accompanying note 53 *supra*. The majority of the court of criminal appeals in *Kennamore*, however, discussed *Nelson* at length. In fact, it was primarily because of its finding that "*Nelson* remains good law" that the court rejected the defendant's assertion of the true man rule. Kennamore v. State, No. 1, Hardeman Criminal, slip op. at 8 (Tenn. Crim. App. Feb. 15, 1979).

89. T.P.I.-CRIM. 36.02 (1978); *see* note 76 *supra*.

90. 604 S.W.2d at 859. The Pattern Instructions deal with the subject of retreat in only one situation: where the accused is the initial aggressor, *see* T.P.I.-CRIM. 36.02, at 333-34 (1978), which was, as the court pointed out, "not involved here." 604 S.W.2d at 859. The Pattern Instructions do, however, contain language similar to that found in *Rippy*, *McGill*, and *McCray* to the effect that the killing "must be done under an honest and well-founded belief that such [act was] absolutely necessary in . . . self-defense." T.P.I.-CRIM. 36.02, at 331 (1978).

ing the "reasonableness of the force used, of the apprehension created and of the conduct of the accused under all the facts and circumstances."[91] The court's conclusion that the true man rule is not the law in Tennessee is supported by the Pattern Instructions through the following reasoning: accepting the *May* rule that a person can go no further than is reasonably necessary in the defense of his person, and accepting the proposition that, in order to harmonize *May* and the Pattern Instructions, unreasonable force equals unnecessary force, then the use of deadly force in self-defense is unreasonable if the defendant had available to him an avenue of retreat.

Having soundly rejected the true man rule, the court returned to *McCray* to fashion the correct rule in Tennessee on the issue of retreat in self-defense. The court found implicit in *McCray* the notion that "the availability of an avenue of retreat and the practicality of using it . . . are factors . . . to be considered in determining whether an accused was justified in taking the life of another in self-defense."[92] This implication arises from *McCray* by construing the *May* rule, repeated in *McCray*, that "one cannot go further than is reasonably necessary in defense of his person,"[93] with the *McCray* rule that "[one] must [employ] all means in his power, consistent with his own safety,

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91. 604 S.W.2d at 859 (footnote omitted); *see* note 76 *supra*. In a footnote the court referred to Tennessee Code Annotated § 38-102. 604 S.W.2d at 859 n.1. Like the Pattern Instructions, this section is authority neither for nor against the true man rule. *See* note 77 *supra*.

92. 604 S.W.2d at 859. The court pointed out that the "availability of an avenue of retreat and the practicality of using it" are only two of the many factors "to be taken into account in any given case." *Id.* Justice Henry, in the dissenting opinion, added to the majority opinion by listing the following factors that the jury should consider in determining the practicality of the avenue of retreat: (1) the safety and effectiveness of the avenue (2) time to use the avenue, (3) the defendant's physical and mental condition, (4) the circumstances as they reasonably appeared to the defendant, and (5) the whole transaction taken as a unified series of events. *Id.* at 862 (Henry, J., dissenting). "Moreover," said Justice Henry, "the jury should [be] instructed that . . . failure to retreat is a circumstance to be considered, along with all others, . . . [and] is not [a] categorical proof of guilt." *Id.* (Henry, J., dissenting).

93. May v. State, 220 Tenn. 541, 544, 420 S.W.2d 647, 649 (1967), *quoted in* State v. McCray, 512 S.W.2d 263, 265 (Tenn. 1974).

to . . . avert the necessity of taking another's life." [94] Taken together, these statements mandate that if a practical and safe avenue of retreat is available to the victim of an unprovoked assault, it must be utilized. As a result of this interpretation of *McCray*, the *Kennamore* court fashioned the following statement of the law of retreat in Tennessee:

> "The law of excusable homicide requires that the defendant must have employed all means reasonably in his power, consistent with his own safety, to avoid danger and avert the necessity of taking another's life. This requirement includes the duty to retreat, if, and, to the extent, that it can be done in safety."[95]

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94. 512 S.W.2d at 265 (citing 40 AM. JUR. 2d *Homicide* § 167 *et seq.* (1968)).

95. State v. McCray, 512 S.W.2d 263, 265 (Tenn. 1974). Although the court made the effort to formulate the correct law in Tennessee on the subject of retreat in self-defense, the court ruled that "in the absence of a proper special request" the trial court did not act impermissibly in refusing to charge the jury on the law of retreat. *Id.* at 859. The court gave three reasons for its ruling. First, the instructions given, which were taken almost verbatim from *Rippy*, *see* text accompanying notes 54-58 *supra*, were sufficient to enable the jury to determine whether the defendant was justified in taking the life of the assailant: "As given," reasoned the court, "[the] charge permitted the jury to consider all of the circumstances of the case, including . . . the necessity, or lack thereof, for the use of deadly force in self-defense," 604 S.W.2d at 859. Second, the subject of retreat was not an issue in the case: "Under [defendant's] version of the facts, there was no occasion to retreat nor any reason to consider the subject . . . , [and] [u]nder the testimony of the [third party], [defendant] had . . . effectively disabled [the deceased] and thereupon . . . needlessly fired the fatal shot." *Id.* "A correct instruction on the law of retreat would not have been beneficial to [defendant], and its omission was, therefore, not reversible error." *Id.* at 860.

In his dissenting opinion, Justice Henry strongly disagreed, giving three reasons to support his view. First, retreat was indeed an issue in the case. Justice Henry pointed out that the defendant's plea was not merely a general assertion of self-defense, but was rather an assertion that he "acted with split-second precision, without time for deliberate thought or reflection" in order to save his life. *Id.* (Henry, J., dissenting). Justice Henry discussed the facts, placing special emphasis on defendant's statement to the effect that he was "out of [his] head," that he "thought [he] was dying and all [he] was doing was trying to protect [himself]," and that "[e]verything happened real fast." *Id.* at 861-62 (Henry, J., dissenting). Second, since the subject of retreat was an issue in the case, defendant had an "automatic right" to have the trial judge charge the

The court's ruling on the issue of retreat is a welcome clarification of the Tennessee law of self-defense. Unfortunately, however, the court failed to explain the policy reasons underlying its decision. Other courts that have addressed the policy behind the issue of retreat have phrased the problem in terms of the dignity of the innocent victim of assault versus the sacredness of human life.[96] Those courts that favor the true man rule have pointed out that a killing in self-defense is committed in the midst of passion and fear, and that a person whose life is threatened by a deadly assault will instinctively strike back against the aggressor, even if presented with a safe avenue of retreat. The argument continues that criminal sanctions should not be imposed on one who has merely acted in accordance with his natural impulses.[97] Furthermore, the proponents of the true man rule stress the importance of honor and dignity in modern society. It is urged that honor is "usually considered more important than life itself,"[98] and that the law of self-defense should reflect this view.[99]

Those who reject the true man rule are not impressed by notions of honor and dignity. One writer has suggested that these notions of honor and dignity are also responsible for duels, lynchings, and war;[100] and just as society is now outraged by duels and lynchings and appalled by war, society should likewise

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jury on the law of retreat. *Id.* at 860 (Henry, J., dissenting). To support this position Justice Henry referred to State v. Thompson, 519 S.W.2d 789 (Tenn. 1975), and article VI, § 9 of the Tennessee Constitution. This part of the Tennesee Constitution is the basis of a trial judge's duty to "declare the law," and *State v. Thompson* declared: "The general principle in criminal cases is that there is a duty upon the trial judge to give a *complete* charge of the law applicable to the facts of the case, and the defendant has a right to have every issue of fact . . . submitted to the jury upon proper instructions . . . ." 519 S.W.2d 789, 792 (Tenn. 1975). Third, Justice Henry reasoned, "Because *Morrison* . . . is the only Tennessee case on the retreat issue, and further because it adheres to the majority rule in this country, the trial judge either should have given the requested charge *or* should have given a full and correct charge on the duty to retreat." 604 S.W.2d at 861 (Henry, J., dissenting).

96. *See* notes 37-40 *supra* and accompanying text.

97. R. MORELAND, *supra* note 18, at 265.

98. *Id.*

99. *Id.*

100. Beale, *supra* note 17, at 581.

be opposed to the killing of another "to avoid a stain on one's honor."[101] Moreover, those opposed to the true man rule point out that the law provides for the redress of a violation of one's rights, and thus, private citizens are not allowed to punish wrongdoers.[102] They argue that it is essential to an orderly society for the administration of justice to be left to the duly constituted officials.[103] Finally, it is urged that although one might well regret the embarrassment of turning one's back on an aggressor, a truly honorable person would more deeply mourn that he had unnecessarily taken the life of another human being.[104]

Unlike the Tennessee Supreme Court, the Tennessee Court of Criminal Appeals in *Kennamore* did address the policy considerations underlying its rejection of the true man rule. The appellate court forcefully urged that "[t]he 'true man doctrine' places barbaric emphasis on manliness unleavened by a proper sensitivity to the value of human life."[105] Judge Byers, however, took a contrary position in his dissenting opinion:

> I would hold [that] a person who is where he has the lawful right to be is not required to retreat from the wrongful attack of another . . . . I do not think the law should throw a mantle of protection over a wrongdoer who exhibits no regard for the life of the person he assaults so that the wrongdoer's life will be preserved at the cost of the rights of the law abiding citizen.[106]

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101. *Id.*

102. *Id.*; R. MORELAND, *supra* note 18, at 264 (citing Viliborghi v. State, 45 Ariz. 275, 291, 43 P.2d 210, 217 (1935)).

103. R. MORELAND, *supra* note 18, at 264.

104. Beale, *supra* note 17, at 581.

105. Kennamore v. State, No. 1, Hardeman Criminal, slip op. at 8 (Tenn. Crim. App. Feb. 15, 1979). The court of criminal appeals in *Kennamore*, like the Tennessee Supreme Court, held that the true man rule is not the law in Tennessee. The court found that Nelson v. State, 32 Tenn. 169, 2 Swan 237 (1852), rather than Morrison v. State, 212 Tenn. 633, 371 S.W.2d 41 (1963), was controlling on the issue of retreat in self-defense. Commenting on *Nelson*, the court stated that "the linchpin of self-defense is the necessity to kill at the time the act is carried out. . . . The [*Nelson*] rule [of retreat to the wall] does not permit the taking of human life to prove one to be a 'true man' nor to preserve one's pride or vindicate a wrong." Kennamore v. State, No. 1, Hardeman Criminal, slip op. at 7-8 (Tenn. Crim. App. Feb. 15, 1979).

106. Kennamore v. State, No. 1, Hardeman Criminal, dissenting op. at 5

An understanding of these competing considerations surrounding the issue of retreat is essential to an informed decision on whether the true man rule should be a part of the law of self-defense. Although brevity and conciseness in judicial opinions are to be encouraged, the public would have benefited from an explanation of why the Tennessee Supreme Court felt that the true man rule is not "the better view."[107]

Nevertheless, for the first time the Tennessee Supreme Court has clarified the law of retreat in self-defense. Although the element of necessity had always been the "linchpin of self-defense"[108] in Tennessee, it had not, until *Kennamore,* been discussed in relation to the issue of retreat. With a background of such cases as *Nelson, Rippy, May,* and *McCray,* the court's mandate was clear. To such key phrases in the Tennessee law of self-defense as "well-founded belief . . . of absolute necessity,"[109] "no further than is reasonably necessary,"[110] and "self-defense . . . ends where necessity ends,"[111] the court added one more: "the law of excusable homicide requires . . . retreat."[112] The court has left no room for further conjecture on the subject of retreat: unless attacked in one's home or habitation, the victim of an unprovoked assault has a duty to retreat to avert the necessity of taking the aggressor's life, if an avenue of retreat is available, and if its utilization is practical and safe.

The *Kennamore* court correctly interpreted the Tennessee case law in stating that the true man rule had never been adopted in this state.[113] *Rippy, May,* and *McCray* made it abundantly clear that a successful plea of self-defense must be founded on necessity. It can hardly be argued that a person has killed out of necessity if he has refused to take advantage of an available and safe avenue of retreat. Although *Morrison* appeared to have adopted the true man rule, the *Kennamore* court

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(Tenn. Crim. App. Feb. 15, 1979) (Byers, J., dissenting).

107. 604 S.W.2d at 858-59; *see* note 79 *supra* and accompanying text.

108. Kennamore v. State, No. 1, Hardeman Criminal, slip op. at 7 (Tenn. Crim. App. Feb. 15, 1979); *see* note 105 *supra.*

109. Rippy v. State, 39 Tenn. 136, 138, 2 Head 217, 220 (1858).

110. May v. State, 220 Tenn. 541, 544, 420 S.W.2d 647, 649 (1967).

111. *Id.,* 420 S.W.2d at 649.

112. 604 S.W.2d at 860.

113. *See* text accompanying note 79 *supra.*

was justified in limiting *Morrison* to its facts.[114] Significantly, *Morrison* offered no case-law authority for its statement that the true man rule is "the law" in Tennessee.[115] Moreover, as many lawyers and judges have contended,[116] this portion of the *Morrison* opinion is dictum. The *Morrison* court effectively decided the case by ruling on the rights of a person assaulted in his home; therefore, the court's discussion of the true man rule was merely incidental to the resolution of the case.[117]

Whether a victim of an unprovoked assault must retreat "to the wall" before responding with deadly force has been the subject of considerable disagreement. At early common law such a retreat was required, but some courts, emphasizing the preservation of the dignity of the individual, have adopted the true man rule.[118] The Tennessee Supreme Court acted wisely in rejecting the true man rule except in the defense of one's habitation. A "true man" should know his own merit without seeking to vindicate his honor in a bloody conflict. The laws of a civilized society should promote harmony among its members. *State v. Kennamore* is in step with that purpose.

PHILIP E. MISCHKE

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114. *See* text accompanying note 81 *supra*.

115. Morrison v. State, 212 Tenn. 633, 641, 371 S.W.2d 441, 444 (1963); *see* notes 60-66 *supra* and accompanying text.

116. *See* 604 S.W.2d at 861 (Henry, J., dissenting).

117. *See* notes 61-62 *supra* and accompanying text.

118. *See* notes 37-39 & 41-42 *supra* and accompanying text.

# Evidence—Attorney-Client Privilege—Rejection of the Corporate Control-Group Test

*Upjohn Co. v. United States*, 449 U.S. 383 (1981)

Defendant Upjohn Company, a drug manufacturer and international distributor, conducted an internal investigation of certain payments that were being made to foreign officials by the company's subsidiaries for the purpose of securing government business. At the conclusion of the investigation, defendant voluntarily submitted a preliminary report[1] to the Securities and Exchange Commission and the Internal Revenue Service. The IRS immediately began its own investigation to determine any tax consequences to defendant from the payments. The IRS issued a summons, demanding production of all questionnaires and notes of interviews that had been conducted by defendant's counsel with officers and employees of defendant. Defendant claimed the protection of the attorney-client privilege and refused to produce the documents.[2] The IRS sought enforcement

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1. Securities and Exchange Commission, Form 8-K. *See* 4 FED. SEC. L. REP. (CCH) ¶ 31,001.

2. Defendant also raised the work-product doctrine embodied in Federal Rule of Civil Procedure 26(b)(3) as a defense to production of the documents. The Rule provides for discovery of documents and other tangible items prepared by an attorney in anticipation of litigation only if the party requesting discovery shows a substantial need and an inability to obtain them by other means without hardship. The mental impressions, opinions, or legal theories of the attorney are protected from disclosure. *Id.*

The work-product doctrine is distinguished from the attorney-client privilege in that the latter applies only to communications between counsel and client. The work-product doctrine is broader in that it affords protection to lists, schedules, legal opinions, and written records of statements made to counsel by witnesses prepared in anticipation of litigation. City of Philadelphia v. Westinghouse Elec. Corp., 210 F. Supp. 483, 485 (E.D. Pa. 1962); *see* notes 22-39 *infra* and accompanying text. The work-product doctrine, however, is subject to the limited discretion of the trial judge. FED. R. CIV. P. 26(b). The attorney-client privilege, on the other hand, is an absolute bar against discovery.

of the summons in federal court under 26 U.S.C. sections 7402(b) and 7604(a).[3] The district court adopted the magistrate's conclusion that defendant had waived the attorney-client privilege and that, therefore, the summons should be enforced.[4] On appeal, the Sixth Circuit Court of Appeals rejected the magistrate's finding of a waiver and applied the privilege to the communications made by defendant's officers who were members of the "control group."[5] The court found the control group to include the officers who had the authority to act on the attorney's advice. The court of appeals did not apply the privilege to communications by employees outside the control group, in the belief that such communications were not the client's.[6] On appeal

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This Note does not deal with the work-product doctrine, which remained a viable issue at each level of the appeal. The district court adopted the magistrate's finding that a showing of necessity sufficient to overcome the work-product doctrine was made. Upjohn Co. v. United States, 449 U.S. 383, 399 (1981). The Sixth Circuit, on appeal, dismissed the work-product issue in a footnote. United States v. Upjohn Co., 600 F.2d 1223, 1228 n.13 (6th Cir. 1979), *rev'd*, 449 U.S. 383 (1981). The court concluded that the work-product doctrine did not apply to administrative summonses issued under 26 U.S.C. § 7602 (1976). *Id.*

In the Supreme Court, the United States, as plaintiff, conceded that the work-product doctrine does apply to administrative summonses. The Court agreed. 449 U.S. at 397. The Court noted that "some courts have concluded that *no* showing of necessity can overcome" the protection of the work-product doctrine. *Id.* at 399 (emphasis in original). *See, e.g., In re* Grand Jury Proceedings, 473 F.2d 840, 849 (8th Cir. 1973). The Court expressly declined to decide the issue of necessity. 449 U.S. at 401. The Court distinguished the documents sought in this case as based on oral statements. Therefore, to the extent they were not protected by the attorney-client privilege, "they reveal the attorneys' mental process in evaluating the communications." *Id.* The Court interpreted Federal Rule of Civil Procedure 26 and Hickman v. Taylor, 329 U.S. 495 (1947), *see* notes 15-17 *infra* and accompanying text, to require a showing greater than "substantial need." 449 U.S. at 401. The Court remanded for further consideration of the work-product defense. *Id.* at 402.

3. 26 U.S.C. § 7402(b) (1976) (grant to district court of jurisdiction to enforce IRS summons to testify, to produce books, or to provide other data); 26 U.S.C. § 7604(a) (1976) (grant to district court of jurisdiction to enforce a summons).

4. Upjohn Co. v. United States, 449 U.S. 383, 388 (1981).

5. 600 F.2d 1223 (6th Cir. 1979), *rev'd*, 449 U.S. 383 (1981). *See* notes 22-30 *infra* and accompanying text.

6. 600 F.2d at 1225.

to the United States Supreme Court, *held*, reversed. The public policies underlying the attorney-client privilege in the corporate context require broader protection of employee communications with counsel than is possible under the "control-group" test. *Upjohn Co. v. United States*, 449 U.S. 383 (1981).

In the past, the courts of appeals were in conflict regarding the extent of the attorney-client privilege in the corporate context.[7] The application of the privilege to the corporate client required the determination of which employees could speak to counsel on behalf of the firm. No standard had been prescribed by the Supreme Court to govern this inquiry. Several circuits pursued the "control-group" approach.[8] Under this test, the only communications protected were those made by employees who had the authority to respond to legal advice. Other circuits either applied a broader "subject-matter" test, under which communications whose subject matter was within the employee's scope of employment were protected, or avoided the issue altogether.[9] In light of these discordant approaches, attorneys found

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7. *See* text accompanying notes 40 & 41 *infra*.

8. Courts in the following cases have adopted the control-group test: Natta v. Hogan, 392 F.2d 686 (10th Cir. 1968) (dicta); Virginia Elec. & Power Co. v. Sun Shipbuilding & Dry Dock Co., 68 F.R.D. 397, 400 (E.D. Va. 1975); Honeywell, Inc. v. Piper Aviation Corp., 50 F.R.D. 117 (M.D. Pa. 1970); Garrison v. General Motors Corp., 213 F. Supp. 515 (S.D. Cal. 1963); City of Philadelphia v. Westinghouse Elec. Corp., 210 F. Supp. 483 (E.D. Pa.) (on rehearing), *prohibition and mandamus denied sub nom.* General Elec. Co. v. Kirkpatrick, 312 F.2d 742 (3d Cir. 1962), *cert. denied*, 372 U.S. 943 (1963).

9. Courts in the following cases have adopted some variation of the subject-matter test: Duplan v. Deering Milliken, Inc., 522 F.2d 809 (8th Cir. 1978); Hercules, Inc. v. Exxon Corp., 434 F. Supp. 136 (D. Del. 1977); Burlington Indus., Inc. v. Exxon Corp., 65 F.R.D. 26 (D. Md. 1974); Xerox Corp. v. International Bus. Mach. Corp., 64 F.R.D. 367 (S.D.N.Y. 1974); Sylgab Steel & Wire Corp. v. Imoco-Gateway Corp., 62 F.R.D. 454 (N.D. Ill. 1974), *aff'd mem.*, 534 F.2d 330 (7th Cir. 1976); *In re* Ampicillin Antitrust Litigation, 81 F.R.D. 377, 387 (D.D.C. 1978); Hasso v. Retail Credit Co., 58 F.R.D. 425 (E.D. Pa. 1973); Love v. General Motors Corp., 43 F.R.D. 508 (S.D.N.Y. 1967).

Courts in the following cases have avoided resolution of the issue: Mead Data Control, Inc. v. Department of Air Force, 566 F.2d 242, 253 n.24 (D.C. Cir. 1977); *In re* Grand Jury Subpoena, 81 F.R.D. 691 (S.D.N.Y.), *rev'd*, 599 F.2d 504 (2d Cir. 1979); Perringnon v. Bergen Brunswig Corp., 77 F.R.D. 455, 459 (N.D. Cal. 1978); SEC v. Canadian Javelin, Ltd., 451 F. Supp. 594, 598-99 (D.D.C. 1978); FTC v. Lukens Steel Co., 444 F. Supp. 803, 803 n.4 (D.D.C.

the confidentiality of their communications jeopardized. Thus, the Supreme Court in *Upjohn* was faced with the question whether the control-group test adequately served the important public policies underlying the attorney-client privilege.

The attorney-client privilege is the oldest privilege of confidential communications known to the common law.[10] The privilege has been based on the need to encourage full disclosure by the client, so that counsel will be able to give sound, effective advice.[11] Although the privilege has been fundamentally personal in nature,[12] the Supreme Court has assumed that it applied to corporations when they were parties as well.[13] Unlike an individual litigant, however, a corporation can speak only through its agents.[14] This unique status compelled the courts to determine which employees personified the corporation for the purpose of invoking the privilege.

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1977); Attorney General v. Covington & Burlington, 430 F. Supp. 1117, 1121 (D.D.C. 1977).

10. 8 J. WIGMORE, EVIDENCE § 2290, at 542 (McNaughton rev. 1961).

11. Hunt v. Blackburn, 128 U.S. 464 (1888). Chief Justice Fuller stated that the privilege is "founded upon the necessity, in the interest and administration of justice, of the aid of persons having knowledge of the law and skilled in its practice, which assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure." *Id.* at 470.

12. 8 J. WIGMORE, *supra* note 10, § 2290, at 544.

13. United States v. Louisville & N.R. Co., 236 U.S. 318, 336 (1915). The issue whether the attorney-client privilege applied to corporate clients was not squarely before the Court. The Court held that discovery, under the provisions of the Act of June 29, 1906, ch. 3591, § 7, 34 Stat. 584 (amending Act to Regulate Commerce, ch. 104, § 20, 24 Stat. 379 (1887)), did not include the correspondence of employees. Such correspondence included intra-corporate communications as well as disclosures to corporate counsel.

For a discussion of the federal courts' failure to hold expressly that the attorney-client privilege should apply to corporations, see Radiant Burners, Inc. v. American Gas Ass'n, 207 F. Supp. 771 (N.D. Ill. 1962). In *Radiant Burners* the court held the privilege inapplicable, reasoning that the secrecy needed for a confidential communication could not exist with a corporate client. The Seventh Circuit Court of Appeals reversed. Radiant Burners, Inc. v. American Gas Ass'n, 320 F.2d 314 (7th Cir.) (en banc), *cert. denied*, 375 U.S. 929 (1963). The court of appeals reasoned that in *Louisville & N.R. Co.* "the Supreme Court was not concerned with the corporate or non-corporate identity of the client." 320 F.2d at 320.

14. H. HENN, LAW OF CORPORATIONS § 80, at 112 (2d ed. 1970).

This issue was addressed in 1947 when the Supreme Court decided the landmark case of *Hickman v. Taylor*.[15] During a tugboat accident, surviving crewmen witnessed the deaths of other crew members. Families of the deceased crewmen brought suit against the tugboat company and its owners. The plaintiff families sought discovery of the recorded statements that counsel for the defendant company had taken from the surviving crew members. The Supreme Court disagreed with the holding of the Third Circuit that the attorney-client privilege applied to statements of these lower level employees.[16] Justice Murphy, speaking for the Court, explained:

> [T]he memoranda, statements and mental impressions in issue in this case fall outside the scope of the attorney-client privilege and hence are not protected from discovery on that basis. . . . For present purposes, it suffices to note that the protective cloak of this privilege does not extend to information which an attorney secures from a *witness* while acting for his client in anticipation of litigation.[17]

Thus, the *Hickman* decision established that the attorney-client privilege would not apply unless the communications to corporate counsel concerned the scope of the employee's employment.

The federal courts have not agreed on the scope of the privilege set forth in *Hickman*. In *United States v. United Shoe Machinery Corp.*[18] the defendant in a civil antitrust action objected to the introduction of nearly 800 exhibits on the basis of the attorney-client privilege.[19] Judge Wyzanski stated that "the privilege should be strictly construed in accordance with its ob-

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15. 329 U.S. 495 (1947). Although the Court dealt primarily with the work-product doctrine, *see* note 2 *supra*, *Hickman v. Taylor* is also important for the Court's treatment of the attorney-client privilege.

16. 153 F.2d 212 (3d Cir. 1945) (en banc). The Court affirmed the decision of the Third Circuit on the basis of the work-product doctrine. *See* note 2 *supra*.

17. 329 U.S. at 508 (emphasis added).

18. 89 F. Supp. 357 (D. Mass. 1950).

19. *Id.* at 357. The court protected communications that met its three-part test: (1) The document was prepared by or for counsel; (2) the purpose of the document was to solicit or give legal advice, and this purpose appeared on the face of the document; and (3) the documents were confidential and were not disclosed to third parties. *Id.*

ject,"[20] yet held that the privilege applied whenever information was "furnished [to counsel] by an officer or employee of the [corporation] in confidence and without the presence of third persons."[21]

The Third Circuit approved a more narrow view of the demands of *Hickman*. In *City of Philadelphia v. Westinghouse Electric Corp.*[22] the district court devised the so-called "control-group" test. The plaintiff in *Westinghouse* moved for penalties against the defendant corporation for its refusal to answer certain interrogatories. The interrogatories included requests for statements which had been made by some employees to corporate counsel concerning allegedly improper meetings with competitors.[23] Judge Kirkpatrick explained that if an employee

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20. *Id.* at 358 (citing People's Bank v. Brown, 112 F. 652 (3d Cir. 1902)).

21. *Id.* at 359. Judge Wyzanski excluded from this broad privilege the corporation's patent lawyers, who functioned primarily as business, rather than legal, advisers. *Id.* at 360-61. For the purpose of the privilege, the court included in the definition of "client" the parent corporation and "all its subsidiaries and affiliates considered collectively." *Id.* at 359. The court noted that "there was no attempt [by counsel] to regard one particular corporation as 'the client.'" *Id.* Focusing primarily on the "business" or "legal" nature of advice sought from counsel, the court laid down a four-pronged test to govern the application of the privilege:

> The privilege applies only if (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.

*Id.* at 358-59.

22. 210 F. Supp. 483 (E.D. Pa. 1962) (on rehearing), *prohibition and mandamus denied sub nom.* General Elec. Co. v. Kirkpatrick, 312 F.2d 742 (3d Cir. 1962), *cert. denied*, 372 U.S. 943 (1963). The district court upheld the claim of privilege asserted on behalf of the corporation, *id.* at 484, but dismissed the claim that the privilege was personal to the employees, *id.* at 486. The communications were confidential only on the condition that they did not reveal a violation of company policy; counsel was obligated to report any violations to upper management. *Id.* at 485-86.

23. On the first hearing the court stressed that the privilege applied to

seeking advice is considered to have an identity analogous to the corporation, then he or she is not a "witness" under the *Hickman* rule.[24] He criticized Judge Wyzanski, however, for applying that precept "to an extremely broad class of employees"[25] in *United Shoe*. Judge Kirkpatrick felt that such a rule was "in conflict with Hickman v. Taylor which very clearly show[ed] the distinction between statements by employees of the client and statements by the client itself."[26] He articulated the following standard:

> [T]he most satisfactory solution . . . is that if the employee making the communication, of whatever rank he may be, is in a position to *control* or even to take a substantial part in a decision about any action which the corporation may take upon the advice of the attorney, or if he is an authorized member of a . . . group which has that authority, then . . . he [personifies] the corporation when he makes his disclosure to the lawyer and the privilege would apply.[27]

Judge Kirkpatrick further defined the control-group test as requiring "actual authority," not "apparent authority."[28] This focus required a determination of the level of decision-making in each particular instance.[29] For example, the head of the claims

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communications only, not to facts. City of Philadelphia v. Westinghouse Elec. Corp., 205 F. Supp. 830, 830 (E.D. Pa.), *aff'd on rehearing*, 210 F. Supp. 483 (E.D. Pa. 1962), *prohibition and mandamus denied sub nom.* General Elec. Co. v. Kirkpatrick, 312 F.2d 742 (3d Cir. 1962), *cert. denied*, 372 U.S. 943 (1963).

24. 210 F. Supp. at 485.

25. *Id.*

26. *Id.*

27. *Id.* (emphasis added).

28. *Id.*

29. *See, e.g.*, State v. Circuit Court, 34 Wis. 2d 559, 580, 150 N.W.2d 387, 400 (1967) ("No application of the attorney-client privilege can be made without concrete reference to the specific issues and the particular set of facts in which the privilege is sought to be invoked."). In adopting the control-group test, Judge Kirkpatrick expressly refused to consider whether the subject of the communication concerned acts within the scope of the agent's employment, 210 F. Supp. at 485, which is one of the principal elements of the subject-matter test. *See* notes 30-38 *infra* and accompanying text.

department, who has authority to settle claims, would be protected in his correspondence with counsel.[30]

The Seventh Circuit, in *Harper & Row Publishers, Inc. v. Decker*,[31] departed from the control-group approach and moved toward the criterion that had been rejected by Judge Kirkpatrick in *Westinghouse*.[32] In this antitrust action for alleged price-fixing of children's edition library books, the plaintiffs sought to inspect and copy certain memoranda that had been prepared by the defendant's counsel during debriefing sessions with company employees. The court of appeals expanded the district court's application of the attorney-client privilege.[33] The court held that

> an employee of a corporation, though not a member of its control group, is sufficiently identified with the corporation so that his communication to the corporation's attorney is privileged where the employee makes the communication at the direction of his superiors in the corporation and where the *subject matter* upon which the attorney's advice is sought by the corporation and dealt with in his communication is the performance by the employee of the duties of his employment.[34]

Some authors have labeled this approach the "subject-matter" test.[35] The court applied the new standard to corporate counsel's memoranda prepared during sessions with employees who were directed to make their statements in confidence. The court stated, "[I]t was not demonstrated that any of these employees was in a position to control or take a substantial part in a decision about action which the corporation may take upon the advice of the attorney, nor that he was a member of a group having

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30. 210 F. Supp. at 485.

31. 423 F.2d 487 (7th Cir. 1970) (per curiam), *aff'd by an equally divided Court*, 400 U.S. 348 (1971). Forty separate actions were consolidated in the district court for discovery and pre-trial proceedings under 28 U.S.C. § 1407 (1968). *Id.* at 489-90. The court considered only the communications of those employees who were employed by the defendant corporations at the time of the interviews. *Id.* at 490-91. *See* Baxter Travenol Labs., Inc. v. Lemay, No. C-3-80-32 (S.D. Ohio 1981).

32. *See* note 26 *supra*.

33. 423 F.2d at 491. The district court had applied the control-group test. *Id.*

34. *Id.* at 491-92 (emphasis added).

35. *See, e.g.*, 4 J. CORP. L. 226 (1978).

that authority."[36] Thus, the employees were not within the control-group, but neither were they mere "bystander witnesses," as were the employees in *Hickman*.[37] Because the information sought concerned the employees' duties, the court held that the employees' communications were protected by the attorney-client privilege.[38] The Seventh Circuit's holding was affirmed without opinion by an equally divided Supreme Court.[39]

With no clear directive from the Supreme Court, the scope of the corporate attorney-client privilege remained ambiguous. In 1978 the Eighth Circuit summarized this divided state of the law in *Diversified Industries, Inc. v. Meredith*.[40] In that case, the plaintiff corporation's employees were paid from defendant Diversified Industries' corporate "slush fund" in return for accepting an inferior grade of copper from Diversified Industries. The directors of Diversified Industries hired a law firm to investigate the matter and urged its employees to cooperate. After

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36. 423 F.2d at 491 (footnote omitted).

37. *Id.*

38. *Id.* The court also declined to adopt Rule 5-03(a)(3) of the 1969 Preliminary Draft of the Proposed Federal Rules of Evidence, which it felt was couched in control-group terms: "A 'representative of the client' is one having authority to obtain professional legal services, or to act on advice rendered pursuant thereto, on behalf of the client." FED. R. EVID. 5-03(a)(3) (Prel. Draft 1969), 46 F.R.D. 161, 250 (1969). The control-group language was eliminated from the Final Draft of the Proposed Rules that was adopted by the Supreme Court in 1972. FED. R. EVID. 503(a)(3) (Fin. Draft), 56 F.R.D. 183, 236 (1972). The Advisory Committee stated: "The rule contains no definition of 'representative of the client.' In the opinion of the Advisory Committee, the matter is better left to resolution by decision on a case-by-case basis." *Id.*, Advisory Committee's Note, at 237. The Committee then drew the distinction between the control-group test and "[b]roader formulations." *Id.* Congress subsequently deleted Rules 501 through 513, which dealt with privileges, and substituted the present Rule 501, which provides that all privileges "shall be governed by the principles of common law . . . interpreted in light of reason and experience." FED. R. EVID. 501.

A control-group test was also included in Uniform Rule of Evidence 502(a)(2). This rule was adopted by six states. ARK. STAT. ANN. § 28-1001, Rule 502(a)(2) (1979); ME. R. EVID. 502; NEV. REV. STAT. § 49.075 (1971); N.D. R. EVID. 502; OKLA. STAT. ANN. tit. 12, § 2502 (1980); S.D. CODIFIED LAWS ANN. § 19-13-2 (1979).

39. *See* note 28 *supra*.

40. 572 F.2d 596 (8th Cir. 1978) (en banc).

the plaintiff corporation sued Diversified Industries, it sought discovery of the law firm's report and corporate minutes and letters that restated portions of the report. In a well-reasoned opinion by Judge Heaney, the court perceived the control-group test as the "most widely used test,"[41] but concluded that it was "inadequate for determining the extent of a corporation's attorney-client privilege."[42] Judge Heaney reasoned that the control-group test "fails to take into account the realities of corporate life."[43] He explained:

> In a corporation, it may be necessary to glean information relevant to a legal problem from middle management and nonmanagement personnel as well as from top executives. The attorney dealing with a complex legal problem is "thus faced with a 'Hobson's choice', if he interviews employees not having 'the very highest authority', their communication to him will not be privileged. If, on the other hand, he interviews *only* those with 'the very highest authority', he may find it extremely difficult, if not impossible, to determine what happened."[44]

According to the court, the subject-matter approach of *Harper & Row* was a superior method for determining the scope of the attorney-client privilege. Judge Heaney stated, "In contrast to the control group test, [the subject-matter test] encourages the free flow of information to the corporation's counsel in those situations where it is most needed."[45] Judge Heaney acknowledged that one drawback to the subject-matter approach is that corporations may use the test to "shield data from the discovery process. . . . [By funnelling] most corporate communications through their attorneys [the firm could] prevent subsequent disclosure."[46] Consequently, the court modified the *Harper & Row* test as follows:

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41. *Id.* at 608 (citing Virginia Elec. & Power Co. v. Sun Shipbuilding & Dry Dock Co., 68 F.R.D. 397, 400 (E.D. Va. 1975)).

42. *Id.* at 609.

43. *Id.* at 608.

44. *Id.* at 608-09 (quoting Weinschel, *Corporate Employee Interviews and the Attorney-Client Privilege*, 12 B.C. INDUS. & COM. L. REV. 873, 876 (1970)).

45. *Id.* at 609.

46. *Id.*

> [T]he attorney-client privilege is applicable to an employee's communication if (1) the communication was made for the purpose of securing legal advice; (2) the employee making the communication did so at the direction of his corporate superior; (3) the superior made the request so that the corporation could secure legal advice; (4) the subject matter of the communication is within the scope of the employee's corporate duties; and (5) the communication is not disseminated beyond those persons who, because of the corporate structure, need to know its contents. . . . [T]he corporation has the burden of showing that the communication in issue meets all of the above requirements.[47]

The first and third conditions alleviate the funnelling problem.[48] The second and fourth provisions incorporate the traditional *Harper & Row* requirements.[49]

The decision in *Diversified Industries* clearly identified the conflict between the courts of appeals in defining the scope of the attorney-client privilege, as well as the competing concerns involved. With the resulting uncertainty regarding the viability of the corporate attorney-client privilege, the time was ripe for guidance from the Supreme Court.

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47. *Id.* The court adopted Judge Weinstein's suggestions in his text on evidence. *Id.* at 609. *See* 2 WEINSTEIN'S EVIDENCE ¶ 503(b)[04] (1975).

48. *See* note 46 *supra* and accompanying text. The court in *Diversified Industries* also adopted Dean Wigmore's standard to distinguish legal from nonlegal advice: " '[T]he most that can be said by way of generalization is that a matter committed to a professional legal adviser *is prima facie so committed for the sake of the legal advice* . . . and is therefore within the privilege unless it clearly appears to be lacking in aspects requiring legal advice.' " 572 F.2d at 610 (quoting 8 J. WIGMORE, EVIDENCE § 2296, at 567 (McNaughten rev. 1961) (emphasis in original)).

49. *See* note 34 *supra* and accompanying text. Limitation (5) was also designed to address the problem of waiver by publication. Duplan Corp. v. Deering Milliken, Inc., 397 F. Supp. 1146 (D.S.C. 1974); *see* notes 82-83 *infra*. Judge Henley, dissenting on other grounds, agreed with the majority's subject-matter test. He stated, however, that he "might have some trouble in including within the privileged category [the] communications involving officers or employees of corporations *that are subsidiaries of or affiliated with the corporate client.*" *Id.* at 613 (Henley, J., dissenting) (emphasis added). This was the precise situation in the instant case. Upjohn Co. v. United States, 449 U.S. 383 (1981).

In *Upjohn Co. v. United States*[50] the Supreme Court found the control-group test too restrictive of the attorney-client privilege. The Court declined, however, to specify a standard for determining which employees can speak for the corporation with the assurance that the communications will be protected by the attorney-client privilege.[51] In light of the underlying purpose of the privilege, the Court examined the undesirable effects of the control-group test. Justice Rehnquist, speaking for the Court, stated that the control-group approach "overlooks the fact that the privilege exists to protect . . . the giving of information to the lawyer," as well as the delivery of advice by the lawyer to the client.[52] Justice Rehnquist reasoned that such information is necessary to enable a lawyer to "give sound and informed advice" pursuant to his or her ethical obligations.[53] The Court emphasized that important data is often possessed by middle or lower level employees who are outside the controlling group of officers.[54] The Court concluded that the control-group test actually discourages the communication of this information and thus "frustrates the very purpose of the privilege."[55]

The Court noted a second disadvantage of the control-group test: it restricts the attorney's ability to assist the corporation to comply with the law. Justice Rehnquist expressed the Court's misgivings: "In light of the vast and complicated array of regulatory legislation confronting the modern corporation, corporations, unlike most individuals, 'constantly go to lawyers to find out how to obey the law,' . . . particularly since compliance with the law in this area is hardly an instinctive matter . . . ."[56] He reasoned that the control-group test discourages the attorney-

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50. 449 U.S. 383 (1981).

51. *Id.*

52. *Id.* at 390.

53. *Id.* at 390-91 (citing ABA CODE OF PROFESSIONAL RESPONSIBILITY, ETHICAL CONSIDERATION No. 4-1).

54. *Id.*

55. *Id.* at 392.

56. *Id.* (quoting Burnham, *The Attorney-Client Privilege in the Corporate Arena*, 24 BUS. LAW. 901, 913 (1969)). The Court cited United States v. United States Gypsum Co., 438 U.S. 422, 440-41 (1978), as an example of the complexities of the Sherman Act. 449 U.S. at 392-93.

client interaction that is necessary to determine the legal effect of proposed conduct.[57]

Finally, the Court criticized the control-group test as being "difficult to apply in practice."[58] As Justice Rehnquist stated, "[T]he attorney and client must be able to predict with some degree of certainty whether particular discussions will be protected."[59] He reasoned that "[a]n uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all."[60] The control-group test, he concluded, results in "[d]isparate decisions" on similar facts.[61]

The Sixth Circuit had been concerned with the potential for abuse of a rule broader than the control-group test.[62] The court had reasoned that a broader rule would encourage the corporation to funnel its nonlegal business communications through its attorneys in order to prevent disclosure of the communications.[63] The court feared that such misuse of the attorney-client privilege would create a " 'zone of silence' " which would place severe burdens on discovery.[64] The Supreme Court did not directly address this concern, but did state that the application of the privilege to such communications would put the adversary "in no worse position than if the communications had never taken place."[65] Justice Rehnquist explained, "The privilege only protects disclosure of communications; *it does not protect disclosure of the underlying facts* by those who communicated with the attorney . . . ."[66] Thus, convenience alone would not justify enforcement of the IRS subpoena: " 'Discovery was

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57. 449 U.S. at 392.

58. *Id.* at 393.

59. *Id.*

60. *Id.*

61. *Id.*

62. United States v. Upjohn Co., 600 F.2d 1223 (6th Cir. 1979), *rev'd*, 449 U.S. 383 (1981).

63. *Id.* at 1227; *see* notes 46-48 *supra* and accompanying text.

64. 600 F.2d at 1227.

65. 449 U.S. at 395.

66. *Id.* at 395-96 (emphasis added) (citing City of Philadelphia v. Westinghouse Elec. Corp., 205 F. Supp. 830, 831 (E.D. Pa. 1962)); *see* note 23 *supra*.

hardly intended to enable a learned profession to perform its functions . . . on wits borrowed from the adversary.' "[67]

The Court established two boundaries for the application of the corporate attorney-client privilege. By abolishing the control-group test, the Court required a broader interpretation of the attorney-client privilege. At the same time, the Court made several references to its decision in *Hickman v. Taylor*, with no suggestion that it repudiated the rule that communications by employees who are "little more than bystander witnesses" are not protected.[68] Within these parameters, however, the Court declined to adopt the subject-matter test or any other standard by which to define the scope of the attorney-client privilege.[69] Justice Rehnquist gave three reasons for this abdication. First, he said, the Court's function is to decide "concrete cases and not abstract propositions of law."[70] Accordingly, the Court should "decline to lay down a broad rule . . . even were [it] able to do so."[71] Second, Justice Rehnquist reasoned that no rigid or "un-

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67. 449 U.S. at 396 (quoting Hickman v. Taylor, 329 U.S. 495, 516 (1947) (Jackson, J., concurring)). The Court thus applied the classic statement of the objective of the work-product doctrine to support the attorney-client privilege. *See* notes 2 & 15 *supra*.

68. 449 U.S. at 391, 396, 397, 399, 401; *see* note 37 *supra* and accompanying text.

69. The Court refused to adopt a standard in spite of the urging of the petitioner and several amici curiae. Four briefs supported the subject-matter approach. Memorandum of the Chicago Bar Association as Amicus Curiae at 4; The Committee on Federal Courts and the Committee on Corporate Law Departments of the Association of the Bar of the City of New York as Amicus Curiae at 12; Brief of the Federal Bar Association as Amicus Curiae at 33; Brief of New England Foundation in Support of Petitioners at 18-20.

Two amicus briefs supported the adoption of a standard without advocating any specific standard. Brief of the American College of Trial Lawyers and 33 Law Firms in Support of Petitioners at 9-10 & n.5; Memorandum of the Committee on Corporate Law Departments of the Association of the Bar of the City of New York as Amicus Curiae.

70. 449 U.S. at 386. A preferable view is that the issue before the Court was broader than the narrow question whether the control-group test was a sufficient standard for the privilege; rather, the Court was faced directly with the question of the extent and viability of the corporate attorney-client privilege itself.

71. *Id.* This inordinate conclusion is directly contrary to the proposition that the Supreme Court should lead, not cower. Only in the very rarest of cases

varying" standard would be capable of "mathematical precision."[72] Finally, and perhaps most importantly, he interpreted Federal Rule of Evidence 501 to mandate a " 'case-by-case' " resolution of the privilege,[73] even though it "may to some slight extent undermine desirable certainty in the boundaries of the attorney-client privilege."[74]

The *Upjohn* decision is important, therefore, primarily for what it failed to do. Chief Justice Burger, concurring in part, was critical of the majority's refusal to articulate a standard.[75] He contrasted the Court's acknowledgment of the confusion surrounding an uncertain standard with its unwillingness "to clarify it within the frame of issues presented."[76] Chief Justice Burger believed that if the Court failed to articulate a standard, the confusion surrounding the issue would linger, and therefore, the Court should display more leadership.[77] The Chief Justice suggested a compromise position for the Court: a communication would be privileged "at least when . . . an employee or former employee speaks at the direction of the management with an attorney regarding conduct . . . within the scope of employment."[78] Although he recognized that other communications "may indeed be privileged," he believed the need for certainty

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should the Court declare itself incompetent to prescribe a standard. See Jacobellis v. Ohio, 378 U.S. 184 (1963), in which Justice Stewart, concurring, declined to define pornography. He declared simply, "But I know it when I see it . . . ." The scope of the attorney-client privilege is more easily definable than is the scope of first amendment protection. Furthermore, it is important that the scope of the attorney-client privilege be defined because the privilege pervades the law.

72. 449 U.S. at 393.

73. *Id.* at 396-97. Federal Rule of Evidence 501 provides that the law of privilege "shall be governed by the principles of the common law as they may be interpreted by the courts . . . in light of reason and experience." No logical reading of this provision would require that the courts abstain from extracting *workable* principles from prior cases in order to provide parties with reliable standards by which to govern their behavior.

74. 449 U.S. at 396-97.

75. *Id.* at 402 (Burger, C.J., concurring in part).

76. *Id.* at 404 (Burger, C.J., concurring in part).

77. *Id.* at 402 (Burger, C.J., concurring in part).

78. *Id.* at 402-03 (Burger, C.J., concurring in part). It may be crucial that management direct the employee to cooperate with counsel. *See* notes 81-82 *infra* and accompanying text.

did not compel the Court "to prescribe *all the details* of the privilege."[79] In addition, the Chief Justice criticized the majority's interpretation of Rule 501. He felt the rule required the Court to carry out its "special duty to clarify aspects of the law of privileges."[80]

The abolition of the control-group test is a welcome development in corporate law. The Supreme Court, however, disappointed those who expected guidance in predicting which communications with corporate counsel will be protected by the attorney-client privilege. Even the Chief Justice, who purported to provide a standard, did little but recite the operative facts in *Upjohn*.[81] The Court left unanswered the question whether the privilege will apply to a situation in which there is no express statement from management requesting a lower level employee to cooperate with counsel. May such a request be implied as a matter of corporate policy? May the attorney make the request as the agent of the corporation or upper management? The Court gave no indication of the protection to be afforded a voluntary and unsolicited communication by a low-ranking employee. Such a determination might depend upon whether a formal investigation is currently underway. The Court also failed to address the level of confidentiality required of corporate employees to prevent the unintended waiver of the privilege.[82] Will it matter that one high-ranking officer subsequently discloses the details of the communication to another high-ranking officer where both are intimately involved with the matter?[83] Since so

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79. 449 U.S. at 403 (Burger, C.J., concurring in part) (emphasis added).

80. *Id.* (Burger, C.J., concurring in part).

81. *See* note 78 *supra* and accompanying text. The critical facts of *Upjohn* were (1) a formal investigation by counsel, (2) that concerned legal matters, (3) for which the cooperation of subordinate employees was expressly requested by a written directive from senior management, resulting in (4) communications concerning incidents within the scope of the employees' duties.

82. In Duplan Corp. v. Deering Milliken, Inc., 398 F. Supp. 1146 (D.S.C. 1974), the court illustrated the potential waiver of the attorney-client privilege: "[W]here communications are between an attorney and members of the corporate control group, as well as corporate personnel *not* acting at the direction of a member of the control group, this court will consider the privilege to be waived." *Id.* at 1164 (emphasis in original).

83. The *Duplan* court discussed two other issues: whether the corporation may be its own attorney and client, and whether in-house counsel may act

many of these problems remain for the corporate practitioner, the *Upjohn* decision is a prime illustration of unwarranted abdication of judicial responsibility.

The effect of *Upjohn* on the future application of the attorney-client privilege is uncertain. Some courts probably will continue to construe the privilege narrowly, fearing that a broad privilege might "imped[e] judicial administration and discovery."[84] Other courts will probably view the privilege more accurately as having no application to facts underlying a communication, thus presenting little barrier to their discovery. Since both Justice Rehnquist and the Chief Justice emphasized that the privilege must be used to achieve its objective " 'in the light of reason and experience,' "[85] the decision provides every court the opportunity to re-evaluate the privilege in the corporate context. The courts should welcome this development and should "focus primarily on the nature and context of the communication between attorney and corporate client, and only secondarily on the status of the employee communicating with the attorney."[86] The Supreme Court's failure to define the scope of the attorney-client privilege should not discourage the lower courts from developing a workable standard. Such a standard should be broad enough to encourage full disclosure by the client. In devising a standard the courts should recognize that the liberal federal discovery rules are designed to uncover relevant facts, not confidential communications concerning such facts. The standard should determine:

(1) Whether an attorney-client relationship exists. This determination should include a rebuttable presumption that advice or information was conveyed primarily for its legal, not its business, significance;

(2) Whether the subject matter of the communication con-

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as the client for purposes of the privilege when conferring with outside counsel. The court held that communications to in-house counsel may be privileged, depending upon whether counsel gave legal or business advice. The court also held in-house counsel's communications with outside counsel privileged. *Id.* at 1167.

84. 12 TEX. TECH. L. REV. 459, 479 (1981).

85. 449 U.S. at 389, 403 (quoting FED. R. EVID. 501).

86. 12 TEX. TECH. L. REV. 459, 479 (1981).

cerns the scope of the employee's duties.[87] This inquiry avoids the "bystander witness" problem of *Hickman v. Taylor*;[88]

(3) Whether the communication remained strictly confidential. This inquiry should focus on whether the communication has been disseminated beyond those persons who should reasonably be expected to be informed;

(4) Whether the employee communicated at the direction of a corporate superior or that superior's designated agent. The definition of "agent" should include the corporation's counsel. A corporation's attorney should have the authority to conduct a quiet investigation without a publicized company-wide mandate for all employees to cooperate. The very nature of the employee-employer relationship should imply a duty to cooperate with authorized counsel. Perhaps even an unsolicited communication to counsel by a low-level employee should be protected if it concerns a clearly legal matter affecting or potentially affecting the corporation. The courts should avoid trivial distinctions based on whether there was a formal investigation underway.

Without a definite standard that can be firmly applied, the attorney-client privilege may still result in "widely varying applications."[89] This is precisely one of the evils the Court sought to obviate in striking down the control-group test.[90] The Court in *Upjohn* reiterated the important public policies behind the attorney-client privilege. The Court correctly found the control-group test too restrictive of these policies. This result is laudable. The Court declined, however, to adopt the subject-matter test or any other standard to govern the scope of the privilege in the corporate context, and so failed to provide needed leadership in this vital area of law.

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87. In *Hickman* the attorney-client privilege issue was "rather peremptorily" decided in the Supreme Court's haste to develop the work-product doctrine. 5 DEL. J. CORP. L. 480, 483 (1980).

88. *See* notes 15-17 *supra* and accompanying text.

89. *See* text accompanying note 60 *supra*.

90. *Id.*

# Patent Law — Subject Matter Patentability — Computers and Mathematical Formulas

*Diamond v. Diehr*, 450 U.S. 175 (1981)

Respondents filed a patent application for a process[1] for molding synthetic rubber.[2] Their method utilized a computer and the Arrhenius equation,[3] a well-known mathematical formula, to ensure that articles would remain in the press the

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1. "The term 'process' means process, art or method, and includes a new use of a known process, machine, manufacture, composition of matter, or material." 35 U.S.C. § 100(b) (1976). Patentable inventions are generally classed into "process" and "product" claims, the latter including machines, manufactures, and compositions of matter. D. CHISUM, INTELLECTUAL PROPERTY § 6.02, at 6-2 (1980) [hereinafter cited as CHISUM, INTELLECTUAL PROPERTY]. "Method" is used interchangeably with "process." *See In re* Tarczy-Hornoch, 397 F.2d 856 (1968). "The central notion of a process is that [it] consists of a series of steps or operations which do not depend upon a particular set of tools, apparatus, or machinery." CHISUM, INTELLECTUAL PROPERTY, *supra*, § 6.03, at 6-29. A process must be "performed upon the subject-matter to be transformed and reduced to a different state or thing." Cochrane v. Deener, 94 U.S. 780, 788 (1876).

2. Respondents Diehr and Lutton filed a patent application in 1975 for 11 claims that described a process for operating a press used to mold raw synthetic rubber into usable products. First, a computer would be programmed with the Arrhenius equation, *see* note 3 *infra*, which is used in all rubber molding processes to calculate the cure time. Second, several variables, such as the density of the rubber, the size of the mold, and the temperature inside the mold, would be fed into the computer. Third, the rubber would be loaded into the press and the operation begun. The computer would constantly monitor the temperature inside the mold, every 10 seconds recalculating when the curing process should end, and would open the press automatically at that point. Presently, the conventional method uses a single temperature variable to calculate the opening time, and this variable often does not reflect the actual temperature inside the press throughout the process. This inaccuracy results in products which are undercured or overcured. *In re* Diehr, 602 F.2d 982, 983-84 (C.C.P.A. 1979), *aff'd sub nom.* Diamond v. Diehr, 450 U.S. 175 (1981).

3. The Arrhenius equation, named for its discoverer, Svante Arrhenius (1859-1927), is used to calculate the proper cure time in a rubber molding press. *See* 602 F.2d at 983 n.2.

precise amount of time necessary to prevent undercuring or overcuring.[4] The patent examiner rejected the claims on the ground that they "were drawn to nonstatutory subject matter."[5] The Patent and Trademark Office Board of Appeals agreed,[6] but the Court of Customs and Patent Appeals (C.C.P.A.) reversed, stating that the mere presence of a computer or mathematical formula in a patent claim does not prima facie render the claim nonstatutory.[7] The C.C.P.A. held that the proper inquiry was whether the claims as a whole fell within section 101 of the Patent Act.[8] On certiorari in the United States Supreme Court, *held*, affirmed. A process for molding rubber which is within section 101 when considered as a whole does not become nonstatutory simply because it utilizes a mathematical formula and a programmed computer in several of its steps. *Diamond v. Diehr*, 450 U.S. 175 (1981).

The threshold question in evaluating an application for a patent is whether the subject matter presented in the claims is eligible for patent protection.[9] One rule beyond dispute is that a

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4. A "cure" results when the synthetic polymer is mixed with curing agents and heated in a mold for a certain period of time. *Id.* at 983. The industry had been unable to achieve the "perfect" cure with any degree of consistency because the temperature inside the molding press could not be accurately measured throughout the curing process. *Id.* Thus, the rubber was often left in the mold for too long or too short a time, and inferior products were the result.

5. 450 U.S. at 179. The opinion of the patent examiner is unreported. Petition for Certiorari, App. D, at 27(A), Diamond v. Diehr, 450 U.S. 175 (1981). Section 101 of the Patent Act limits the categories of patentable subject matter. 35 U.S.C. § 101 (1976); *see* text accompanying note 14 *infra*. The term "nonstatutory" is used to describe a claim falling outside all the categories. *See In re* Jones, 373 F.2d 1007, 1014 (C.C.P.A. 1967).

6. 602 F.2d at 984. The opinion of the Patent and Trademark Board of Appeals is unreported. Petition for Certiorari, App. D, at 27(A), Diamond v. Diehr, 450 U.S. 175 (1981).

7. 602 F.2d at 988. Two alternative appellate routes from the Patent Office are available. First, one may appeal to the Court of Customs and Patent Appeals pursuant to 35 U.S.C. § 141 (1976). The other choice, used very rarely, is a trial de novo in the United States District Court for the District of Columbia. This is not a true appeal, but rather a civil action to obtain a patent. 35 U.S.C. § 145 (1976).

8. 602 F.2d at 987.

9. Diamond v. Diehr, 450 U.S. 175, 182-84 (1981).

law of nature, including its mathematical manifestations, is not patentable, at least when the inventor seeks to patent such a principle directly.[10] The matter is uncertain, however, if a process claim incorporates a computer or mathematical formula to aid in accomplishing the end result, while leaving the law of nature in the public domain to be used in other ways. The rapid technological advances in the area of computer software[11] have forced the courts to define more precisely which inventions involving the use of computers and mathematical formulas are disqualified under section 101. In the *Diehr* decision, the Supreme Court specifically addressed the issue whether a process for molding synthetic rubber which in several of its steps utilized the Arrhenius equation and a programmed computer constituted patentable subject matter under section 101 of the Patent Act.

The source of federal authority to grant patents is the United States Constitution, which authorizes Congress "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[12] The current patent

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10. *See* Gottschalk v. Benson, 409 U.S. 63 (1972). The Court in *Benson* held that a law of nature may not be patented directly so as to preempt its use completely. This prohibition proceeds from the notion that such laws are the fundamental building blocks of science and, therefore, should not be monopolized. *See* MacKay Radio & Tel. Co. v. Radio Corp. of America, 306 U.S. 86 (1939). The courts use the terms "scientific principle," "natural phenomenon," "idea," and "law of nature" interchangeably. *See* Parker v. Flook, 437 U.S. 584 (1978). In patent cases involving computers, courts frequently use the term "algorithm," which the United States Supreme Court defines as "[a] procedure for solving a given type of mathematical problem." Gottschalk v. Benson, 409 U.S. at 65. The term is subject to a variety of definitions, most of which are broader than the Court's. The Patent Office defines algorithm as "[a] fixed, step-by-step procedure for accomplishing a given result; usually a simplified procedure for solving a complex problem." Diamond v. Diehr, 450 U.S. 176, 186 n.9 (1981). Under any definition, algorithms are considered laws of nature and are themselves unpatentable.

11. Computer software is the set of instructions that tells the computer how to function to solve a particular problem. "Software" and "program" are used synonymously. Predicted annual growth in the software industry worldwide will be 21.3% over the next five years. Revenues will almost triple during that period to $21 billion in 1985. PREDICASTS FORECASTS, 1980 Cum. Ed., No. 80, at B-518 (citing FORTUNE, May 19, 1980, at 68).

12. U.S. CONST. art. I, § 8, cl. 8. The terms "Authors" and "Writings"

statute, enacted in 1952,[13] enumerates in section 101 the categories into which inventions must fall to qualify for patent protection: "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 . . . ."[14] An invention not falling within one of these four classes is deemed nonstatutory subject matter and is not eligible for patent protection. In addition to meeting the section 101 requirements, an invention must also exhibit novelty[15] and nonobviousness[16] before a patent will issue. Together, these three basic

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refer to copyright protection, the statutory source of which is the Copyright Revision Act of 1976, codified at Title 17 of the United States Code. Section 102(a) of the Copyright Revision Act extends copyright protection to "original works of authorship fixed in any tangible medium of expression." 17 U.S.C. § 102(a) (1977). The Copyright Office has been registering computer programs since 1964. *See* Copyright Office Circular 311 (Jan. 1965). *See generally* Data Cash Systems, Inc. v. JS&A Group, Inc., 480 F. Supp. 1063 (N.D. Ill. 1979) (part of a program which cannot be seen and read with the human eye is not protected). For an excellent treatment of the issues involved in copyright protection of computer software, see 47 TENN. L. REV. 787 (1980).

13. Patent Act of 1952, ch. 950, 66 Stat. 792 (current version at 35 U.S.C. §§ 100-376 (1976)). The first patent act was passed in 1790 and provided a 14-year monopoly on the invention. Patent Act of 1790, ch. 7, § 1, 1 Stat. 109 (repealed 1793). The present act gives the patentee the right to exclude others from making, using, or selling the invention for 17 years. 35 U.S.C. § 271(a) (1976).

14. 35 U.S.C. § 101 (1976).

15. "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 . . . ." *Id.* § 102(a). The test for novelty is explained by the author of a leading treatise:

> In determining novelty, the starting point is the language of the claim in the application or patent. An inventor seeking patent protection defines his own exclusive domain by drafting one or more claims setting forth the parameters of what he regards as his invention. . . . A claim fails the novelty test if it covers or "reads on" any product or process found in a single source . . . in the prior art.

CHISUM, INTELLECTUAL PROPERTY, *supra* note 1, § 7.03, at 7-18. *See, e.g., In re* Wiggins, 488 F.2d 538 (C.C.P.A. 1973).

16. 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

conditions determine the patentability of an invention, thereby restricting patent protection to those developments which advance the goals of the Patent Act.[17]

The subject of patent protection for computer-related claims is relatively new in comparison with other areas of the law, most of which have evolved slowly over many years. The federal courts have had little time to formulate a position on patentability in the computer field because of its enormous growth during the past three decades.[18] It was not until 1972 that the United States Supreme Court addressed the issue of patent protection for computer programs;[19] therefore, only limited progress has been made toward resolving the perplexing legal and practical problems in this area.

Prior to the late 1960s the principles of patent law were formulated with no regard for as yet nonexistent computer technology.[20] This resulted in the development of three doctrines that severely limited the availability of patents on process claims involving a computer. First, the courts formulated the "function of a machine" doctrine, whereby a process claim would be rejected if it merely recited the inherent function of a machine.[21] A pro-

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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 (1976). *See, e.g.*, Graham v. John Deere Co., 383 U.S. 1 (1966).

17. "The general purpose of the statutory classes of subject matter is to limit patent protection to the field of applied technology." 1 D. CHISUM, PATENTS § 1.01, at 1-4 (1980) [hereinafter cited as CHISUM, PATENTS]. The novelty requirement ensures that inventors will add to the body of existing knowledge, and the nonobviousness requirement allows a patent to issue only if it exhibits a high degree of "inventiveness."

18. In 1952 scientists developed and built the first computer capable of using stored programs. *See* Ulam, *Computers*, 211 SCI. AM. 203 (1964); *see* note 11 *supra*.

19. *See* Gottschalk v. Benson, 409 U.S. 63 (1972). The Court of Customs and Patent Appeals' first significant case dealing with computers was *In re* Prater, 415 F.2d 1378 (C.C.P.A. 1968), *modified on rehearing*, 415 F.2d 1393 (C.C.P.A. 1969).

20. The Supreme Court admitted this shortcoming of patent law in Parker v. Flook, 437 U.S. 584, 595 (1978). *See* note 85 *infra*.

21. The Supreme Court declared unpatentable a process for manufacturing belt pulleys in *Risdon Locomotive Works v. Medart*, holding that no patent

cess that could not be carried out apart from a particular machine was held to be the mere "function" of that machine, and hence, unpatentable. The practical effect of this doctrine was to require inventors to disclose more than one type of apparatus that could perform the operation. The second troublesome principle was the "mental steps" doctrine, under which processes that called for human mental participation were held to be nonpatentable subject matter.[22] The doctrine was defended on the ground that "[i]t is self-evident that thought is not patentable."[23] Illustrative is *Johnson v. Duquesne Light Co.*,[24] in which a process claim for testing insulators on power lines was rejected. The lineman, using a testing device, could determine which insulators needed replacing by the sound and length of the arc each insulator made. The court held the process nonpatentable because its accuracy depended on "correct mental comparisons" and the lineman's intelligence.[25] Based on the established rule that an idea cannot be patented,[26] the mental steps

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could "be obtained for a process which involves nothing more than the operation of a piece of mechanism, or, in other words, for the function of a machine." Risdon Locomotive Works v. Medart, 158 U.S. 68, 77 (1894). *See also* Chisholm-Ryder Co. v. Buck, 65 F.2d 735 (4th Cir. 1933) (process for snipping beans held unpatentable as involving only the function of a machine); *In re* Middleton, 167 F.2d 1012 (C.C.P.A. 1948) (claims drawn to method of causing reactions to a chemical process held unpatentable as the mere function of a machine).

22. *See* Halliburton Oil Well Cementing Co. v. Walker, 146 F.2d 817 (9th Cir. 1944) (sonar device for measuring depth of oil wells held to be mere computation), *rev'd on other grounds*, 329 U.S. 1 (1946). The mental steps doctrine is based on three considerations:

> The first is that a patentable process must transform or operate physically upon substances. . . . The second notion is that a patentable process is restricted to specific means that can be described with reasonable definiteness. . . . The third notion is that a patentable process must be part of the "useful arts," the field of industrial technology as opposed to the "liberal arts" or the social sciences.

1 CHISUM, PATENTS, *supra* note 17, § 1.03[6], at 1-58 to -59. *See generally* 48 TENN. L. REV. 903 (1981).

23. *In re* Abrams, 188 F.2d 165, 168 (C.C.P.A. 1951).

24. 29 F.2d 784 (W.D. Pa. 1928).

25. *Id.* at 786.

26. *See In re* Bolongaro, 62 F.2d 1059 (C.C.P.A. 1933). " '[A] principle or idea, or a permissive function, predicated upon a thing involving no structural

doctrine also reflected the notion that a patentable process must transform or physically alter a substance.[27] Finally, under the "point of novelty focus," the patent office dismantled a claim into its various steps or components and then checked each against the prior art.[28] If the only novel step was nonstatutory subject matter, such as a purely mental step, the claim was rejected under section 101.[29]

The courts became increasingly aware of the problems these rules presented to an inventor who wanted to patent a claim in the field of modern science. In 1968 the Court of Customs and Patent Appeals in *In re Tarczy-Hornoch*[30] overruled a series of its prior decisions that had developed the "function of a machine" doctrine, finding the doctrine to be "unwarranted by, and at odds with, the basic purposes of the patent system."[31] Thus, a process might be patentable even though one particular machine had to be utilized in performing the process. Shortly after *Tarczy-Hornoch*, the C.C.P.A. moved toward eliminating the vestiges of the mental steps doctrine by acknowledging that the doctrine was based on confusing and badly reasoned case law.[32] The C.C.P.A. held in *In re Prater* that a process that could be performed mentally would not be rejected if it could also be per-

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law' " constitutes unpatentable subject matter. *Id.* at 1060.

27. The classic definition of "process" was stated in *Cochrane v. Deener*: "A process is a mode of treatment of certain materials to produce a given result. It is an act, or a series of acts, performed upon the subject-matter to be transformed and reduced to a different state or thing." 94 U.S. 780, 788 (1876). *See* note 1 *supra*.

28. The "prior art" is all the references (prior patents or printed publications) which may be used to determine the novelty or nonobviousness of subject matter presented in a patent claim. A reference must be in the same art as the invention or in one closely similar. CHISUM, INTELLECTUAL PROPERTY, *supra* note 1, at GL-36. References include patents and printed publications from anywhere in the world, as well as inventions known, invented, or used in the United States. 35 U.S.C. § 102 (1976).

29. *See* Lincoln Eng'r Co. v. Stewart-Warner Corp., 303 U.S. 545 (1938). For a good discussion of the point of novelty focus see *In re* Chatfield, 545 F.2d 152 (C.C.P.A. 1976), *cert. denied sub nom.* Dann v. Chatfield, 434 U.S. 875 (1977) (petition untimely filed).

30. 397 F.2d 856 (C.C.P.A. 1968).

31. *Id.* at 867.

32. *In re* Prater, 415 F.2d 1378 (C.C.P.A. 1968), *modified on rehearing*, 415 F.2d 1393 (C.C.P.A. 1969).

formed by a machine.[33] The C.C.P.A. formulated a new test, stating that in order to meet the requirements of section 101, the invention need only fall within the "technological arts."[34] The court later explained this test to mean that the scope of section 101 is as broad as permitted by the term "useful Arts" in the Constitution.[35] The C.C.P.A. completed the removal of the barriers that had excluded computer-related claims with its ruling that the "point of novelty focus" should not be used in determining the subject matter patentability of claims involving mathematical "algorithms."[36] The court held that the test ignored the statutory requirement that the examiner consider the

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33. *Id.* at 1389. Thus, the C.C.P.A. was able to distinguish *In re* Abrams, 188 F.2d 165 (C.C.P.A. 1951). Abrams had sought to patent a six-step process for prospecting for oil deposits. Steps five and six were "determining the rate of pressure rise in" several boreholes, and "comparing the rates determined in step five for the different boreholes to detect anomalies which are indicative of the presence of petroliferous deposits." 415 F.2d at 1385. The *Prater* court distinguished Abrams' claims from Prater's because Abrams had "disclosed no *means* whatever for performing . . . steps (5) and (6), of calculation and comparison. Certainly no analog computer for carrying out these calculations [was] disclosed . . . ." *Id.* at 1389 (emphasis in original). In other words, because the steps could *only* be performed mentally, the claim was unpatentable. The court also intimated that had a computer been available in 1944 to perform steps five and six, the claim might have been patentable. *Id.*

34. *In re* Musgrave, 431 F.2d 882, 893 (C.C.P.A. 1970). The underlying rationale of the mental steps doctrine, that no one may patent a principle of nature, survived the doctrine's demise.

35. U.S. CONST. art. I, § 8, cl. 8. This theory was first suggested in *In re* Waldbaum (Waldbaum I), 457 F.2d 997, 1003 (C.C.P.A. 1972) (Rich, J., concurring). The view was adopted by the majority in *In re* Johnston, 502 F.2d 765, 771 n.12 (C.C.P.A. 1974), *rev'd on other grounds sub nom.* Dann v. Johnston, 425 U.S. 219 (1976).

36. *In re* Bernhart, 417 F.2d 1395, 1400 (C.C.P.A. 1969). The court upheld product and process claims which depicted three-dimensional objects on a plane (in two dimensions). The court said that even if the only novelty of the invention consisted of otherwise nonstatutory natural phenomena such as mathematical equations, the claim was still patentable if it disclosed physical equipment (*e.g.*, a computer) capable of implementing the invention. *Id.* The case is most widely known for its holding that a computer programmed with a novel, nonobvious program is a completely new machine for purposes of the patent law. *Id.*

invention *as a whole* rather than dissect it into its separate parts.[37]

In 1972 the United States Supreme Court first dealt with the issue of the patentability of computer-related claims. In *Gottschalk v. Benson*[38] the Court held unanimously that a process for converting binary-coded decimal (BCD) numerals into pure binary numerals, which was useful in devising programs for digital computers, could not be patented.[39] Avoiding any discussion of the mental steps doctrine, the Court noted that the procedures were merely "a generalized formulation for programs to solve mathematical problems of converting one form of numerical representation to another," or more simply, a type of algorithm.[40] The Court observed that the algorithm could be performed with or without the aid of a computer, but indicated that this fact had little bearing on the question of the patentability of the process.[41] After reiterating that scientific truths are not patentable,[42] the Court stated that "if the formula for converting

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37. *See In re* Chatfield, 545 F.2d 152 (C.C.P.A. 1976), *cert. denied sub nom.* Dann v. Chatfield, 434 U.S. 875 (1977) (petition untimely filed). Section 103 of the Patent Act stipulates that a patent will not issue if, considering the prior art, "the subject matter *as a whole* would have been obvious . . . ." 45 U.S.C. § 103 (1976) (emphasis added).

38. 409 U.S. 63 (1972).

39. *Id.* at 71-72.

40. *Id.* at 65. *See* notes 10 & 34 *supra*.

41. *Id.* at 67. This conclusion can also be drawn from the Court's failure to indicate whether the machinery used, or lack thereof, influenced the decision in any way. The Court focused on the process itself.

42. *Id.* The Court quoted excerpts from several cases in support of the basic proposition that one may not hold a patent on a law of nature even if the natural law is newly discovered. The Court cited, among others, Funk Bros. Seed Co. v. Kalo Inoculant Co., 333 U.S. 127 (1947) (discovery that combining different types of bacteria will render plant seeds immune to disease is nothing more than a discovery of natural phenomena); MacKay Radio & Tel. Co. v. Radio Corp. of America, 306 U.S. 86 (1938) (antenna designed according to a scientific formula is patentable subject matter; claims narrowly drawn, not embracing all antennas which could be designed according to the formula); Rubber-Tip Pencil Co. v. Howard, 87 U.S. (20 Wall.) 498 (1874) (attaching eraser to end of pencil is an unpatentable idea); O'Reilly v. Morse, 56 U.S. 402, 15 How. 62 (1853) (several patents on telegraph granted, but process claim drawn broadly to the use of electromagnetism in long-distance communications denied because of possible preemption of future developments); LeRoy v.

BCD numerals to pure binary numerals were patented in this case," the result would be a monopoly on a scientific truth.[43] Benson's process, explained the Court, was so abstract and broad that it covered all uses of the algorithm.[44] The Court did not allow a patent on his method because it felt that doing so would "preempt" the algorithm, taking it out of the public domain.[45] The Court limited the impact of the holding by specifically stating that it had *not* held that all computer programs were nonpatentable subject matter,[46] and the Court observed in conclusion that Congress was better equipped to act on the pressing issue of computer-related patents.[47]

Much confusion arose in the wake of the *Benson* decision,[48] and the opinion was criticized as illogical.[49] The Court of Cus-

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Tatham, 55 U.S. 108, 14 How. 156 (1852) (principle that lead can be forced under extreme pressure into a pipe is unpatentable).

43. 409 U.S. at 71.

44. *Id.* at 68.

45. *Id.* at 71-72. By "preempt," the Court meant that no one could have made any practical use of the algorithm without infringing Benson's patent. Hence, it would be a patent on an idea. The Court said that "[t]he mathematical formula involved here has no substantial practical application except in connection with a digital computer, which means that if the judgment below is affirmed, the patent would wholly pre-empt the mathematical formula and in practical effect would be a patent on the algorithm itself." *Id.*

46. *Id.* at 71.

47. *Id.* at 73. *See* 54 CORNELL L. REV. 586 (1969). The Court in *Benson* emphasized that the Patent Office simply could not at that time bear the administrative and economic burden of examining all the applications for programs. 409 U.S. at 72 (citing REPORT OF THE PRESIDENT'S COMM'N ON THE PATENT SYSTEM 13 (1966)).

48. *See* 6 RUTGERS J. COMPUTERS AND LAW 14 (1977). The main points of contention among commentators were (1) whether the Court had ruled all software unpatentable, (2) whether the mental steps doctrine formed the basis for the decision, and (3) whether the Court failed to understand computer technology and, therefore, the issues presented in the case. *See* 28 BAYLOR L. REV. 187 (1976); 14 B.C. INDUS. & COM. L. REV. 1050 (1973); 47 ST. JOHN'S L. REV. 635 (1973).

49. 1 CHISUM, PATENTS, *supra* note 17, § 1.03, at 1-81. Chisum sharply criticized the holding:

> The statement as to "preempting the mathematical formula" is nonsense. Benson and Tabbot were claiming a certain means and that means only. . . . The method they claimed was a prescribed series of steps for manipulating information (data)—not a "mathematical

toms and Patent Appeals limited the impact of *Benson* by applying it only when a case involved both an algorithm (as narrowly defined by the Supreme Court[50]) and a process claim.[51] *Benson* was not applied to product claims,[52] and some viewed this policy as an invitation to draft process claims as product claims.[53] The C.C.P.A. soon designed a new test that did not rely as heavily on the distinction between process and product claims: process claims, even those which called for the use of a machine, were held nonpatentable if drawn merely to a "method of calculation."[54] Falling within this category were claims covering both known and unknown end uses[55] and those essentially

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formula" in the conventional meaning of that term. Many patents have in effect "preempted" all the then known practical applications of a newly-discovered "principle" or truth.

*Id.* at 1-83 to -84.

50. *See* note 10 *supra*.

51. *In re* Chatfield, 545 F.2d 152 (C.C.P.A. 1976), *cert. denied sub nom.* Dann v. Chatfield, 434 U.S. 875 (1977) (petition untimely filed).

52. *See In re* Noll, 545 F.2d 141 (C.C.P.A. 1976), *cert. denied sub nom.* Dann v. Noll, 434 U.S. 875 (1977) (application abandoned); *In re* Johnston, 502 F.2d 765 (C.C.P.A. 1974), *rev'd on other grounds sub nom.* Dann v. Johnston, 425 U.S. 219 (1976).

53. *In re* Chatfield, 545 F.2d 152, 159 (C.C.P.A. 1976) (Rich, J., dissenting), *cert. denied sub nom.* Dann v. Chatfield, 434 U.S. 875 (1977) (petition untimely filed).

54. *In re* de Castelet, 562 F.2d 1236, 1244 (C.C.P.A. 1977). After the *Benson* decision, the C.C.P.A. developed a new test based on the distinction between inventions which were a "method of calculation" (unpatentable) and those which were a "method of operation" (patentable). *Id.* at 1243. In *de Castelet*, the C.C.P.A. affirmed rejection of claims drawn to "solving a set of mathematical equations per se, the solution being a set of points along a curve, and not a process which merely uses equation solutions as one step in achieving some result other than solution of the equations." *Id.* at 1244. The C.C.P.A. then cited *In re* Chatfield and *In re* Deutsch, 553 F.2d 689 (C.C.P.A. 1977), as examples of cases involving processes for "operating a machine system or plant system in a particular manner." 562 F.2d at 1244. Concerning *Deutsch*, the C.C.P.A. explained that the "method *used* the results of an algorithm, and the algorithm was not the method nor the method the algorithm." *Id.* at 1243 (emphasis in original).

55. *See In re* Waldbaum (Waldbaum II), 559 F.2d 611 (C.C.P.A. 1977) (claims drawn to method for controlling operation of data processor and use of stored data covered both known and unknown uses of the method; held, unpatentable as preempting the algorithm).

based on solving an algorithm (even if the solution had a specific purpose).[56] A "method of operation," on the other hand, was patentable even if an algorithm were used, as long as only the *result* of the algorithm was utilized[57] and the invention was not based simply on calculations used to arrive at the result.

One decision in which the C.C.P.A. first manifested its intention to narrow the *Benson* holding was *In re Johnston*.[58] In a three-two decision the court reversed the Patent and Trademark Office Board of Appeals and granted a product patent on an automatic financial record-keeping system which employed a computer. The court found that the claims did not "encompass a law of nature, a mathematical formula, or an algorithm"[59] and distinguished *Benson* on that ground. The claims fell within the "technological arts" test the court had devised and thus constituted patentable subject matter.[60]

In *In re Chatfield*[61] the C.C.P.A. continued to narrow the applicability of *Benson* by allowing a patent on a process designed to improve the efficiency of a computer that could handle multiple programs simultaneously. The court held that computer programs drafted as processes would pass the *Benson* test if only some, and not *all* uses of an algorithm were preempted

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56. *See In re* Richman, 563 F.2d 1026 (C.C.P.A. 1977) (claims drawn to methods of calculating an airborne radar boresight correction angle or velocity component for the aircraft held not statutory subject matter).

57. *In re* Waldbaum (Waldbaum II), 559 F.2d 611, 617 (C.C.P.A. 1977).

58. 502 F.2d 765 (C.C.P.A. 1974), *rev'd on other grounds sub nom.* Dann v. Johnston, 425 U.S. 219 (1976).

59. *Id.* at 771.

60. *Id.* In finding that such a system was within the "technological arts," the C.C.P.A. rejected arguments that the system was "within the purview of the 'liberal arts,'" and that "banking is a 'social science.'" *Id.* & n.13. The court emphasized that the claim was drawn to a machine. "Such *machine* systems, which comprise programmed digital computers, are statutory subject matter under the provisions of section 101 . . . ." *Id.* at 771 (emphasis in original). Judge Rich, in dissent, argued that the court failed to follow the spirit of *Benson*. He disagreed with the differentiation of process from product claims, stating that Benson could have drawn his claim in product form and thereby obtained a patent. *Id.* at 773 (Rich, J., dissenting).

61. 545 F.2d 152 (C.C.P.A. 1976), *cert. denied sub nom.* Dann v. Chatfield, 434 U.S. 875 (1977) (petition untimely filed).

by the claim.[62] There was a vigorous dissent by Judge Rich, joined by Judge Lane, who argued that *Benson* had held that programs for general purpose computers are not patentable subject matter,[63] although he admitted that *Benson* was "open to different interpretations with respect to the patentability of software."[64]

The C.C.P.A. eventually developed a two-stage analysis for inventions involving mathematics. In *In re Freeman*[65] the court stated:

> First, it must be determined whether the claim directly or indirectly recites an "algorithm" in the *Benson* sense of that term, for a claim which fails even to recite an algorithm clearly cannot wholly preempt an algorithm. Second, the claim must be further analyzed to ascertain whether in its entirety it wholly preempts that algorithm.[66]

Only if a claim satisfied both inquiries was the invention held nonpatentable. The C.C.P.A. followed this reasoning in *In re Toma*[67] in reversing rejection of a patent on a method of using a computer to translate from one language to another. The court found that the claim did not involve an algorithm in the *Benson* sense.[68]

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62. *Id.* at 156. The C.C.P.A. framed the issue as "whether the claimed method falls within either of two categories judicially determined to be nonstatutory, *i.e.*, claims drawn to mathematical problemsolving algorithms or to purely mental steps," and held that the invention fell within neither category. *Id.* at 157.

63. *Id.* at 161 (Rich, J., dissenting). Both judges also dissented in *In re* Noll, 545 F.2d 141 (C.C.P.A. 1976) (system for display of graphic information held patentable because claims were not abstract and were limited to a particular technology), *cert. denied sub nom.* Dann v. Noll, 434 U.S. 875 (1977) (application abandoned).

64. *Id.* at 160 (Rich, J., dissenting).

65. 573 F.2d 1237 (C.C.P.A. 1978).

66. *Id.* at 1245. The court applied the first stage of the test and found no algorithm. It limited the term to *mathematical* algorithms since a broader definition would have made it appear that "the [*Benson*] Court was reading the word 'process' out of the statute." *Id.* at 1246.

67. 575 F.2d 872 (C.C.P.A. 1978).

68. *Id.* at 877. The court went on to say that "[e]ven if the only novel aspect of this invention were an algorithm, it is not proper to decide the question of statutory subject matter by focusing on less than all of the claimed

In *Parker v. Flook*[69] the United States Supreme Court attempted to eliminate the confusion surrounding *Benson*. Flook had applied for a patent on a method for updating an "alarm limit"[70] in catalytic conversion of hydrocarbons. Flook's process used a mathematical algorithm to accomplish this, but his claims did not contain a computer program. The Court held the claim nonpatentable, explaining that "[a]ll that [the claim] provides is a formula for computing an updated alarm limit,"[71] and that the patent, if issued, would be on a law of nature. The Court stated as it had in *Benson* that the law did not allow a patent on an algorithm,[72] but conceded that a process is not nonpatentable simply because an algorithm is involved.[73] The Court stated that a process which embodies a scientific principle is patentable only if the "process itself, not merely the mathematical algorithm, [is] new and useful."[74] In an apparent revival

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invention." *Id.* at 876 (citing *In re* Chatfield, 545 F.2d 152 (C.C.P.A. 1976), *cert. denied sub nom.* Dann v. Chatfield, 434 U.S. 875 (1977) (petition untimely filed)).

69. 437 U.S. 584 (1978).

70. The Court described alarm limits in this way:

> An "alarm limit" is a number. During catalytic conversion processes, operating conditions such as temperature, pressure, and flow rates are constantly monitored. When any of these "process variables" exceeds a predetermined "alarm limit," an alarm may signal the presence of an abnormal condition indicating either inefficiency or perhaps danger. Fixed alarm limits may be appropriate for a steady operation, but during transient operating situations, such as start-up, it may be necessary to "update" the alarm limits periodically.

*Id.* at 585.

71. *Id.* at 586. Flook's method consisted of (1) measuring the value of the process variable, (2) using a mathematical algorithm to calculate an updated alarm limit value, and (3) adjusting the actual alarm limit to the updated value. *Id.* at 585. Flook's application suggested that his method was primarily useful in conjunction with a computer that would automatically adjust the alarm limit. *Id.* at 586.

72. *Id.* at 591.

73. *Id.* at 590.

74. *Id.* at 591. The *Flook* test for claims involving scientific principles is applied by (1) treating the principle in the claim as part of the prior art, and (2) ascertaining whether there is a novel and nonobvious *application* of the principle. There must be some inventiveness apart from the principle for a patent to issue. *Id.* at 592-94. *See* 1979 WIS. L. REV. 867, 883.

of the "point of novelty focus," the Court reasoned that if the only novel step in a process claim were an algorithm, the process would not constitute statutory subject matter. According to the Court, this result followed from the requirement that the claim demonstrate novelty *independent* of the algorithm or other natural phenomena.[75]

This part of the *Flook* rationale was at odds with firmly entrenched precedent which had established that the "point of novelty focus" was not the proper method for determining subject matter patentability.[76] The Court asserted that its analysis did not run counter to the prohibition, but nevertheless maintained that once the algorithm in Flook's claim was assumed to be a part of the prior art,[77] his invention as a whole was devoid of patentable subject matter.[78] Flook also had argued that because of the "presence [in his process] of specific 'post-solution' activity,"[79] his invention was not simply a newly discovered algorithm. The Court disagreed, explaining that "[a] competent draftsman could attach some form of post-solution activity to

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75. 437 U.S. at 590-92. The Court cited several of its previous decisions in support of its view that "[t]he process itself, not merely the mathematical algorithm, must be new and useful." *Id.* at 591. *See, e.g.*, Funk Bros. Seed Co. v. Kalo Inoculant Co., 333 U.S. 127 (1948); MacKay Radio & Tel. Co. v. Radio Corp. of America, 306 U.S. 86 (1939). The novelty in Flook's invention was the new method of calculating the alarm limit, and his method was an improvement over the old one. 437 U.S. at 594-95.

76. *See In re* Chatfield, 545 F.2d 152 (C.C.P.A. 1976), *cert. denied sub nom.* Dann v. Chatfield, 434 U.S. 875 (1977) (petition untimely filed); note 36 *supra* and accompanying text. Flook argued that the Court's test "improperly imports into § 101 the considerations of 'inventiveness' which are the proper concerns of §§ 102 and 103." 437 U.S. at 592. Section 102(a) of the Patent Act deals with an invention's novelty and provides that a person shall not be entitled to a patent if "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." 35 U.S.C. § 102(a) (1976). *See* notes 15-16 *supra*.

77. By assuming that algorithms are a part of the prior art, the Court is simply indicating that they are not patentable. *See* note 28 *supra*.

78. 437 U.S. at 594. The Court supported this conclusion by reiterating the rule that a scientific principle cannot itself support a patent in the absence of some other invention in the claims. *Id.*

79. *Id.* at 590. Flook's "post-solution activity" was the use of the formula to adjust the alarm limit.

almost any mathematical formula . . . ."[80]

The Court of Customs and Patent Appeals first addressed the *Flook* decision in *In re Sarkar*.[81] The court rejected a claim for a process for mathematically modeling natural streams or artificial waterways in order to calculate the flow of water during a period of time. The court stated that the "invention as a whole consists of a mathematical exercise."[82] *Sarkar* is important primarily because of dicta[83] in which Chief Judge Markey rejected the *Flook* imperative that the courts "must proceed cautiously when . . . asked to extend patent rights into areas wholly unforeseen by Congress."[84] The court contended that "Congress cannot be expected to foresee, or to annually amend Title 35 to incorporate every future breakthrough onto entirely new technological terrain . . . ."[85] The court also tried to reduce the confusion created by the *Flook* test by explaining that a claim's novelty and obviousness are to be decided only after the separate issue of subject matter patentability is settled.[86]

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80. *Id.* Thus, "the Pythagorean theorem would not have been patentable, or partially patentable, because a patent application contained a final step indicating that the formula, when solved, could be usefully applied to existing surveying techniques." *Id.*

81. 588 F.2d 1330 (C.C.P.A. 1978).

82. *Id.* at 1336.

83. *Id.* at 1333.

84. Parker v. Flook, 437 U.S. 584, 596 (1978).

85. 588 F.2d at 1333. One writer, speaking of the C.C.P.A. dicta in *Sarkar*, noted that the statements were "in direct opposition to the language in *Flook* and could invoke the wrath of the Supreme Court." 1979 WIS. L. REV. 867, 892. Actually, the tension might not have been as great as it seemed on the surface. The Supreme Court itself had noted:

> To a large extent our conclusion [denying the patent] is based on reasoning derived from opinions written before the modern business of developing programs for computers was conceived. The youth of the industry may explain the complete absence of precedent supporting patentability. Neither the dearth of precedent, nor this decision, should therefore be interpreted as reflecting a judgment that patent protection of certain novel and useful computer programs will not promote the progress of science and the useful arts, or that such protection is undesirable as a matter of policy.

437 U.S. at 595.

86. 588 F.2d at 1333 n.10.

In *In re Johnson*[87] the C.C.P.A. allowed claims for a process designed to remove noise from seismic readings. The court interpreted *Flook* narrowly as holding that a "method of calculation" is not patentable even though focused upon a specific end use.[88] The *Johnson* claims, on the other hand, were held to be "within the framework of a process for filtering out or removing noise."[89] The calculating step, said the court, was "but one of a sequence of substantive steps."[90] Finally, the court made clear that "selection of a general purpose computer and digital data processing techniques to implement the processes does not determine whether these claimed processes are statutory."[91] This case continued the C.C.P.A.'s methodical narrowing of *Flook*, and it was uncertain whether the Supreme Court would, with an explicit reversal, end the court's practice of evading *Benson* and *Flook* or would choose to adopt the C.C.P.A.'s views.

The uncertainty surrounding the patentability of claims that required the use of a mathematical formula, computer program, or computer led to the Supreme Court's consideration of *Diamond v. Diehr*.[92] Initially, the Court reiterated the *Benson* test for patentability of a process: " 'Transformation and reduction of an article "to a different state or thing" is the clue to the patentability of a process claim that does not include particular machines.' "[93] The Court reasoned that respondents' method for curing rubber, described in detail from start to finish, involved just such a transformation.[94] This simple but unassailable analysis led directly to the conclusion that the claim fell "within the § 101 categories of possibly patentable subject matter."[95] The Court stressed that the use of a mathematical equation and

87. 589 F.2d 1070 (C.C.P.A. 1978).

88. *Id.* at 1075. The C.C.P.A. ignored the rhetoric of *Flook* and relied instead on its narrow holding. *Id.* at 1076.

89. *Id.* at 1081.

90. *Id.* The C.C.P.A. found the claims to be statutory processes that merely utilized the recited algorithms and did not attempt to patent the algorithms themselves. *Id.* at 1082.

91. *Id.* at 1081.

92. 450 U.S. 175 (1981).

93. *Id.* at 184 (quoting Gottschalk v. Benson, 409 U.S. 63, 70 (1972)).

94. *Id.*

95. *Id.*

programmed computer did not alter this conclusion.[96]

The Court noted that there are limits on what may be patented under section 101, specifically the exclusion of laws of nature, physical phenomena, and abstract ideas. Both *Benson* and *Flook* were described as standing "for no more than these long-established principles."[97] *Benson* was distinguishable, said the Court, because in that case the only way to use the algorithm was in connection with a computer. Since no one could have used the algorithm in a computer program without infringing Benson's patent, the Court explained, the grant of a patent would have in effect allowed a monopoly on an idea.[98] Addressing *Flook*, the Court stated that the claim in that case was nothing more than a formula for computing an alarm limit, which, the Court declared, "is simply a number."[99] The Court added that this number could be computed by using Flook's formula, but only if several variables, which he had failed to disclose, were known.[100]

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96. *Id.* at 187.

97. *Id.* at 185.

98. *Id.* at 185-86.

99. *Id.* at 186. This reasoning is reminiscent of the "method of calculation"/"method of operation" distinction developed by the C.C.P.A. in the wake of *Benson*. *See* note 54 *supra* and accompanying text. The Court in *Flook* stated, "Very simply, our holding today is that a claim for an improved method of calculation, even when tied to a specific end use, is unpatentable subject matter under § 101." Parker v. Flook, 437 U.S. 584, 595 n.18 (1978).

100. The Court made it clear that Flook's claims standing alone did not "teach" one how to actually update an alarm limit:

> As we explained in *Flook*, in order for an operator using the formula to calculate an updated alarm limit the operator would need to know the original alarm base, the appropriate margin of safety, the time interval that should elapse between each updating, the current temperature (or other process variable) and the appropriate weighing factor to be used to average the alarm base and the current temperature.

450 U.S. at 186 n.10 (citing Parker v. Flook, 437 U.S. 584, 586 (1978)). The Court later mentioned the same point in defending their distinguishing *Flook* on the facts:

> We were careful to note in *Flook* that the patent application did not purport to explain how the variables used in the formula were to be selected, nor did the application contain any disclosure relating to chemical processes at work or the means of setting off an alarm or

According to the Court, Flook's claims had fallen short of the threshold of patentability because his "process" was nothing more than an isolated formula. The *Diehr* Court termed Flook's attempt at a practical application of the formula "token"[101] and "insignificant postsolution activity."[102] In contrast, the Court found in *Diehr* that respondents' claims were drawn to a process for curing synthetic rubber, which the Court viewed as describing "in detail a step-by-step method for accomplishing [the cure], beginning with the loading of a mold with raw, uncured rubber and ending with the eventual opening of the press at the conclusion of the cure."[103] The Court indicated that the key to deciding the case was a statement from a pre-computer era case: " 'While a scientific truth, or the mathematical expression of it, is not a patentable invention, a novel and useful structure created with the aid of knowledge of scientific truth may be.' "[104] As applied in *Diehr*, this principle meant that the Arrhenius equation[105] itself could not be patented, but the rubber curing process could incorporate the equation and "at the very least not [be] barred at the threshold by § 101."[106]

Writing for the dissent, Justice Stevens stated simply that "[t]he Court's decision in this case rests on a misreading of the Diehr and Lutton patent application."[107] He characterized the invention as "an improved method of calculating the time that the mold should remain closed during the curing process."[108] Armed with this reading of the claims, Justice Stevens proceeded to find nothing novel in the process except that a com-

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adjusting the alarm limit.

*Id.* at 192 n.14 (citing 437 U.S. at 586).

101. *Id.* at 192 n.14.

102. *Id.* at 191.

103. *Id.* at 184.

104. *Id.* at 188 (quoting MacKay Radio & Tel. Co. v. Radio Corp. of America, 306 U.S. 86, 94 (1939)).

105. *See* note 3 *supra*.

106. 450 U.S. at 188.

107. *Id.* at 194 (Stevens, J., dissenting). Justice Stevens pointed out a shortcoming of patent litigation: "[T]he outcome of such litigation is often determined by the judge's understanding of the patent application." *Id.* at 205 (Stevens, J., dissenting).

108. *Id.* at 206-07 (Stevens, J., dissenting) (footnote omitted).

puter determined how long the press should remain closed; he found this to be "strikingly reminiscent of the method of updating alarm limits that Dale Flook sought to patent."[109] Justice Stevens thought that the majority had misapplied *Flook* by confusing the "distinction between the subject matter of what the inventor *claims* to have discovered—the § 101 issue—and the question whether that claimed discovery is in fact novel—the § 102 issue."[110] In Justice Stevens' view, the focus in determining subject matter patentability is only that part of a claim which the inventor claims is his discovery. Since Justice Stevens saw the discovery in respondents' claims as simply a method of programming a computer, he reasoned that the claims disclosed no patentable subject matter under *Benson* and *Flook* and should have been rejected.[111]

The implications of the Court's reasoning are twofold. First, despite the Court's declaration to the contrary,[112] the manner in which a claim is drafted could well determine whether an invention passes the test of subject matter patentability. Attorneys would be well advised to make certain that process claims containing mathematical or computer-related steps are not incomplete or drawn simply to a "method of computing." The end result must be the physical transformation of a tangible article accomplished by an inventive application of the principle.[113] Second, and more important, the use of a computer to carry out a step or steps in a process will not make an otherwise patentable claim nonstatutory[114] and may even improve the chances of

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109. *Id.* at 209 (Stevens, J., dissenting).

110. *Id.* at 211 (Stevens, J., dissenting) (emphasis in original) (footnote omitted).

111. *Id.* at 215-16 (Stevens, J., dissenting).

112. The Court explained that the addition of "insignificant postsolution activity will not transform an unpatentable principle into a patentable process. . . . To hold otherwise would allow a competent draftsman to evade the recognized limitations on the type of subject matter eligible for patent protection." *Id.* at 191-92.

113. "It is now commonplace that an *application* of a law of nature or mathematical formula to a known structure or process may well be deserving of patent protection." *Id.* at 187 (citations omitted) (emphasis in original).

114. *Id.* "Our earlier opinions lend support to our present conclusion that a claim drawn to subject matter otherwise statutory does not become nonstatutory simply because it uses a mathematical formula, computer program, or dig-

patentability by demonstrating how the process can be put to a practical use. For example, in *Diehr*, respondents' entire claim was based on continuously recalculating the cure time needed to achieve the perfect cure, which would not have been possible without computer technology. The Court made it clear that an inventor will not jeopardize the chances for obtaining a patent by using a computer in devising a "more efficient solution"[115] of a familiar process.

In addition, the Court forbade further use of the "point of novelty focus" for determining the subject matter patentability of claims reciting mathematical algorithms, explaining that it is particularly inappropriate to separate a *process* claim into its old and new elements, because a new combination of well-known steps may be patentable.[116] The Court mandated that all the steps in a claim be considered as a whole: "The 'novelty' of any element or steps in a process, or even of the process itself, is of no relevance in determining whether the subject matter of a claim falls within the § 101 categories of possibly patentable subject matter."[117]

This approach appears to be inconsistent with the *Flook* test. The Court explained, however, that although the *Flook* test required that a mathematical algorithm be assumed to be within

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ital computer." *Id.*

115. *Id.* at 188. The dissent called for "an unequivocal holding that no program-related invention is a patentable process under § 101 unless it makes a contribution to the art that is not dependent entirely on the utilization of a computer." *Id.* at 219 (Stevens, J., dissenting). Because inventions deserving of patent protection will increasingly involve computers and mathematical solutions designed to save time and money by improving upon old processes and products, Justice Stevens' view is extremely shortsighted.

116. *Id.* at 188. Under this "synergism" doctrine, a combination of previously known elements which produces an effect that is greater than the separate effects of the several elements may be patentable. The combination must produce an unusual or surprising result to pass the nonobviousness test. Kearney & Trecker Corp. v. Cincinnati Milacron Inc., 562 F.2d 365, 370 (6th Cir. 1977).

117. 450 U.S. at 188-89 (footnote omitted). This was the position of the C.C.P.A. in *In re* Chatfield, 545 F.2d 152 (C.C.P.A. 1976), *cert. denied sub nom.* Dann v. Chatfield, 434 U.S. 875 (1977) (petition untimely filed). *See* note 37 *supra*. *Flook* had placed the view in jeopardy. *See* Parker v. Flook, 437 U.S. 584 (1978); notes 75-78 *supra*.

the prior art (requiring it to be separated from the rest of the claim conceptually), this assumption does not mean that the algorithm is to be given no consideration at all.[118] The dissent's failure to understand the majority's distinction between assuming an algorithm to be within the prior art[119] and ignoring it altogether could partially explain the difference of opinion, but the true disagreement is a more general one. The majority views a process claim as a whole, from start to finish, and algorithms, which are themselves unpatentable, are taken into account as a part of the larger process.[120] The dissent, on the other hand, looks at only the "new" part of a claim, and if that element is an algorithm, the entire process is rejected.[121] The Court in *Diehr* declared that the section 101 inquiry is a separate issue from that of an invention's novelty or nonobviousness.[122]

Generally, patent cases pose special problems for judges untrained in the "hard" sciences.[123] The difficulties are magnified when the intricacies of the evolving law must be applied to the complex facts involved in patent cases. This may explain why the *Diehr* majority did not view the *Flook* test as inconsistent with its decision.[124] The Court in *Diehr* stated that a scientific principle cannot be patented and that this rule may not "be cir-

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118. 450 U.S. at 189 n.12.

119. *See* note 28 *supra*.

120. 450 U.S. at 188-89 & n.12.

121. *Id.* at 212 (Stevens, J., dissenting).

122. *Id.* at 190. The Court was careful to point out that a finding that respondents' claims constituted patentable subject matter did not mean that a patent could issue. The formidable hurdles of sections 102 and 103 were yet to be cleared. Concerning these sections, the Court explained that "[a] rejection on either of these grounds does not affect the determination that respondents' claims recited subject matter which was eligible for patent protection under § 101." *Id.* at 191.

123. Justice Blackmun is an exception. He received a degree in mathematics (*summa cum laude*) from Harvard in 1929. CONGRESSIONAL QUARTERLY'S GUIDE TO THE U.S. SUPREME COURT 864 (1979).

124. The votes in *Flook* and *Diehr* indicate that the cases are inconsistent. Apparently, in the four years between *Flook* and *Diehr*, Justices White and Powell were persuaded to adopt Justice Stewart's dissenting view in *Flook* that "[s]ection 101 is concerned only with subject-matter patentability. Whether a patent will actually *issue* depends upon the criteria of §§ 102 and 103 . . . ." Parker v. Flook, 437 U.S. 584, 600 (1978) (Stewart, J., dissenting) (emphasis in original). The voting in the two cases was as follows:

cumvented by attempting [as in *Flook*] to limit the use of the formula to a particular technological environment."[125] The problem is how to distinguish the situation in *Flook* from the one in *Diehr*.[126] One plausible explanation is that determination of the subject matter patentability of claims reciting a computer, computer program, or mathematical algorithm depends upon the degree to which it is applied in a process (or structure) which considered as a whole "is performing a function which the patent laws were designed to protect (*e. g.*, transforming or reducing an article to a different state or thing)."[127] *Benson* represents one end of the scale because the claims there produced no physical transformation; *Diehr* represents the other end because a tangible article was literally transformed; and *Flook* would fall somewhere in the middle, short of patentability because the claims there lacked the requisite degree of "transforming" properties. A simpler explanation may be that the Supreme Court adopted the Court of Customs and Patent Appeals' calculation/operation distinction[128] as the test for subject matter patentability in mathematical claims. Nevertheless, the practical difficulty in discerning which claims are drawn to mere "methods of calculation" and which claims are not remains a real problem.

The scope of the holding in *Diehr* is difficult to ascertain. Because the *Diehr* definition of "algorithm" is the same narrow one used in *Benson*,[129] the case has limited precedential value.

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| *Flook* dissent: | Rehnquist, Burger, Stewart |
| *Diehr* majority: | Rehnquist, Burger, Stewart |
| | White, Powell |
| *Flook* majority: | White, Powell |
| | Stevens, Brennan, Marshall, Blackmun |
| *Diehr* dissent: | Stevens, Brennan, Marshall, Blackmun |

125. 450 U.S. at 191.

126. The Court never promised that it would be easy. In *Flook* the Court warned that "[t]he line between a patentable 'process' and an unpatentable 'principle' is not always clear. Both are 'conception[s] of the mind, seen only by [their] effects when being executed or performed.'" 437 U.S. at 589 (quoting Tilghman v. Proctor, 102 U.S. 707, 728 (1880)). The dissent in *Diehr* found the claims in *Flook* very similar to those in *Diehr*. *See* text accompanying notes 107-09 *supra*.

127. 450 U.S. at 192.

128. *See* notes 54-57 *supra* and accompanying text.

129. *See* note 10 *supra*.

The C.C.P.A., nevertheless, probably will apply the case to a wide range of fact situations in accordance with its liberal policy of finding subject matter patentability in computer-related and mathematics-related claims.[130] *Diehr* finally provides the C.C.P.A. with a case upon which to expand, which may result in a reversal of the constant narrowing of *Benson* and *Flook* in which the court has been engaged for several years.

The Court's reasoning in *Diehr* is refreshingly simple and direct. A process for molding rubber has long been recognized as patentable subject matter.[131] It may not be novel, and it may not be inventive, but it *is* patentable subject matter, and use of a computer or a mathematical formula does not make it any less so. Respondents' invention was an important improvement over the present rubber molding process and was deserving of patent protection.[132] In the future, many advances in old technologies will likewise be made possible through use of computers and

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130. The C.C.P.A.'s position seems even more liberal because it is juxtaposed with that of the Commissioner of Patents and Trademarks and the Board of Patent Appeals. Traditionally, there had been a high degree of harmony between the C.C.P.A. and the Patent Office, but this relationship changed in the late 1960s when the C.C.P.A. rather summarily rejected the established "function of a machine" and "mental steps" doctrines. *See* text accompanying notes 31-33 *supra*. This opened the door to patentability for computer programs. The Patent Office's hostility toward computer-related claims is no secret. There is great concern that if massive numbers of claims are filed, searching the prior art to determine novelty will be impossible. Patent examiners will be left with little choice but merely to note the receipt of each patent application. *See* REPORT OF THE PRESIDENT'S COMM'N ON THE PATENT SYSTEM 13 (1966). The *Benson* Court, quoting from the Report, acknowledged these practical difficulties. 409 U.S. at 72; *see* note 47 *supra*. For this reason, the Court deferred to Congress the question whether patents should be granted to computer programs. 409 U.S. at 73.

131. The dissent found the majority's statement of the issue—" 'whether a process for curing synthetic rubber . . . is patentable subject matter' "—a bit simplistic, stating that "[o]f course, that question was effectively answered many years ago . . . ." 450 U.S. at 205 (Stevens, J., dissenting) (quoting the opinion of the Court at 177).

132. The dissent thought otherwise: "In short, Diehr and Lutton do not claim to have discovered anything new about the process for curing synthetic rubber." *Id.* at 1066 (Stevens, J., dissenting). This statement is clearly wrong. *See* notes 103-06 *supra* and accompanying text.

mathematical algorithms.[133] While the decision did not settle the issue of patentability of computer programs,[134] it did bring the issue more into focus. While an isolated computer program that is not intimately entwined in a specific statutory process will be labeled a mere "method of calculation" and, therefore, will not be patentable, an inventor need no longer avoid using computer programs, mathematical formulas, or other algorithms in a patentable process for fear that their presence will jeopardize the claim's status as patentable subject matter.

STEVEN GREGORY CHURCHWELL

133. *See* notes 11 & 115 *supra*.

134. The Court has deferred to Congress on this question. Parker v. Flook, 437 U.S. 584, 595-96 (1978); *see* note 130 *supra*.

# BOOK REVIEW

TENNESSEE CIRCUIT COURT PRACTICE. By Lawrence A. Pivnick and James F. Schaeffer (Consulting Author). Norcross, Georgia: The Harrison Company. 1981. Pp. 436. $54.95.

During the 1970s Tennessee's rules of civil procedure for both trial and appellate practice were thoroughly modernized, with the result that an up-to-date single-volume reference work in the field was badly needed. Lawrence Pivnick and James Schaeffer have now largely filled this void. Although designed primarily for use by practitioners trying cases in the circuit courts, their book is also a valuable single source for anyone searching authority on a question of Tennessee civil procedure. Comparatively little space is devoted to appellate practice, but this is understandable since the courts have had a full decade of experience under the trial rules but only two years under the appellate rules. We can expect expanded treatment of appellate practice in the annual supplements.

Justice Harbison of the Tennessee Supreme Court has identified the apparent purposes of the book in his foreword: analysis of the new rules with supporting reasons, quick reference to the leading authorities construing them, and advice concerning solution or avoidance of procedural problems (p. vii). Measured by these standards, the book should be judged a success. It covers a broad range of procedural topics, and its treatment of statutory and judicial authority is accurate and current. Topics are arranged logically, and there are ample cross references. The book's only disappointing feature is the lack of reference to secondary authority for discussions in greater depth or treatment of topics beyond the scope of the book.

There is treatment of every topic one would expect in a thorough survey of civil procedure. Initial chapters cover the definition of an action, time limitations, court organization and jurisdiction, venue, and parties. (Chs. 1-6). All procedural stages of a civil action are given specific treatment, from pleading to

judgment. (Chs. 7-27). There are also special chapters on appellate review (Ch. 30), judgment enforcement (Ch. 29), and the governmental tort liability and medical malpractice acts (Chs. 32 & 33).

Especially comprehensive are the chapters on parties (Ch. 5) and process (Ch. 9). Both general theory and numerous specific situations are included. Under the heading of "parties" we find master and servant, corporations, partnerships, unincorporated associations and joint ventures, rights and liabilities of women, actions for injury to spouse, actions involving infants, actions by others for injuries to children, products liability actions, actions against government and its employees, prisoners, wrongful death actions, survival of actions, and more. Similarly, the discussion of process treats, among others, service on minors, service on prisoners, service on private domestic corporations, service on private foreign corporations, service on nonresident motorists, and service on public entities.

Tennessee's civil practice rules are patterned after, but do not duplicate, the Federal Rules of Civil Procedure. The authors carefully identify both where the text of Tennessee's rules differs and where the Tennessee courts have differed in their construction of similar language. Sections on pleading (Sec. 7-2) and on the jury's power to render only a general verdict (Sec. 26-2) are prime examples of local variations that probably would be unfamiliar to one who lacks experience in Tennessee circuit court practice.

In a book which covers so many topics it is not surprising that a few chapters do not meet its overall standard of quality. The authors' stated reason for skimpy treatment of the pretrial conference in Chapter 21 is that the procedure is little used (p. 264), but much more could have been said to promote effective use of the pretrial conference, and references could have been given to other sources containing more thorough discussions.[1] Enforcement of judgments in Tennessee is an admittedly difficult topic, but it could have been given more than a cursory discussion. More authorities and references could have been col-

1. *E.g.*, C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE §§ 1522-1523 (1971).

lected,[2] and some attempt at practical analysis would have been especially helpful. Occasional preachments on sound practice contribute to the book's utility, except for the discussion of trial conduct in Section 24-27, which is merely a pasted-together litany from the text of various disciplinary rules in the Code of Professional Responsibility with no citation to the particular sources. No attempt is made to provide a rationale for any of the proffered rules of conduct.[3]

A practice book is soundly tested only through its widespread use. If there are errors—for example, in citations to the numerous authorities—they will emerge. The book does square with this reviewer's understanding of the law and with the recent literature.[4] Members of the bar and bench who rely on the authority and analysis in this book should not often be led astray. The contract with the publisher calls for annual supplements, and it is hoped that Pivnick and Schaeffer can maintain the high standard set in the original volume and remedy its few apparent deficiencies.

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2. *See, e.g.*, CONTINUING LEGAL EDUCATION PROGRAM, UNIV. OF TENN. COLLEGE OF LAW, CREDITORS' RIGHTS AND REMEDIES IN TENNESSEE (1978); CONTINUING LEGAL EDUCATION PROGRAM, UNIV. OF TENN. COLLEGE OF LAW, CREDITORS' RIGHTS AND REMEDIES (1976).

3. In any event, the text of the ABA-approved Code of Professional Responsibility will soon be significantly altered. ABA MODEL RULES OF PROFESSIONAL CONDUCT (Proposed Final Draft 1981).

4. Sobieski, *A Survey of Civil Procedure in Tennessee—1977*, 46 TENN. L. REV. 271 (1979); Sobieski, *The Procedural Details of the Proposed Tennessee Rules of Appellate Procedure*, 46 TENN. L. REV. 1 (1978).

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