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Volume 46 Fall 1978 Number 1

CONTENTS

ARTICLES

THE PROCEDURAL DETAILS OF THE PROPOSED TENNESSEE RULES OF APPELLATE PROCEDURE *John L. Sobieski, Jr.* 1

SURVEY OF TENNESSEE CONSTITUTIONAL LAW IN 1976-77 *Kenneth L. Penegar* 120

SURVEY OF TENNESSEE PROPERTY LAW *Toxey H. Sewell* 160

RECENT DEVELOPMENTS

CONSTITUTIONAL LAW—EQUAL PROTECTION—IMPOSING MONEY BAIL 203

CONSTITUTIONAL LAW—EQUAL PROTECTION—SEX DISCRIMINATION IN SECONDARY SCHOOL ATHLETICS 222

DOMESTIC RELATIONS—JURISDICTION—EXTENSION OF COMITY TO FOREIGN-NATION DIVORCES 238

TORTS—DEFAMATION—PUBLIC-FIGURE STATUS 252

BOOK REVIEW

AVNET: HOW TO PROVE DAMAGES IN WRONGFUL PERSONAL INJURY AND DEATH CASES *Jerry J. Phillips* 269

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TENNESSEE LAW REVIEW

Volume 46 Winter 1979 Number 2

CONTENTS

ARTICLES

A SURVEY OF CIVIL PROCEDURE IN TENNESSEE—1977
John L. Sobieski, Jr. 271

THE BURGER COURT, THE REGULATION OF INTERSTATE TRANSPORTATION, AND THE CONCEPT OF LOCAL CONCERN: THE JURISPRUDENCE OF CATEGORIES *Earl M. Maltz* 406

RECENT DEVELOPMENTS

CONSTITUTIONAL LAW—DUE PROCESS—FUNDAMENTAL RIGHT TO BODILY INTEGRITY—PROTECTIVE SERVICES FOR ELDERLY PERSONS 425

CONSTITUTIONAL LAW—FOURTH AMENDMENT—WARRANT REQUIREMENT FOR OSHA INSPECTIONS 446

DOMESTIC RELATIONS—DIVORCE—RESTRICTIONS ON RECRIMINATION 461

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TENNESSEE LAW REVIEW

Volume 46 Spring 1979 Number 3

CONTENTS

ARTICLES

CRIMINAL LAW IN TENNESSEE IN 1977-1978—
A CRITICAL SURVEY
Joseph G. Cook 473

CLASS ACTIONS PURSUANT TO TENNESSEE RULE
OF CIVIL PROCEDURE 23
Martha S. L. Black 556

COMMENT

CONSTITUTIONAL CHALLENGES TO MEDICAL
MALPRACTICE REVIEW BOARDS
Robert L. Lockaby, Jr. 607

RECENT DEVELOPMENTS

CONSTITUTIONAL LAW—DUE PROCESS—
INDIGENT PARENTS' RIGHT TO
COUNSEL IN CHILD NEGLECT CASES 649

CONSTITUTIONAL LAW—DUE PROCESS—PROCEDURAL
SAFEGUARDS IN THE FOSTER CARE SYSTEM 671

CONSTITUTIONAL LAW—EQUAL PROTECTION—ALIENS—
STATE RESTRICTIONS ON EMPLOYMENT 692

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TENNESSEE LAW REVIEW

Volume 46 Summer 1979 Number 4

CONTENTS

ARTICLES

CHARLES H. MILLER LECTURE—LAWYERS AND THEIR PUBLIC RESPONSIBILITIES *Thomas Ehrlich* 713

AN UPDATE OF THE NEW TENNESSEE RULES OF APPELLATE PROCEDURE *John L. Sobieski, Jr.* 727

THE UNCERTAIN POWER OF THE PRESIDENT TO EXECUTE THE LAWS *Bruce Ledewitz* 757

RECENT DEVELOPMENTS

CIVIL PROCEDURE—CLASS ACTIONS—DENIAL OF CERTIFICATION—INVALIDITY OF DEATH KNELL DOCTRINE AS BASIS FOR IMMEDIATE APPEAL 807

CONSTITUTIONAL LAW—SEARCHES AND SEIZURES—STANDING AND FOURTH AMENDMENT RIGHTS 827

CONSTITUTIONAL LAW—SIXTH AMENDMENT RIGHT TO TRIAL BY JURY—FIVE JURORS ARE NOT ENOUGH 847

FEDERAL COURTS—DIVERSITY JURISDICTION—ANCILLARY JURISDICTION AND THIRD-PARTY PRACTICE 865

WORKER'S COMPENSATION—MULTIPLE SCHEDULE INJURY—THREE-MEMBER RULE AND POLICY 884

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TENNESSEE LAW REVIEW

Volume 46 Fall 1978 Number 1

THE PROCEDURAL DETAILS OF THE PROPOSED TENNESSEE RULES OF APPELLATE PROCEDURE

JOHN L. SOBIESKI, JR.*

I. INTRODUCTION 2
II. INITIATION OF AN APPEAL 4
A. *Appeal as of Right* 4
B. *Appeal by Permission* 15
C. *Direct Review by the Court of Appeals of Administrative Proceedings* 21
III. SECURITY AND STAY PENDING APPEAL 23
A. *Security for Costs in Civil Actions* 23
B. *Security for the Judgment and Stays in Civil Actions* 25
C. *Release in Criminal Cases* 31
IV. THE RECORD ON APPEAL 35
A. *Preparation of the Record on Appeal* 36
B. *Completion, Transmission, and Filing of the Record on Appeal* 53
C. *Keeping the Record on Appeal Up-to-Date* . . 66
D. *The Record on Direct Appellate Review of Administrative Proceedings* 67
V. BRIEFS 69
A. *Filing and Service of Briefs* 69
B. *Content and Form of Briefs* 72
C. *Optional Appendix to Briefs* 80

* B.S., Loyola University (Chicago); J.D., University of Michigan; Associate Professor of Law, University of Tennessee; Reporter, Tennessee Supreme Court Advisory Commission on Civil Rules.

Although the author served as Reporter to the Tennessee Supreme Court Advisory Commission on Civil Rules in the preparation of the proposed appellate rules, the views expressed in this article are personal and enjoy no other status.

D. *Amicus Curiae Briefs* 82
VI. HEARING OF APPEALS 86
A. *Sequence of Oral Argument or Submission of Cases* 86
B. *Conduct of Oral Argument* 87
VII. DISPOSITION OF APPEALS 90
A. *Entry of Judgment* 90
B. *Rehearing in the Appellate Court* 92
C. *Costs; Interest on Judgments* 97
D. *Issuance, Stay, and Recall of Mandates* 100
VIII. PRACTICE ON APPEAL 102
A. *Voluntary Dismissal* 102
B. *Appeals by Poor Persons* 103
C. *Substitution, Addition, and Dropping of Parties* 105
D. *Filing and Service of Papers* 106
E. *Computation and Extension of Time* 108
F. *Motions* 110
IX. CONCLUSION 113
CHECKLISTS OF STEPS ON APPEAL 114

I. INTRODUCTION

An earlier article set forth the theoretical foundations of the proposed Tennessee Rules of Appellate Procedure,[1] which if approved by the General Assembly will govern procedure in proceedings before the Tennessee Supreme Court, Court of Appeals, and Court of Criminal Appeals.[2] Only incidental attention was given in that article to the procedural details of the rules. In part, this deemphasis on matters of detail is attributable to the under-

1. Sobieski, *The Theoretical Foundations of the Proposed Tennessee Rules of Appellate Procedure*, 45 TENN. L. REV. 161 (1978). The proposed appellate rules, official forms, and amendments to the Tennessee Rules of Civil Procedure are set forth in an appendix to the cited article. *Id.* at 271-349. Although there have been some changes in the proposed rules since publication of the earlier article concerning them, most of the changes are highly technical. The more substantive changes are indicated in this article.

2. PROPOSED TENN. R. APP. P. 1. The Advisory Commission comment to rule 1 notes that none of the rules affects the allocation of subject-matter jurisdiction among the appellate courts. That comment also states that "[n]othing in these rules . . . is intended to affect substantive rights, and all the rules must be construed consistently with the constitutions of the United States and the state of Tennessee."

lying spirit of the proposed rules, which views procedure not as a battle of "bright or dull wits . . . on witless technicalities"[3] but as a practical means to an end. As stated in proposed rule 1, "[t]hese rules shall be construed to secure the just, speedy, and inexpensive determination of every proceeding on its merits." A number of other rules reflect this same spirit.[4] Most notably, under rule 2 the appellate courts may suspend for good cause the requirements or provisions of any of the rules and may order proceedings in accordance with their discretion, subject to the limitation that the time for seeking appellate review in certain circumstances may not be lengthened.[5] In addition, numerous other rules simplify current law by eliminating technicalities of little or no contemporary utility—technicalities that have survived from "blind imitation of the past."[6] In short, the proposed rules both simplify current practice and insist upon strict conformity with procedural details only insofar as necessity requires.

The procedural details of the proposed rules, however, are matters of significant and legitimate concern and are the focal point of this discussion. While it would be gratifying if the appellate courts and the attorneys who regularly practice before them found this discussion useful, it is intended principally for the benefit of those who are only occasionally involved in the appellate process. This is not an exhaustive treatment of the procedural details of the proposed rules, but all those matters of detail ordinarily involved in seeking appellate review are discussed.[7]

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3. R. TRAYNOR, THE RIDDLE OF HARMLESS ERROR 15 (1970).

4. *See* Sobieski, *supra* note 1, at 169-70.

5. *See* text accompanying note 592 *infra*. The Advisory Commission comment to rule 2 notes that conferring power on the appellate courts to suspend the requirements or provisions of the proposed rules in a particular case is the result of two principal considerations.

> These rules, as do most rules of law, necessarily speak in somewhat general terms. Otherwise, the rules would be overburdened with qualifications, exceptions, specifications, and provisos. In addition, no draftsman or body of draftsmen can possibly foresee all the situations life may churn up. This rule, therefore, permits the necessary individualization of the law in particular cases, and provides the source of authority for the courts to formulate law in situations not currently foreseeable.

See Sobieski, *supra* note 1, at 174-79.

6. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).

7. The conclusion of this article contains checklists of steps to be taken

Like the rules themselves, the discussion is arranged insofar as possible in a chronological fashion, providing a step-by-step description of the evolution of the appellate process from initiation until final disposition—and a little bit beyond as well.[8]

II. Initiation of an Appeal

A. *Appeal as of Right*

The proposed appellate rules characterize virtually all plenary appellate proceedings as "appeals"[9] and establish two types of appeals: appeals as of right and appeals by permission. An appeal as of right, as defined in rule 3(d), "is an appeal that does not require permission of the trial or appellate court as a prerequisite to taking an appeal." In civil actions every final judgment is appealable as of right,[10] and rules 3(b) and 3(c) delineate the circumstances in which the defendant and the state may appeal as a matter of right in criminal actions.[11]

An appeal as of right is initiated by filing, generally within thirty days after the date of entry of the judgment appealed from, a notice of appeal with the clerk of the trial court.[12] The thirty-

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on an appeal as of right from the trial court, an interlocutory appeal by permission from the trial court, and an appeal by permission to the supreme court from a final decision of an intermediate appellate court. *See* text accompanying notes 616-50 *infra*.

8. *See* text accompanying notes 550-53 *infra*.

9. Direct review of administrative proceedings by the court of appeals is not referred to in proposed rule 12 as an "appeal" but as a "review proceeding." The Advisory Commission comment to that rule notes that rule 12 was formulated so as not to conflict with the terminology of the Tennessee Uniform Administrative Procedures Act. *See* Tenn. Code Ann. §§ 4-507 to 527 (Cum. Supp. 1977). In most respects, however, a review proceeding under rule 12 is substantially the same as an appeal as of right. *See* text accompanying notes 112-19 *infra*.

10. Proposed Tenn. R. App. P. 3(a). As discussed in subsequent sections of this article, the proposed rules also establish a number of summary appellate proceedings available as a matter of right. *See* text accompanying notes 149-56, 171-80 & 574 *infra*.

11. For a discussion of when an appeal may be taken as of right, see Sobieski, *supra* note 1, at 216-17, 227-31.

12. Proposed Tenn. R. App. P. 3(e), 4(a). *See also* ABA Commission on Standards of Judicial Administration, Standards Relating to Appellate Courts § 3.13(a)-.13(b) (1977) [hereinafter cited as Appellate Court Standards].

day period applies uniformly to all appeals.[13] The Advisory Commission comment to rule 4 notes that "[t]hirty days is sufficient time particularly in light of the fact that a party is required to do nothing to initiate the appellate process except file and serve notice of appeal." If an expedited decision on any matter is desirable, "notice of appeal may be filed and served immediately upon entry of the judgment appealed from, and an expedited schedule of appellate review may be established as permitted by rule 2."[14]

The notice of appeal required by rule 3(e) specifies the party taking the appeal, the judgment from which relief is sought, and the court to which the appeal is taken.[15] Neither the issues presented for review nor the argument in support of the issues need be set forth in the notice of appeal.[16] Moreover, under the current revision of proposed rule 3(f), "[a]n appeal shall not be dismissed for informality of form or title of the notice of appeal." Similarly, cases appealed to the wrong appellate court are not dismissed but are transferred to the proper court.[17] Official form 1 sets forth a sample notice of appeal, and under proposed rule 48 the official forms "are sufficient under the rules and are intended to indicate the simplicity and brevity of statement that the rules contemplate."

While notice of appeal generally must be filed within thirty days after entry of the judgment appealed from,[18] certain specified timely motions in the trial court terminate the running of the time within which notice of appeal must be filed.[19] As stated in

13. PROPOSED TENN. R. APP. P. 4(a), Advisory Comm'n comment. The comment to rule 4(a) also states that "[s]tatutes prescribing some other time period for an appeal are in conflict with these rules and of no further force or effect." *See* TENN. CODE ANN. § 16-116 (Cum. Supp. 1977).

14. PROPOSED TENN. R. APP. P. 4(a), Advisory Comm'n comment. *See also* APPELLATE COURT STANDARDS, *supra* note 12, § 3.52(a).

15. PROPOSED TENN. R. APP. P. 4(f).

16. *See* text accompanying notes 387-407 *infra*. These matters need not be set forth until the later briefwriting stage of the appeal.

17. PROPOSED TENN. R. APP. P. 17. This provision is in accord with existing law. *See* TENN. CODE ANN. §§ 16-408, -450 (Cum. Supp. 1977). *See also* APPELLATE COURT STANDARDS, *supra* note 12, § 3.13(b).

18. PROPOSED TENN. R. APP. P. 4(a). Unlike FED. R. APP. P. 4(b), the proposed Tennessee rules do not establish a shorter time for filing notice of appeal in criminal cases. *But cf.* APPELLATE COURT STANDARDS, *supra* note 12, § 3.70 ("Procedure in criminal cases should expedite appeals . . . .").

19. Under current law, the pendency of any motion or other matter

the Advisory Commission comment to rule 4, "it would be undesirable to proceed with the appeal while the trial court has before it a motion the granting of which would vacate or alter the judgment appealed from, and which might affect either the availability of or the decision whether to seek appellate review." Accordingly, in civil actions, running of the time for filing notice of appeal is terminated for all parties if a timely motion is made under Tennessee Rule of Civil Procedure 50.02 for judgment in accordance with a motion for a directed verdict, under rule 52.02 to amend or make additional findings of fact (whether or not an alteration of the judgment would be required if the motion is granted), under rule 59.03 to alter or amend the judgment, and under rule 59.01 for a new trial.[20] In criminal actions, running of the time for filing notice of appeal is terminated by a timely motion under Tennessee Rule of Criminal Procedure 29(c) for a judgment of acquittal, under rule 33(a) for a new trial, under rule 34 for arrest of judgment, or a petition under rule 32(f)(1) for a suspended sentence.[21] These motions terminate the running of the time within which notice of appeal must be filed only if they are made within the time specified in the Tennessee Rules of Civil and Criminal Procedure, and only these motions have the indicated effect. The full time for filing notice of appeal commences to run and is computed from entry of an order disposing of the designated motions. Since the granting of a new trial is an interlocutory order, however, an appeal of right lies only after entry of judgment after the second trial, although an interlocutory appeal by permission may be sought from the order granting the new trial pursuant to proposed rule 9 or rule 10.

"having the effect of suspending [a] final judgment or action" is excluded from the time within which the bill of exceptions must be filed. TENN. CODE ANN. § 27-111 (Cum. Supp. 1977). *See also* APPELLATE COURT STANDARDS, *supra* note 12, § 3.13(a)(1).

20. PROPOSED TENN. R. APP. P. 4(b). This provision is based on a proposed amendment to the Federal Rules of Appellate Procedure. *See* COMMITTEE ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF APPELLATE PROCEDURE 5 (1977) [hereinafter cited as PROPOSED FEDERAL AMENDMENTS].

21. PROPOSED TENN. R. APP. P. 4(c). The earlier published versions of proposed appellate rule 4(c) did not include among the motions that terminate the time for filing notice of appeal a motion under criminal rule 29(c) for a judgment of acquittal.

In some cases notice of appeal may be filed prematurely. For example, notice may be filed immediately after the announcement of a decision or order, but judgment may not be entered thereon until sometime later.[22] Alternatively, notice may be filed after entry of judgment but prior to the filing of a later timely motion in the trial court for a new trial or judgment notwithstanding the verdict or other similar motion. Proposed rule 4(d) provides that "a notice of appeal filed before the entry of the judgment shall be treated as filed after such entry and on the day thereof."[23] If, therefore, an appellant does file his notice of appeal after announcement of a decision but prior to formal entry of judgment, the notice is "treated as filed after such entry and on the day thereof," thereby preserving appellant's opportunity to obtain appellate review even if no subsequent notice of appeal is filed within thirty days after formal entry of judgment. The date of entry of judgment in effect becomes the date of filing notice of appeal for the purpose of determining the timeliness of subsequent steps in the appellate process, which are measured with reference to the filing date of the notice of appeal.[24]

Proposed rule 4(b) establishes a different rule for those civil actions in which notice of appeal is filed prior to making a timely motion that under rule 4(b) would terminate the running of time within which notice of appeal must be filed.[25] Under the current revision of rule 4(b), "[a] notice of appeal filed before the filing of any of the [enumerated] motions shall have no effect."[26] The party making one of the enumerated motions after notice of appeal is filed is to move in the trial court for an order dismissing the appeal, and a copy of the order of dismissal is to be filed by

22. TENN. R. CIV. P. 58.02 provides that "[t]he filing with the clerk of a judgment, signed by the judge, constitutes the entry of such judgment, and, unless the court otherwise directs, no judgment shall be effective for any purpose until the entry of same." As suggested in the text, there may be a gap between the time the court announces a decision or order and the time judgment is entered as required by TENN. R. CIV. P. 58.02.

23. A similar provision is found in FED. R. APP. P. 4(b), which governs appeals in criminal cases. A proposed amendment to the Federal Rules of Appellate Procedure would extend federal rule 4(b) to appeals in civil cases. *See* PROPOSED FEDERAL AMENDMENTS, *supra* note 20, at 4.

24. *See, e.g.*, PROPOSED TENN. R. APP. P. 24(a)-(d).

25. *See* text accompanying note 20 *supra*.

26. *See* Sobieski, *supra* note 1, at 192 n.173.

the moving party with the clerk of the trial court.[27] After entry of an order disposing of the motion, a new notice of appeal must be filed within the prescribed thirty days after entry of the order; the appeal cannot be sustained on the basis of a notice of appeal filed prior to the making of one of the enumerated motions. The timeliness of subsequent steps in the appellate process is measured with reference to the date the new notice of appeal is filed.[28]

Nothing in the proposed rules permits the extension of time for filing notice of appeal beyond the specified thirty-day period.[29] On the contrary, while rule 2 generally permits the appellate courts to suspend for good cause the requirements or provisions of any of the rules, that rule expressly exempts extension of time for filing notice of appeal.[30] According to the Advisory Commission comment to rule 2, "[s]ince filing a notice of appeal is an essential step necessary to a valid appeal of right, this step should not be waivable inasmuch as the rights of parties remain uncertain during the time available for filing a notice of appeal." On the other hand, an otherwise untimely appeal in a civil action may be taken by first securing relief from the judgment under Tennessee Rule of Civil Procedure 60.02, which permits the trial court to grant relief from its final judgments or orders. For example, in *Jerkins v. McKinney*[31] appellant first learned of entry of an order denying his new-trial motion more than thirty days after entry. The Tennessee Supreme Court held that "the failure of the clerk to provide counsel with a copy of the order overruling the motion for a new trial, or to notify them of its existence, as to counsel, constituted excusable neglect justifying relief under rule 60.02(1)."[32] Moreover, the court also held that reentry of

27. PROPOSED TENN. R. APP. P. 4(b).

28. *Id.*, Advisory Comm'n comment.

29. FED. R. APP. P. 4(a) and 4(b) permit a thirty-day extension for filing notice of appeal upon a showing of excusable neglect. A proposed amendment to the federal rules would change this standard to one of good cause if an extension is sought within the time otherwise prescribed for filing notice of appeal; extensions sought after the prescribed period would have to satisfy the excusable neglect standard. *See* PROPOSED FEDERAL AMENDMENTS, *supra* note 20, at 5-6. *See also* APPELLATE COURT STANDARDS, *supra* note 12, § 3.13(a)(3). For a discussion of why a similar provision was not incorporated into the proposed Tennessee rules, see Sobieski, *supra* note 1, at 183 n.121.

30. *See* text accompanying note 592 *infra*.

31. 533 S.W.2d 275 (Tenn. 1976).

32. *Id.* at 281.

judgment on the rule 60 motion started anew the running of the time for seeking appellate review.[33] Relief would also seem appropriate under rule 60 if appellant utilizes the mails for filing his notice of appeal, as he may under proposed appellate rule 20(a), and the notice is lost or misdelivered through no fault of his own. Similarly, relief from failure to file notice of appeal in timely fashion would seem appropriate in those circumstances that traditionally have given rise to equitable relief from a judgment.[34] In a criminal action, permission to prosecute an untimely appeal may be sought under the Post-Conviction Procedure Act.[35]

In addition to filing notice of appeal with the clerk of the trial court, the appellant in civil actions must serve a copy of the notice of appeal on counsel of record of each party (or, if a party is not represented by counsel, on the party) and on the clerk of the appellate court designated in the notice of appeal.[36] Since the clerk of the appellate court dockets the appeal immediately upon receipt of the notice of appeal and is required to serve notice on all parties of the docketing of the appeal,[37] the copy of the notice of appeal served on the clerk of the appellate court must be accompanied by a list of the names and addresses of the parties or counsel upon whom service is required. Service by the appellant is to be made not later than seven days after filing notice of appeal, and proof of service must be filed with the clerk of the

33. *Id.* To guard against relief from an otherwise untimely appeal, the second sentence of proposed appellate rule 4(a) permits any party to serve notice of entry of an appealable judgment. The Advisory Commission comment to that rule states:

> By giving notice under this subdivision of the entry of an appealable judgment, the party in whose favor the judgment was entered may be able effectively to thwart resort to Tennessee Rule of Civil Procedure 60.02 in an attempt to extend the time for appealing beyond the 30 days specified in this rule on the grounds of mistake, inadvertence, surprise or excusable neglect.

34. *See* RESTATEMENT OF JUDGMENTS §§ 112-130 (1942).

35. TENN. CODE ANN. § 40-3820 (1975).

36. PROPOSED TENN. R. APP. P. 5(a). Under FED. R. APP. P. 3(d), the clerk of the district court, not the appellant, bears the responsibility for serving the notice of appeal. Service of the notice of appeal on the clerk of the appellate court advises that court of the pendency of the appeal and permits it to assume supervision of the appeal. *See* APPELLATE COURT STANDARDS, *supra* note 12, § 3.50.

37. PROPOSED TENN. R. APP. P. 5(c).

trial court within seven days after service.[38] Unless proof of service is filed, the clerk of the trial court will not assemble and complete the record on appeal as otherwise required by proposed rule 25(a), and the appeal may be dismissed pursuant to rule 26(b).[39] The appellant is to note on each copy of the notice of appeal served the date on which notice of appeal was filed[40] so that those served may ascertain if the appeal is timely. As indicated earlier, under rule 20(a), filing may be accomplished by mail addressed to the clerk, and "[t]he day of mailing, which may be evidenced by a postmark affixed in and by a United States Post Office, shall be deemed the day of filing if first class mail is utilized."[41]

Because appeals in criminal cases are handled by the attorney general, the defendant in a criminal appeal in which he is the appellant must serve a copy of the notice of appeal not only on the district attorney general of the county in which judgment was entered but also on the state attorney general at his Nashville office. If the defendant is the appellant but the action was prosecuted by a governmental entity other than the state for violation of an ordinance, a copy of the notice of appeal is served on the chief legal officer of the entity or, if his name and address does not appear of record, on the chief administrative officer of the entity at his official address. If the state or other prosecuting entity is the appellant, a copy of the notice of appeal is served on both the defendant and his counsel.[42] According to the Advisory Commission comment to rule 5, "[s]ervice on both the appellee and his counsel is required only in criminal appeals in which the state or other prosecuting entity is the appellant." In all other respects—time for service, proof of service, and the like—service of the notice of appeal in criminal appeals is the same as in civil appeals.[43]

The importance of the filing and service requirements of the proposed rules is emphasized by the Advisory Commission comment to rule 3(e), which states that "[c]ompliance with the provisions of this subdivision is of the utmost importance, since

38. *Id.* R. 5(a).
39. *See* text accompanying notes 261-68 *infra*.
40. PROPOSED TENN. R. APP. P. 5(a).
41. *See* text accompanying notes 580-82 *infra*.
42. PROPOSED TENN. R. APP. P. 5(b).
43. *Id.*

failure of an appellant to file and serve notice of appeal affects its validity." On the other hand, even untimely filing of notice of appeal may be excused in some circumstances,[44] and noncompliance with the less significant service requirement is also excusable. Unlike the filing requirement, noncompliance with the service requirement may be excused for good cause under proposed appellate rule 2. As urged in the prior article on the theoretical foundations of the rules, "[t]he limited purpose served by the notice of appeal also suggests that failure to serve a copy of the notice of appeal as required by rule 5 should be inexcusable only if some prejudice beyond the mere absence of notice of the appeal is suffered thereby."[45] Prudent counsel, however, will ensure that notice of appeal is filed and served in timely fashion. It seems highly unlikely the appellee will not receive notice of an appeal if the appellant complies with the service requirement of the rules and if the clerk of the appellate court notifies the parties of the docketing of the appeal. If, however, the appellee receives no notice of an appeal, he should be so notified, if necessary on the appellate court's own motion, and should be given a meaningful opportunity to be heard.

According to proposed rule 3(e), "[f]ailure of an appellant to take any step other than the timely filing and service of a notice of appeal does not affect the validity of the appeal but is ground only for such action as the appellate court deems appropriate, which may include dismissal of the appeal."[46] One purpose of this provision, as noted in the Advisory Commission comment, is to eliminate "highly technical procedural barriers that traditionally have been prerequisites to an appeal or affected the scope of appellate review." Rule 3(e) expressly abolishes as prerequisites to an appeal motions for a new trial or in arrest of judgment as well as the prayer for an appeal and entry of an order permitting an appeal. That rule also provides that an appeal as of right may be taken without "the making of any other similar motion

44. *See* text accompanying notes 31-35 *supra*.

45. Sobieski, *supra* note 1, at 191.

46. FED. R. APP. P. 3(a) provides that only failure to file a timely notice of appeal affects the validity of the appeal since service of the notice is the responsibility of the clerk of the district court. *See* note 36 *supra*. *See also* APPELLATE COURT STANDARDS, *supra* note 12, § 3.13(b).

or compliance with any procedure."[47] Moreover, if an appellant does move for a new trial prior to an appeal, rule 3(e) states that the scope of appellate review of questions of law and fact is wholly unaffected.[48] Otherwise, a party would in effect be penalized for making a new-trial motion.

The Advisory Commission comment to rule 3(e) notes that elimination of the motion for a new trial as a prerequisite to an appeal in jury cases "does not mean that relief may be granted on appeal with respect to issues not presented to the trial court." This idea also finds expression in proposed rule 36(a), which provides that relief need not be granted to a party "who failed to take whatever action was reasonably available to prevent or nullify the harmful effect of an error." Thus, as stated in the Advisory Commission comment to rule 3(e), "[f]ailure to present an issue to the trial court . . . will typically not merit appellate relief." For example, since the inadequacy[49] or excessiveness[50] of a verdict can first be raised in the trial court by way of a new-trial motion, a new-trial motion raising one or the other of these issues should be made to ensure the availability of appellate relief.[51] Similarly, a new-trial motion should be made if appellant seeks to challenge the sufficiency of the evidence since the scope of review by the trial court of a jury verdict is broader than that of the appellate court reviewing the same case.[52] Errors concerning the instructions also must be raised in the trial court and, depending upon the error, a new-trial motion may be the appropriate vehicle for doing so.[53] In some circumstances, the new-trial

47. PROPOSED TENN. R. APP. P. 3(e). *See also* APPELLATE COURT STANDARDS, *supra* note 12, § 3.13(b), Commentary at 34.

48. PROPOSED TENN. R. APP. P. 3(e) provides: "The scope of appellate review of questions of law and fact shall not be limited by making or failing to make a motion for a new trial."

49. *See* TENN. CODE ANN. § 20-1330 (Cum. Supp. 1977).

50. *See id.* § 27-118 (1955).

51. This is in accord with existing law on additur. *See, e.g.*, Loftis v. Finch, 491 S.W.2d 370 (Tenn. Ct. App. 1972). On the other hand, remittitur may be "first suggested or required" in the court of appeals. TENN. CODE ANN. § 27-119 (1955).

52. *See, e.g.*, Dykes v. Meighan Constr. Co., 205 Tenn. 175, 326 S.W.2d 135 (1959); Rupe v. Durbin Durco, Inc., 557 S.W.2d 742 (Tenn. Ct. App. 1976).

53. *See, e.g.*, Henry County Bd. of Educ. v. Burton, 538 S.W.2d 394 (Tenn. 1976) (doctrine of waiver applicable to errors concerning jury instruc-

motion serves as the means by which evidence necessary for appellate review is included in the record.[54] However, any errors at the trial to which objection is duly made may be raised on appeal although there has not been a motion for a new trial or other posttrial motion raising the objection a second time; once is enough.[55]

While no step other than timely filing and service of a notice of appeal affects the appeal's validity, an appellant who fails to file a bond for costs on appeal[56] or who fails to cause timely completion or transmission of the record[57] or who fails timely to file his brief[58] invites the appellate court, in the language of proposed rule 3(e), to take "such action as the appellate court deems appropriate, which may include dismissal of the appeal." Under proposed rule 2 the appellate courts have the discretionary authority to suspend the requirements or provisions of virtually all the rules,[59] but the burden rests on the party failing to comply with the rules to demonstrate good cause for relief from his noncompliance. Good cause would almost always seem to be present if noncompliance with the rules is no fault of the appellant but is instead due to the inadvertence of those over whom the appellant has no control.[60]

For reasons explored at length elsewhere, parties other than

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tions). During the course of its opinion in Rule v. Empire Gas Corp., 563 S.W.2d 551 (Tenn. 1978), the Tennessee Supreme Court noted that TENN. R. CIV. P. 51.02 permits a party to allege error in his motion for a new trial based upon either the inaccuracy of the charge as given or the failure to give a requested instruction. However, the supreme court also held that the failure of the trial court to instruct the jury on an aspect of the case on which an instruction is desired cannot be raised initially in a new-trial motion but must be raised prior to submission of the case to the jury for its verdict.

54. *See* Sobieski, *supra* note 1, at 186.

55. Essentially the same principle lies behind TENN. R. CIV. P. 46, which renders formal exceptions to rulings or orders of the trial court unnecessary.

56. *See* text accompanying notes 120-31 *infra*.

57. *See* text accompanying notes 261-68 & 282-84 *infra*.

58. *See* text accompanying notes 372-86 *infra*.

59. However, rule 2 does not permit extension of the time for filing notice of appeal, an application for permission to appeal to the supreme court from a final decision of an intermediate appellate court, or a petition for review of an administrative agency order. *See* text accompanying note 592 *infra*.

60. *See, e.g.*, General Elec. Supply Co. v. Arlen Realty & Dev. Corp., 546 S.W.2d 210, 214 (Tenn. 1977).

the initial appellant do not need to file their own notices of appeal to obtain appellate review and relief.[61] Once the appellant takes his appeal, the appellate court has the power to modify the judgment in favor of any nonappealing party even if that party has not participated at all in the appeal.[62] However, only rarely is it appropriate to grant relief to a party not participating in the appeal,[63] and relief that a party has no desire to obtain generally should not be given.

In cases with more than a single plaintiff and a single defendant, proposed rule 16(a) permits two or more persons to proceed as a single appellant and file a joint notice of appeal, a joint brief, and the like, if their interests make joinder practicable. Alternatively, parties may take separate appeals and their appeals may thereafter be consolidated under rule 16(b), which permits consolidation whenever common questions of law or fact are involved in separate appeals.[64]

Proposed rule 19(a) establishes the procedure to be followed when a party dies before or after notice of appeal is filed and the claim sought to be enforced is not extinguished by death.[65] If a party entitled to appeal dies before notice of appeal is filed, the notice may be filed and served by his personal representative or, if he has no personal representative, by his counsel of record within the prescribed time.[66] If a party entitled to appeal dies

61. *See* Sobieski, *supra* note 1, at 187-92. *See also* 9 MOORE'S FEDERAL PRACTICE ¶ 204.11[5] (2d ed. 1975); 15 C. WRIGHT, A. MILLER, & F. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3904 (1976); Comment, *Appeal and Error: Review of Errors at the Instance of a Party Who Has Not Appealed,* 20 CALIF. L. REV. 70 (1932); Note, *Federal Jurisdiction and Procedure—Review of Errors at the Instance of a Non-Appealing Party,* 51 HARV. L. REV. 1058 (1938).

62. *But see, e.g.*, TENN. CODE ANN. § 27-310 (1955) (on appeal judgment remains in full force and effect against parties who do not appeal).

63. *See* 15 C. WRIGHT, A. MILLER, & F. COOPER, *supra* note 61, § 3904, at 418-19.

64. Proposed appellate rule 16(b) permits consolidation on the appellate court's own motion, on motion of a party, or by stipulation of the parties to the several appeals.

65. Revivor on appeal is currently governed by TENN. CODE ANN. §§ 20-601 to 623 (1955 & Cum. Supp. 1977); TENN. SUP. CT. R. 22-23; TENN. CT. APP. R. 25-27.

66. The Advisory Commission comment to rule 19(a) states that permitting an attorney of record to take an appeal on behalf of successors in interest if the deceased has no personal representative is designed to negate the argu-

after notice of appeal is filed or while a proceeding is otherwise pending in the appellate court, the appellate court may order substitution of the proper parties. If a party against whom an appeal may be taken dies after entry of judgment in the trial court but before notice of appeal is filed, an appellant may proceed as if death had not occurred. After notice of appeal is filed, substitution is effected in the appellate court.[67] Substitution in all cases[68] is by way of motion, which may be made by any party or by the successor or representative of the deceased party.[69] An order for substitution may be entered at any time, but the failure to enter an order does not affect the substitution.[70] Substitution for other causes is effected in the same manner.[71]

B. Appeal by Permission

The second type of appeal established by the proposed rules is the appeal by permission. As its name implies, an appeal by permission, unlike an appeal as of right, is available only if permission to appeal is granted by the trial or appellate court. Most appeals of interlocutory orders of the trial court must be sought under proposed rule 9, and an appeal is available only if both the trial and appellate courts grant permission to appeal. In certain narrowly defined circumstances, an interlocutory appeal may also be sought under rule 10, which, unlike rule 9, requires the permission of only the appellate court and also permits review by the supreme court of interlocutory orders of the intermediate appellate courts.[72] In addition to the plenary interlocutory review available by permission under rules 9 and 10, certain types of

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ment that "if a party entitled to appeal dies before notice of appeal is filed, the appeal can be taken only by his legal representative and must be taken within the time ordinarily prescribed."

67. PROPOSED TENN. R. APP. P. 19(a).

68. *Id.* R. 19(b).

69. *Id.* R. 19(a). The Advisory Commission comment to that rule notes that the procedure described for substitution on appeal is similar to TENN. R. CIV. P. 25 on substitution of parties in civil actions in the trial court.

70. PROPOSED TENN. R. APP. P. 19(d).

71. *Id.* R. 19(b). Proposed rule 19(b) lists as other possible reasons for substitution marriage, bankruptcy, assignment, "or any reason other than death." *See also* text accompanying notes 575-79 *infra*.

72. For a discussion of the circumstances in which an appeal by permission lies under proposed rules 9 and 10, see Sobieski, *supra* note 1, at 223-27.

interlocutory orders are summarily reviewable as of right under other rules.[73] Final decisions of the intermediate appellate courts may be appealed under rule 11 if permission to appeal is granted by the supreme court. Appeals by permission under rules 9, 10, and 11 are available to both the state and defendant in criminal actions.[74]

An interlocutory appeal by permission under rule 9 is sought first by requesting the trial court to enter an order granting permission to appeal.[75] If the trial court believes that an appeal should be allowed, it must state in writing the legal criteria specified in rule 9(a) making the order appealable, the factors leading the trial court to the opinion those criteria are satisfied, and any other factors leading the trial court to exercise its discretion in favor of permitting an appeal.[76] Because an appeal by permission under rule 9 also requires the permission of the appellate court,[77] an application for permission to appeal must be filed with the clerk of the appellate court. The application must be filed within ten days after the date of entry of the order in the trial court granting permission to appeal or the making of the prescribed statement by the trial court, whichever is later.[78] The application sets forth a statement of the facts sufficient to permit the appellate court to understand why an appeal by permission should be granted and a statement of the reasons supporting an immediate appeal. The application for permission to appeal must also be accompanied by a copy of the order appealed from, the trial court's written statement of reasons, and any other parts of the record necessary for an informed determination by the appellate court of whether the application for permission to appeal should be granted. The statement of reasons that must be included in the application may simply incorporate by reference the trial court's written statement of reasons for granting its permission

73. The clearest example is summary review of release orders made prior to trial. *See* text accompanying notes 171-80 *infra*. Summary review is also available of stay orders in civil actions, *see* text accompanying notes 149-56 *infra*, and the denial or withdrawal of permission by the trial court to proceed on appeal as a poor person. *See* text accompanying note 574 *infra*.

74. PROPOSED TENN. R. APP. P. 9(g), 10(e), 11(g).

75. *Id.* R. 9(a).

76. *Id.* R. 9(b).

77. *Id.* R. 9(a).

78. *Id.* R. 9(c).

for an interlocutory appeal.[79] Because the application is passed upon by the full court (or section of the court if it sits in sections) instead of a single judge of the court,[80] a sufficient number of copies of the application must be filed to provide the clerk and each judge of the appellate court with one copy.[81] If the application for permission to appeal is filed with an intermediate appellate court, copies are required only for each judge of the section of the appellate court that will pass upon the application.[82] A copy of the application must be served on all other parties.[83] An answer in opposition to the application may be filed within seven days after service of the application and may be accompanied by any additional parts of the record deemed appropriate for consideration by the appellate court. The appellate court considers the application and answer without oral argument unless it orders otherwise.[84] Neither filing of the application nor granting of permission to appeal automatically stays proceedings in the trial court, but the trial or appellate court may order otherwise.[85] Rule 9 provides further that the time for filing a bond for costs and the time within which the record is to be prepared is measured from entry of the order by the appellate court granting permission to appeal. The appeal is also docketed upon entry of the order permitting the appeal.[86] The Advisory Commission comment notes that if permission to appeal is granted, "[t]here is no need to file a notice of appeal."

An appeal by permission under rule 10, which requires only the permission of the appellate court,[87] also is sought by preparation of an application, although the application is designated as an application for extraordinary appeal.[88] In most other respects, the application required by rule 10 is substantially the same as the application required by rule 9. The application for extraordinary appeal must state the facts necessary to an understanding

79. *Id.* R. 9(d).
80. *See* text accompanying notes 607-10 *infra*.
81. PROPOSED TENN. R. APP. P. 9(c).
82. *Id.* R. 20(f); *see* text accompanying notes 590-91 *infra*.
83. PROPOSED TENN. R. APP. P. 9(c).
84. *Id.* R. 9(d).
85. *Id.* R. 9(f).
86. *Id.* R. 9(e).
87. *Id.* R. 10(a).
88. *Id.* R. 10(b).

of why an extraordinary appeal lies, the reasons supporting an extraordinary appeal, and the precise relief sought. The application is accompanied by a copy of any order or opinion or parts of the record necessary for determination of the application, and may be supported by affidavits or other relevant documents.[89] The application must be served and filed in the same manner as an application under rule 9.[90] The appellate court may deny permission for an extraordinary appeal on the basis of the application alone. Otherwise, the appellate court enters an order fixing the time within which an answer to the application may be filed by the other parties. The order is served on the parties by the clerk of the appellate court and, if the application has not previously been served, is accompanied by a copy of the application.[91] If the appellate court grants an extraordinary appeal, subsequent proceedings are had as determined appropriate by the appellate court.[92]

While rules 9 and 10 are concerned with appeals by permission from interlocutory orders, proposed rule 11 addresses those situations in which the supreme court is asked to exercise its discretionary power of review of final decisions of the intermediate appellate courts.[93] However, the procedure for asking the supreme court to exercise its discretionary power to permit a successive appeal is essentially the same as the procedure for seeking permission for interlocutory review. An application for permission to appeal must be filed with the clerk of the supreme court within thirty days after entry of the judgment of the intermediate appellate court or within fifteen days after denial of a petition for rehearing or entry of the judgment on rehearing.[94] The time within which the application must be filed cannot be lengthened[95] and is shorter than the forty-five days (which may be extended

89. *Id.* R. 10(c).

90. *Id.* R. 10(b).

91. *Id.* R. 10(d).

92. *Id.*

93. The current procedure is set forth in TENN. CODE ANN. § 16-452 (1955); *id.* §§ 27-819 to 823 (Cum. Supp. 1977); TENN. SUP. CT. R. 11-13. *See also* APPELLATE COURT STANDARDS, *supra* note 12, § 3.14.

94. PROPOSED TENN. R. APP. P. 11(b). Petitioning for rehearing in the intermediate appellate court is not a prerequisite for seeking review in the supreme court.

95. *Id.* R. 2, 21(b); *see* text accompanying note 592 *infra*.

an additional forty-five days) currently permitted for seeking certiorari.[96] The application itself must contain (1) a statement of the date judgment was entered in the intermediate appellate court and whether a petition for rehearing was filed, and if so, the date of the denial of the petition or entry of the judgment on rehearing; (2) the questions presented for review; (3) the facts relevant to the questions presented, although the facts need not be restated in the application if they are correctly stated in the opinion of the intermediate appellate court; and (4) the reasons, including appropriate authorities, supporting review by the supreme court. A copy of the opinion of the intermediate appellate court must be appended to the application.[97] Six copies of the application must be filed, and it must be served on all other parties,[98] who have fifteen days after service to file an answer in opposition. The answer sets forth the reasons the application should not be granted and any other matter considered necessary for correction of the application. The filing and service requirements for the answer are the same as for the initial application for permission to appeal.[99] An application will be granted only if two members of the supreme court consider it appropriate to grant permission to appeal,[100] and if permission is granted the thirty-day period within which appellant must file and serve his brief[101] is measured from the date on which permission to appeal was granted.[102]

The Advisory Commission comment to rule 11 emphasizes the limited purpose served by the application for permission to appeal:

> [T]he application for permission to appeal filed in the Supreme Court serves the purpose of demonstrating to that court that the case is an appropriate one for the exercise of the court's discretion in favor of permitting an appeal. The application is not designed to serve the office of arguing the merits of the decision of the intermediate appellate court.

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96. TENN. CODE ANN. § 16-452 (Cum. Supp. 1977); *id.* § 27-820 (1955).
97. PROPOSED TENN. R. APP. P. 11(b).
98. *Id.* R. 11(c).
99. *Id.* R. 11(d).
100. *Id.* R. 11(e).
101. *Id.* R. 29(a); *see* text accompanying notes 372-75 *infra*.
102. PROPOSED TENN. R. APP. P. 11(f).

The character of the reasons that typically will be considered sufficient to merit review by the supreme court are specified in rule 11(a) and include the need to secure uniformity of decision, the need to secure settlement of important questions of law, the need to secure settlement of questions of public interest, and the need for the exercise of the supreme court's supervisory authority.[103] Consistent with its limited purpose, the application for permission to appeal should demonstrate, therefore, that the question presented for review falls within the categories set forth in rule 11(a), not that the question presented was wrongly decided by the intermediate appellate court.[104]

The terminology used to describe the procedure for seeking review under rule 11 differs from current terminology, which describes as petitioning for certiorari the procedure for seeking review by the supreme court of final decisions of the intermediate appellate courts.[105] Renaming familiar procedures is not inherently desirable, but certiorari is an ambiguous word used to describe distinguishable procedures capable of a more functional description.[106] Consistent with the underlying spirit of the proposed rules, however, the fact that a document in which review is sought under rule 11 is mislabelled should not prevent consideration of the propriety of granting review.

If permission to appeal is granted under rules 9, 10, or 11, any

103. For a fuller discussion of proposed rule 11(a), see Sobieski, *supra* note 1, at 231-35.

104. Given the limited purpose served by the application for permission to appeal, it is also necessary for the parties to prepare briefs addressed to the supreme court demonstrating why the intermediate appellate court wrongly decided the case. The Advisory Commission expressly rejected a provision that would have permitted the appellant to allow his application for permission to appeal to stand as his brief and the appellee to allow his answer in opposition to the application to stand as his brief. Similarly, nothing in proposed rule 11 permits the parties to stand on their briefs filed in the intermediate appellate court. *Cf.* TENN. SUP. CT. R. 12 (assignments of error in the supreme court must be redrafted expressly directed to error in the judgment or decree of the intermediate appellate court, showing specifically where the opinion of that court is erroneous). *See also* APPELLATE COURT STANDARDS, *supra* note 12, § 3.14.

105. *See* TENN. CODE ANN. § 16-452 (Cum. Supp. 1977); *id.* § 27-819 (1955); TENN. SUP. CT. R. 11.

106. *Compare, e.g.*, TENN. CODE ANN. § 27-801 (1955) *with id.* § 16-452 (Cum. Supp. 1977) *and id.* § 27-819 (1955). *See also* Conners v. City of Knoxville, 136 Tenn. 428, 189 S.W. 870 (1916).

question of law may be brought up for review and relief by any party, even if that question has not been set forth in an application seeking permission to appeal.[107] The fact that a question is brought up for review and relief does not mean that the appellate court must pass upon the question or that it must grant the requested relief.[108] Particularly in the context of interlocutory appeals in which the record has not been fully developed, consideration of issues beyond those set forth in the application is infrequently appropriate.[109] In cases reaching the supreme court through the intermediate appellate courts, the Advisory Commission comment to rule 13(a) states that

> [o]rdinarily . . . the Supreme Court will refuse to consider an issue not presented to the intermediate appellate court because, as stated in rule 36, the party raising the issue has failed to take action reasonably available to nullify the error presented by the issue. However, if the issue were presented but not dealt with by the intermediate appellate court, the Supreme Court may decide the issue and grant appropriate relief.

In the second situation described in the Commission comment, the supreme court, although having the power to decide an issue presented to but not passed upon by the intermediate appellate court,[110] may refrain from exercising that power and instead remand the case to the intermediate appellate court for its consideration of the pretermitted issue.[111]

C. Direct Review by the Court of Appeals of Administrative Proceedings

In addition to appeals as of right and by permission, the only

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107. PROPOSED TENN. R. APP. P. 13(a); *cf.* TENN. CODE ANN. § 27-823 (1955) (respondent not required to file separate petition for certiorari to save points of law or fact for review by supreme court); TENN. SUP. CT. R. 13 (respondent not required to file separate petition for certiorari to save points of law or fact for review by supreme court).

108. *See* Sobieski, *supra* note 1, at 194.

109. *See* Cumberland Capital Corp. v. Patty, 556 S.W.2d 516, 543 (Tenn. 1977) (Harbison, J., dissenting); Tennessee Dep't of Mental Health & Mental Retardation v. Hughes, 531 S.W.2d 299, 300-01 (Tenn. 1975). *See also* 16 C. WRIGHT, A. MILLER, F. COOPER, & E. GRESSMAN, FEDERAL PRACTICE AND PROCEDURE § 3937, at 269-71 (1977).

110. This power is also recognized in TENN. CODE ANN. § 27-823 (1955) and TENN. SUP. CT. R. 13.

111. *See, e.g.*, Rule v. Empire Gas Corp., 563 S.W.2d 551 (Tenn. 1978).

remaining type of plenary appellate proceeding established by the proposed rules is designed to cover the rare situation in which judicial review lies directly from an administrative agency to the court of appeals. Generally judicial review of administrative proceedings as an initial matter takes place in the trial court,[112] but in at least one situation review is had initially in the court of appeals.[113] Proposed rule 12 establishes the procedure to be followed in this unusual situation; but the rule, as noted in the Advisory Commission comment, "does not itself create a right of review."

While the situation covered by rule 12 is a rare one, the procedure established for seeking review is substantially similar to the procedure established for taking an appeal as of right. Review is instituted by filing a petition for review with the clerk of the court of appeals. The petition specifies the party seeking review and designates the respondent and the order to be reviewed. The administrative agency whose order is being reviewed and all other parties of record must be named as respondents.[114] Official form 2 is a sample petition for review. The petition filed with the court of appeals must be accompanied by petitioner's or his counsel's address and a list of the names and addresses of all other parties of record,[115] who must be served with a copy of the petition in the same manner as provided in rule 5(a) for service of a notice of appeal in civil actions. Proof of service also must be filed as provided in rule 5(a).[116] The clerk of the court of appeals dockets the proceeding and serves notice of the docketing as he does in an appeal as of right.[117] Insofar as appropriate, the other rules of appellate procedure apply to proceedings under rule 12,[118] although the record on review and the time for filing briefs receive explicit consideration in rules 12(d), (e), and (f).[119]

112. *See, e.g.*, TENN. CODE ANN. § 4-523 (Cum. Supp. 1977).

113. *See id.* § 7-147(4) (1973) (in cases of death or injury, Tennessee National Guardsmen or their beneficiaries may appeal decisions of the Board of Claims to the court of appeals).

114. PROPOSED TENN. R. APP. P. 12(a).

115. *Id.*

116. *Id.* R. 12(b).

117. *Id.* R. 12(a).

118. *Id.* R. 12(h).

119. *See* text accompanying notes 361-72 *infra*.

III. Security and Stay Pending Appeal

A. *Security for Costs in Civil Actions*

Proposed rule 6, consistent with current Tennessee law,[120] provides that in civil actions the initiation of an appeal as of right must be accompanied by a bond for costs to secure payment of the appellee's recoverable costs on appeal in the event the appellant's appeal is unsuccessful.[121] The bond is to be filed in the trial court with the notice of appeal and unless the trial court fixes a different amount, shall be in the sum or value of $500. The bond must have sufficient surety and must be conditioned to secure the payment of costs if the appeal is dismissed or the judgment is either affirmed or modified. If a bond in the sum or value of $500 is given, no approval of the bond is required. After the filing of the bond, any objections to the form of the bond, sufficiency of the surety, or sufficiency of the amount of the bond may be raised by the appellee on motion for determination by the trial court.[122] The last sentence of proposed appellate rule 6 makes the provisions of proposed new Tennessee Rule of Civil Procedure 65A applicable to a bond for costs given under proposed appellate rule 6. Under rule 65A, security may be given in any form deemed sufficient by the trial court to secure the other party. Each surety, whose address must be shown on the bond,[123] submits himself to the jurisdiction of the trial court and agrees that his liability may be enforced on motion "without the necessity of an independent action."[124] When an interlocutory appeal is taken under appellate rule 9, a bond for costs as required by rule 6 must be filed within ten days after entry of an order by the appellate court granting permission to appeal.[125]

Proposed appellate rule 6 recognizes three exceptions to its requirement of a bond for costs on appeal. First, a bond for costs

120. *See* Tenn. Code Ann. §§ 27-312, -315 to 316 (1955).

121. *See* 9 Moore's Federal Practice ¶ 207.02 (2d ed. 1975).

122. Proposed Tenn. R. App. P. 6; *cf.* Tenn. Code Ann. § 27-317 (1955) (trial court has authority to determine sufficiency of appeal bond). Under Fed. R. App. P. 7, objections to the form of the bond or the sufficiency of the surety are determined by the clerk of the district court rather than by the court itself.

123. Tenn. R. Civ. P. 65.05(1), which deals with injunction bonds, contains the identical provision.

124. Proposed Tenn. R. Civ. P. 65A.

125. Proposed Tenn. R. App. P. 9(e).

is not required if the appellant is exempted from such a requirement by the appellate rules. The only exemption set forth in the appellate rules is that for poor persons, who, under proposed appellate rule 18(b), "may proceed . . . without prepayment of fees or costs . . . or the giving of security therefor."[126] Second, a bond for costs is not required if the appellant is exempted by the Tennessee Rules of Civil Procedure. According to the Advisory Commission comment to appellate rule 6, this exception refers to proposed new rule 62.06 of the Tennessee Rules of Civil Procedure, which exempts the state and any county or municipal corporation within the state from any requirement of security.[127] Finally, no bond for costs is required if the appellant has filed a bond for a stay that includes security for the payment of costs on appeal as provided in proposed new Tennessee Rule of Civil Procedure 62.05.[128]

While proposed appellate rule 6 is consistent with current law insofar as it requires a bond for costs, it differs from current law in at least two notable respects. Although the filing of a bond for costs is mandatory, the Advisory Commission comment to rule 6 emphasizes that "the failure to file security contemporaneously [with the filing of notice of appeal] is not in and of itself fatal to the validity of the appeal."[129] As previously noted, no step other than timely filing and service of a notice of appeal affects its validity.[130] The Advisory Commission comment also notes, however, that "[t]he failure to file security may be remedied on motion of the appellee, and may ultimately include dismissal of the appeal." Rarely if ever will the failure to file a bond for costs justify dismissal as long as the appellant stands ready to correct his oversight.[131] Proposed appellate rule 6 also differs from current

126. *See* text accompanying notes 562-74 *infra*.

127. *See* text accompanying notes 140-44 *infra*.

128. *See* text accompanying notes 140-41 *infra*. An appeal bond is not required by statute in that rare situation in which the court of appeals directly reviews determinations by the Board of Claims. TENN. CODE ANN. § 7-147(4) (1973). Proposed appellate rule 6, on the other hand, does not expressly exempt such actions from its requirement of a bond for costs.

129. *But see, e.g.*, Strain v. Roddy, 171 Tenn. 181, 101 S.W.2d 475 (1937); Bray v. Blue-Ridge Lumber Co., 3 Tenn. App. 417 (1925); TENN. CODE ANN. § 27-318 (1955).

130. *See* text accompanying notes 46-48 *supra*.

131. *See also* 9 MOORE'S FEDERAL PRACTICE ¶ 207.02 (2d ed. 1975); 16 C.

law with regard to the costs that are secured by the bond. Those costs are specified in proposed appellate rule 40(c) and include "the cost of preparing and transmitting the record, the cost of a transcript of the evidence or proceedings, the cost of producing briefs and the record, the premiums paid for bonds to preserve rights pending appeal, and any other fees of the appellate court or clerk." As noted in the Advisory Commission comment to rule 40(c), many of these items are not currently recoverable as costs.

B. Security for the Judgment and Stays in Civil Actions

The security for costs required by proposed appellate rule 6 should not be confused with the security required to obtain a stay of execution of the judgment of the trial court.[132] Under proposed new rule 62 of the Tennessee Rules of Civil Procedure, the initiation of an appeal does not by itself stay execution of the judgment of the trial court.[133] Generally speaking, a stay may be obtained only by giving a bond in an amount sufficient to secure payment of the judgment in full, interest, and damages for delay as well as costs on appeal.[134] Unlike the bond for costs on appeal, a bond staying execution is not mandatory. The only consequence of not filing a bond for a stay is that the judgment may be executed notwithstanding the pendency of an appeal. The appellant, however, does not lose his right to an appeal merely because the judgment has been executed,[135] although in some circumstances a problem of mootness might arise if a stay is not obtained.[136]

WRIGHT, A. MILLER, F. COOPER, & E. GRESSMAN, *supra* note 109, § 3953, at 378. Even under existing law the failure to file an appeal bond within the time specified in TENN. CODE ANN. §§ 27-312, -317 to 318 (1955) is not fatal to appellate review by way of a writ of error. *See, e.g.*, Ward v. North Am. Rayon Corp., 211 Tenn. 535, 538-39, 366 S.W.2d 134, 135-36 (1963); Chambers v. Holland, 524 S.W.2d 941, 943-44 (Tenn. Ct. App. 1975).

132. Stays of mandates of the appellate court are discussed in a subsequent section of this article. *See* text accompanying notes 548-52 *infra*.

133. For a discussion of the problems involved in determining whether a stay of execution should be permitted and, if so, whether security should be required, see Sobieski, *supra* note 1, at 235-41.

134. PROPOSED TENN. R. CIV. P. 62.04 to .05.

135. *See, e.g.*, Peabody v. Fox Coal & Coke Co., 54 S.W. 128 (Tenn. Ch. App. 1899); Gaines v. Fagala, 42 S.W. 462 (Tenn. Ch. App. 1897).

136. This problem is most likely to arise if the trial court refuses to enjoin an impending sale of property. *See* 9 MOORE'S FEDERAL PRACTICE ¶ 208.03, at

While the initiation of an appeal does not itself stay execution, proposed rule 62.01 provides that generally "no execution shall issue upon a judgment, nor shall proceedings be taken for its enforcement until the expiration of 30 days after its entry." Unless otherwise ordered by the trial court, this automatic stay provision is inapplicable in injunction and receivership actions and in actions that remove a public officer[137] or that award, change, or otherwise affect the custody of a minor child. In accordance with existing law, the automatic stay provision is also inapplicable "if the party against whom judgment is entered is about fraudulently to dispose of, conceal or remove his property, thereby endangering satisfaction of the judgment."[138]

In addition to the thirty-day automatic stay provided in rule 62.01, proposed new rule 62.02 provides that a judgment is further stayed pending and for thirty days after entry of an order on timely motion:

> (1) granting or denying a motion under Rule 50.02 for judgment in accordance with a motion for a directed verdict; (2) granting or denying a motion under Rule 52.02 to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; (3) granting or denying a motion under Rule 59.03 to alter or amend the judgment; and (4) denying a motion under Rule 59.01 for a new trial.

Under proposed appellate rule 4(b), these same motions also terminate the running of the time for filing a notice of appeal, which need not be filed until and within thirty days after entry of the enumerated orders.[139] These motions, therefore, have an identical effect on the time after which execution may issue and within which notice of appeal must be filed.

To obtain a stay beyond the automatic stay provisions of rules 62.01 and 62.02, the appellant generally must file a bond. The bond may be given at or after the time of filing notice of

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1408 (2d ed. 1975); *cf.* TENN. CODE ANN. § 27-612 (1955) (reversal of judgment or decree by writ of error after execution by sale of property does not affect interest of any purchaser at execution sale).

137. *See* TENN. CODE ANN. §§ 8-2701 to 2726 (1973).

138. PROPOSED TENN. R. CIV. P. 62.01; *see* TENN. CODE ANN. § 26-116 (1955); TENN. R. CIV. P. 62.08.

139. *See* text accompanying notes 18-21 *supra*.

appeal, but the stay becomes effective only when the bond is approved by the trial court.[140] The conditions of the bond are specified in proposed new rule 62.05.

> A bond shall have sufficient surety and: (1) if an appeal is from a judgment directing the payment of money, the bond shall be conditioned to secure the payment of the judgment in full, interest, damages for delay, and costs on appeal; (2) if an appeal is from a judgment ordering the assignment, sale, delivery or possession of personal or real property, the bond shall be conditioned to secure obedience of the judgment and payment for the use, occupancy, detention, and damage or waste of the property from the time of appeal until delivery of possession of the property, and costs on appeal. If the appellant places personal property in the custody of an officer designated by the court, such fact shall be considered by the court in fixing the amount of the bond.

The premium paid for a bond staying execution is a recoverable cost on appeal.[141] Since the purpose of the bonding requirement is to protect the appellee, it would ordinarily be waivable by him, and it may be to the appellee's advantage to do so to reduce the costs recoverable against him if it appears likely the appellant will prevail on his appeal.

Rule 62 recognizes certain exceptions to its general requirement that an appellant may obtain a stay only by giving a bond securing payment of the judgment in full, plus interest, damages for delay, and costs on appeal. Persons financially unable to give any security or the full amount of security required by rule 62.05 may make a motion to obtain a stay without providing any security or to have the amount of security reduced. Since execution may issue, unless stayed, thirty days after entry of judgment, the appellant should move as promptly as possible. The motion must be accompanied by an itemized and verified statement of the appellant's financial condition unless that information has previously been presented to the trial court. If the motion is granted, the appellant may obtain a stay by giving such security as the court deems appropriate in light of the appellant's financial condition. If the motion is denied, the trial court must state in writ-

140. PROPOSED TENN. R. CIV. P. 62.04.
141. PROPOSED TENN. R. APP. P. 40(c).

ing the reasons for its denial,[142] and review of the denial is available under proposed appellate rule 7.[143] In cases in which the appellant is the state, any county or municipal corporation within the state, or an officer or agency acting in their behalf, the judgment is stayed automatically and no bond or other security is required from the appellant.[144]

In order to permit the trial court to consider the circumstances of the individual case, proposed new rule 62.07 provides that "[n]othing in this Rule shall be construed to limit the power of the court in exceptional cases to stay proceedings on any other terms or conditions as the court deems proper." This portion of rule 62 empowers the trial court to stay execution without requiring any security "in exceptional cases" in addition to the case in which the appellant is financially unable to provide any security. Similarly, proposed rule 62.08 empowers the appellate court "to stay proceedings or to suspend relief or grant whatever additional or modified relief is deemed appropriate during the pendency of an appeal or to make any order appropriate to preserve the status quo or the effectiveness of any judgment that may subsequently be entered."

Two other aspects of the trial court's power receive explicit consideration in proposed new rule 62. If the trial court in an action involving multiple claims or multiple parties grants permission to take an interlocutory appeal on fewer than all the claims or to fewer than all the parties, the court "may enter a judgment and stay enforcement of that judgment until the entering of a subsequent judgment and may prescribe such terms as

142. PROPOSED TENN. R. CIV. P. 62.05. Rule 62.05 was amended slightly after its latest publication. The first two sentences were not altered, but the remaining portions of that rule now read:

> A party may obtain a stay without giving any security or without giving the full amount of the security required by this Rule upon motion and, if not previously presented, upon presentation of an itemized and verified statement of his financial condition. If the motion is granted, the party may obtain a stay by giving such security as the court deems proper based upon the party's financial condition. If leave to obtain a stay without giving any or the full amount of the security required by this Rule is denied, the court shall state in writing the reasons for the denial.

143. *See* text accompanying notes 149-60 *infra*.

144. PROPOSED TENN. R. CIV. P. 62.06.

to bond or otherwise as it deems proper to secure the party in whose favor the judgment is entered."[145] If a bond is required, it may be given at or after permission to appeal is granted, and the stay is effective when the bond is approved by the trial court.[146] In addition, even after an appeal is taken, the trial court, in actions granting continuing relief, may "suspend relief or grant whatever additional or modified relief is deemed appropriate during the pendency of the appeal and upon such terms as to bond or otherwise as it deems proper to secure the other party."[147] The actions falling within the scope of this power are injunction and receivership actions, actions that remove a public officer or that award, change or otherwise affect the custody of a minor child, and actions for alimony or child support.[148]

While proposed new rule 62 specifies the procedure that must be followed in the trial court to obtain a stay pending appeal in civil actions, it must be read together with proposed appellate rule 7 to achieve a comprehensive understanding of the procedure to be followed for seeking a stay or injunction pending appeal. According to the first sentence of appellate rule 7(a), application for a stay pending appeal or for approval of a bond staying execution or for an order suspending, granting, or modifying continuing relief pending appeal "must ordinarily be made in the first instance in the trial court." If, however, application to the trial court for the relief sought is not practicable[149] or if the trial court has denied the relief sought or if the trial court has failed to afford the relief the applicant requested, then relief may be sought in the appellate court to which the appeal has been taken.[150]

An application for relief in the appellate court is made by way of motion. The motion must set forth the circumstances that entitle the appellant to relief from the appellate court. Thus the

145. *Id.* R. 62.09.

146. *Id.*

147. *Id.* R. 62.03.

148. *Id.* R. 62.01, .03.

149. *See* 9 MOORE'S FEDERAL PRACTICE ¶ 208.07, at 1424 (2d ed. 1975): "[A] showing of impracticability would normally require a showing that the [trial] judge is unavailable, or that relief to be effective must be immediate and that in the nature of what occurred in the [trial] court relief from it is improbable."

150. PROPOSED TENN. R. APP. P. 7(a).

motion must demonstrate that the appellant has unsuccessfully sought the requested relief in the trial court or, alternatively, that seeking relief in the trial court is not practicable. The motion must also set forth the reasons, if any, given by the trial court for its action and the reasons for the relief requested from the appellate court.[151] The facts relied upon must be set forth "and if the facts are subject to dispute the motion shall be supported by affidavits or other sworn statements or copies thereof."[152] The motion must be accompanied by such parts of the record as are relevant and is to be filed with the clerk of the appellate court or a judge thereof.[153] Proposed appellate rule 20 on service[154] and rule 22 on motions[155] apply to motions made under appellate rule 7.

Unlike rule 22(a), which provides that generally a showing in opposition to a motion may be made within five days after service of the motion, rule 7(a) requires that only reasonable notice of the motion be given to all parties. Reasonable notice may be shorter than the five days generally provided for making a showing in opposition to a motion.[156] As noted in the Advisory Commission comment to rule 22(a), "the need for expeditious action would make it undesirable to delay disposition of [a] motion [under rule 7] for the 5 days otherwise specified . . . ." If there is no need for expeditious action, of course, the other parties should be given the full five days within which to make any showing in opposition to the appellant's rule 7 motion.

Like all other motions, a motion filed under rule 7 may be granted or denied by a single judge of the appellate court.[157] This procedure stands in marked contrast to the grant or denial of an application for permission to appeal under rules 9, 10, or 11, which requires consideration by the court instead of a single judge.[158] The action of a single judge on a rule 7 motion, however, may be reviewed by the court.[159]

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151. *Id.*
152. *Id.*
153. *Id.*
154. *See* text accompanying notes 585-89 *infra.*
155. *See* text accompanying notes 596-615 *infra.*
156. PROPOSED TENN. R. APP. P. 22(a), Advisory Comm'n comment.
157. *Id.* R. 22(c).
158. *See* text accompanying notes 607-10 *infra.*
159. PROPOSED TENN. R. APP. P. 22(c).

Proposed appellate rule 7(b) provides that relief available under rule 7(a) "may be conditioned on the filing of a bond in the trial court as provided in Tennessee Rules of Civil Procedure 62 and 65A." Therefore, while the appellate court may impose the requirement of a bond as well as set its amount, the bond itself is filed in the trial court, which also decides questions concerning liability on the bond in the same manner it would if it had itself required the bond. As one commentator has noted concerning the similar provision in the Federal Rules of Appellate Procedure, "[t]his is the more convenient procedure. The amount of damages sustained by reason of a stay or injunction not infrequently depends upon evidence, and the [trial] court is in a better position to hear evidence and make findings of fact."[160]

C. Release in Criminal Cases

Proposed new Tennessee Rule of Civil Procedure 62 and proposed appellate rule 7 are concerned with the procedure for obtaining a stay only in civil actions. Release of a defendant in criminal actions, including release on appeal after conviction, is governed by the recently enacted Release from Custody and Bail Reform Act of 1977[161] and to a much lesser extent by the Tennessee Rules of Criminal Procedure.[162] Under the Bail Reform Act, all persons charged with an offense are entitled to bail before trial, except for those charged with an offense punishable by death "where the proof is evident or the presumption great."[163] Generally an accused is to be released from custody on his personal recognizance or upon the execution of an unsecured appearance bond pending trial unless the magistrate determines that release on such condition will not reasonably assure the future appearance of the accused.[164] In the latter event, the magistrate is directed to impose the least onerous conditions reasonably likely to assure the defendant's appearance. The conditions that may be imposed include (1) release of the defendant into the care

160. 9 MOORE'S FEDERAL PRACTICE ¶ 208.09, at 1427 (2d ed. 1975); *see* 16 C. WRIGHT, A. MILLER, F. COOPER, & E. GRESSMAN, *supra* note 109, § 3954, at 382-83.

161. 1978 Tenn. Pub. Acts ch. 506, §§ 1-48.

162. TENN. R. CRIM. P. 32(c).

163. 1978 Tenn. Pub. Acts ch. 506, § 2.

164. *Id.* § 15.

of some qualified person or organization; (2) placing the defendant under the supervision of an available probation officer or other appropriate public officer; (3) imposition of reasonable restrictions on the activities, movements, associations, and residences of the defendant; and (4) any other reasonable restrictions designed to assure the defendant's appearance, including the deposit of a bail bond.[165] A defendant released before trial is to continue on release during trial on the same terms and conditions as were imposed prior to trial unless the court determines other terms and conditions (or termination of release) are necessary to assure his presence during trial.[166] Subject to one exception,[167] after conviction the trial court may order that the original bail or conditions of release remain in effect pending appeal; it may deny release; or it may increase or reduce bail or alter the conditions of release.[168] The court of criminal appeals and supreme court may also grant the defendant bail or increase or reduce bail.[169] Any change in bail or other conditions of release requires a written motion, and in granting or denying such a motion the court must state in writing the reasons for its action.[170]

In accordance with the Bail Reform Act, a revised version of proposed appellate rule 8(a)[171] provides that "[b]efore or after

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165. *Id.* § 16.

166. *Id.* § 42.

167. Bail is unavailable pending appeal upon a conviction under TENN. CODE ANN. § 52-1432(a)(1) (Cum. Supp. 1977) for the manufacture, delivery, sale, or possession with intent to manufacture, deliver, or sell a controlled substance, or for the sale or possession with intent to sell a prescription for a controlled substance. 1978 Tenn. Pub. Acts ch. 506, § 13.

168. 1978 Tenn. Pub. Acts ch. 506, § 43. This provision of the Bail Reform Act must be construed in light of TENN. CODE ANN. § 40-3406 (Cum. Supp. 1977), *as amended by* 1978 Tenn. Pub. Acts ch. 578, § 1. The amendment to the Code provides that bail is generally available as a matter of right if a person is convicted of a felony, the punishment for which is imprisonment for less than one year. The amendment is inapplicable, however, if there are other felony charges pending against the defendant. Bail is also available as a matter of right pending appeal in misdemeanor cases. TENN. CODE ANN. § 40-3408 (1975).

169. 1978 Tenn. Pub. Acts ch. 506, § 13.

170. *Id.* § 44.

171. Proposed rule 8(a) was amended substantially after its latest publication and now provides:

> Before or after conviction the prosecution or defendant may obtain review of an order entered by a trial court from which an appeal lies to

conviction the prosecution or defendant may obtain review of an order entered by a trial court from which an appeal lies to the Supreme Court or Court of Criminal Appeals granting, denying, setting or altering conditions of defendant's release."[172] As a prerequisite to review before conviction, a written motion for the relief sought on review must first be made in the trial court. After conviction and after the case is pending on appeal, a written motion may be filed either in the trial court in which judgment was entered or in the appellate court to which the appeal has been taken.[173] Proposed rule 8(a) reiterates the requirement of the Bail Reform Act that whenever the trial court enters an order that grants or denies a motion for change in bail or other conditions of release, it must state in writing the reason for the action taken.

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the Supreme Court or Court of Criminal Appeals granting, denying, setting or altering conditions of defendant's release. Before conviction, as a prerequisite to review, a written motion for the relief sought on review shall first be presented to the trial court. After conviction and after the action is pending on appeal, a written motion may be made either in the trial court in which judgment was entered or in the appellate court to which the appeal has been taken. On entry of an order granting or denying a motion for a change in bail or other conditions of release, the trial court shall state in writing the reasons for the action taken.

Review may be had at any time before an appeal of any conviction by filing a motion for review in the Court of Criminal Appeals or, if an appeal is pending, by filing a motion for review in the appellate court to which the appeal has been taken. The motion for review shall be accompanied by a copy of the motion filed in the trial court, and any answer in opposition thereto, and the trial court's written statement of reasons, and shall state: (1) the court that entered the order, (2) the date of the order, (3) the crime or crimes charged or of which defendant was convicted, (4) the amount of bail or other conditions of release, (5) the arguments supporting the motion, and (6) the relief sought. Review shall be had without briefs after reasonable notice to the other parties, who shall be served with a copy of the motion. The other parties may promptly file an answer. The court, on its own motion or on motion of any party, may order preparation of a transcript of all proceedings had in the trial court on the question of release. No oral argument shall be permitted except when ordered on the court's own motion. Review shall be completed promptly.

172. If the release order is entered by a court from which an appeal lies to a court inferior to the supreme court or court of criminal appeals, review is sought "in the next higher court upon writ of certiorari." 1978 Tenn. Pub. Acts ch. 506, § 45.

173. PROPOSED TENN. R. APP. P. 8(a).

Review of the action of the trial court is obtained by filing a motion for review. Before appeal, review is sought in the court of criminal appeals; after an appeal is pending, review is sought in the appellate court to which the appeal has been taken, which generally will be the court of criminal appeals but in some circumstances may be the supreme court. The motion for review must be accompanied by a copy of the motion filed in the trial court, any answer in opposition thereto, and the trial court's required written statement of reasons.[174] The motion itself must state "(1) the court that entered the order, (2) the date of the order, (3) the crime or crimes charged or of which defendant was convicted, (4) the amount of bail or other conditions of release, (5) the arguments supporting the motion, and (6) the relief sought."[175] Review is had without briefs and after reasonable notice to the other parties, who must be served with a copy of the motion for review and who may promptly file an answer in opposition to the motion. The appellate court on its own motion or on motion of any party may order preparation of a transcript of all proceedings in the trial court on the question of release. Unless ordered by the appellate court on its own motion, no oral argument is permitted.[176] According to the last sentence of rule 8(a), "[r]eview shall be completed promptly."

As noted in the Advisory Commission comment to rule 8(a), "[t]he purpose of this subdivision is to ensure the expeditious review of release orders. It permits review on an informal record without the necessity of briefs and on reasonable notice." In light of the purpose of rule 8(a), reasonable notice typically will be less than the five days otherwise permitted by rule 22(a) within which to make a showing in opposition to a motion.[177] Since review of the release decision of the trial court is by way of motion, the motion for review may be granted or denied by a single judge of the appellate court.[178] This procedure differs from the Bail Reform Act, which provides that an order amending or overturning the order of the trial court may be entered only by joint order of two or more judges of the court of criminal appeals.[179] This difference,

174. *Id.*
175. *Id.*
176. *Id.*
177. *See* text accompanying notes 598-603 *infra*.
178. PROPOSED TENN. R. APP. P. 22(c).
179. 1978 Tenn. Pub. Acts ch. 506, § 45.

however, is not as great as it appears since the action of a single judge under the proposed appellate rules may be reviewed by the court.[180] The proposed rule, therefore, imposes a lesser initial burden on the appellate court but at the same time provides a check on the action of a single judge deemed necessary by the Bail Reform Act.

The defendant's liberty interest, which provides a partial explanation for the expeditious review contemplated by rule 8(a), also accounts for the provisions of proposed appellate rule 8(b). Certain orders and judgments of the trial court in criminal actions are appealable as of right by the state,[181] and the state may also seek permission to appeal in criminal actions under proposed rules 9, 10, and 11.[182] Rule 8(b) provides that during the pendency of an appeal by the state or an application for permission to appeal by the state, "[a] defendant shall not be held in jail or to bail . . . unless there are compelling reasons for his continued detention or being held to bail." This language quite obviously envisions that it will only rarely be appropriate to confine a defendant or hold him to bail during the pendency of an appeal or application for permission to appeal by the state.

IV. The Record on Appeal

After an appeal has been initiated, the bond for costs on appeal in civil actions filed, and the judgment or order of the trial court either stayed or allowed to remain in effect, the next step in the appellate process involves preparation of the record on appeal.[183] As stated in the Advisory Commission comment to rule 24, one of the principal purposes of the proposed appellate rules concerning the record on appeal "is to abolish the current distinction between the bill of exceptions and the technical record." Professor Edson Sunderland has pointed out that the distinction between the bill of exceptions and the technical record merely provides an obstacle that "confuse[s] and delay[s] the litigant

180. Proposed Tenn. R. App. P. 22(c).

181. *Id.* R. 3(c).

182. *Id.* R. 9(g), 10(e), 11(g).

183. For a discussion of the genesis of the current law and the purposes of the proposed appellate rules concerning the record on appeal, see Sobieski, *supra* note 1, at 242-51. *See generally* Appellate Court Standards, *supra* note 12, § 3.13(d).

and divert[s] his attention and that of the [appellate] court from the really meritorious questions which are of primary concern."[184] The Advisory Commission comment to rule 24 notes that a further purpose of the proposed rules is "to provide a method of preparation of the record that is both inexpensive and simple, and will convey an accurate account of what transpired in the trial court."

A. Preparation of the Record on Appeal

Proposed rule 24(a) defines the content of the record on appeal. According to that rule the record on appeal consists, first, of copies, certified by the clerk of the trial court, of all papers filed in the trial court. However, certain papers filed in the trial court are typically not necessary in most appeals, and these are not included unless a party otherwise so designates in writing.[185] The excluded papers include

> (1) subpoenas or summonses for any witness or for any defendant when there is an appearance for such defendant; (2) all papers relating to discovery including depositions, interrogatories and answers thereto, reports of physical or mental examinations, requests to admit, and all notices, motions or orders relating thereto; and (3) any list from which jurors are selected.[186]

Thus, if on file, the record on appeal includes copies of the pleadings; motions, supporting papers, and answers in opposition (except those relating to discovery); all orders of the trial court; tendered instructions; the verdict or any findings of fact and conclusions of law or opinion of the trial court; the judgment; and the notice of appeal.

While copies of all papers filed in the trial court, except those routinely excluded, are part of the record on appeal, rule 24(a)

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184. Sunderland, *A Simplified System of Appellate Procedure*, 17 TENN. L. REV. 651, 659 (1943). As intimated in the text, the "record on appeal" as that term is used in the proposed rules is not synonymous with the "technical record." The "record" referred to in the proposed rules is the equivalent of the "transcript of the record" as that term is currently employed. *See* note 197 *infra*.

185. PROPOSED TENN. R. APP. P. 24(a).

186. *Cf.* TENN. SUP. CT. R. 5 (notice to take depositions, captions of depositions, affidavits, reports of receivers, and any list of talesmen routinely excluded from transcript); TENN. CT. APP. R. 6 (notice to take depositions and reports of receivers routinely excluded from transcript).

must be construed in light of rule 24(g), which provides that nothing may be included in the record that does not convey a fair, accurate, and complete account of what transpired in the trial court. One purpose of rule 24(g) is to set forth the accepted rule that only those papers presented to the trial court are considered a part of the record.[187] As stated in the Advisory Commission comment to rule 24(g), a party may not "augment the record by evidence entered ex parte."

That portion of proposed rule 24(a) concerning the papers on file in the trial court that are included in the record on appeal differs from the corresponding Federal Rule of Appellate Procedure[188] in two notable respects. Under the federal rules the original (not certified copies) of all papers filed in the district court are included in the record on appeal.[189] In addition, all papers filed in the district court are included in the record; there is no provision in the federal rules comparable to that found in proposed Tennessee rule 24(a) routinely excluding certain papers typically not needed on appeal.

The federal rule has certain advantages. Because the original papers are included in the record, it relieves the clerk of the district court of the burden of copying the papers filed in the district court, thereby facilitating more expeditious preparation of the record, and it lessens the expense of preparing the record by eliminating the cost of copying the papers filed in the district court.[190] Moreover, by forwarding all papers to the appellate court, the federal rule relieves the clerk of the additional burden of determining which papers are properly included in the record.

The Advisory Commission that formulated the proposed Tennessee rules concluded, however, that certified copies (instead of the originals) of all papers filed in the trial court should be included in the record to ensure the availability of those papers if the record sent to the appellate court is lost or destroyed. In addition, the Commission thought retention of the papers in the trial court would permit more convenient access to the information contained therein if, for example, there is a title search in an

187. *See* Sobieski, *supra* note 1, at 200-01. *See also* APPELLATE COURT STANDARDS, *supra* note 12, § 3.11.

188. FED. R. APP. P. 10(a).

189. *See* 9 MOORE'S FEDERAL PRACTICE ¶¶ 210.02, .04[1] (2d ed. 1975).

190. *Id.* ¶ 210.02.

appealed case involving land. Finally, while recognizing that some burden would be placed on the clerk of the trial court in deciding whether particular papers are to be included in the record, the Commission determined this conceivable disadvantage was outweighed by the advantages gained in reducing the record by eliminating those papers rarely important on appeal. The cost of producing the record is less, and the appellate court is not burdened with unnecessary papers. Besides, if any party desires to have an excluded paper included in the record, he need merely so designate in writing.[191]

In addition to copies of papers filed in the trial court, the record on appeal also includes the original of any exhibits filed in the trial court. Three aspects of this rule are noteworthy. First, unlike other papers filed in the trial court, the original, not copies, of documentary exhibits are sent to the appellate court. Similarly, the original of any nondocumentary exhibits are included in the record. The appellate court, therefore, will be in as good a position as the trier of fact to assess the probative value of any exhibits.[192] Second, the original of only those exhibits filed in the trial court are included in the record. Rule 24(a) thereby alerts counsel "to the necessity for placing exhibits relevant to an appeal in the custody of the clerk of the [trial] court so that they can be transmitted to the court of appeals."[193] If an exhibit is not filed in the trial court, it will not be included in the record transmitted to the appellate court, although an exhibit filed after transmission of the record may be included in a supplemental record and transmitted to the appellate court as provided in proposed rule 24(e).[194] Third, rule 24(a) provides that "[a]ny paper relating to discovery and offered in evidence for any purpose shall be clearly identified and treated as an exhibit." Thus, while papers relating to discovery filed in the trial court are not generally included in the record, those discovery papers "offered in evi-

191. PROPOSED TENN. R. APP. P. 24(a).

192. The scope of appellate review of factual determinations is set forth in proposed appellate rules 13(d) and 13(e). For a discussion of those rules, see Sobieski, *supra* note 1, at 203-16.

193. 9 MOORE'S FEDERAL PRACTICE ¶ 210.04[2], at 1614 (2d ed. 1975); *see* 16 C. WRIGHT, A. MILLER, F. COOPER, & E. GRESSMAN, *supra* note 109, § 3956, at 386.

194. *See also* 9 MOORE'S FEDERAL PRACTICE ¶ 210.04[2], at 1614 (2d ed. 1975).

dence for any purpose," including discovery papers offered for impeachment purposes, are included in the record as exhibits as long as they are identified as such and on file in the trial court. Documentary exhibits of unusual bulk or weight and physical exhibits are subject to a special rule[195] concerning their transmission to the appellate court.[196]

The third item included in the record, besides copies of papers filed in the trial court and the original of any exhibits, is the transcript or statement of the evidence or proceedings.[197] The method of preparing the transcript or statement is discussed in a subsequent section of this article.[198] For present purposes it is sufficient to note that the transcript or statement must, in the language of rule 24(a), "clearly indicate and identify any exhibits offered in evidence and whether received or rejected." The purpose of this requirement is to ensure that the transcript or statement clearly indicates that an exhibit contained in the record was offered into evidence.[199] The exhibit itself may be included in the transcript or statement, or the exhibit may be filed separately with the clerk of the trial court.[200] "No paper," according to rule 24(a), "need be included in the record more than once."[201]

Finally, the record on appeal contains "any other matter designated by a party and properly includable in the record."[202] The matters properly includable in the record are specified in rule 24(g) as those that "may be necessary to convey a fair, accurate and complete account of what transpired in the trial court." Min-

195. PROPOSED TENN. R. APP. P. 25(d).

196. *See* text accompanying notes 285-91 *infra*.

197. Under existing law, the term "transcript" refers to the technical record plus the bill of exceptions. The proposed appellate rules, by contrast, use the term "transcript" to refer to what under current terminology is referred to as the "bill of exceptions." Rule 24(h) expressly abolishes bills of exception in order to promote the purpose of treating the record on appeal as an integrated whole and not as two separate parts, one part consisting of the technical record and the other part consisting of the bill of exceptions.

198. *See* text accompanying notes 209-46 *infra*.

199. *See also* 9 MOORE'S FEDERAL PRACTICE ¶ 210.04[2], at 1614 (2d ed. 1975).

200. PROPOSED TENN. R. APP. P. 25(a).

201. *Cf.* TENN. SUP. CT. R. 5 (no paper will be copied in the transcript more than one time).

202. PROPOSED TENN. R. APP. P. 24(a).

ute[203] or docket[204] entries, for example, might be properly designated for inclusion in the record on appeal. On the other hand, the Advisory Commission comment to rule 24(g) cautions that

> the ability to designate additional parts to be included in the record extends only insofar as it is necessary to convey a fair, accurate and complete account of what transpired in the trial court. The ability to designate additional parts under [rule 24(a)] does not permit a party to augment the record by evidence entered ex parte.[205]

In summary, then, the record on appeal as defined in proposed rule 24(a) consists of (1) copies of all papers filed in the trial court, except those typically unnecessary on appeal; (2) the original of any exhibits filed in the trial court, including any paper relating to discovery and offered in evidence for any purpose; (3) the transcript or statement of the evidence or proceedings, which must clearly indicate and identify any exhibits offered in evidence and whether they were received or rejected; and (4) any other matter designated for inclusion in the record and properly includable.

The second paragraph of rule 24(a) establishes the procedure to be followed if the appellant concludes that a full record is not necessary for his appeal[206] and the appellee is unwilling to stipulate that parts of the record be retained in the trial court.[207] Only inclusion of less than the entire transcript of the evidence typically will result in substantial enough savings to justify preparation of less than a full record. The procedure to be followed if less than the entire transcript is to be included in the record is set out in rule 24(b). Thus, it is unlikely that rule 24(a) will be frequently utilized. The procedure for preparation of less than a full record, however, is identical in all material respects to the procedure for preparation of less than the entire transcript, which is but a part

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203. *See* TENN. CODE ANN. § 16-106 (Cum. Supp. 1977).

204. *See id.* § 18-105.

205. *See also* 9 MOORE'S FEDERAL PRACTICE ¶ 210.04[1], at 1612-13 (2d ed. 1975); 16 C. WRIGHT, A. MILLER, F. COOPER, & E. GRESSMAN, *supra* note 109, § 3956, at 386.

206. *Cf.* TENN. CODE ANN. §§ 27-323 to 325 (1955) (designation of parts to be included in transcript); TENN. SUP. CT. R. 1 (abridgement of the record); TENN. CT. APP. R. 5(b) (abridgement of the bill of exceptions).

207. *See* text accompanying notes 328-32 *infra*.

of the record on appeal.[208] The ensuing discussion concerning preparation of less than the entire transcript, therefore, is equally illuminating of the procedure to be followed if it is desirable to include only a portion of the other matters that are normally included in the record on appeal.

Before discussing the substance of rule 24(b), two points made in the Advisory Commission comment to that rule should be emphasized. To have as exact a record as possible of what transpired in the trial court and to avoid the inaccuracies that inevitably attend preparation of a narrative record,[209] rule 24(b) requires a verbatim transcript of the evidence or proceedings "[i]f a stenographic report or other contemporaneously recorded, substantially verbatim recital of the evidence or proceedings is available . . . ."[210] On the other hand, rule 24(b) does not require that a stenographic report be made of all the evidence or proceedings in the trial court.[211] If a stenographic report or its equivalent is not available, rule 24(c) establishes the procedure to be followed for generating a narrative record.[212]

Unless the entire transcript is to be included in the record on appeal, rule 24(b) requires the appellant, within fifteen days after filing his notice of appeal, to file with the clerk of the trial court and serve on the appellee a description of the parts of the transcript he intends to include in the record.[213] According to the first

208. *See* text accompanying notes 185-205 *supra*.

209. *See* Griswold & Mitchell, *The Narrative Record in Federal Equity Appeals*, 42 HARV. L. REV. 483, 504 (1929); Parker, *Improving Appellate Methods*, 25 N.Y.U. L. REV. 1, 5 (1950); Stone, *The Record on Appeal in Civil Cases*, 23 VA. L. REV. 766, 790 (1937).

210. *But see* TENN. SUP. CT. R. 2A (audio-video reproduction of the evidence may be filed as the bill of exceptions in any appellate proceeding in any criminal case). *See also* APPELLATE COURT STANDARDS, *supra* note 12, § 3.13(d), Commentary at 36-37. While nothing in the proposed rules dispenses with the requirement of preparation of a transcript, nothing forbids inclusion of an audio-video or other reproduction in the record in addition to the transcript. *See also id.* § 3.13(d).

211. *See* Sobieski, *supra* note 1, at 248.

212. *See* text accompanying notes 235-40 *infra*.

213. *Cf.* TENN. SUP. CT. R. 2 (abridgement of bill of exceptions); TENN. CT. APP. R. 5(6)-(7) (abridgement of bill of exceptions). Proposed rule 24(a) provides that the declaration and description of the parts of the record to be included on appeal may be filed and served with the declaration and description of the parts of the transcript to be included in the record.

sentence of rule 24(b), the appellant must designate "such part of the evidence or proceedings as is necessary to convey a fair, accurate and complete account of what transpired with respect to those issues that are the bases of appeal." This language is designed to make clear that the appellant may not order only those portions of the transcript that favor his arguments. Instead, the appellant must order all portions of the transcript, whether favorable or unfavorable, that are relevant to the issues he intends to present for review.[214] On the other hand, appellant must make certain that he orders enough of the transcript so that any matters upon which he relies for relief clearly appear since generally speaking an appellate court will reverse the judgment below only if the record affirmatively reveals the occurrence of error justifying appellate relief.[215]

To permit the appellee to determine whether the parts of the transcript appellant intends to order are adequate for the appeal, the appellant must also serve on the appellee "a short and plain declaration of the issues he intends to present on appeal."[216] If the appellee deems a transcript of other parts of the evidence or proceedings to be necessary, he must, within fifteen days after service of the appellant's description and declaration, file with the clerk of the trial court and serve on the appellant a designation of additional parts to be included. The appellant must either have the additional parts prepared at his own expense or apply to the trial court for an order requiring the appellee to do so.[217] This portion of proposed Tennessee rule 24(b) differs from the corresponding Federal Rule of Appellate Procedure,[218] which places on the appellee the burden of ordering the additional parts at his own expense or of applying to the district court for an order requiring the appellant to do so.

It should be stressed that the declaration of issues that must accompany the appellant's description of the parts of the transcript he intends to present on appeal is not the equivalent of

214. *See also* 9 MOORE'S FEDERAL PRACTICE ¶ 210.05[1], at 1620-22 (2d ed. 1975).

215. *See, e.g.*, TENN. SUP. CT. R. 14; TENN. CT. APP. R. 12. *But see* Fischer v. Cromwell Co., 556 S.W.2d 749 (Tenn. 1977).

216. PROPOSED TENN. R. APP. P. 24(b).

217. *Id.*

218. FED. R. APP. P. 10(b).

assignments of error.[219] Assignments of error are expressly abolished by proposed appellate rule 3(h).[220] The appellant's declaration need merely advise the appellee of the issues the appellant intends to present on appeal so that the appellee can determine whether the parts of the transcript the appellant intends to order are adequate. If the appellant misleads the appellee, the latter may seek modification of the record under proposed rule 24(e). But the appellant cannot shift to the appellee his burden of ordering such parts of the transcript as are necessary to convey a fair, accurate, and complete account of what transpired with respect to those issues that are the bases of his appeal and that must clearly appear in the record to entitle the appellant to relief on appeal.[221]

If the entire transcript is included in the record on appeal, the appellant is not required to serve on the appellee a description of the parts of the transcript he intends to include in the record or a declaration of the issues he intends to present on appeal. Inclusion of the entire transcript also ensures that any errors occurring during the proceedings below will appear in the record, unless the transcript needs to be modified or corrected to conform to the truth. In most cases, therefore, it will be more convenient and prudent, although somewhat more expensive, for the appellant to include the entire transcript in the record. All that the appellant needs to do is order the entire transcript from the reporter promptly so that it can be filed in timely fashion.

Whether the entire transcript or only parts thereof are included in the record, the transcript must be filed with the clerk of the trial court within ninety days after filing the notice of appeal.[222] The time for filing the transcript in interlocutory appeals under rule 9 is measured from the date of entry of the order

219. *See also* 9 MOORE'S FEDERAL PRACTICE ¶ 210.05[2], at 1624-25 (2d ed. 1975). The required form for assignments of error is set forth in TENN. SUP. CT. R. 14 and TENN. CT. APP. R. 12. Assignments of error are not necessary in criminal cases. *See* TENN. CODE ANN. § 40-3409 (1975); TENN. SUP. CT. R. 17(1).

220. *See* Sobieski, *supra* note 1, at 250.

221. *See also* 9 MOORE'S FEDERAL PRACTICE ¶ 210.05[2], at 1625-26 (2d ed. 1975).

222. PROPOSED TENN. R. APP. P. 24(b). *But cf.* APPELLATE COURT STANDARDS, *supra* note 12, § 3.52(b)(1) (record should be completed within thirty days after it is ordered).

by the appellate court granting permission to appeal.[223] Under current law, the bill of exceptions must be filed within thirty days after entry of judgment unless an extension is sought within this thirty-day period. Because an extension cannot exceed an additional sixty days, the maximum period of time for filing the bill of exceptions is ninety days after entry of judgment.[224] In criminal cases, however, the supreme court and court of criminal appeals may for good cause permit the bill of exceptions to be filed "at any time."[225] One important difference between current law and proposed rule 24(b) is that the time for filing the transcript under the rule is measured from the date of filing the notice of appeal.[226] Generally, the notice of appeal must be filed any time within thirty days after the date of entry of the judgment appealed from.[227] As a result, the proposed rule gives the appellant more time within which to file the transcript than current law gives for filing the bill of exceptions. If, for example, the notice of appeal is filed thirty days after entry of judgment, the appellant will have a total of 120 days (thirty days for filing notice of appeal plus ninety days for filing the transcript) after entry of judgment within which to file the transcript. If notice is filed the day judgment is entered, there will be no difference between the proposed

223. PROPOSED TENN. R. APP. P. 9(e).

224. TENN. CODE ANN. § 27-111 (Cum. Supp. 1977). The bill of exceptions does not have to be signed by the trial court within the specified time. *See* Arnold v. Carter, 555 S.W.2d 721 (Tenn. 1977). But if a bill of exceptions is not timely filed, it will not be considered by the appellate court. *See, e.g.*, Lindsey v. Fowler, 516 S.W.2d 88 (Tenn. 1974).

225. TENN. CODE ANN. § 27-111 (Cum. Supp. 1977).

226. Under the Federal Rules of Appellate Procedure, there is no time specified within which the transcript must be filed, but the transcript must be ordered within ten days after filing notice of appeal, FED. R. APP. P. 10(b), and the record on appeal must be transmitted to the court of appeals within forty days after filing of notice of appeal unless the time is shortened or extended. *Id.* R. 11(a). For cause shown an extension of time for transmitting the record may be sought in the district court within the time originally prescribed; and, if an extension is granted, it cannot exceed ninety days from filing of notice of appeal. *Id.* R. 11(d). The court of appeals may permit the record to be transmitted and filed after expiration of the time otherwise allowed or fixed. *Id.* The proposed amendments to the Federal Rules of Appellate Procedure would alter these provisions in several significant respects. *See* PROPOSED FEDERAL AMENDMENTS, *supra* note 20, at 10-15.

227. PROPOSED TENN. R. APP. P. 4(a).

rule and current law, at least with respect to the time within which the transcript must be filed. Another important difference between current law and rule 24(b) is that under the rule the appellant in all cases has ninety days after filing notice of appeal within which to file the transcript.[228] The appellant, therefore, is spared the burden currently imposed of moving for an extension within thirty days after entry of judgment, a requirement that at times has been overlooked and has proven fatal to an appellant who relies upon error appearing only in the bill of exceptions.[229] Finally, while nothing in the proposed rules prevents the appellant from seeking an extension of the time within which to file the transcript, an extension must be sought in the appellate court and requires a showing of good cause in both civil and criminal cases.[230] To be in a position to show good cause for an extension based on the reporter's inability to prepare the transcript within the specified time, the appellant should be able to demonstrate that the transcript was ordered promptly after filing notice of appeal.[231] Indeed, at least in cases in which the entire transcript is to be included in the record on appeal, the transcript should be ordered the same day notice of appeal is filed. Otherwise, the appellant invites the appellate court to take any action it deems appropriate, "which may include dismissal of the appeal."[232]

The transcript filed with the clerk of the trial court must be certified by the appellant, his counsel, or the reporter as an accurate account of the proceedings. Simultaneously with filing the

228. An expedited schedule of appellate review, however, may be established under proposed appellate rule 2.

229. *See, e.g.*, State v. Williams, 547 S.W.2d 895 (Tenn. 1976); Thomas v. State, 206 Tenn. 633, 337 S.W.2d 1 (1960).

230. The only proposed rule under which an extension may be sought is proposed rule 2, which empowers the appellate courts, not the trial courts, for good cause to suspend the requirements or provisions of any of the proposed rules except the time for initiating appellate review under proposed rules 4, 11, and 12.

231. A proposed amendment to FED. R. APP. P. 10(a) would require the appellant to file with the clerk of the district court, within ten days after filing notice of appeal, a copy of a written order directed to the reporter ordering a transcript of such parts of the proceedings not already on file as the appellant deems necessary. *See* PROPOSED FEDERAL AMENDMENTS, *supra* note 20, at 10. The Advisory Commission rejected a suggestion that a comparable provision be incorporated into the proposed Tennessee Rules of Appellate Procedure.

232. PROPOSED TENN. R. APP. P. 3(e).

transcript, the appellant must serve notice of the filing on the appellee. Proof of service must also be filed with the clerk of the trial court at the same time the transcript is filed. The appellee then has fifteen days after service of notice of the filing of the transcript within which to raise any objections to the transcript as filed. If no objection is made within that time, the transcript as filed is included by the clerk of the trial court in the record on appeal.[233] The procedure for settling any differences concerning the transcript is discussed below.[234]

For any number of reasons, a stenographic report or transcript may be unavailable. The reporter may not have been present, the reporter may have failed to record a portion of the proceedings, the reporter may have moved or died, or the report of the proceedings may have been lost or destroyed or may otherwise be inadequate to permit transcription. Whenever for any reason a transcript of the evidence or proceedings or some part thereof cannot be prepared, proposed rule 24(c) provides that "the appellant shall prepare a statement of the evidence or proceedings from the best available means, including his recollection." The importance of this method of preparing a statement of the evidence or proceedings is underscored by the recent decision of the Tennessee Supreme Court in *Trice v. Moyers*.[235] There, the supreme court held that a party is not entitled to a new trial simply on the ground that a stenographic report is unavailable. Instead, he must at least make an effort to generate a summary of the evidence that would be adequate for appellate review. Only if a transcript or summary cannot be obtained "by any practical or feasible means . . . and [only if] the respondent and his counsel were without fault in that regard" should the trial court order a new trial.[236]

The method of initially preparing a statement of the evidence or proceedings is up to the appellant, although rule 24(c) requires him to prepare the statement from "the best available means, including his recollection." Thus, if the statement can be prepared from a source superior to the appellant's recollection, it should be; but the appellant's recollection suffices if it is the best

233. *Id.* R. 24(b).

234. *See* text accompanying notes 247-52 *infra*.

235. 561 S.W.2d 153 (Tenn. 1978).

236. *Id.* at 156.

means available for preparing the statement. Thereafter, the method of preparing a statement of the evidence or proceedings under proposed rule 24(c) is substantially the same as the procedure set forth in rule 24(b) for preparation of a transcript. The statement prepared by the appellant, certified by him or his counsel as an accurate account, must be filed with the clerk of the trial court within ninety days after filing the notice of appeal[237] or after entry of the order by the appellate court granting permission to appeal under rule 9.[238] Simultaneously with filing the statement, the appellant must serve notice of the filing on the appellee and file proof of service on the appellee with the clerk of the trial court. The statement must be accompanied by a short and plain declaration of the issues the appellant intends to present on appeal. If no objection is made by the appellee within fifteen days after service of the appellant's declaration of issues and notice of filing of the statement, the statement as filed is included by the clerk of the trial court in the record on appeal.[239] The procedure for settling any differences regarding the statement is discussed below.[240]

Proposed rule 24 establishes one final method of preparing the record on appeal that deserves mention. Under rule 24(a) the record on appeal generally consists of copies of all papers filed in the trial court, the original of any exhibits, a transcript or statement of the evidence or proceedings prepared in accordance with rule 24(b) or 24(c), and any other matter designated by a party and properly includable in the record.[241] If less than this full record is considered sufficient, the second paragraph of rule 24(a) permits the appellant to initiate a procedure for preparation of an abridged record.[242] A second method of preparing less than the full record as defined in rule 24(a) is set forth in rule 24(d). Under rule 24(d), within ninety days after filing the notice of appeal or entry of the order by the appellate court granting permission to appeal under rule 9,[243] the parties may prepare and sign an agreed

237. PROPOSED TENN. R. APP. P. 24(c).
238. *Id.* R. 9(e).
239. *Id.* R. 24(c).
240. *See* text accompanying notes 247-52 *infra*.
241. *See* text accompanying notes 185-205 *supra*.
242. *See* text accompanying notes 206-21 *supra*.
243. PROPOSED TENN. R. APP. P. 9(e).

statement of the case. The agreed statement sets forth how the issues presented by the appeal arose and were settled by the trial court and only as much of the evidence or proceedings as is necessary to convey a fair, accurate, and complete account of what transpired with respect to those issues that are the bases of appeal. The agreed statement filed with and transmitted by the clerk of the trial court constitutes the record on appeal.[244] If the experience under a comparable provision of the Federal Rules of Appellate Procedure[245] is an accurate predictor, it is likely that rule 24(d) will be used only rarely.[246] Still, it may be of some value if preparation of the record as defined by rule 24(a) is unduly expensive and the parties agree on the dispositive matters that need to be presented to the appellate court.

Because the record on appeal is the only official account of what transpired below[247] and because in any given case the record may fall short of giving a fair, accurate, and complete account of the proceedings in the trial court, proposed rule 24(e) permits correction or modification of the record to make it conform to the truth. The record may not be impeached by the unilateral assertions of counsel in his brief or argument; if the record needs to be corrected to conform to the truth, correction must be sought under rule 24(e).

Rule 24(e) recognizes that the record may need to be corrected because some matter properly includable is omitted or because some matter is improperly included in the record or because the record contains an incorrect statement.[248] Since the

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244. *Id.* R. 24(d).

245. FED. R. APP. P. 10(d).

246. *See* 9 MOORE'S FEDERAL PRACTICE ¶ 210.07, at 1635 (2d ed. 1975); Godbold, *Twenty Pages and Twenty Minutes—Effective Advocacy on Appeal*, 30 SW. L.J. 801, 806 (1976).

247. *See, e.g.*, Rector v. Griffith, 563 S.W.2d 899, 901 (Tenn. 1978).

248. *Cf.* TENN. CODE ANN. § 27-329 (1955) (remand for correction of record); TENN. SUP. CT. R. 9 (suggestion of diminution of record). If, for example, some matter properly includable in the record is omitted from an agreed statement prepared under rule 24(d), the omission may be corrected under rule 24(e). The parties, therefore, need not be deterred from proceeding under rule 24(d) because of a concern that some matter vital to decision may be inadvertently omitted. Any omission, however, should be corrected promptly.

The Advisory Commission comment to rule 24(e) notes that if it is necessary to inform the appellate court of facts that have arisen after judgment in the trial court, resort should be made to rule 14 of the proposed rules. *See* text accompa-

appellate court does not have any firsthand knowledge of what transpired in the trial court, rule 24(e) in effect provides that generally all disputes concerning what actually occurred in the trial court must be submitted to and settled by that court and not the appellate court regardless of whether the record has been transmitted to the appellate court. As stated in rule 24(e), "[a]bsent extraordinary circumstances, the determination of the trial court [of what actually occurred in that court] is conclusive." If necessary, a supplemental record may be certified and transmitted.[249] On the other hand, the trial court is not empowered to exclude from the record matters that occurred or to include matters that did not occur. This limitation on the power of the trial court finds expression in rule 24(g), which provides that nothing in rule 24 "shall be construed as empowering . . . any court to add to or subtract from the record except insofar as may be necessary to convey a fair, accurate and complete account of what transpired in the trial court."

Rule 24(e) also empowers the appellate court to remedy any omissions, improper inclusions, and misstatements. Since copies of all papers filed in the trial court, subject to certain exceptions not here relevant, are included in the record on appeal,[250] the appellate court will be fully informed concerning what occurred in the trial court with regard to correction or modification of the record. As previously noted, however, most matters concerning the accuracy of the record should initially be presented to the trial court, which may correct or modify the record before or after its transmission to the appellate court. Moreover, while the appellate court has the power to correct the record and direct that a supplemental record be prepared and transmitted, it may be understandably reluctant to do so if the matter is raised for the first time after the appeal has been fully briefed and argued and if preparation of a supplemental record would interfere with the expeditious disposition of the appeal.

The procedure to be followed in correcting or modifying the record is specified in the last sentence of rule 24(e): "Correction

nying notes 352-59 *infra*. The purpose of rule 24(e) is the limited one of ensuring that the record accurately reflects what transpired in the trial court rather than adding to it other matters not presented to the trial court.

249. PROPOSED TENN. R. APP. P. 24(e).

250. *See* text accompanying notes 185-87 *supra*.

or modification may be ordered pursuant to stipulation or on motion of the parties or on the court's own motion." Ordinarily, the record will be corrected by stipulation or on motion of one of the parties. If correction of the record necessitates adding material erroneously omitted, a fair construction of rule 24(e), particularly in light of rule 24(c), would seem to require that the party moving to add material to the record serve on the other party, together with his motion, his version of what transpired. Also, whenever a party moves to correct a matter misstated in the record, his motion under rule 24(e) should be accompanied either by his statement of what occurred or by a transcript if one is available. Rule 22(a) on the content of motions would seem to require as much, since under that rule a motion must state the order or other relief requested. The other parties in their answers in opposition to the motion should then specify their objections or amendments to the moving party's statement or any objections or amendments they have to any transcript filed with the motion for correction or modification. If correction of the record requires matters to be stricken from the record, a motion to exclude the matters would seem appropriate. Finally, if the trial or appellate court intends to correct or modify the record on its own motion, the parties should be given notice and an opportunity to be heard before the court corrects or modifies the record.

Unless the record needs to be corrected or modified, rule 24(f) provides that "it is not necessary for the record on appeal . . . to be approved by the trial court." Even records that are corrected or modified under rule 24(e) do not necessarily need to be approved by the trial judge who presided at the proceedings if he is unavailable. Any other judge or chancellor of the court in which the proceedings were held may approve the record or grant whatever other relief is appropriate, including ordering a new trial.[251] As the opinion in *Trice v. Moyers*[252] demonstrates, the requirements for obtaining a new trial are strict and such relief should not be routinely granted. The Advisory Commission comment to rule 24(f) similarly states that "[i]f . . . a transcript of the proceedings is available, only rarely would it be necessary to order a new trial."

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251. PROPOSED TENN. R. APP. P. 24(f).

252. 561 S.W.2d 153 (Tenn. 1978); *see* text accompanying notes 235-36 *supra*.

The proposed elimination of any requirement that the record be approved by the trial court has generated a substantial amount of controversy, most notably among members of the trial bench. Unlike the situation in many other states, under current Tennessee law official court reporters are provided only in criminal proceedings.[253] If official reporters were provided in civil actions as well, there would probably be little support for retention of a requirement that the trial court approve the record on appeal. But even without official reporters, it seems unlikely any untoward problems will arise in the great majority of cases in which a stenographic report is available and the parties agree that the transcript and other portions of the record are accurate. As a practical matter, under current practice if all the attorneys on both sides agree that the bill of exceptions correctly states the proceedings and the evidence, the rule requiring the trial court to approve the bill[254] "is ordinarily only a waste of the time, the energy . . . or whatever else is needed to get the paper to the judge, as his signature follows in such a case as a matter of course."[255] Current practice, therefore, seems consistent with the objective noted in the Advisory Commission comment to rule 24(f) of permitting preparation of the record "without judicial supervision, unless the parties are unable to agree concerning the content of the record." Moreover, the requirement that the trial court approve the bill of exceptions, a requirement that originated long before the development of modern techniques of copying and of creating a verbatim record of what transpired in the trial court,[256] has at times resulted in undeniable miscarriages of justice.[257] Elimination of any requirement that the trial court ap-

253. *See* Trice v. Moyers, 561 S.W.2d 153, 155 (Tenn. 1978); TENN. CODE ANN. §§ 40-2029 to 2041 (1975).

254. *See* TENN. CODE ANN. § 27-109 (Cum. Supp. 1977).

255. Wicker, *A Comparison of Appellate Procedure in Tennessee and in the Federal Courts*, 17 TENN. L. REV. 668, 677 (1943).

256. The requirement in Tennessee that the trial court sign the bill of exceptions can easily be traced back to the midnineteenth century and probably well antedates that.

257. *See, e.g.*, Tennessee Cent. Ry. v. Tedder, 170 Tenn. 639, 98 S.W.2d 307 (1936), *noted in* Wicker, *supra* note 255, at 677-79. Until 1972, as illustrated in *Tedder*, the trial court had to approve the bill of exceptions within the time

prove the record, therefore, is consistent with current practice and designed to eliminate the injustices that have been sanctioned in the past.

To promote the previously mentioned purpose of treating the record as an integrated whole and not as two separate parts, one part consisting of the technical record and the other part consisting of the bill of exceptions,[258] rule 24(h) expressly abolishes bills of exception, including wayside bills of exception. As stated in the Advisory Commission comment to rule 24(h), "[a]ll the information properly includable in the record . . . is available to the appellate court." However, even though wayside bills are expressly abolished, rule 24(h) provides further that a transcript or statement of the evidence may be prepared prior to entry of an appealable judgment or order if it is deemed desirable. Unlike current law, preparation of a transcript or statement prior to the entry of an appealable order or judgment is permissive, not mandatory.[259] According to the Advisory Commission comment, "[i]t would only be in unusual cases that it would be necessary to resort to this subdivision if a stenographic report of the proceedings was made." If, however, it is deemed desirable to prepare a transcript or statement of the evidence for inclusion in the record prior to entry of an appealable judgment or order, the party preparing the transcript or statement must serve on all other parties notice of the filing simultaneously with the filing itself. The party preparing the transcript or statement must also serve a short and plain declaration of the issues he may present on appeal. Proof of service must be filed with the clerk along with the filing of the transcript or statement. If no objection is made

provided for its filing. This requirement has been eliminated by a 1972 amendment to the Tennessee Code, which requires only that the trial court sign the bill as soon as practicable after it is filed. TENN. CODE ANN. § 27-111 (Cum. Supp. 1977), *construed in* Arnold v. Carter, 555 S.W.2d 721 (Tenn. 1977).

258. *See* text accompanying note 184 *supra*.

259. A wayside bill of exceptions is necessary, for example, to preserve a record of the first trial if a new trial is granted. *See, e.g.*, Overturf v. State, 547 S.W.2d 912 (Tenn. 1977). Like a bill of exceptions, a wayside bill must be filed within thirty days (or an extension of sixty additional days sought within the original thirty-day period) from the entry of the order or action of the court that occasioned its filing. TENN. CODE ANN. § 27-111 (Cum. Supp. 1977); *see* Comment, *The Bill of Exceptions in Tennessee*, 25 TENN. L. REV. 246, 258-60 (1958).

within fifteen days after service of the declaration of issues and notice of the filing, the transcript or statement is considered a fair, accurate, and complete account of what transpired with respect to the declared issues. Any differences regarding the transcript or statement are settled in the same manner as any differences are settled with regard to the record prepared upon entry of an appealable judgment or order.[260]

B. Completion, Transmission, and Filing of the Record on Appeal

After the transcript or statement or agreed statement prepared in accordance with rule 24 is filed with the clerk of the trial court, the record on appeal is completed and transmitted to the appellate court as provided in rule 25. Unless the time for completion of the record is shortened or extended as provided in rule 25(e) or proof of service of the notice of appeal has not been filed, the clerk of the trial court is to assemble, number, and complete the record on appeal within thirty days after filing of the transcript, statement, or agreed statement.[261] This is slightly less time than the forty days currently permitted within which the clerk must complete and transmit the record.[262] Of course, nothing prevents the clerk from completing the record before expiration of the thirty-day period. For failure to complete the record on time, the clerk may forfeit his entire cost of preparing and transmitting the record or such part thereof as appropriate.[263] The responsibility for ensuring timely completion of the record, however, is not the clerk's alone. To remind the parties of their responsibilities under the proposed rules, rule 25(a) also provides that after filing notice of appeal the parties must comply with rule 24 and take any other action necessary to enable the clerk to complete the record. Thus, if the entire transcript is to be included, this portion

260. PROPOSED TENN. R. APP. P. 24(h); *see* text accompanying notes 247-50 *supra*.

261. PROPOSED TENN. R. APP. P. 25(a).

262. *See* TENN. CODE ANN. § 27-322 (Cum. Supp. 1977); TENN. SUP. CT. R. 6; TENN. CT. APP. R. 7.

263. PROPOSED TENN. R. APP. P. 40(g); *cf.* TENN. SUP. CT. R. 7 (disallowance of trial clerk's costs for not filing transcript in time, manner, and form prescribed); TENN. CT. APP. R. 7 (disallowance of trial clerk's fees for not filing transcript on time).

of rule 25(a) is designed to remind the appellant to order the transcript from the reporter, to file it within ninety days after filing of notice of appeal, and to notify the appellee of its filing.[264] If less than the entire transcript is to be included, the appellant is reminded to serve on the appellee his description of the parts of the transcript to be included and his declaration of the issues he intends to present on appeal.[265] If any exhibits are to be included in the record, both parties are reminded that they must be filed with the clerk of the trial court, either as part of the transcript or statement or separately, to be included in the record on appeal.[266] Rule 25(a) also reminds the appellant to file proof of service of the notice of appeal. Unless proof of service is filed, the clerk of the trial court will not complete the record and as a result the appeal itself may be, although it does not necessarily have to be, dismissed as provided in rule 26(b).[267] By directing the clerk not to complete the record unless proof of service of the notice of appeal is filed, rule 25(a) seeks to ensure that the appellee has been notified of the appeal. Only rarely, however, will the appellee, even if not previously notified of the appeal, be able to demonstrate some prejudice beyond the mere absence of notice of the appeal justifying dismissal of the appeal.[268]

As part of his obligation to complete the record, the clerk of the trial court is directed by rule 25(a) to number the pages of the documents comprising the record and to prepare a list of the documents correspondingly identified with reasonable definiteness. Numbering the pages of the documents comprising the record is designed to permit intelligible references to the record in the briefs as required in rule 27 on the content of briefs.[269] The list of documents comprising the record is transmitted with the record to the appellate court and permits that court to ascertain whether it has the full record before it.[270] Rule 25(a) also directs the clerk of the trial court to bind together in chronological order all papers filed in the trial court, thereby facilitating the appel-

264. *See* text accompanying notes 222-32 *supra*.
265. *See* text accompanying notes 213-21 *supra*.
266. *See* text accompanying notes 193-94 *supra*.
267. *See* text accompanying notes 342-51 *infra*.
268. *See* text accompanying notes 44-45 *supra*.
269. *See* text accompanying notes 411-13 *infra*.
270. PROPOSED TENN. R. APP. P. 25(a).

late court's understanding of the sequence of events as they unfolded in the trial court.[271] Finally, by virtue of the last sentence of rule 25(a), the clerk of the trial court is directed to notify the appellant if he is unable to complete the record in timely fashion. An appellant so notified has cause as required by rule 25(e) for obtaining an extension of time for completing the record.[272] Moreover, under 26(b) an appeal may not be dismissed because of the errors or omissions of the clerk of the trial court.[273]

To serve the convenience of parties who may be far removed from the office of the clerk of the appellate court but who need to consult the record in preparing their briefs and other appellate papers, rule 25(b) provides that the clerk of the trial court shall defer transmission of the record to the appellate court.[274] To ensure against unnecessary delay in preparation of the record and to permit the clerk of the appellate court to keep an accurate account of the timeliness of subsequent steps in the appellate process,[275] rule 25(b) also provides that upon completion of the record the clerk of the trial court must forward to the clerk of the appellate court a certificate reciting that the record, including the transcript or statement of the evidence or proceedings, is complete for purposes of the appeal. The certificate may not be forwarded until the record on appeal is complete; if the record can-

271. *Cf.* TENN. SUP. CT. R. 4 (transcript to contain process, pleadings, rules, orders, decrees, judgments, and all steps in the order they occurred); TENN. CT. APP. R 5(4) (transcript to contain process, pleadings, rules, orders, decrees, judgments, and all steps in the order of sequence in the progress of the case).

272. PROPOSED TENN. R. APP. P. 25(a).

273. *See* text accompanying note 60 *supra.*

274. Under current Tennessee law, the record is routinely forwarded to the appellate court when completed. *See* TENN. CODE ANN. § 27-322 (Cum. Supp. 1977); TENN. SUP. CT. R. 6; TENN. CT. APP. R. 7. FED. R. APP. P. 11(b) similarly requires the record to be transmitted to the court of appeals within forty days after filing notice of appeal. Federal rule 11(c), however, permits temporary retention of the record in the district court for use in preparing appellate papers on stipulation of the parties or on motion of any party. Also, federal rule 11(e) permits the court of appeals by rule or order to provide that the record be retained permanently in the district court, subject to the right of any party to request at any time during the pendency of the appeal that designated parts of the record be transmitted. PROPOSED TENN. R. APP. P. 25(b) is similar to federal rule 11(c) but differs in that the record is routinely retained in the trial court to facilitate more convenient preparation of appellate papers.

275. *See* PROPOSED TENN. R. APP. P. 25(b), Advisory Comm'n comment.

not be completed within the time specified in rule 25(a), an extension must be sought as provided in rule 25(e). When the clerk of the trial court forwards the certificate to the clerk of the appellate court, he must mail a copy of the certificate to counsel of record of each party or, if a party is not represented by counsel, to the party himself.[276] It is important that the clerk mail a copy of the certificate to the parties because the time for filing and serving the appellant's brief is measured from the date on which the record is completed.[277] The actual record itself is transmitted to the appellate court after receipt by the appellant of the appellee's brief,[278] as is discussed more fully below.[279]

Proposed rule 25(c) specifies the duty of the clerk of the trial court to make the record available to the parties so that they may prepare their briefs or other appellate papers.[280] Under that rule any party to an appeal may request the clerk of the trial court to transmit the record to him. The clerk is required to comply with the request, without the necessity of an order from the trial court, by sending the record to the party charges collect or by personal delivery of the record to him. The party is responsible for the safekeeping of the record and must return it to the trial court clerk by personal delivery or prepaid express or mail not later than the day upon which his brief is to be filed. The clerk must keep a written account of requests for and the return of the record on appeal.[281] Under rule 26(c) the clerk of the appellate court is to make the record available to the parties in the same manner as that prescribed in rule 25(c).

Because the record is retained in the trial court, rule 25(d) imposes a duty on the appellant to request in writing that the clerk of the trial court transmit the record to the clerk of the appellate court. The requirement of a written request is designed to provide clear evidence of the appellant's compliance with rule 25(d). The appellant's written request for transmission of the record must be made within twenty-one days after receipt of the

276. *Id.* R. 25(b).

277. *Id.* R. 29(a); *see* text accompanying notes 372-75 *infra*.

278. PROPOSED TENN. R. APP. P. 25(d).

279. *See* text accompanying notes 282-91 *infra*.

280. *Cf.* TENN. SUP. CT. R. 8 (transcript available to counsel); TENN. CT. APP. R. 8 (transcript available to counsel).

281. PROPOSED TENN. R. APP. P. 25(c).

brief of the appellee.[282] If the appellant fails to request the clerk of the trial court to transmit the record in timely fashion, any appellee may move to dismiss the appeal.[283] Only infrequently will granting such a motion be appropriate, however, since retention of the record in the trial court serves the appellee's convenience as well, and he should therefore bear some responsibility for ensuring that the record is timely transmitted to the appellate court. Moreover, it is unlikely that the appellee will suffer any prejudice if the record is retained in the trial court beyond the time set forth in rule 25(d) for its transmittal.[284]

The clerk of the trial court is under a duty to transmit the record to the clerk of the appellate court when requested to do so by the appellant. The record forwarded to the clerk of the appellate court is accompanied by the list identifying the documents comprising the record that must be prepared by the trial court clerk under rule 25(a). Because of considerations of difficulty, inconvenience, and expense, documents of unusual bulk or weight and physical exhibits other than documents are not automatically transmitted by the clerk of the trial court.[285] As stated with regard to a comparable provision in the Federal Rules of Appellate Procedure:[286]

> The purpose of [this provision] is very obviously the prevention of unnecessary transmission of materials which can be transmitted at all only with difficulty, inconvenience, and expense. If documents of unusual bulk or weight and physical exhibits other than documents are actually necessary for the determination of the issues presented by the appeal, they must, of course, be sent to the court of appeals regardless of difficulty or expense. But if they are not necessary they should not be automatically sent off to the court of appeals . . . .[287]

Although the clerk of the trial court initially determines whether

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282. *Id.* R. 25(d).

283. *Id.* R. 26(b).

284. The only possible prejudice that suggests itself is that the appeal may not be called for argument or otherwise submitted to the appellate court for decision as soon as it otherwise would have been. If delay in consideration of the case by the appellate court causes no prejudice, dismissal of the appeal would be inappropriate.

285. PROPOSED TENN. R. APP. P. 25(d).

286. FED. R. APP. P. 11(b).

287. 9 MOORE'S FEDERAL PRACTICE ¶ 211.08, at 1815 (2d ed. 1975).

certain materials are unusually bulky or heavy or are physical exhibits other than documents, the clerk must notify the parties if any documents or physical exhibits are not to be transmitted. Any party or the clerk of the appellate court may at any time direct the clerk of the trial court to transmit any such omitted documents or physical exhibits.[288] Whether or not transmitted, all such documents are papers or exhibits on file in the trial court and are by definition part of the record on appeal.[289] As a result, these documents may be transmitted to the appellate court without entry of an order by the trial or appellate court and without preparation of a supplemental record.[290] If a party does request transmission, he must make advance arrangement with the clerks of the trial and appellate courts for the documents' or exhibits' transportation and receipt.[291]

Under the second paragraph of rule 25(d), transmission of the record is effected when the clerk of the trial court mails or otherwise forwards the record to the clerk of the appellate court.[292] The trial court must indicate by endorsement on the face of the record or otherwise the date upon which the record is transmitted to the appellate court.[293] These provisions of proposed rule 25(d) are not as significant as the comparable provisions of the Federal Rules of Appellate Procedure,[294] at least from the parties' perspec-

288. PROPOSED TENN. R. APP. P. 25(d).

289. *See* text accompanying notes 185-96 *supra*.

290. *See* text accompanying notes 247-50 *supra*.

291. PROPOSED TENN. R. APP. P. 25(d).

292. *Cf.* TENN. CODE ANN. § 27-322 (Cum. Supp. 1977) (certificate of postmaster that transcript deposited in the post office within the prescribed time presumptive evidence of timely transmission).

293. PROPOSED TENN. R. APP. P. 25(d).

294. FED. R. APP. P. 11(b). The proposed amendments to the Federal Rules of Appellate Procedure delete this provision from rule 11(b). *See* PROPOSED FEDERAL AMENDMENTS, *supra* note 20, at 13. One purpose behind federal rule 11(b) was to eliminate the disparity that arose under the former federal rule regarding the time within which the clerk of the district court had to transmit the record to the appellate court. Under the former rule the record had to be filed in the court of appeals forty days after notice of appeal was filed. Because the time required for the record to reach the court of appeals from the district court varied depending upon the proximity of those courts to one another, the result was that the time within which the record had to be transmitted varied. Now that the record needs to be transmitted rather than filed within forty days after filing notice of appeal and transmittal is measured from the date the

tive.[295] Under the federal rules the record generally must be transmitted to the court of appeals within forty days after the filing of notice of appeal.[296] An appeal may be dismissed if the record is not transmitted in timely fashion,[297] and the clerk of the court of appeals is required to file the record only if it is timely transmitted.[298] The proposed Tennessee Rules of Appellate Procedure, on the other hand, do not specify any fixed time after the date of filing the notice of appeal within which the record must be transmitted,[299] and the appellate court clerk files the record in all cases upon its receipt following transmittal.[300] Still, the provisions of rule 25(d) specifying how transmittal is effected and requiring the clerk of the trial court to endorse the date on which the record is transmitted serve the valuable purposes of establishing a uniform method of determining when the record was transmitted and of providing further evidence that the appellant requested transmission of the record in timely fashion.

If the record on appeal cannot be completed on time, proposed rule 25(e) authorizes the trial court on motion "for cause shown" to extend the time for completing the record.[301] Ordinarily, there will be only two reasons that the record cannot be completed within the thirty-day period after filing of the transcript,

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district court clerk forwards the record, the time within which the record must be transmitted is uniform in all federal courts. *See* 9 MOORE'S FEDERAL PRACTICE ¶ 211.02 (2d ed. 1975).

295. Since the clerk of the trial court may forfeit his costs in preparing and transmitting the record if he fails to transmit it on time, these provisions of rule 25(d) are uniquely valuable to him. *See* PROPOSED TENN. R. APP. P. 40(g).

296. FED. R. APP. P. 11(a).

297. *Id.* R. 12(c). This rule is also deleted under the proposed amendments to the federal appellate rules. *See* PROPOSED FEDERAL AMENDMENTS, *supra* note 20, at 16.

298. FED. R. APP. P. 12(b). This portion of rule 12(b) is also deleted by the proposed amendments to the federal appellate rules. *See* PROPOSED FEDERAL AMENDMENTS, *supra* note 20, at 16.

299. Proposed Tennessee appellate rule 25(d) requires transmittal of the record only after receipt by the appellant of the brief of the appellee. The date the appellant will receive the appellee's brief will vary from case to case. *See* text accompanying notes 376-77 *infra*.

300. PROPOSED TENN. R. APP. P. 26(a); *see* text accompanying notes 341-42 *infra*.

301. Nothing in proposed rule 25(e) expressly authorizes the trial court to act on its own motion. If the clerk cannot complete the record on time, he must advise the appellant, who then has good cause for an extension.

statement, or agreed statement prepared under rule 24. One is that the appellant has failed to file proof of service of the notice of appeal.[302] The other reason is that the clerk of the trial court is unable to make the required copies of the original papers filed in the trial court[303] and to otherwise assemble, number, and complete the record within the time allowed for completing the record.[304] Rule 25(a) provides that if the clerk is unable to discharge his responsibilities, an appellant has cause for an extension under rule 25(e). This is consistent with the general notion that the appellant should not be penalized if noncompliance with the rules is not his fault.[305] On the other hand, failure to file proof of service of the notice of appeal may be the fault of the appellant,[306] and the requirement that cause be shown indicates that the appellant is not entitled to an extension as a matter of course. Yet, the only effect of a delay in completion of the record is that the appellant gains some additional time for serving and filing his brief. This time period is measured from the date on which the record is completed.[307] Perhaps the most desirable solution is to extend the time for completing the record but also to abridge the time within which the appellant must file and serve his brief.[308] This solution seems consistent with the spirit of rule 3(e), which provides that failure of an appellant to take any step other than the timely filing and service of a notice of appeal does not affect its validity but is ground only for such action as is appropriate.

There are two restrictions contained in rule 25(e) on the trial court's authority to extend the time for completing the record. A request for an extension must be filed within the time originally prescribed or within an extension previously granted. In addition, the trial court may not extend the time more than sixty days after

302. Under proposed rule 25(a), the clerk is not required to complete the record if proof of service of the notice of appeal has not been filed.

303. *See* text accompanying notes 185-91 *supra*.

304. *See* text accompanying notes 261-73 *supra*.

305. *See* text accompanying note 60 *supra*.

306. The fact that proof of service of the notice of appeal is not on file with the trial court may reflect nothing other than that proof of service was lost in the mails or misdelivered through no fault of the appellant. In such a case, dismissal of the appeal under rule 25(e) would be inappropriate.

307. PROPOSED TENN. R. APP. P. 29(a); *see* text accompanying notes 372-75 *infra*.

308. *See* 9 MOORE'S FEDERAL PRACTICE ¶¶ 211.10[2], 212.05 (2d ed. 1975).

the date of the filing of the transcript, statement, or agreed statement prepared in accordance with rule 24.[309] Since the time ordinarily allowed for completion of the record is thirty days,[310] the trial court may grant only a thirty-day extension.

If the trial court is without authority to grant an extension of time for completing the record or has denied an extension, the appellate court on motion for cause shown may also extend the time for completing the record.[311] This power of the appellate court is more extensive than that of the trial court since the appellate court "may permit the record to be completed after expiration of the time fixed or allowed therefor."[312] Like all other motions, the motion under this portion of rule 25(e) must state the grounds on which it is based;[313] and if a request for an extension has been denied by the trial court, the motion must indicate the denial and set forth the reasons for the denial if any were given.[314] The remarks made previously concerning the circumstances justifying an extension of time by the trial court are equally applicable to the appellate court.[315] Since an extension is sought by motion, it may be acted upon by a single judge of the appellate court, but his action may be reviewed by the court.[316] Moreover, since the appellant's motion for an extension will probably be accompanied by a motion by the appellee under rule 26(b) to dismiss the appeal, the court will generally consider the matter since a single judge may not dismiss an appeal.[317]

The final sentence of rule 25(e) permits the trial or appellate court for cause shown to require the record to be completed and transmitted at any time within the time otherwise fixed or allowed. Since the clerk of the trial court is generally allowed only thirty days after filing of the transcript or statement or agreed statement prepared under rule 24 to complete the record,[318] utilization of this provision will not result in significant savings of

309. PROPOSED TENN. R. APP. P. 25(e).
310. *Id.* R. 25(a).
311. *Id.* R. 25(e).
312. *Id.*
313. *Id.* R. 22(a); *see* text accompanying notes 598-99 *infra.*
314. PROPOSED TENN. R. APP. P. 25(e).
315. *See* text accompanying notes 301-08 *supra.*
316. PROPOSED TENN. R. APP. P. 22(c).
317. *Id.*
318. *Id.* R. 25(a).

time, although if an agreed statement is filed under rule 24(d),[319] the rule does permit the appellee to obtain an order that in effect will require the appellant to proceed immediately with his brief-writing. If an expedited appeal is desired, a party should proceed under rule 2, which empowers the appellate courts to suspend the requirements or provisions of virtually any of the proposed rules.[320] Under that rule the appellate court may also reduce the time for preparing the transcript or statement prepared under rule 24[321] and the time for filing and serving briefs[322] and is also empowered to alter the sequence of oral argument or submission of the case[323] and enter judgment prior to completion of a written opinion.[324] Such steps will result in far greater reduction of the overall time for deciding a matter on appeal than will result from reduction of the time for completion and transmission of the record.[325]

Transmission of the record to the appellate court generally causes no inconvenience in the trial court when an appeal is taken after entry of a final judgment that disposes of the entire action. However, when an appeal is taken from an interlocutory order of the trial court, proceedings may continue in the trial court. Under proposed rule 9(f), for example, an application for permission to appeal or even the grant thereof does not stay proceedings in the trial court unless the trial or appellate court so orders. If a stay is not ordered and proceedings continue in the trial court, it may be inconvenient to transmit the record to the appellate court. Since the record on appeal consists of copies (rather than the originals) of papers filed in the trial court,[326] this difficulty will arise only in connection with any exhibits filed in the trial court

319. *See* text accompanying notes 241-46 *supra*.

320. The appellate courts, however, may not extend the time for initiating appellate review under rules 4, 11, and 12.

321. *See* PROPOSED TENN. R. APP. P. 24(b)-(c).

322. *See id.* R. 29(a).

323. *See id.* R. 34.

324. *See id.* R. 38.

325. Preparation of the record and preparation of a written opinion are probably the two most time-consuming phases of the traditional American appellate process. *See* APPELLATE COURT STANDARDS, *supra* note 12, § 3.13, Commentary at 36; P. CARRINGTON, D. MEADOR, & M. ROSENBERG, JUSTICE ON APPEAL 32 (1976).

326. *See* text accompanying notes 185-91 *supra*.

and the transcript or statement of the evidence or proceedings. To alleviate any inconvenience that transmission of these parts of the record would cause in the trial court, proposed rule 25(f) provides that the trial court may enter an order directing that specified portions of the record be retained in that court pending the appeal. If the trial court enters such an order, the clerk of the trial court is directed to retain the specified portions of the record, subject to a request for transmission by the appellate court. The record on appeal consists of a certified copy of the order of the trial court, together with such parts of the original record as the trial court allows to be transmitted, and certified copies of any retained parts.[327]

The parties themselves may also stipulate, pursuant to proposed rule 25(g), that designated parts of the record shall be retained in the trial court unless thereafter the appellate court orders or any party requests their transmittal. Because the retained parts are considered a part of the record on appeal for all purposes,[328] however, the parties need not fear that such a stipulation will affect the scope of review. As has been noted with regard to a comparable provision in the Federal Rules of Appellate Procedure:[329]

> The reason for encouraging parties to stipulate against transmission is to avoid the expense, labor, and general inconvenience attendant upon the transmission of voluminous records in those cases in which the entire record is unnecessary. When the [trial] court record is of moderate size, it is more convenient, both for the parties and for the clerks, to transmit the entire record, even if particular papers are unnecessary. But when the questions involved in an appeal require the consideration of a relatively small part of a large record . . . it is an imposition on the clerks of both courts to oblige transmission of the entire record. [This rule] permits the parties to avoid that imposition without any risk of prejudicing themselves.[330]

The record on appeal may also be reduced pursuant to the second paragraph of rule 24(a).[331] If the parties are able to agree on the

327. PROPOSED TENN. R. APP. P. 25(f).
328. *Id.* R. 25(g).
329. FED. R. APP. P. 11(f).
330. 9 MOORE'S FEDERAL PRACTICE ¶ 211.13, at 1827-28 (2d ed. 1975).
331. *See* text accompanying notes 206-21 *supra*.

parts of the record that should be retained in the trial court, however, proceeding under rule 25(g) avoids the necessity of complying with the more elaborate procedure set forth in rule 24(a).[332]

Just as there are some circumstances in which it is desirable to retain the record in the trial court beyond the time within which the record on appeal is generally transmitted to the appellate court, there are also some circumstances in which it is desirable to transmit the record to the appellate court prior to the time the record is normally transmitted. For example, the appellate court may need to study parts of the record in connection with a motion under proposed appellate rule 7 for a stay of a judgment or order of the trial court pending an appeal in civil actions,[333] a motion under rule 8 for release in criminal cases,[334] an application for permission to appeal under rule 9,[335] an application for an extraordinary appeal on original application in the appellate court under rule 10,[336] a motion to dismiss the appeal, or various other matters. Since the record on appeal typically will not be transmitted until after the appellate court must pass on these matters,[337] proposed rule 25(h) permits a party to require the transmission of those parts of the record necessary to the disposition of a motion or application for an order appropriately granted by the appellate court prior to the time the record would otherwise be transmitted.

Upon receipt of the record on appeal following its transmittal, the clerk of the appellate court files the record and notifies all parties of the filing.[338] Docketing of the appeal will have already taken place since the clerk of the appellate court dockets the appeal immediately upon receipt by him of a copy of the

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332. *See* text accompanying notes 241-46 *supra*.

333. *See* text accompanying notes 132-60 *supra*.

334. *See* text accompanying notes 161-82 *supra*.

335. *See* text accompanying notes 75-86 *supra*.

336. *See* text accompanying notes 87-92 *supra*.

337. *See* text accompanying notes 274-79 *supra*.

338. PROPOSED TENN. R. APP. P. 26(a). Filing of the record (and therefore notice of the date of filing) is of greater significance under the Federal Rules of Appellate Procedure because the time within which the appellant must serve and file his brief is measured with reference to the date on which the record is filed. *See* FED. R. APP. P. 31(a).

notice of appeal[339] or entry of an order by the appellate court granting permission to appeal.[340]

Unlike the comparable Federal Rule of Appellate Procedure,[341] the proposed Tennessee rule requires the clerk of the appellate court to file the record in all cases upon receipt following transmittal,[342] not just upon receipt following timely transmittal as provided in the federal rule. If, however, the appellant has failed to cause timely completion or transmission of the record, the appellee may file a motion seeking dismissal of the appeal under rule 26(b). The motion, which must be served on the appellant,[343] is to be accompanied by a certificate of the trial court clerk showing the date and substance of the judgment or order from which the appeal was taken, the date on which the notice of appeal was filed, and the expiration date of any order extending the time for completing the record.[344] In cases in which an appeal by permission is granted under rule 9, the motion should set forth the date of entry of the order by the appellate court granting permission to appeal since the time fixed for preparation of the record runs from entry of that order.[345] The appellant is given fourteen days in which to respond after service of the appellee's motion to dismiss. Instead of granting the motion, or at any time on its own motion, the appellate court may order completion and transmission of the record.[346] Unlike most other motions, a motion to dismiss may not be granted by a single judge of the appellate court.[347]

Rule 26(b) expressly provides that a motion to dismiss should not be granted if the failure to complete or transmit the record in timely fashion is due to the errors or omissions of the clerk of

339. PROPOSED TENN. R. APP. P. 5(c). Under proposed rule 5(c) an appeal is docketed under the title given to the action in the trial court, with the appellant identified as such. If the title to the action in the trial court does not contain the name of the appellant, his name, identifying him as the appellant, is added to the title.

340. *Id.* R. 9(e).

341. FED. R. APP. P. 12(b).

342. PROPOSED TENN. R. APP. P. 26(a).

343. *See id.* R. 20(b).

344. *Id.* R. 26(b).

345. *Id.* R. 9(e).

346. *Id.* R. 26(b).

347. *Id.* R. 22(c).

the trial court.[348] As noted previously, failure to complete the record in timely fashion will more often than not be attributable to the clerk of the trial court,[349] and untimely transmission of the record is unlikely to prejudice the appellee, who is also benefited by retention of the record in the trial court pending preparation of the briefs.[350] Dismissal under rule 26(b), therefore, would appear to be appropriate only if the appellant has abandoned his appeal but has not taken a voluntary dismissal, as he may under proposed rule 15.[351]

C. *Keeping the Record on Appeal Up-to-Date*

Even if all steps in the process of preparing, completing, transmitting, and filing the record on appeal are completed in timely fashion, it is occasionally necessary to bring the record up-to-date so that the appellate court is aware of facts occurring after judgment that affect the positions of the parties or the subject matter of the action.[352] Accordingly, proposed rule 14(a) empowers the appellate court, in its discretion, to consider "those facts [that occurred after judgment] capable of ready demonstration, affecting the positions of the parties or the subject matter of the action such as mootness, bankruptcy, divorce, death, other judgments or proceedings, relief from the judgment requested or granted in the trial court, and other similar matters." This is not an exclusive listing of those events that an appellate court may consider, but the Advisory Commission comment to rule 14 cautions that "[t]his rule is not intended to permit a retrial in the appellate court." The limited type of matters appropriately considered under rule 14(a) is also emphasized in the last sentence of that rule, which provides: "Nothing in this rule shall be construed as a substitute for or limitation on relief from the judgment available under the Tennessee Rules of Civil Procedure or the Post-Conviction Procedure Act." If, for example, a party uncovers evidence during the pendency of an appeal that the judgment

348. *See* text accompanying note 60 *supra*.

349. *See* text accompanying notes 301-05 *supra*.

350. *See* text accompanying notes 282-84 *supra*.

351. *See also* 9 MOORE'S FEDERAL PRACTICE ¶¶ 211.10[2], 212.05 (2d ed. 1975).

352. *See* Sobieski, *supra* note 1, at 200-02.

was obtained fraudulently, relief from the judgment should be sought in the trial court, not the appellate court, under Tennessee Rule of Civil Procedure 60.02(2). The fact that relief from the judgment is being sought in the trial court, however, may appropriately be brought to the attention of the appellate court pursuant to proposed appellate rule 14. The appellate court may then grant whatever relief, if any, it deems appropriate, such as staying its consideration of the appeal or remanding the case to the trial court.[353]

Consideration of postjudgment facts by the appellate court is sought by way of a motion,[354] which must be served on all other parties.[355] The appellate court may grant or deny the motion in whole or in part and subject to whatever conditions the court deems proper.[356] If the appellate court grants the motion or acts on its own motion, the court is empowered to direct that the facts be presented in such manner and pursuant to such reasonable notice and opportunity to be heard as it deems fair.[357] Since appellate courts are ill-equipped to receive lengthy testimony, postjudgment facts will typically be presented in properly authenticated documents, public records, or affidavits or other sworn statements, any or all of which may accompany the motion.[358] Of course, nothing in rule 14 prevents the appellate court in appropriate circumstances from remanding an action to the trial court for preparation of a supplemental record.[359]

D. The Record on Direct Appellate Review of Administrative Proceeedings

The record on direct appellate review of administrative pro-

353. For a discussion of the relationship between district court action under FED. R. CIV. P. 60 and appellate review, see 11 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2873 (1973 & Supp. 1978); 16 C. WRIGHT, A. MILLER, F. COOPER, & E. GRESSMAN, *supra* note 109, § 3938, at 281-83.

354. PROPOSED TENN. R. APP. P. 14(b).

355. *Id.* R. 20(b).

356. *Id.* R. 14(b).

357. *Id.* R. 14(c).

358. *Id.* R. 22(a).

359. Under proposed appellate rule 36(a), the appellate courts are empowered to grant any relief deemed appropriate, including the giving of any judgment and making of any order.

ceedings[360] is given separate treatment in proposed rules 12(d) and 12(e). The entire record before the administrative agency is the record on review.[361] This provision eliminates any distinction between the record before the agency and the record on review and to this extent differs from rule 24, which requires preparation of a record on appeal separate from the record in the trial court.[362] The agency and the petitioner, however, may stipulate to omit portions of the record,[363] and rule 12(d) encourages them to do so since a party unreasonably refusing to stipulate may be taxed for the additional cost.[364] The parties need not fear that such a stipulation will affect the scope of review because omitted portions of the record are to be transmitted to the court of appeals on the request of the agency itself, the petitioner, or any other party. Such a request must be served on all other parties. The court of appeals on its own motion may also order that omitted portions of the record be transmitted to it.[365] If anything in the record is misstated, the parties may correct the misstatement by stipulation at any time, or the court of appeals may order that the misstatement be corrected and, if necessary, that a supplemental record be prepared and filed.[366]

Under rule 12(e) the burden of filing the record in timely fashion is placed on the agency and not on the appellant, who, under the rules governing the record on appeal, bears the primary responsibility for preparing and ensuring timely completion and transmission of the record.[367] The agency must file the record within forty-five days after service of the petition for review unless an extension is granted by the court of appeals. An extension is sought by motion and must be made within the forty-five day period or within an extension previously granted. If an extension is sought thereafter, the motion must be made within thirty days after the forty-five day period (or an extension) and requires a

360. *See* text accompanying notes 112-19 *supra*.

361. PROPOSED TENN. R. APP. P. 12(d).

362. The record is separate in the sense that copies of the original papers filed in the trial court, and not the originals themselves, are transmitted to the appellate court. *See* text accompanying notes 185-91 *supra*.

363. PROPOSED TENN. R. APP. P. 12(d).

364. *Id.*

365. *Id.*

366. *Id.*

367. *See id.* R. 24-26.

showing of reasonable excuse for failing to file the motion for an extension earlier.[368] The date of filing of the record is important because the time for filing briefs begins to run from that date.[369] To make the parties aware of when the record is filed, the clerk of the court of appeals must give notice to all parties of the date on which the record is filed.[370]

In all other respects, a review proceeding under rule 12 is governed by the other proposed rules insofar as appropriate, except for rules 24 through 26 concerning the record on appeal. As used in any applicable rule, the term "appellant" includes a petitioner and the term "appellee" includes a respondent in proceedings to review agency orders under rule 12.[371]

V. BRIEFS

A. Filing and Service of Briefs

After the record on appeal is completed or in proceedings under rule 12 to review agency orders after the record is filed, the attention of the appellant will be directed toward preparation of his brief. Under proposed rule 29(a) the appellant has thirty days from the date on which the record is completed to file and serve his brief.[372] This differs from the Federal Rules of Appellate Procedure, which measure the time for filing the appellant's brief from the date the record is filed in the court of appeals.[373] Like the federal rules, the thirty-day period commences to run from the date the record is filed in proceedings under rule 12 to review agency orders.[374] Since the record may be completed or filed at different times in particular cases, the start of the thirty-day period will depend on the precise date the record is completed or filed. The thirty days allowed by rule 29(a) is slightly more than the twenty-five days after the date of the filing of the transcript

368. *Id.* R. 12(e).
369. *Id.* R. 12(f).
370. *Id.* R. 12(e).
371. *Id.* R. 12(h).
372. In cases appealed to the supreme court from an intermediate appellate court, the thirty-day period commences to run from the date on which permission to appeal is granted. *Id.* R. 11(f).
373. FED. R. APP. P. 31(a).
374. PROPOSED TENN. R. APP. P. 12(f).

of the record that the appellant is given under current law in civil cases within which to file his assignments of error and supporting brief.[375]

The appellee also has thirty days from the date of service of the appellant's brief to serve and file his brief.[376] The start of the thirty-day period within which the appellee must file and serve his brief will therefore also vary from case to case depending upon when he is served with the appellant's brief. If the appellant serves his brief substantially before expiration of thirty days after the record is completed, the appellee still has thirty days to file and serve his brief, but the overall amount of time devoted to the briefing phase of the appeal will be reduced. The thirty days within which the appellee must file and serve his brief under rule 29(a) is substantially more than the fifteen days currently allowed in civil cases.[377]

Rule 27(c) also permits the appellant and the appellee to file reply briefs, and under rule 29(a) such briefs must be served and filed within fourteen days after service of the preceding brief. Thus, the appellant's reply brief must be filed and served within fourteen days after service of the appellee's principal brief, and the appellee's reply brief must be filed and served within fourteen days after service of the appellant's reply brief.

Under rule 29(b), a sufficient number of copies of each brief must be filed with the clerk of the appellate court to provide the clerk and each judge of the appellate court with one copy. Thus, six copies of the brief need to be filed in the supreme court, and only four copies will generally need to be filed in the intermediate

375. *See* TENN. SUP. CT. R. 14; TENN. CT. APP. R. 12. In criminal cases the appellant's brief must be filed within 30 days after filing of the transcript. TENN. SUP. CT. R. 17; TENN. CRIM. APP. R. 3. The proposed appellate rules, therefore, would not change the time for filing the appellant's brief in criminal appeals. *But cf.* APPELLATE COURT STANDARDS, *supra* note 12, § 3.52(b)(2) (appellant's brief should be filed within 20 days after record is filed in criminal cases).

376. PROPOSED TENN. R. APP. P. 29(a).

377. TENN. SUP. CT. R. 16; TENN. CT. APP. R. 14. In the court of criminal appeals, the appellee has 30 days within which to file his brief. TENN. CRIM. APP. R. 3. *But cf.* APPELLATE COURT STANDARDS, *supra* note 12, § 3.52(b)(2) (appellee's brief should be filed within 20 days after appellant's brief is filed). In all the appellate courts, the time for filing the appellee's brief is measured with reference to the filing of the brief of the appellant rather than with reference to service of the appellant's brief, as is the case under the proposed appellate rules.

appellate courts.[378] One copy of the brief must also be served on each party;[379] but if one counsel appears for several parties, he is entitled to only one copy of the brief.[380] If more than one counsel appears for a party, service of one copy of the brief on one counsel is sufficient.[381] In all cases the appellate court may order that a greater or lesser number of copies be filed and served.[382]

Nothing in the proposed rules prohibits the parties from seeking an extension of the time within which to file and serve their respective briefs; but if the appellant's or the appellee's brief is not filed in timely fashion, rule 29(c) specifies the consequences that may ensue. If the appellant fails to file his brief within the thirty-day period specified in rule 29(a) or within the time as extended, any appellee may file a motion in the appellate court to dismiss the appeal. The appellant has fourteen days after service of the motion within which to respond. The appellate court is not required to grant the motion, but may at any time—even after the time for filing and service has expired—order service and filing of the appellant's brief.[383] However, seemingly harsh dismissals have been ordered for failure of an appellant to file his assignments of error and supporting brief on time,[384] and such action sounds a warning that cannot safely be ignored. If the appellee fails to file his brief on time, any appellant may file a motion in the appellate court to have the appeal decided on the record and appellant's brief.[385] Also, under rule 35(a), an appellee who has not filed his brief will not be heard on oral argument. The appellee has fourteen days after service of the appellant's motion within which to respond. Here too, the appellate court is not required to grant the appellant's motion

378. *See* PROPOSED TENN. R. APP. P. 20(f), which provides: "Whenever these rules require copies for each judge of the appellate court and the appellate court sits in sections, copies are required only for each judge of the section."

379. *Id.* R. 29(b).

380. *Id.* R. 20(d).

381. *Id.* In cases in which the validity of a state statute or an administrative rule or regulation is drawn in question on appeal and the state or an officer or agency of the state is not a party, a copy of the brief must also be served on the attorney general. *Id.* R. 32(a); *see* text accompanying notes 465-69 *infra*.

382. PROPOSED TENN. R. APP. P. 29(b).

383. *Id.* R. 29(c).

384. *See, e.g.*, Hamby v. Millsaps, 544 S.W.2d 360 (Tenn. 1976).

385. PROPOSED TENN. R. APP. P. 29(c).

and may at any time order that the appellee's brief be filed and served.[386]

B. *Content and Form of Briefs*

Rule 27 governs the content of briefs and is largely self-explanatory. As noted in the Advisory Commission comment:

> This rule works a change in the form of briefs as they exist under current Tennessee practice. Since assignments of errors are abolished, the machinery associated with them is also abolished. Briefs will be oriented toward a statement of the issues presented in a case and the arguments in support thereof.[387]

All briefs filed in any appeal are governed by rule 27, but if briefs are required under rule 10(d) in an extraordinary appeal, less elaborate briefs may be appropriate.[388] No briefs other than the brief of the appellant, the brief of the appellee, and a reply brief by the appellant and the appellee are expressly permitted.

The brief of the appellant must contain under appropriate headings and in the following order:[389]

(1) A table of contents. This table must include references to the pages in the brief on which the succeeding portions of the brief may be found.

(2) A table of authorities. This table should include alphabetically arranged cases, statutes, and other authorities cited, with references to the pages in the brief where they are cited.

(3) A jurisdictional statement in cases appealed to the supreme court directly from the trial court indicating briefly the jurisdictional grounds for the appeal to the supreme court.[390] While some cases are appealable directly to the supreme court from the trial court,[391] such cases are sufficiently unusual to justify this requirement. If a case appealed to the supreme court should have been appealed to an intermediate appellate court, the case should be transferred to the proper court as provided in rule 17.[392]

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386. *Id.*

387. *See also* APPELLATE COURT STANDARDS, *supra* note 12, § 3.31.

388. *See* text accompanying notes 87-92 *supra.*

389. PROPOSED TENN. R. APP. P. 27(a).

390. *Cf.* TENN. SUP. CT. R. 13A (statement to be filed on direct appeals to the supreme court).

391. *See* Sobieski, *supra* note 1, at 182 n.114.

392. *Cf.* TENN. CODE ANN. § 16-408 (Cum. Supp. 1977) (transfer of cases

(4) A statement of the issues presented for review. This statement should be carefully drawn since "[s]ome judges may read this statement first and acquire a lasting impression of the nature and importance of the appeal."[393] In addition, under rule 13(b) generally, review will extend only to those issues presented for review.[394]

(5) A statement of the case, indicating briefly the nature of the case, the course of proceedings, and its disposition in the court below. The purpose of this section is simply to advise the appellate court of the procedural posture of the case so that the court will be aware at the outset of the scope of its review.

(6) A statement of the facts, setting forth the facts relevant to the issues presented for review with appropriate references to the record. It is vitally important to set forth the facts accurately since sensitivity to the factual similarities and dissimilarities between the case now presented and earlier cases lies at the heart of the common-law method of adjudication.[395] There is no more certain way to lose the respect of an appellate court than by an inaccurate statement of the facts. Referring to the exact place in the record where the relevant facts may be found not only helps to ensure the accuracy of the statement of facts but also keeps the appellate court from having to search the record for error, which it may understandably be unwilling to do.[396] If reference is made to evidence, the admissibility of which is in controversy, rule 27(g) also requires that reference be made to the pages in the record at which the evidence was identified, offered, and received or rejected.[397]

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between supreme court and court of appeals); *id.* § 16-450 (transfer of cases between supreme court and court of criminal appeals).

393. 16 C. WRIGHT, A. MILLER, F. COOPER, & E. GRESSMAN, *supra* note 109, § 3974, at 421.

394. *See* Sobieski, *supra* note 1, at 194-200; *cf.* TENN. SUP. CT. R. 15(2) (errors not assigned generally treated as waived); TENN. CT. APP. R. 13(4) (errors not assigned generally treated as waived).

395. *See* Jones, *Our Uncommon Common Law*, 42 TENN. L. REV. 443 (1975).

396. *Cf.* TENN. SUP. CT. R. 14(2)-(3) (reference must be made to place in record where error appears); TENN. CT. APP. R. 12(2)-(4) (reference must be made to place in record where error appears).

397. *Cf.* TENN. SUP. CT. R. 14(3) (reference must be made to place in record where erroneous ruling on evidence occurred); TENN. CT. APP. R. 12(2)

(7) An argument, which may be preceded by a summary of argument, setting forth the contentions of the appellant with respect to the issues presented and the reasons therefor, including the reasons that the contentions require appellate relief, with citations to the authorities and appropriate references to the record (which may be quoted verbatim) relied on. The importance of referring the appellate court to the place in the record where the matter forming the basis of the appellant's argument may be found has already been noted.[398] "[F]ailure properly to call the matter [in the record that forms the basis of the appellant's argument] to the attention of the court may result in a decision that the appellant has not met the burden of demonstrating error."[399] But in addition to demonstrating error, it is also vitally important that the appellant include the reasons that the error requires appellate relief. "All too frequently counsel set forth arguments in their briefs that error was or was not committed, but then fail to argue whether the alleged error was or was not harmless."[400] The standard for determining whether error is harmless or prejudicial is set forth in proposed rule 36(b), which provides: "A final judgment from which relief is available and otherwise appropriate shall not be set aside unless, considering the whole record, error involving a substantial right more probably than not affected the judgment or would result in prejudice to the judicial process." The genesis of rule 36(b) and its intended scope of operation are discussed in the earlier article on the proposed appellate rules.[401]

(8) A short conclusion, stating the precise relief sought. The appellant will invariably be seeking reversal or modification of the judgment below, but he should also indicate the substance of any direction he seeks the appellate court to give to the trial or intermediate appellate court. "If the appellant seeks, for example, a reversal with direction to dismiss the complaint or a remand for a determination of certain matters, that relief should be specified in the conclusion."[402]

(reference must be made to place in record where erroneous ruling on evidence occurred).

398. *See* text accompanying notes 395-96 *supra*.

399. 9 MOORE'S FEDERAL PRACTICE ¶ 228.02[4], at 3757 (2d ed. 1975).

400. R. TRAYNOR, *supra* note 3, at 26.

401. *See* Sobieski, *supra* note 1, at 251-61.

402. 16 C. WRIGHT, A. MILLER, F. COOPER, & E. GRESSMAN, *supra* note 109, § 3974, at 422.

The brief of the appellee and all other parties must conform to the requirements specified for the appellant's brief, except that a jurisdictional statement, a statement of the issues presented for review, a statement of the case, and a statement of facts need not be included unless the presentation by the appellant is deemed unsatisfactory.[403] If, however, the appellee considers it desirable to reformulate these matters (as he oftentimes will, at least with respect to the issues presented for review and the statement of facts) he may do so. If the appellee is also requesting relief from the judgment, as he may under rule 13(a) without filing a cross-appeal or separate appeal,[404] his brief must also contain the issues and arguments involved in his request for relief as well as his response to the brief of the appellant.[405] The arguments the appellee may raise in response to the appellant's argument is an aspect of the broader question of the scope of review, a question explored at length in the earlier article on the proposed appellate rules.[406]

Under rule 27(c) the appellant may file a brief in reply to the appellee's brief. If the appellee's brief also requests relief from the judgment, then the appellee may file a reply brief with respect to the appellant's response to the issues presented by the appellee's request for relief.[407] In short, the purpose of reply briefs is to give to the party initially presenting an issue for review and relief not only the first but also the last word. New issues may not appropriately be raised in reply briefs, which may include only a response to arguments raised for the first time in the preceding brief. No briefs beyond the reply briefs are expressly permitted by rule 27.

Occasionally, new cases, legislation, and other authorities will come to the attention of a party after his brief has been filed or after oral argument but before decision. The method of bringing such matters to the attention of the appellate court (so that it will have the latest authorities before it in deciding a case) is set forth in proposed rule 27(d). Under that rule, when pertinent and significant authorities come to the attention of a party after he has filed his brief or after oral argument but before decision,

403. PROPOSED TENN. R. APP. P. 27(b).
404. *See* Sobieski, *supra* note 1, at 188-92.
405. PROPOSED TENN. R. APP. P. 27(b).
406. *See* Sobieski, *supra* note 1, at 187-216.
407. PROPOSED TENN. R. APP. P. 27(c).

he may promptly advise the clerk of the court by letter, with extra copies to the clerk for each judge of the appellate court. A copy of the letter must also be served on all the other parties. The letter should simply set forth the citation and refer either to the page of the brief or the point argued orally to which the citation pertains. The letter should also without argument state the reasons for the supplemental citation. Any response to the letter must be made promptly and must be "similarly limited."[408] If the appellate court considers it desirable to obtain a full explanation from the parties concerning the significance of the supplemental authority, it would certainly seem free to order preparation of supplemental briefs.[409]

If determination of the issues presented for review requires consideration of a constitutional provision, statute, rule, regulation, or other similar matter, rule 27(e) provides that they must be reproduced in pertinent part in the brief or in an addendum to the brief or supplied to the court in pamphlet form.

The parties may be referred to in the briefs as they were designated in the trial court or other proceeding under review (for example, "plaintiff" and "defendant") or by using the actual names of the parties or descriptive terms (for example, "the insured person," or "the employee").[410] Whatever reference is utilized, it should be used consistently throughout the brief to promote clarity.

Except in cases in which the parties choose to prepare an appendix to their briefs,[411] references in briefs to the record shall be made to the appropriate pages of the record.[412] As the Advisory Commission comment notes, this requirement "envisions that the clerk of the trial court will have numbered the pages of the record consecutively from start to finish as provided in rule 25(a) of these rules." Intelligible abbreviations (for example, "R. 7") may be used. If reference is made to evidence, the admissibility of which is in controversy, reference must be made to the pages

408. *Id.* R. 27(d).

409. In some courts, new cases, legislation, or other authorities not available at the time of briefing or hearing are usually presented by way of a supplemental brief. *See, e.g.*, U.S. SUP. CT. R. 41(5); ILL. SUP. CT. R. 341(h).

410. PROPOSED TENN. R. APP. P. 27(f).

411. *See* text accompanying notes 427-47 *infra*.

412. PROPOSED TENN. R. APP. P. 27(g).

in the record at which the evidence was identified, offered, and received or rejected.[413]

The proper form of citation for authorities frequently cited is specified in rule 27(h).[414] Citation of cases must be by title, to the page of the volume at which the case begins, and to the pages upon which the pertinent matter appears in at least one of the reporters cited. Using only "*supra*" or "*infra*" is not sufficient; the page of the brief at which the complete citation can be found must be included. Alternatively, the full citation must be repeated. Tennessee cases may be cited to either the official reports or the South Western Reporter or both.[415] Because of the general unavailability of the official reports of other states, cases from other jurisdictions must be cited to the National Reporter System but may also be cited to both the official state reports and National Reporter System. If only the National Reporter System citation is used, the court rendering the decision must also be indicated. All citations to cases must include the year of decision. Textbooks must be cited to the section, if any, and page upon which the pertinent matter appears, and the citation must also include the year of publication and edition if the edition cited is not the first edition. Statutory citations must generally be made to the Tennessee Code Annotated, Official Edition, but citations to the session laws of Tennessee may be made when appropriate. Citation of a supplement to the Tennessee Code Annotated must be indicated and must include the year of publication of the supplement.[416] If other matters in addition to those explicitly treated in rule 27(h) are cited (for example, unreported decisions), the form of citation should be complete enough to permit easy identification of the source.

The length of briefs is specified in rule 27(i). According to that rule, arguments in principal briefs shall not exceed fifty pages, and arguments in reply briefs must not exceed twenty-five pages. The same page limitations apply whether the brief is

413. *Id.*

414. The proper form of citation is currently governed by TENN. SUP. CT. R. 18 and TENN. CT. APP. R. 13(2).

415. This provision of proposed rule 27(h) differs from rule 13(2) of the court of appeals, which requires citation to both the official and unofficial reports.

416. PROPOSED TENN. R. APP. P. 27(h).

printed or typewritten.[417] These page limitations may be altered in particular cases,[418] but parties should avoid burdening the appellate court with needlessly lengthy briefs. The Advisory Commission comment to rule 27 emphasizes that the page limitations relate to the argument section of the briefs; the full brief may exceed the specified limitations. That comment also emphasizes that the cost of reproducing briefs cannot be recovered at rates higher than those charged for photocopying. Briefs may be commercially printed only at the respective party's own expense.[419]

To eliminate needless repetition without infringing upon the right of every party to be heard, rule 27(j) provides that "[i]n cases involving multiple parties, including cases consolidated for purposes of the appeal, any number of parties may join in a single brief, and any party may adopt by reference any part of the brief of another party." This same provision applies to reply briefs.[420] In cases in which an argument would otherwise exceed the page limitations specified in rule 27(i), this rule should be particularly helpful.

The technical requirements of the form of briefs, as well as all other papers filed in the appellate court, are specified in rule 30.[421] Briefs should be produced on opaque, unglazed white paper by any printing, duplicating, or copying process that produces a clear black image. Original typewritten pages may be used, but carbon copies are not acceptable except on behalf of parties allowed to proceed as poor persons as specified in proposed appellate rule 18.[422] All printed matter should be on paper 6⅛ by 9¼

417. According to the Advisory Committee on the federal appellate rules, investigation has disclosed that the number of words on the printed page is little if any greater than the number on a page typed in standard elite type. *See* PROPOSED FEDERAL AMENDMENTS, *supra* note 20, at 19.

418. PROPOSED TENN. R. APP. P. 27(i).

419. *See id.* R. 40(f).

420. *Id.* R. 27(j).

421. The form of papers specified in proposed rule 30 is substantially the same as the form required under current law. *See* TENN. SUP. CT. R. 3; TENN. CT. APP. R. 4.

422. It has been observed that "[e]ven in proceedings in forma pauperis . . . the modern duplicating and copying processes have become so common and inexpensive that carbon copies of documents are seldom submitted by appointed counsel for the indigent. The indigents who proceed pro se are more likely to use the carbon copy option." 16 C. WRIGHT, A. MILLER, F. COOPER, & E. GRESSMAN, *supra* note 109, § 3978, at 446.

inches in type not smaller than 11-point, and the text of the printed matter cannot exceed 4¼ by 7¼ inches. If not printed, copies should be on paper 8½ by 11 inches, double spaced, except for quoted matter, which may be single spaced. The text of non-printed papers should be in type not smaller than standard elite typewriting and not exceeding 6½ by 9½ inches. Briefs and other papers should be numbered on the bottom and fastened on the left.[423]

One of the principal purposes of permitting the use of any process that produces a clean, readable page is to minimize the cost of producing briefs and other papers.[424] Rule 30 should be construed together with rule 40(f), which provides that "[t]he cost of producing briefs and other appellate papers shall be taxable at rates not higher than those generally charged for photocopying in the area where the clerk's office is located." While briefs may be commercially printed, the parties must bear the additional expense. Whatever the method of production used, however, the parties (or clerk of the trial court with respect to the record on appeal) should ensure that the appellate court is presented with a clear, readable copy.

The front covers of briefs must contain (1) the number of the case in the appellate court and the name of that court; (2) the title of the case as it appeared in the trial court, except that the status of each party in the appellate court must also be indicated (for example, "plaintiff-appellant," "defendant-appellee"); (3) the nature of the proceeding in the appellate court (for example, "Interlocutory Appeal by Permission") and the name of the court, agency, or board below; (4) the title of the document (for example, "Brief of the Appellant"); and (5) the name and address of counsel or, if unrepresented by counsel, the party filing the brief.[425]

If available, the colors of the covers must be blue for the brief of the appellant, red for the brief of the appellee, gray for reply briefs, and green for briefs of amicus curiae.[426] Obviously, a brief

423. PROPOSED TENN. R. APP. P. 30(a).

424. *See* APPELLATE COURT STANDARDS, *supra* note 12, § 3.13(e), Commentary at 38; Willcox, Karlen, & Roemer, *Justice Lost—By What Appellate Papers Cost*, 33 N.Y.U. L. REV. 934 (1958).

425. PROPOSED TENN. R. APP. P. 30(b).

426. *Id.* R. 30(c).

should not be rejected because its cover does not conform to this essentially permissive color scheme.

C. *Optional Appendix to Briefs*

Discussion of proposed rule 28, which regulates preparation of an appendix to the briefs, has been intentionally deferred until after a comprehensive discussion of the content and form of the briefs because preparation of an appendix is not required but is an option afforded to the parties.[427] It is a costly option, both because of the time spent and reproduction costs incurred in its preparation[428] and because the cost of preparing an appendix is not a recoverable cost on appeal.[429]

While the record on appeal will be available to the appellate court, the purpose of an appendix is to present only the essentials of an appeal to the appellate court by eliminating testimony and other purely formal parts of the record not material to a decision on appeal.[430] An appellate court may have "neither the time nor the will to search through . . . the record in search of errors to substantiate appellant's claims."[431] On the other hand, the record transmitted to the appellate court can be drastically reduced by utilizing the option afforded in rule 24(a) of designating less than a full record on appeal[432] or by stipulating under rule 25(g) that parts of the record be retained in the trial court.[433] "Moreover," as noted in the Advisory Commission comment to rule 28, "insofar as it is considered advantageous to refer the appellate court to particular portions of the record, the parties can quote verbatim from the record in their briefs."[434] Thus, while it is vi-

427. *Id.* R. 28(a).

428. *See* C. WRIGHT, THE LAW OF FEDERAL COURTS § 104, at 525 (3d ed. 1976); Joiner, *Lawyer Attitudes Toward Law and Procedural Reform*, 50 JUDICATURE 23, 25 (1966).

429. Proposed appellate rule 40(c) lists the recoverable costs on appeal. The costs of preparing and producing an appendix are not included in rule 40(c).

430. *See* PROPOSED TENN. R. APP. P. 28, Advisory Comm'n comment; Sobieski, *supra* note 1, at 245-47.

431. 16 C. WRIGHT, A. MILLER, F. COOPER, & E. GRESSMAN, *supra* note 109, § 3976, at 437.

432. *See* text accompanying notes 206-21 *supra*.

433. *See* text accompanying notes 328-32 *supra*.

434. *See* PROPOSED TENN. R. APP. P. 27(a)(7). The advantage of quoting the record verbatim in a brief is that each judge of the court is thereby provided

tally important for a party to call to the appellate court's attention particular portions of the record essential to appellate review or upon which a party particularly relies, preparation of an appendix is only one means of doing so, and the parties are not required to prepare an appendix if they think that some other method is equally effective.[435]

If the appellant decides to prepare an appendix, it must contain (1) any relevant portions of the pleadings, charge, findings, or opinion; (2) the judgment, order, or decision in question; and (3) any other parts of the record the appellant deems essential for the judges to read to determine the issues presented. All parts of the record that must be studied to determine the issues presented for review must be reproduced; it is not sufficient for the appellant to reproduce only those parts of the record that support his argument. If, in the judgment of the appellee, the parts of the record reproduced by the appellant are inadequate for determination of the issues presented for review, the appellee may reproduce in an appendix to his brief other parts of the record he deems essential for the judges to read. The parties are encouraged, however, to agree on the content of the appendix. The fact that parts of the record are not included in the appendix does not prevent the parties from relying on such parts.[436] Moreover, the parties are reminded that the entire record is always available to the appellate court for reference and examination and that, if the appendix is to achieve its desired objective, parts of the record that do not need to be read by the judges in determining the issues presented should not be reproduced.[437]

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a copy of those portions of the record on which a party particularly relies. Even if the record transmitted to the appellate court is substantially reduced under proposed rules 24(a) or 25(g), only the judge assigned to write the court's opinion may read the record, but the entire court may read the briefs.

435. In addition to the method of preparing the appendix discussed in the text, the Advisory Commission considered two other approaches to preparation of the appendix. One would have required preparation of a single appendix after the principal briefs had been written; the other would have required preparation of a single appendix prior to preparation of the appellant's brief. For a discussion of the advantages and disadvantages of these various methods of preparing an appendix, see Cohn, *The Proposed Federal Rules of Appellate Procedure*, 54 GEO. L.J. 431, 459-63 (1966).

436. PROPOSED TENN. R. APP. P. 28(a).

437. *Id.* R. 28(b).

The appendix begins with a list identifying the parts of the record that it contains in the order the parts are included therein.[438] The pages in the appendix must be numbered consecutively at the bottom,[439] and the list at the beginning of the appendix must refer to the pages of the appendix at which each part begins. The parts of the record reproduced in the appendix are then set out in chronological fashion. When matter contained in a transcript of the evidence or proceedings is included in the appendix, the page of the transcript at which the matter may be found is indicated in brackets immediately before the matter included. Omissions in the text of papers or the transcript must be indicated by asterisks. Immaterial formal matters such as captions, subscriptions, and acknowledgements are to be omitted. A question and an answer may be contained in a single paragraph.[440] If exhibits are designated for inclusion in the appendix, they may be contained in a separate volume or volumes suitably indexed.[441]

While references in the briefs to the record are generally made to the pages of the record involved,[442] references to parts of the record reproduced in an appendix must be to the pages of the appendix at which those parts appear.[443] The appendix itself must be served and filed with a party's brief.[444] The same number of copies of the appendix and the same service requirements that apply to a brief[445] also apply to the appendix[446] and any separate volumes containing exhibits.[447]

D. Amicus Curiae Briefs

In certain cases, particularly those in which resolution of the issues presented for review would have an impact not confined to the parties,[448] an appellate court may receive helpful if not

438. *Id.* R. 28(d).
439. *Id.* R. 28(a).
440. *Id.* R. 28(d).
441. *Id.* R. 28(e).
442. *Id.* R. 27(g).
443. *Id.* R. 28(c).
444. *Id.* R. 28(a).
445. *See* text accompanying notes 378-82 *supra.*
446. PROPOSED TENN. R. APP. P. 28(a).
447. *Id.* R. 28(e).
448. To the extent that every decision, even in disputes between private parties about private rights, has a stare decisis impact, resolution of any issue

essential assistance from briefs by nonparties.[449] As noted by the American Bar Association Commission on Standards of Judicial Administration:

> With increasing frequency appellate courts must resolve issues that have implications of broad public significance. Very often they involve the activities of government agencies or affect interests of persons who are not parties to litigation. In such cases, although the resolution of the immediate controversy properly should be grounded on the submission of the immediate parties, the basis and scope of the decision ought to reflect adequate consideration of its wider implications. Hence, presentation of briefs by those who may be affected is often helpful and sometimes essential. It is especially important that this be done in cases affecting government agencies, for their duties and authority fundamentally depend on interpretation of the law applicable to their activities. Similar considerations may indicate the desirability of briefs *amicus curiae* in cases involving issues of unusual or specialized technical complexity, such as those governed by intricate statutory provisions. Briefs by persons appearing as *amicus curiae* can improve the court's perspective of a case and lessen its dependence on its internal resources for research and deliberation.[450]

The participation of an amicus curiae, as the ABA Commission concedes, may make the immediate parties' own presentations more difficult, and the parties therefore should be given an adequate opportunity to become acquainted with and respond to an

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presented for review has an impact not confined to the parties. But there is also a good deal of contemporary litigation that does not arise out of disputes between private parties about private rights; instead, the object of the litigation is to vindicate constitutional or statutory policies. *See* Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976). The decision of the Tennessee Supreme Court in Cumberland Capital Corp. v. Patty, 556 S.W.2d 516 (Tenn. 1977), and the recent decision of the chancery court in Davidson County concerning prisons in Tennessee are but two local examples. Trigg v. Blanton, No. A-6047 (Tenn. Ch. Ct., Davidson County, filed Sept. 22, 1975).

449. It has also been suggested that appellate courts "should remain free to consult sources of knowledge and wisdom by voice and ear as well as by eye, and on the particular as well as the general." K. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 324 (1960).

450. APPELLATE COURT STANDARDS, *supra* note 12, § 3.33, Commentary at 52-53.

amicus curiae brief. However, the resistance of the parties should not deter an appellate court from obtaining needed or helpful assistance. "While the parties have a right to present the case as they see it, they must also recognize that the law to be established in their case may have effects far beyond their immediate concerns."[451]

Recognizing the important role an amicus curiae brief can serve, proposed rule 31(a) permits an amicus brief to be filed by leave granted on motion or at the request of the appellate court.[452] Unlike the comparable Federal Rule of Appellate Procedure,[453] rule 31 does not permit the filing of an amicus brief by the consent of all of the parties because, according to the Advisory Commission comment to that rule, "generally such consent is so rarely granted as to make the provision meaningless." Like all other motions, a motion for leave to file an amicus brief must be served on all parties,[454] who may file a written opposition to the motion.[455] The motion must identify the interest of the applicant and must state how an amicus curiae brief will assist the appellate court.[456] This requirement reflects the Advisory Commission's belief that "most amicus briefs are in fact a type of adversary intervention rather than objective assistance to the court. . . . However, if the court requests an amicus brief, it may obtain the outside objective assistance that an amicus in theory renders."[457]

A motion for leave to file an amicus brief may be accompanied by the brief itself although the motion may also be filed without the amicus brief.[458] The preparation of an amicus brief prior to the granting of leave by the appellate court may result in the needless expenditure of time, money, and effort if leave is denied. But by accompanying the motion for leave to file with the brief itself the appellate court will receive a more vivid impression of how the brief may assist it. Indeed, the party seeking leave to

451. *Id.* at 53.

452. *See also id.* § 3.33(b); Note, *The Amicus Curiae*, 55 Nw. U.L. REV. 469 (1960).

453. FED. R. APP. P. 29.

454. PROPOSED TENN. R. APP. P. 20(b).

455. *Id.* R. 22(b).

456. *Id.* R. 31(a).

457. *Id.*, Advisory Comm'n comment.

458. *Id.* R. 31(a).

file an amicus may subtly influence the court even if leave is denied. Moreover, if the brief accompanies the motion the appellate court may grant leave to file the amicus brief without fear of delaying disposition of the appeal. In any event, a party should file his motion sufficiently in advance of the due date of the brief of the party he is supporting so that the filing schedule for the parties' briefs will not be disrupted. Otherwise the party opposing the amicus curiae may not be able to respond within the time normally allotted to him for filing his brief.[459] In all cases, however, the time and conditions for the filing of an amicus brief are fixed by the appellate court.[460]

The form of an amicus brief must follow the form prescribed for the brief of an appellee.[461] It is therefore unnecessary for an amicus brief to contain a jurisdictional statement, a statement of the issues presented for review, a statement of the case, or a statement of the facts if these matters are satisfactorily presented in the appellant's brief.[462] Even though the appellate court permits the filing of an amicus brief, an amicus is not technically a party to the appeal, and he is therefore not bound by the judgment in terms of its res judicata effect nor is he in a position to seek further review of an adverse judgment.[463] Similarly, an amicus curiae may participate in oral argument only by leave of court granted on motion or at the request of the appellate court.[464] The request for leave to argue orally may accompany the motion for leave to file the brief.

Because of the special effect the resolution of certain issues

459. FED. R. APP. P. 29 generally requires any amicus brief to be filed within the time allowed the party whose position on affirmance or dismissal the amicus brief will support. "The reason for requiring that the amicus brief be filed within the period allowed for the supported party's brief is to permit the opposing party to respond to both briefs within his normal time allotted." 16 C. WRIGHT, A. MILLER, F. COOPER, & E. GRESSMAN, *supra* note 109, § 3796, at 436.

460. PROPOSED TENN. R. APP. P. 31(b).

461. *Id.*

462. *Id.* R. 27(b).

463. *See* 16 C. WRIGHT, A. MILLER, F. COOPER, & E. GRESSMAN, *supra* note 109, § 3976, at 436; Note, *supra* note 452, at 469-70. *See also* Shapiro, *Some Thoughts on Intervention Before Courts, Agencies, and Arbitrators*, 81 HARV. L. REV. 721 (1968).

464. PROPOSED TENN. R. APP. P. 31(c).

may have on the activities of state government,[465] rule 32 is in effect a special amicus curiae rule. Under that rule, any party raising a question on appeal concerning the validity of a state statute or an administrative rule or regulation must serve a copy of his brief on the attorney general unless the state or an officer or agency is already a party to the appeal.[466] Proof that service has been made on the attorney general must be filed with the brief of the party raising the question.[467] The attorney general is entitled to file a brief in his own behalf within the time for the filing of a responsive brief by a party. Unlike other amicus curiae, regardless of whether he files a brief the attorney general is also entitled to be heard orally.[468] In the absence of the specified notice, the appellate court will not dispose of the appeal until notice and opportunity to respond has been given to the attorney general.[469]

VI. HEARING OF APPEALS

A. *Sequence of Oral Argument or Submission of Cases*

After the briefwriting phase of the appellate process is concluded, the appeal is ready for consideration by the appellate court.[470] As noted previously, appeals are docketed by the clerk

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465. *See* APPELLATE COURT STANDARDS, *supra* note 12, § 3.33(b)(1).

466. PROPOSED TENN. R. APP. P. 32(a). The attorney general is also entitled to be served at the trial level. *See* TENN. CODE ANN. § 23-1107 (1955); TENN. R. CIV. P. 24.04. Proposed appellate rule 32(a), therefore, will be of value principally in those rare cases in which the validity of a statute, rule, or regulation is raised for the first time on appeal.

467. PROPOSED TENN. R. APP. P. 32(b).

468. *Id.* R. 32(c).

469. *Id.* R. 32(d).

470. Under rule 33 of the proposed appellate rules, the appellate courts may direct counsel for the parties to appear before the court or a judge thereof for a prehearing conference to consider the simplification of the issues and such matters as may aid in the disposition of the proceeding by the court. Although designated as a "prehearing conference," the conference may be convened at any stage of the proceedings in which the court concludes that a conference would be of value. *Id.* R. 33, Advisory Comm'n comment. Any matters agreed upon or admitted by counsel are to be set forth in an order of the appellate court, which controls the subsequent proceeding unless modified. Modification should be freely granted to permit determination of the proceeding on its merits if no prejudice results. *Id.* R. 33. The Advisory Commission comment to rule 33 states that "[t]he provisions of this rule for a pretrial conference were considered to

of the appellate court upon his receipt of the notice of appeal[471] or upon entry of an order by the appellate court granting permission to appeal,[472] and under proposed rule 34 cases in the appellate court are to be numbered in the order in which they are docketed. Unlike current practice,[473] rule 34 provides that all cases are to be called for argument or submitted without argument in the order in which they appear on the docket unless the court orders otherwise. In the supreme court all civil cases will be heard together as will all criminal cases.[474] According to the Advisory Commission comment to rule 34, "[n]othing in this rule alters those statutory enactments requiring certain appeals to be heard on an expedited basis."[475]

B. Conduct of Oral Argument

The right of the parties to be heard orally as well as through their written briefs is unaffected by the proposed appellate rules.[476] Proposed rule 35(a) does substantially change existing Tennessee practice in civil appeals, however, by requiring any party who desires oral argument so to request by stating at the bottom of the cover page of his brief that oral argument is requested.[477] If the proposed rules are adopted, civil appeals will no longer be automatically scheduled for oral argument; oral argument must be requested. However, the Advisory Commission

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be a potentially valuable tool to the appellate court for simplifying complex appeals in a manner similar to the pretrial conference used at the trial level." *See also* APPELLATE COURT STANDARDS, *supra* note 12, § 3.53; 16 C. WRIGHT, A. MILLER, F. COOPER, & E. GRESSMAN, *supra* note 109, § 3979; Kaufman, *The Pre-Argument Conference: An Appellate Procedural Reform*, 74 COLUM. L. REV. 1094 (1974).

471. PROPOSED TENN. R. APP. P. 5(c).

472. *Id.* R. 9(e).

473. *See* TENN. SUP. CT. R. 19-20; TENN. CT. APP. R. 10-11. The county-by-county rule generally followed in calling cases is inapplicable in criminal cases appealed to the supreme court. *See* TENN. SUP. CT. R. 17(5). *See also* TENN. CRIM. APP. R. 5.

474. PROPOSED TENN. R. APP. P. 34.

475. *See, e.g.*, TENN. CODE ANN. § 8-2725 (1973) (actions to remove public officers have precedence on appeal over all civil and criminal cases).

476. *See* Sobieski, *supra* note 1, at 251 n.501.

477. This is the rule currently followed in the court of criminal appeals although that court also requires that oral argument be requested on the last page of the brief. *See* TENN. CRIM. APP. R. 6.

comment to rule 35 notes that "[i]f a party inadvertently fails to request oral argument, the appellate court may relieve him of his omission."

Once any party to an appeal requests oral argument, it is unnecessary for any other party to request to be heard orally unless the party who requested oral argument thereafter notifies the clerk of the appellate court and all other parties that he has decided to waive argument. In that event, any other party who has not previously requested oral argument may request it by notifying the clerk and all other parties.[478] If no party requests oral argument, the clerk of the appellate court, after the briefs from all parties are filed, will submit the case for decision on the record and briefs.[479] The appellate court, however, may direct that a case be argued even if no party has requested oral argument.[480]

The clerk of the appellate court must give the parties advance notice of the time and place a case is to be argued and the amount of time for oral argument. A request for postponement of argument must be made reasonably in advance of the date fixed for hearing.[481]

Each side requesting the same relief is allowed thirty minutes for argument unless the appellate court orders otherwise.[482] According to the Advisory Commission comment to rule 35, the term "side" is used to indicate opposing interests rather than individual parties. If multiple appellants or appellees have a common interest, they are considered a single side for the purpose of the time allowed for oral argument.[483] If any party, including counsel for multiple parties who constitute a single side, thinks that additional time is necessary for adequate presentation of the case, he may request additional time by motion filed reasonably in advance of the date fixed for hearing.[484] "It is in the spirit of

478. PROPOSED TENN. R. APP. P. 35(a).

479. *Id.* R. 35(h). This practice is currently followed in the court of criminal appeals. *See* TENN. CRIM. APP. R. 6.

480. PROPOSED TENN. R. APP. P. 35(h).

481. *Id.* R. 35(b).

482. *Id.* R. 35(c). Under current law, the supreme court allows one hour for argument, TENN. SUP. CT. R. 29; the court of appeals allows thirty minutes, TENN. CT. APP. R. 17; and the court of criminal appeals allows twenty minutes. TENN. CRIM. APP. R. 10.

483. PROPOSED TENN. R. APP. P. 35, Advisory Comm'n comment.

484. *Id.* R. 35(c).

this rule," the Advisory Commission comment to rule 35 states, "that the appellate court grant additional time if there is a reasonable basis for the requested additional time." On the other hand, a party is not obligated to use all of his allotted time, and the court may terminate argument whenever in its judgment further argument is unnecessary.[485]

The appellant is entitled to open the argument and conclude it with a rebuttal,[486] but his total time generally cannot exceed the allotted thirty minutes. Parties will not be permitted to read at length from the record, briefs, or authorities cited.[487] As a purely practical matter, reading is ineffective advocacy and should be avoided for that reason alone.[488]

If there are multiple parties or multiple counsel on the same side, no more than two counsel or parties will be heard from each side requesting the same relief except by leave of the appellate court. Leave will be granted if parties on the same side have diverse interests. Divided arguments, however, are not favored,[489] and rule 35(f) admonishes that care be taken to avoid duplication of arguments.

If a party fails to appear for oral argument, the appellate court will hear argument on behalf of the parties present if they wish to be heard. If no party appears for argument, the case is decided on the record and briefs unless the appellate court orders otherwise.[490]

Occasionally, particularly in criminal cases, the party who requested oral argument will fail to appear without giving notice to the other parties that he has decided to waive argument. This can be both costly and inconvenient to the other parties who may have been quite satisfied to dispense with oral argument and to

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485. *Id.*

486. *Id.* R. 35(d); *cf.* TENN. CT. APP. R. 17 (counsel for appellant opens and, if desired, concludes argument).

487. PROPOSED TENN. R. APP. P. 35(d); *cf.* TENN. SUP. CT. R. 30 (reading of authorities relied upon not generally allowed); TENN. CT. APP. R. 18 (reading of books and reports of opinions not generally allowed).

488. *See* Schaefer, *Appellate Advocacy,* 23 TENN. L. REV. 471, 473 (1954).

489. PROPOSED TENN. R. APP. P. 35(f). The supreme court currently permits only one counsel to be heard for each side. TENN. SUP. CT. R. 29. The court of appeals permits two counsel for each side to be heard orally. TENN. CT. APP. R. 17.

490. PROPOSED TENN. R. APP. P. 35(g).

have the case decided on the record and briefs. To discourage nonappearance by the party requesting argument in the absence of notice of waiver, rule 35(g) provides that the court may assess against him the reasonable cost incurred by the party who does appear for argument. Moreover, in its discretion, the court may include a reasonable attorney's fee as a part of such costs.[491]

VII. Disposition of Appeals

While oral argument marks the transition into the decisional phase of the appellate process, it is only the beginning of that process. After oral argument the members of the appellate court will confer among themselves concerning the appropriate disposition of the case in light of the applicable law. An opinion will be prepared by one of the judges and circulated among the other members of the court until agreement is reached.[492] The form of the opinion and whether it should be published are topics of intense contemporary concern and have been discussed at length in the previous article on the proposed appellate rules.[493]

A. Entry of Judgment

Once the appellate court has prepared its opinion it will forward the opinion to the clerk of the appellate court. Upon receipt of the opinion, rule 38 provides that the clerk must prepare and enter judgment unless the appellate court orders otherwise.[494] Entry of the judgment is defined as the notation of the judgment in the docket,[495] and rule 38 states that the entry of judgment is not to be delayed pending computation of costs. On the same day that he enters judgment the clerk must mail to the parties a copy

491. *Id.*

492. *See* Appellate Court Standards, *supra* note 12, § 3.36.

493. *See* Sobieski, *supra* note 1, at 262-68.

494. The court of appeals currently places the initial burden of preparing the judgment on the parties, and the supreme court also routinely permits the parties to suggest the proper content of the judgment. *See* Tenn. Sup. Ct. R. 33; Tenn. Ct. App. R. 19. Under proposed rule 38 the clerk will routinely prepare the judgment, but the appellate court may order the parties to agree upon the content of the judgment or to submit their respective suggestions for settlement by the court.

495. Proposed Tenn. R. App. P. 38.

of the opinion, judgment, and notice of the date of entry of the judgment.[496]

It is vitally important that the clerk notify the parties immediately upon entry of the judgment as provided in rule 38 because the date upon which judgment is entered is significant in a number of respects. The time within which a petition for rehearing must be filed is measured from the date of entry of judgment,[497] as is the time for filing an application for permission to appeal from an intermediate appellate court to the supreme court.[498] The mandate of the appellate court also issues within a specified period of time after entry of the judgment.[499] The parties must, therefore, have notice of the entry of the judgment so that they may accurately calculate the time within which they must take any further steps. In most cases the judgment will be entered by the clerk the same day he receives the appellate court's opinion, but if there is a difference between the date of the opinion and the date of entry of the judgment, the date of entry of the judgment controls the time for petitioning for a rehearing, the time for filing an application for permission to appeal from the intermediate appellate court to the supreme court, and the issuance of the appellate court's mandate.

It is also important for the clerk to mail a copy of the opinion together with the judgment and notice of the date judgment was entered. If a petition for rehearing is filed, it must make reference to the particular portions of the opinion upon which the petition is predicated.[500] Similarly, a copy of the opinion of the intermediate appellate court must be appended to an application filed in the supreme court for permission to appeal.[501] Hence, while notice of the date of entry of judgment is important so a party may take any further steps in timely fashion, receipt of the opinion of the court is important so he can comply with the rules specifying how these steps are to be taken.

496. *Id.*; *cf.* TENN. CODE ANN. §§ 27-121 to 122 (1955) (opinions furnished to counsel and trial court).

497. PROPOSED TENN. R. APP. P. 39(b).

498. *Id.* R. 11(b).

499. *Id.* R. 42(a).

500. *Id.* R. 39(b).

501. *Id.* R. 11(b).

B. *Rehearing in the Appellate Court*

One further step that the losing party may take is to petition the appellate court for a rehearing, that is, a reargument and resubmission of briefs before judgment is finally entered. It has been observed that "[p]robably few applications in our procedural system are so often made and so seldom granted as petitions for rehearing."[502] Nonetheless, rehearing is a valuable device for the correction of appellate errors; and even when rehearing is formally denied, an appellate court may review its original decision and perhaps even write a more or less extensive opinion amounting to a reconsideration of the merits.[503]

"The basic postulate of rehearing must be that a court which is final must also be careful; it must admit of the possibility that error may occur and that original decisions may not always be the best possible decisions."[504] This understanding of the essential purpose of rehearing is reflected in proposed rule 39(a), which provides:

> In determining whether to grant a rehearing, the following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons that will be considered: (1) the court's decision incorrectly states the material facts established by the evidence and set forth in the record; (2) the court's decision is in conflict with a statute, prior decision, or other principle of law; (3) the court's decision overlooks or misapprehends a material fact or proposition of law; and (4) the court's decision relies upon matters of fact or law upon which the parties have not been heard and that are open to reasonable dispute.[505]

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502. Louisell & Degnan, *Rehearing in American Appellate Courts*, 44 CALIF. L. REV. 627, 627 (1956).

503. *Id.* at 630.

504. *Id.* at 632.

505. *See also id.* at 632-41. Current supreme court rule 32 does not specify the grounds upon which rehearing will be granted, but it does provide that rehearing will not be granted if no new argument is made, no new authority adduced, or no material fact pointed out as overlooked. The court of appeals' rule permits rehearing en banc if its judgment or decree is in conflict with a prior decision of another section of the court that has not been reversed by the supreme court. TENN. CT. APP. R. 23. Nothing in the proposed appellate rules governs en banc rehearings in the intermediate appellate courts, and the desirability of such rehearings is certainly questionable. *See* APPELLATE COURT STANDARDS, *supra* note 12, § 3.01, Commentary at 10-12.

Rule 39(a) also restates the generally accepted proposition that rehearing will not be granted to permit reargument of matters fully argued.[506] Rehearing should not be granted to consider for the first time issues not presented for review in the briefs or on oral argument.[507] However, the grounds specified for rehearing do not have to be such that they will change the appellate court's mandate or the practical result of the decision. "[W]hatever the consequences of error to the parties, the precedent role of the decision sometimes seems sufficiently important to justify limited use of rehearing to amend or clarify unfortunate statements which may result in confusing or even misleading indications of what the law may be."[508] To further this purpose of rehearing to keep the law straight, rule 39(a) permits rehearing not only on petition of a party but also on the appellate court's own motion or on petition of an amicus curiae.

The form and content of the petition for rehearing are governed by rule 39(b). The petition must set forth the reasons the appellate court should reconsider in light of the grounds specified in rule 39(a) or any other grounds deemed appropriate for a rehearing.[509]

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506. *Cf.* TENN. SUP. CT. R. 32 (rehearing unavailable if no new argument or authority presented).

507. *See* Louisell & Degnan, *supra* note 502, at 635:

> There is general agreement that rehearing will not be granted merely for the purpose of again debating matters on which the court has once deliberated and spoken—on this rules, cases, and justices speak with one voice. Nor is there much disposition to grant a petition which raises for the first time a question of law or a legal theory which was not raised on the first argument, especially when that question has not been raised in the trial court and appears for the first time in the petition. The latter principle is really a corollary of the common appellate rule which bars consideration, except under exceptional circumstances, of matters not raised in the trial court. The simultaneous preclusion from rehearing of certain matters which have been previously raised, on the one hand, and matters which have not been previously raised, on the other, superficially suggests an impasse based on inconsistency in the philosophy of rehearing. Actually, however, there are sound policy reasons for excluding both types—the former because they have had their day in court, the latter because the parties did not see fit seasonably to bring them to court. And there is left as the legitimate subject of rehearing matters seasonably presented by the parties but neglected by the appellate court itself in the first decision.

508. *Id.* at 636.

509. PROPOSED TENN. R. APP. P. 39(b).

> The ideal petition must be aimed not at the reason or reasons why the court was wrong in its original decision but at establishing reasons for the court to *reconsider* rather than grounds to *change* . . . . If [petitioner] is unable to state grounds other than that the court was wrong in its original decision, the prospect that his petition will be granted with consequent opportunity for full reargument on the merits is remote, and he does not even have assurance that the petition will receive more than perfunctory attention.
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> . . . [The petition] should not be expected to also serve the role of persuading the court how the conflict or error should be resolved. That is the object of resubmission. The object of the petition is only to show that the petitioner is entitled to a rehearing, not that he is entitled to a different decision on the merits.[510]

In addition to specifying why the appellate court should reconsider, the petition must contain references to the particular portions of the opinion, record, or briefs relied on.[511] The underlying facts related to the merits need not be restated except insofar as necessary to establish that rehearing is appropriate. To limit the petition to its intended purpose and to frustrate attempts to set forth in the petition arguments directed toward how the court should dispose of the case on rehearing, rule 39(b) limits the length of the petition to no more than fifteen pages and requires the petition to be filed within ten days after entry of judgment.[512] Both these requirements may be modified by the appellate court or a judge thereof, but motions for extending the time to file petitions for rehearing will be granted only in "extreme and unavoidable circumstances."[513] Unlike the practice followed in the Supreme Court of the United States,[514] there is no requirement that a certificate of good faith by petitioning counsel accompany the petition, but obviously the absence of this requirement should

510. Louisell & Degnan, *supra* note 502, at 644, 658.

511. PROPOSED TENN. R. APP. P. 39(b).

512. The ten-day period for petitioning for rehearing is consistent with existing law in the supreme court and court of appeals. *See* TENN. SUP. CT. R. 32; TENN. CT. APP. R. 22. In the court of criminal appeals, a petition for rehearing must be filed within 15 days from the entry of judgment. TENN. CODE ANN. § 16-451 (Cum. Supp. 1977).

513. PROPOSED TENN. R. APP. P. 39(b).

514. *See* U.S. SUP. CT. R. 58(1).

not be interpreted as an invitation to file frivolous petitions or petitions interposed only for delay.

A sufficient number of copies of the petition must be filed with the clerk of the appellate court to provide the clerk and each judge of the appellate court with one copy. The petition must also be served on all other parties.[515] Since petitions for rehearing are seldom granted, however, no answer to the petition is permitted unless requested by the court.[516] The opposing party is reassured by rule 39(d) that the original result will not be changed unless he is afforded an opportunity to be heard. As stated in that rule, "no action will be taken except to grant or deny rehearing."[517] No oral argument is permitted on the petition to rehear unless ordered by the appellate court on its own motion, not on the motion of the parties.[518]

The mere filing of the petition for rehearing automatically stays the mandate of the appellate court until disposition of the petition unless the appellate court orders otherwise.[519] Similarly, the time for filing an application for permission to appeal from the intermediate appellate court to the supreme court is affected by the filing of a petition to rehear. While normally such an application must be filed within thirty days after entry of the judgment of the intermediate appellate court, if a petition for rehearing is filed, the application must be filed within fifteen days after the denial of the petition or the date of entry of the judgment on rehearing.[520]

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515. PROPOSED TENN. R. APP. P. 39(c).

516. *Id.* R. 39(d).

517. *See* Louisell & Degnan, *supra* note 502, at 650 n.98:

> [A]t least enough formality should be observed to guarantee the party originally prevailing an opportunity to be heard in opposition. If the practicing profession is assured that its victories will not be vacated without that opportunity, it will have much less inclination to prepare and file opposition or resistance to petitions for rehearing. And courts would not then be as often faced with petitions to rehear petitions to rehear. The benefits of procedural regularity here seem to outweigh the slight economy gained by out of hand vacation of the original opinion, no matter how firmly the court is convinced that new briefs or new argument could not dissuade them from their revised view.

518. PROPOSED TENN. R. APP. P. 39(d).

519. *Id.* R. 42(a).

520. *Id.* R. 11(b).

Rule 39 does not specify how petitions for rehearing are to be processed within the appellate court, except insofar as rule 39(e) provides that rehearing will be granted only if a majority of the members of the appellate court are satisfied that rehearing is appropriate. In view of the practical difficulties associated with initial assignment of a petition to rehear to a judge who wrote the opinion or one who dissented from it,[521] each member of the court should give the petition his independent consideration. If a petition for rehearing is granted, the appellate court, after studying the particular circumstances of the case,[522] must make an appropriate order regarding reargument or resubmission of briefs. Since the case will already have been fully briefed and argued and since the issues considered on rehearing will be narrower and more sharply focused, it is to be expected that generally less time will be allowed for briefs on rehearing than is allowed for their initial submission.[523]

Finally, to preclude repeated petitions for rehearing, rule 39(f) provides that if an intermediate appellate court has granted a petition for rehearing and entered judgment on rehearing, no further petition for rehearing shall be filed in that court.[524] While nothing in that rule expressly prohibits a second petition by the unsuccessful petitioner, such a petition will almost inevitably be futile; and there is nothing in rule 11(b) to suggest that a second petition for rehearing will in any way stop the running of the fifteen days provided for filing an application for permission to appeal with the supreme court. Consistent with the current supreme court rule,[525] no second petition for rehearing may be filed in that court except on motion and leave granted by the court or a judge thereof.[526] Here too, it is extraordinarily unlikely the court

521. *See* Louisell & Degnan, *supra* note 502, at 649-51.

522. PROPOSED TENN. R. APP. P. 39(e).

523. *See* Louisell & Degnan, *supra* note 502, at 660.

524. Current rule 22 of the court of appeals provides that no second petition for rehearing shall be filed except upon special leave obtained from the court or a judge thereof. Similarly, in the court of criminal appeals no party may file more than one petition to rehear unless permitted by a judge of that court. TENN. CODE ANN. § 16-451 (Cum. Supp. 1977). Proposed rule 39(f), therefore, is more restrictive than current law insofar as it completely prohibits further petitions for rehearing once a petition has been granted and judgment entered on rehearing.

525. TENN. SUP. CT. R. 32.

526. PROPOSED TENN. R. APP. P. 39(f).

will entertain a second petition after denying the first, particularly if the supreme court has already issued its mandate.

C. Costs; Interest on Judgments

To gain a fuller understanding of the issuance of mandates from the appellate court, attention must first be devoted to the awarding of costs on appeal and interest on judgments. The allowance of costs is governed by rule 40(a), which, according to the Advisory Commission comment, embraces the general rule that "except as otherwise provided by a statute or these rules, costs are to be adjudged in favor of the prevailing party."[527] Rule 40(a) simply elaborates on the general rule by providing that generally (1) if an appeal is dismissed or a judgment is affirmed, costs shall be awarded against the appellant, and (2) if a judgment is reversed, costs shall be taxed against the appellee. If the judgment is affirmed or reversed in part or is vacated, making the "prevailing party" harder to identify,[528] costs are allowed only as ordered by the appellate court. In those cases in which the appeal is dismissed, the parties may agree upon a different allocation of costs. This agreement typically requires each party to bear his own costs. In all cases the appellate court has the discretion not to award costs in favor of the prevailing party;[529] but if the judgment or opinion of the appellate court says nothing at all about costs, they will be awarded as a matter of course as provided in rule 40(a).

In cases involving the state of Tennessee, its officers, or agencies, rule 40(b) provides that costs are awarded as they are in all other cases.[530] As noted in the Advisory Commission comment to

527. *Cf.* TENN. CODE ANN. § 20-1601 (1955) (successful party entitled to recover costs); TENN. R. CIV. P. 54.04 (costs allowed as a matter of course to prevailing party).

528. *See* Annot., 66 A.L.R.3d 1115 (1975).

529. PROPOSED TENN. R. APP. P. 40(a); *cf.* TENN. CODE ANN. § 16-1620 (1955) (costs awarded in discretion of court if case not covered by existing law); TENN. R. CIV. P. 54.04 (costs awarded in discretion of court).

530. *But see* TENN. R. CIV. P. 54.04 (costs awarded against state, its officers, and agencies only as permitted by law). *See also* TENN. CONST. art. 1, § 17; TENN. CODE ANN. §§ 8-4203, 20-1702, 3-3301 to 3331 (Cum. Supp. 1977); Comment, *Sovereign Immunity and the Tennessee Governmental Tort Liability Act*, 41 TENN. L. REV. 885 (1974).

rule 40(b), "[t]he effect of this subdivision is to place the state of Tennessee on the same footing as a private party with respect to the award of costs."

The costs recoverable on appeal under the proposed rules "include the cost of preparing and transmitting the record, the cost of a transcript of the evidence or proceedings, the cost of producing briefs and the record, the premiums paid for bonds to preserve rights pending appeal, and any other fees of the appellate court or clerk."[531] The cost of preparing an appendix to the briefs is not recoverable. As noted in the Advisory Commission comment to rule 40(c), "[m]any of the costs made recoverable by this subdivision are not currently taxable as costs. This subdivision makes costs taxable based on the principle that all items of cost expended in the prosecution of a proceeding should be recoverable by the successful party."

To recover his costs on appeal, the prevailing party must file an itemized and verified bill of his recoverable costs not included in the bill of costs of the clerk of the trial court.[532] It would seem that the verified bill of costs may appropriately take the form of an affidavit by the party or his counsel attesting to his costs incurred on appeal. The bill must be filed with the clerk of the appellate court with proof of service within fifteen days after entry of judgment although the appellate court may extend the time for filing the bill or permit the bill to be filed after the fifteen-day period. Objections to the bill of costs must be filed within ten days after service of the bill on the party against whom costs are to be taxed unless the time is extended by the appellate court.[533]

The clerk of the appellate court prepares and certifies an itemized statement of costs taxed for insertion in the mandate. On motion, however, the action of the clerk may be reviewed by the appellate court;[534] and at least in cases in which objections

531. PROPOSED TENN. R. APP. P. 40(c). Damages in the form of all of the appellee's expenses including reasonable attorney's fees are also recoverable on frivolous appeals. *See* TENN. CODE ANN. § 27-124 (Cum. Supp. 1977), *construed in* Davis v. Gulf Ins. Group, 546 S.W.2d 583 (Tenn. 1977).

532. PROPOSED TENN. R. APP. P. 40(d). *See also* TENN. CODE ANN. § 20-1641 (1955) (trial court clerk to make out bill of costs to accompany record).

533. PROPOSED TENN. R. APP. P. 40(d).

534. *Id.* R. 40(e).

have been filed, it may be sensible for the clerk to refer the matter to the court before preparing the statement of costs for inclusion in the mandate. Issuance of the mandate is not delayed for the taxing of costs,[535] and if the mandate has been issued before final determination of the costs, the statement of costs or any amendment thereto shall be added to the mandate at any time on request of the clerk of the appellate court.[536]

To minimize the costs of appeal, rule 40(f) provides that the cost of producing briefs and other appellate papers shall be taxable at a rate not higher than those generally charged for photocopying in the area where the clerk's office is located. The additional expense of commercially printed appellate papers must be borne by the respective parties. In reviewing the bill of costs of the clerk of the trial court, the clerk of the appellate court is directed, as he is under current law,[537] to disallow costs not authorized by law and costs forfeited for failure to comply with the appellate rules.[538] According to rule 40(g), for failure to complete and transmit the record on appeal in the time and manner provided in the rules, the clerk of the trial court forfeits his entire cost of preparing and transmitting the record or such portion thereof as appropriate.

Interest on judgments is governed by proposed rule 41, which, as noted in the Advisory Commission comment, "does not modify any existing law providing for interest before judgment, nor does it affect the rate of interest."[539] If a money judgment in a civil case is affirmed or the appeal is dismissed, whatever interest is allowed by law shall be payable from the date judgment was entered in the trial court.[540] This provision of rule 41 governs even if the mandate of the appellate court does not expressly mention

535. *Id.* R. 42(a).

536. *Id.* R. 40(e).

537. TENN. SUP. CT. R. 34; TENN. CT. APP. R. 28.

538. PROPOSED TENN. R. APP. P. 40(f).

539. The current rate of interest on judgments is eight percent per year. TENN. CODE ANN. § 47-14-101 (Cum. Supp. 1977).

540. The Tennessee Supreme Court's decision holding that the rate of interest is calculated from the date a new trial motion is overruled and not from the date of entry of the original judgment, *see* Monday Trucking Co. v. Millsaps, 197 Tenn. 295, 271 S.W.2d 857 (1954), *noted in* 23 TENN. L. REV. 1044 (1955), has been set aside by statute. *See* TENN. CODE ANN. § 47-14-110 (Cum. Supp. 1977).

interest, and its practical effect is to make interest payable just as if no appeal had been taken. If a judgment is reversed or modified with a direction that a money judgment be entered, the mandate should specify if interest is to be allowed and from what date.[541]

> Thus, where [an appellate court] reverses a judgment notwithstanding the verdict and directs entry of a money judgment on the verdict, the mandate should specify whether interest is to run from the date of entry of the appellate judgment or from the date on which the judgment would have been entered in the [trial court] but for the erroneous ruling corrected on the appeal.[542]

If the mandate fails to contain the required direction, that oversight would seem correctable on a motion to have the mandate recalled for a determination of the question.[543]

D. Issuance, Stay, and Recall of Mandates

The mandate, or procedendo, consists of copies, certified by the clerk of the appellate court, of the judgment, statement of costs, any order concerning costs or instructions on the computation or payment of interest, and a copy of the opinion of the appellate court. The mandate is transmitted by the clerk of the appellate court to the clerk of the trial court,[544] who must file the mandate promptly upon receiving it.[545] If the appellate court dismisses the appeal or affirms the judgment, execution may then issue and other proceedings may be conducted in the trial court as if no appeal had been taken.[546] If the appellate court remands the case for a new trial or hearing, the case is reinstated in the trial court and the subsequent proceedings are conducted after at

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541. PROPOSED TENN. R. APP. P. 41.

542. 16 C. WRIGHT, A. MILLER, F. COOPER, & E. GRESSMAN, *supra* note 109, § 3984, at 463. For a general discussion of the problems that may arise in calculating interest on a judgment, see D. DOBBS, THE LAW OF REMEDIES § 3.5, at 174-78 (1973).

543. *See* PROPOSED TENN. R. APP. P. 42(d).

544. *Id.* R. 42(a); *cf.* TENN. CODE ANN. § 27-331 (1955) (certification of decrees of appellate court to trial court).

545. PROPOSED TENN. R. APP. P. 43(a).

546. *Id.* R. 43(b).

least ten days' notice to the parties.[547]

The mandate is issued with notice to the parties thirty-one days after entry of judgment unless the court directs otherwise. If a petition for rehearing is timely filed, the mandate is automatically stayed until disposition of the petition. If the petition is denied, the mandate issues sixteen days after entry of the order denying the petition unless the court orders otherwise. Issuance of the mandate is not delayed pending computation of costs.[548]

The time provided for issuance of the mandate should be considered in light of the time provided for filing an application for permission to appeal the final decision of the intermediate appellate court in the supreme court. Under rule 11(b), such an application must be filed within thirty days after entry of the judgment of the intermediate appellate court or, if a petition for rehearing is filed, within fifteen days after the denial of the petition or entry of the judgment on rehearing. The mandate of an intermediate appellate court, therefore, will issue only after the losing party has had the full time provided for seeking further review in the supreme court. If a timely application for permission to appeal is filed in the supreme court, the intermediate appellate court's mandate is also stayed automatically until final disposition of the application in the supreme court. If the application is denied, the mandate of the intermediate appellate court issues immediately upon the filing of the order denying the application.[549]

In cases in which still further review may be sought in the Supreme Court of the United States, the appellate court whose decision is sought to be reviewed or a judge thereof or the Supreme Court of Tennessee or a judge thereof may stay the man-

547. *Id.* R. 43(c).

548. *Id.* R. 42(a).

549. *Id.* R. 42(b); *cf.* TENN. CODE ANN. § 16-411 (1955) (judgments of court of appeals may be executed only after certiorari petition has been disposed of by the supreme court or time for filing for certiorari has expired). Judgments of the court of criminal appeals may be executed 30 days after entry, *id.* § 16-451 (Cum. Supp. 1977), while petitions for certiorari from the supreme court need not be filed until 45 days (which may be extended an additional 45 days) after entry of judgment by the court of criminal appeals. *Id.* § 16-452. Proposed appellate rule 42(b) would coordinate the time for issuance of the mandate of the court of criminal appeals to the time for seeking further review in the state supreme court, as is currently done in civil cases.

date.[550] Stay is not automatic, however, and requires a motion, which must comply with the provisions of rule 22 on motions.[551] Particularly in criminal cases, it may be expected that the mandate will be issued and bail revoked even if a petition for certiorari is to be filed in the United States Supreme Court unless the defendant can demonstrate that a substantial question will be presented to the Supreme Court.[552]

Finally, proposed rule 42(d) provides that the power to stay a mandate includes the power to recall a mandate. This power, however, is likely and appropriately to be exercised only sparingly since "[f]ree amendment of mandates would threaten the ordinary rules of appealability if proceedings have continued after appellate decision, and would jeopardize the more profound interests in repose if proceedings had apparently been terminated by the appellate decision."[553]

VIII. Practice on Appeal

At various points throughout this discussion it has been necessary for the sake of completeness to refer to a variety of unrelated matters that are grouped in the proposed appellate rules under the convenient heading of "practice on appeal." In some instances, the earlier discussion has been ample enough to render any further discussion needlessly repetitious. However, to complete this discussion of the procedural details of the proposed appellate rules, this section is devoted to a comprehensive discussion of voluntary dismissals; appeals by poor persons; substitution, addition, and dropping of parties; filing and service of papers; computation and extension of time; and motions.

A. Voluntary Dismissal

Proposed rule 15 regulates the voluntary dismissal of an appeal, and under subdivision (a) of that rule an appeal may be dismissed by the trial court any time before the record on appeal has been filed with the clerk of the appellate court. This provision

550. Proposed Tenn. R. App. P. 42(c).

551. *See* text accompanying notes 598-99 *infra*.

552. *See* Tenn. Crim. App. R. 11.

553. 16 C. Wright, A. Miller, F. Cooper, & E. Gressman, *supra* note 109, § 3938, at 276. *See also* Louisell & Degnan, *supra* note 502, at 660-61.

differs from the corresponding Federal Rule of Appellate Procedure under which the docketing of the appeal terminates the district court's power to dismiss.[554] Moreover, since the record is retained in the trial court pending completion of the principal briefs of the parties,[555] most voluntary dismissals will probably occur in the trial court. An appeal may be dismissed on a written stipulation signed by all the parties or on motion and notice by the appellant.[556] Because the appellant is the party who will move for a voluntary dismissal[557] or the party who will generally seek a stipulation of dismissal, the appellant (or his counsel) must file a copy of any order of dismissal by the trial court with the clerk of the appellate court.[558] Filing the dismissal in the appellate court is necessary to keep that court's docket current and should not be overlooked.

After the record has been filed with the clerk of the appellate court, an order of dismissal must be sought in the appellate court. If the parties sign and file with the clerk of the appellate court an agreement that the appeal be dismissed specifying the terms of payment of costs and fees, if any, due in connection with the appeal, the clerk of the appellate court shall enter the dismissal. An appeal may also be dismissed in the appellate court on motion upon such terms as may be agreed upon by the parties or fixed by the court.[559] If the appeal were frivolous or taken solely for delay, such terms may include the expenses incurred by the appellee as a result of the appeal.[560] A copy of the dismissal is to be filed by the clerk of the appellate court with the clerk of the trial court to permit execution and other proceedings to be conducted as if no appeal had been taken.[561]

B. Appeals by Poor Persons

The procedure to be followed to appeal as a poor person is

554. FED. R. APP. P. 42(a).
555. *See* text accompanying notes 274-79 & 282-84 *supra*.
556. PROPOSED TENN. R. APP. P. 15(a).
557. *See id.*, Advisory Comm'n comment.
558. *Id.* R. 15(a).
559. *Id.* R. 15(b).
560. *See* TENN. CODE ANN. § 27-124 (Cum. Supp. 1977), *construed in* Davis v. Gulf Ins. Group, 546 S.W.2d 583 (Tenn. 1977).
561. PROPOSED TENN. R. APP. P. 15(b).

set forth in proposed rule 18.[562] If a party did not proceed in the trial court as a poor person, which includes one who is financially unable to obtain adequate defense in a criminal case,[563] the first step to proceed on appeal as a poor person is to make a motion in the trial court seeking leave so to proceed.[564] The motion need not be accompanied by a statement of the issues the party intends to present on appeal as required by the Federal Rules of Appellate Procedure.[565] While proposed rule 18 does not specify any particular time within which the motion must be made,[566] the motion does not extend the time for filing notice of appeal nor does it revive the right to appeal if the time for filing notice of appeal has expired. In civil cases, the motion will usually be in writing[567] and must conform to the other requirements of the Tennessee Rules of Civil Procedure.[568] In criminal cases, rule 37(c) of the Tennessee Rules of Criminal Procedure requires the trial court after overruling a motion for a new trial or in arrest of judgment, whichever is later, to determine for the record whether the defendant is indigent. If he is, the trial court must also advise him of his right to proceed on appeal with court-appointed counsel and a record on appeal furnishable at state expense.[569] An oral request at that point by the defendant so to proceed on appeal will effectively make the motion in the trial court[570] as required

562. Authority for and the procedure to be followed in taking an appeal as a poor person is found in TENN. CODE ANN. §§ 27-312, -317 to 318 (1955). Authority to proceed on appeal in a criminal case with appointed counsel is found in *id.* § 40-2018 (1975). A poor person may also obtain a transcript in criminal appeals without payment of the reporter's fee pursuant to *id.* § 40-2040. For a collection of cases on determination of indigency of an accused for purposes of appeal, see Annot., 66 A.L.R.3d 954 (1975).

563. PROPOSED TENN. R. APP. P. 18(a).

564. *Id.* R. 18(b).

565. FED. R. APP. P. 24(a).

566. *But see* TENN. CODE ANN. §§ 27-312, -317 to 318 (1955).

567. *See* TENN. R. CIV. P. 7.02(1).

568. *See id.* R. 6.04, 7.02.

569. TENN. R. CRIM. P. 37(c); *see* PROPOSED TENN. R. APP. P. 18(d). *See also* APPELLATE COURT STANDARDS, *supra* note 12, § 3.20; ABA CODE OF PROFESSIONAL RESPONSIBILITY, Ethical Consideration 2-31 (1975); Boskey, *The Right to Counsel in Appellate Proceedings*, 45 MINN. L. REV. 783 (1961).

570. TENN. R. CRIM. P. 47. The duties of counsel on appeal in criminal cases are treated in TENN. CRIM. APP. R. 1; TENN. R. CRIM. P. 37(e). *See also* State v. Williams, 529 S.W.2d 714 (Tenn. 1975); Hutchins v. State, 504 S.W.2d 758 (Tenn. 1974); Moultrie v. State, 542 S.W.2d 835 (Tenn. Crim. App. 1976).

by proposed appellate rule 18(b).

In either a civil or a criminal case, if the trial court grants leave to proceed on appeal as a poor person, the party may proceed without further application in the appellate court and without prepayment of fees or costs in either court or the giving of security therefor.[571] Upon denial of a motion to proceed on appeal as a poor person, the trial court must state in writing the reasons for the denial.[572]

If a party has proceeded in the trial court as a poor person, he may so proceed on appeal without any further authorization unless the trial court finds otherwise. Such a finding may apparently be made before or after notice of appeal has been filed. The trial court must state in writing the reasons for its finding.[573]

If leave to proceed on appeal as a poor person is denied or if the trial court finds that the party is not entitled so to proceed, the clerk of the trial court must forthwith serve notice of the denial or finding. Within thirty days after service of notice of the action by the trial court, a motion for leave to proceed as a poor person may be filed in the appellate court. The motion must be accompanied by copies of all papers filed in the trial court seeking leave to proceed as a poor person and by a copy of the statement of reasons given by the trial court for its action.[574] As emphasized in the Advisory Commission comment to rule 18, "[r]eview in the appellate court is by way of motion, rather than by way of an appeal. This simple and expeditious procedure seems clearly preferable to an appeal."

C. Substitution, Addition, and Dropping of Parties

The procedure to be followed if a party dies before or after notice of appeal is filed has already been discussed in connection with initiation of an appeal as of right, and substitution for other causes is effected in the same manner as outlined there.[575] It is necessary here only to note a few additional matters. Under rule

571. Carbon copies of appellate papers may also be filed on behalf of parties allowed to proceed as poor persons. PROPOSED TENN. R. APP. P. 30(a).

572. *Id.* R. 18(b).

573. *Id.* R. 18(a).

574. *Id.* R. 18(c).

575. *See* text accompanying notes 65-71 *supra.*

19(c) if a public officer in his official capacity is a party to an appeal and during its pendency he dies, resigns, or otherwise ceases to hold office, the action does not abate, and his successor is automatically substituted as a party. Proceedings thereafter are in the name of the substituted party, but any misnomer not causing harmful error is disregarded.[576] Rule 19(c) also provides that a public officer who is a party in his official capacity may be described as a party by his official title rather than by name. The appellate court, however, may require that his name be added.[577] All these provisions are derived from Tennessee Rule of Civil Procedure 25.04.

Parties may also be added or dropped by order of the appellate court on its own motion or on motion of a party and on such terms as are just.[578] This provision also finds a parallel in Tennessee Rule of Civil Procedure 21 and is designed in part to permit intervention at the appellate level.[579]

D. Filing and Service of Papers

The general requirements for the filing and service of all appellate papers—briefs, applications, petitions, motions, and the like—are specified in proposed appellate rule 20. All papers required or permitted to be filed in the appellate court are to be filed with the clerk of that court. Filing may be accomplished in person or by mail addressed to the clerk. If filing is accomplished by mail, the day of mailing, which is evidenced by a postmark affixed in and by a United States Post Office, shall be deemed the day of filing if first class mail is utilized.[580] This provision differs from the Federal Rules of Appellate Procedure under which filing of all papers, except briefs and appendices, is not timely unless the papers are received by the clerk within the time fixed for filing.[581] The advantage of measuring the date of filing

576. PROPOSED TENN. R. APP. P. 19(c).

577. *Id.*

578. *Id.* R. 19(e).

579. Intervention at the appellate level is rare but has been permitted in a few federal cases. *See* 7A C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1916, at 583-84 (1972).

580. PROPOSED TENN. R. APP. P. 20(a). *See also* 7 WIGMORE ON EVIDENCE § 2152 (3d ed. 1940).

581. FED. R. APP. P. 25(a).

from the postmark date is that it affords all parties, and not merely those conveniently located near the office of the clerk of the appellate court, the maximum time required or permitted for the preparation of papers.[582]

Rule 20(a) also provides that if a motion requests relief that may be granted by a single judge—and all motions may be except those to dismiss an appeal[583]—the judge may permit the motion to be filed with him. In that event the judge must note on the motion the date of filing and must transmit it to the clerk of the appellate court.[584]

Copies of all papers filed by any party must be served at or before the time for filing by a party or person acting for him on all other parties to the appeal or proceeding.[585] The Advisory Commission comment to rule 20 emphasizes that service must be made on all parties and not merely adverse parties:

> In view of the simplicity of service by mail, and the difficulty in some circumstances determining who is an "adverse" party, there seems to be no good reason why a party who files a paper should not be required to serve all other parties to the proceeding in the appellate court.

Service on a party represented by counsel is to be made on counsel.[586] If one counsel appears for several parties, he is entitled to only one copy of any paper served upon him by any other party. If more than one counsel appears for a party, service upon one of them is sufficient.[587]

Service may be either personal or by mail. Personal service includes delivery of the copy to the clerk or other responsible person at the office of counsel or, if a party is not represented by counsel, by leaving the copy at his residence with some member of the family of the age of ten years or upwards. Service by mail is complete on mailing.[588]

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582. One conceivable disadvantage is the uncertainty of the mails and the difficult question of fact that arises if a party claims an appellate paper, such as the notice of appeal, was lost in the mail.

583. PROPOSED TENN. R. APP. P. 22(c).

584. *Id.* R. 20(a).

585. *Id.* R. 20(b).

586. *Id.* R. 20(c).

587. *Id.* R. 20(d).

588. *Id.* R. 20(c).

Papers presented to the clerk of the appellate court for filing must contain proof of service. Proof of service may be in the form of an acknowledgement of service by the person served or, alternatively, in the form of a statement of the date and manner of service and the names of the persons served, certified by the person who made service. Proof of service may appear either on the paper served or be separately affixed thereto.[589]

Rule 20(e) permits the clerk to file papers without acknowledgment or proof of service, but he must require that proof of service be filed promptly thereafter. In all cases, however, it is better practice to submit proof of service upon filing.

The last section of rule 20 provides that whenever copies must be filed for each judge of the appellate court and that court sits in sections, copies are required only for each judge of the section.[590] As a result, generally only four copies of such papers must be filed with the clerk of the intermediate appellate courts: one for the clerk and one for each judge of the section.[591]

E. Computation and Extension of Time

The method of computing time under the proposed appellate rules is governed by rule 20(a), which is identical in all material respects with Tennessee Rule of Civil Procedure 6.01 and Tennessee Rule of Criminal Procedure 45. Under all those rules (1) the day of the act, event, or default from or after which the designated period of time begins to run is not to be included in the computation, but (2) the last day of the period is to be included unless it is a Saturday, Sunday, or a legal holiday, in which event the period runs until the end of the next day that is not a Saturday, Sunday, or a legal holiday. If the period of time prescribed or allowed is less than seven days, however, intermediate Saturdays, Sundays, and legal holidays are to be excluded from the computation. As stated in the comment to civil trial rule 6.01, "[w]hen the time allowed is so short, the party limited by the time should not be further handicapped by losing one or more days because normal business operations are suspended by Saturday, Sunday, or legal holiday observances." An illustration of the

589. *Id.* R. 20(e).
590. *Id.* R. 20(f).
591. *Id.*, Advisory Comm'n comment.

intended operation of rule 6.01 is set forth in the comment to that rule and is equally illuminating of the intended operation of appellate rule 21(a).

Rule 21(b) provides that for good cause shown the appellate court may enlarge the time prescribed either by the rules or by the court's own order for doing any act. The appellate court may also permit an act to be done after expiration of the applicable period of time. However, the appellate court is expressly enjoined from extending the time for filing notice of appeal or an application for permission to appeal seeking review by the supreme court of a final decision of the intermediate appellate court or a petition for review of an administrative agency order.[592] Rule 2 contains the same limitation on the power of the appellate courts to suspend the requirements or provisions of the proposed appellate rules in a particular case.

Under rule 21(c) the period of time provided for the doing of any act or the taking of any proceeding is wholly unaffected by the continued existence or expiration of a term of court. Nor does the continued existence or expiration of a term of court affect the power of a court to do any act or take any proceeding.[593] As noted in the comment to the identical provisions of Tennessee Rule of Civil Procedure 6.03:

> The time within which an act is required to be done or a proceeding taken is fixed to allow the parties a reasonable time in which to act. To allow this reasonable time to be affected or limited by the continuance or expiration of a term of court is to introduce a variable which may make the time allowed in a particular case unreasonable and thus work a hardship upon a party. Accordingly, this rule eliminates court terms as a factor in computing allowable time periods.

The last subdivision of proposed appellate rule 21 provides, in language identical in all material respects to Tennessee Rule of Civil Procedure 6.05 and Tennessee Rule of Criminal Procedure 45(d), that whenever a party is required or permitted to do an act or take some proceeding within a prescribed period after the service of a notice or other paper upon him and the notice or paper is served upon him by mail, three days shall be added to the pre-

592. *Id.* R. 21(b).
593. *Id.* R. 21(c).

scribed period.[594] As has been noted with regard to the identical provision of the Federal Rules of Civil Procedure, "[t]he three additional days allowed when service has been made by mail should be added to the original period, rather than treated as a separate period, and the total treated as a single period for purposes of computation."[595]

F. Motions

The final aspect of practice on appeal to be discussed in this concluding section is motions, which are governed by proposed rule 22. Motions may be made for a variety of purposes. Some may seek to dismiss or otherwise finally dispose of an appeal.[596] Most motions, however, "are subordinate to, and in aid of, the main purpose of an appeal, which is to brief and argue the case and to induce the court to dispose of the merits."[597]

Rule 22(a) provides that, unless another form is elsewhere prescribed in the proposed rules, an application for an order, unless made during a hearing, shall be made by filing a written motion for such order or relief with proof of service on all other parties.[598] The motion must contain or be accompanied by any matter required by a specific provision of the proposed appellate rules governing such a motion and the papers, if any, upon which it is based. The motion must also state the grounds on which it is based and the order or other relief requested. A memorandum of law must accompany the motion, and if the motion is based on matters not of record, affidavits or other supporting evidence must accompany the motion. Any showing in opposition to the motion must be served and filed within five days after service of the motion, but the court may shorten or extend the time for

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594. *Id.* R. 21(d).

595. 4 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1171, at 646 (1969).

596. *See, e.g.*, PROPOSED TENN. R. APP. P. 26(b), 29(c). *See also* APPELLATE COURT STANDARDS, *supra* note 12, § 3.13(f).

597. 16 C. WRIGHT, A. MILLER, F. COOPER, & E. GRESSMAN, *supra* note 109, § 3973, at 417; *see* PROPOSED TENN. R. APP. P. 1 ("These rules shall be construed to secure the just, speedy, and inexpensive determination of every proceeding on its merits.").

598. *Cf.* TENN. SUP. CT. R. 26 (all motions must be reduced to writing); TENN. CT. APP. R. 21 (all motions must be reduced to writing).

responding to any motion.[599]

Unlike the comparable rule of the Federal Rules of Appellate Procedure,[600] proposed rule 22(b) provides that "[e]xcept for motions for which necessity requires otherwise or for motions that may be acted upon after reasonable notice as elsewhere prescribed in these [proposed] rules, motions shall be disposed of only after service and opposition thereto has been filed or the time for filing has expired."[601] Nothing prevents the moving party from obtaining a waiver from the other parties of their right to be heard in opposition. The moving party may then indicate in his motion that the other parties have no objection to the grant of the requested relief, and the court may act without waiting for a showing in opposition. Motions that may be acted upon after reasonable notice include motions under rule 7 for a stay or injunction pending appeal[602] and motions under rule 8 for release in criminal cases.[603] As noted in the Advisory Commission comment to rule 22, reasonable notice may be less than the five days' notice otherwise specified in rule 22(a) for making a showing in opposition, and the need for expeditious action on motions filed under rule 7 or 8 makes it undesirable to delay disposition automatically for five days.

On request of a party or on its own motion, the appellate court may place any motion on the calendar for hearing or may otherwise dispose of the motion. When a motion is placed on the calendar for hearing, the clerk of the appellate court must notify each party of the date and time designated for the hearing.[604] Except for motions the granting of which will affect the outcome, such as motions for summary affirmance or dismissal, it is unlikely that oral argument will be ordered for most motions.[605] Pursuant to rule or order of the court, motions for specified types of procedural orders may be disposed of by the clerk of

599. PROPOSED TENN. R. APP. P. 22(a).

600. FED. R. APP. P. 27(b).

601. *Cf.* TENN. SUP. CT. R. 26 (no motion will be considered except on reasonable notice to opposing counsel); TENN. CT. APP. R. 21 (motion must show reasonable notice has been given adversary counsel before being presented to the court).

602. *See* text accompanying note 156 *supra*.

603. *See* text accompanying note 177 *supra*.

604. PROPOSED TENN. R. APP. P. 22(b).

605. *Cf.* TENN. SUP. CT. R. 27 (motions will be disposed of only on briefs).

the appellate court.[606] This delegation should normally be limited to routine and unopposed motions that do not immediately affect the outcome of the appeal.

Under rule 22(c) a single judge of the appellate court may entertain and may grant or deny any request for relief that may be sought by motion under the proposed rules. However, a single judge may not dismiss or otherwise finally dispose of an appeal or other proceeding.[607] According to the Advisory Commission comment to rule 22(c), "[f]inal disposition of an appeal means the termination of an appeal, whether by decision, dismissal, or otherwise." Similarly, a single judge may not act upon a request that takes some form other than a motion. For example, some of the rules previously discussed require preparation of an application or petition.[608] Since the relief requested under those rules may not properly be sought by motion, a single judge may not grant the relief:

> It would, therefore, be inappropriate for a single judge to grant a request for permission to appeal, since permission is requested by the filing of an application, not by a motion. On the other hand, a single appellate judge may grant a stay or injunction under rule 7 pending disposition of an application for permission to appeal by the full court.[609]

In all cases in which a single judge may appropriately grant or deny a motion, his action, on motion, may be reviewed by the court.[610]

The form of all motions must comply with the same form previously discussed in connection with briefs.[611] Motions and papers other than briefs must also contain a caption setting forth (1) the number of the case in the appellate court and the name

606. PROPOSED TENN. R. APP. P. 22(b). *See also* APPELLATE COURT STANDARDS, *supra* note 12, § 3.01(d), Commentary at 12.

607. PROPOSED TENN. R. APP. P. 22(c).

608. *See, e.g., id.* R. 9(c) (application for interlocutory appeal by permission from the trial court); *id.* R. 10(b) (application for extraordinary appeal by permission on original application in the appellate court); *id.* R. 11(a) (application for appeal by permission from intermediate appellate court to supreme court); *id.* R. 39(a) (petition for rehearing).

609. *Id.* R. 22(c), Advisory Comm'n comment.

610. *Id.* R. 22(c).

611. *See id.* R. 22(d); text accompanying notes 421-23 *supra*.

of that court, (2) the title of the case as it appeared in the trial court, and (3) a brief descriptive title indicating the purpose of the paper.[612] Two copies of the motion shall be filed, but the court may require that additional copies be furnished.[613]

Rule 22 on motions should be construed in light of rules 23 and 37(a). Rule 37(a) provides that the denial of any motion or application or petition must be accompanied by a statement of reasons, either orally or in writing.[614] Under rule 23 the clerk of the appellate court immediately upon entry of an order shall serve by mail notice of its entry on each party to the proceeding together with a copy of any written reasons respecting the order. The clerk must also make a note in the docket of the mailing.[615] According to the Advisory Commission comment, the purpose of rule 23 "is to keep the parties up-to-date with regard to the disposition of the appeal or other proceeding before the appellate court."

IX. CONCLUSION

Instead of a concluding textual summary of the preceding discussion, what follows is intended to serve as a checklist of steps ordinarily necessary in three kinds of appeals: (1) an appeal as of right from the trial court, (2) an interlocutory appeal by permission from the trial court, and (3) an appeal by permission to the supreme court from a final decision of the intermediate appellate court. These kinds of appeals are singled out for treatment because they are by far the most common types of appeals that would be prosecuted under the proposed appellate rules if they are approved by the legislature. To be of greatest usefulness to the respective parties, the checklists are divided between the steps to be taken by the appellant and those to be taken by the appellee. The footnotes indicate the relevant proposed rules and portions of this article that should be consulted for a more detailed discussion of the various steps outlined below. There is of

612. PROPOSED TENN. R. APP. P. 30(d).

613. *Id.* R. 22(d).

614. Only a statement of reasons, not an opinion, is required. The form of the statement lies in the discretion of the appellate court. *But see* APPELLATE COURT STANDARDS, *supra* note 12, § 3.10(c), Commentary at 17-18; *id.* § 3.12(d), Commentary at 29-30.

615. PROPOSED TENN. R. APP. P. 23.

course no guarantee that what follows will become law, but what follows does accurately set forth the current recommendation of the Tennessee Supreme Court's Advisory Commission of what the law should be.

CHECKLISTS OF STEPS ON APPEAL

1. Checklist of Steps on an Appeal as of Right from the Trial Courts

A. Steps by the Appellant in an Appeal as of Right

(1) File a notice of appeal with the clerk of the trial court within thirty days after the date of entry of the judgment appealed from.[616]

(2) Simultaneously with filing item (1), file a bond for costs on appeal in civil actions.[617] This step may be omitted as noted in step (3).

(3) File a bond for stay, if such is desired, and secure approval thereof by the trial court.[618] If a bond for stay includes security for the payment of costs on appeal, step (2) may be omitted.

(4) Within seven days after filing item (1), serve a copy thereof on the other parties and the clerk of the appellate court to which the appeal has been taken. Note on each copy served the date on which item (1) was filed, and include with the copy filed with the clerk of the appellate court a list of the parties upon whom service is required.[619]

(5) Within seven days after service, file proof of service of item (4) with the clerk of the trial court.[620]

(6) Order the entire transcript of the evidence or proceedings; or within fifteen days after filing item (1), serve on the appellee both a description of the parts of the transcript to be included in the record and a short and

616. *See id.* R. 3(e)-(f), 4; text accompanying notes 12-35 *supra.*

617. *See* PROPOSED TENN. R. APP. P. 6; text accompanying notes 120-31 *supra.*

618. *See* PROPOSED TENN. R. CIV. P. 62, 65A; text accompanying notes 132-60 *supra.*

619. *See* PROPOSED TENN. R. APP. 5(a)-(b); text accompanying notes 36-43 *supra.*

620. *See* PROPOSED TENN. R. APP. P. 5(a)-(b).

plain declaration of the issues to be presented on appeal.[621]

(7) File exhibits not on file with the clerk of the trial court for inclusion in the record or with the reporter for inclusion in the transcript.[622]

(8) File the transcript of the evidence or proceedings with the clerk of the trial court within ninety days after filing item (1).[623]

(9) Simultaneously with filing item (8), file notice of the filing on the appellee and file proof of service of notice with the clerk of the trial court.[624]

(10) Within thirty days after the record is completed by the clerk of the trial court, prepare and file in the appellate court copies of a brief.[625] If oral argument is desired, state on the bottom of the cover page of the brief "Oral Argument Requested."[626] File four copies if the appeal is in an intermediate appellate court. File six copies if the appeal is in the supreme court. Serve one copy of the brief on counsel for each appellee and file proof of service with the clerk of the appellate court.[627]

(11) Within fourteen days after receipt of the brief of the appellee, prepare, file, and serve a reply brief as provided in step (10).[628]

(12) Within twenty-one days after receipt of the brief of the appellee, request in writing that the clerk of the trial court transmit the record to the clerk of the appellate court.[629]

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621. *See id.* R. 24(b); text accompanying notes 209-21 *supra.*

622. *See* PROPOSED TENN. R. APP. P. 25(a); text accompanying notes 192-201 *supra.*

623. *See* PROPOSED TENN. R. APP. P. 24(b); text accompanying notes 222-34 *supra.*

624. *See* PROPOSED TENN. R. APP. P. 24(b).

625. *See id.* R. 27, 29-30; text accompanying notes 372-75, 378-402, & 410-26 *supra.*

626. *See* PROPOSED TENN. R. APP. P. 35(a); text accompanying notes 476-77 *supra.*

627. *See* PROPOSED TENN. R. APP. P. 29; text accompanying notes 378-82 & 589 *supra.*

628. *See* PROPOSED TENN. R. APP. P. 27(c); text accompanying notes 407 & 625-27 *supra.*

629. *See* PROPOSED TENN. R. APP. P. 25(d); text accompanying notes 282-84 *supra.*

B. Steps by the Appellee in an Appeal as of Right

(1) Within fifteen days after service of the appellant's declaration of issues and description of parts of the transcript to be included in the record, serve on the appellant and file with the clerk of the trial court a designation of any additional parts to be included.[630]

(2) File exhibits not on file with the clerk of the trial court for inclusion in the record or with the reporter for inclusion in the transcript.[631]

(3) Within fifteen days after service of notice of the filing of the transcript, serve on the appellant and file with the clerk of the trial court any objections to the transcript as filed with the clerk of the trial court.[632]

(4) Within thirty days after receipt of the brief of the appellant, prepare, file, and serve a brief as provided in appellant's step (10).[633]

(5) Within fourteen days after receipt of the reply brief of the appellant, prepare, file, and serve a reply brief as provided in appellant's step (10).[634]

2. Checklist of Steps on an Interlocutory Appeal by Permission from the Trial Court

A. Steps by the Appellant in an Appeal by Permission

(1) Request permission to appeal from the trial court and, if such is desired, a stay of further proceedings in the trial court.[635]

(2) Within ten days after entry of an order by the trial court granting permission to appeal or preparation by the trial court of a written statement of its reasons for

630. *See* PROPOSED TENN. R. APP. P. 24(b); text accompanying notes 216-18 *supra*.

631. *See* PROPOSED TENN. R. APP. P. 25(a); text accompanying notes 192-201 *supra*.

632. *See* PROPOSED TENN. R. APP. P. 24(b).

633. *See id.* R. 27(b); text accompanying notes 625-27 *supra*.

634. *See* PROPOSED TENN. R. APP. P. 27(c); text accompanying notes 407 & 625-27 *supra*.

635. *See* PROPOSED TENN. R. APP. P. 9(a), (f).

permitting an appeal, whichever is later, prepare and file with the clerk of the appellate court an application for permission to appeal setting forth the facts necessary to an understanding of why an appeal by permission lies and the reasons supporting an immediate appeal. Attach to the application the order appealed from, the trial court's statement or reasons for permitting an appeal, and any parts of the record necessary for a determination of the application by the appellate court. File four copies of the application if the appeal is to an intermediate appellate court. File six copies if the appeal is to the supreme court.[636]

(3) Serve a copy of the application on each of the other parties and file proof of service with the clerk of the appellate court.[637]

(4) If permission to appeal is granted, file a bond for costs on appeal in civil actions within ten days after entry of the order by the appellate court granting permission to appeal.[638]

(5) If permission to appeal is granted, steps 1(A)(6) through (9) must be taken within the indicated times measured from the date of entry of the order by the appellate court granting permission to appeal.[639]

(6) If permission to appeal is granted, steps 1(A)(10) through (12) must be taken.[640]

B. Steps by the Appellee in an Appeal by Permission

(1) Within seven days after service of the appellant's application for permission to appeal, prepare and file with the clerk of the appellate court an answer in opposition. File four copies of the answer if the application is to an intermediate appellate court. File six copies if

636. *See id.* R. 9(c)-(d); text accompanying notes 77-82 *supra.*

637. *See* PROPOSED TENN. R. APP. P. 9(c); text accompanying notes 585-89 *supra.*

638. *See* PROPOSED TENN. R. APP. P. 9(e).

639. *See* text accompanying notes 621-24 *supra.*

640. *See* text accompanying notes 625-29 *supra.*

the application is to the supreme court.[641]

(2) Serve a copy of the answer on each of the other parties and file proof of service with the clerk of the appellate court.[642]

(3) If permission to appeal is granted, steps 1(B)(1) through (5) becomes applicable.[643]

3. Checklist of Steps on an Appeal by Permission to the Supreme Court from a Final Decision of an Intermediate Appellate Court

A. Steps by the Appellant on an Appeal to the Supreme Court from an Intermediate Appellate Court

(1) Within thirty days after entry of judgment by the intermediate appellate court or, if a petition for rehearing is filed, within fifteen days after denial of the petition or entry of judgment on rehearing, prepare and file with the clerk of the supreme court six copies of an application for permission to appeal setting forth (a) the date on which judgment was entered and whether a petition for rehearing was filed, and if so, the date of denial of the petition or entry of judgment on rehearing; (b) the questions presented for review; (c) the facts relevant to the questions presented, but facts correctly stated in the opinion of the intermediate appellate court need not be repeated; and (d) the reasons and authorities supporting review by the supreme court. Attach to the application a copy of the opinion of the intermediate appellate court.[644]

(2) Serve a copy of the application on each of the other parties and file proof of service with the clerk of the supreme court.[645]

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641. *See* PROPOSED TENN. R. APP. P. 9(d); text accompanying notes 590-91 *supra*.

642. *See* PROPOSED TENN. R. APP. P. 9(d); text accompanying notes 585-89 *supra*.

643. *See* text accompanying notes 630-34 *supra*.

644. *See* PROPOSED TENN. R. APP. P. 11(a)-(c); text accompanying notes 93-98 *supra*.

645. *See* PROPOSED TENN. R. APP. P. 11(c); text accompanying notes 585-89 *supra*.

(3) If permission to appeal is granted, step 1(A)(10) must be taken within the indicated time measured from the date of entry of the order by the supreme court granting permission to appeal.[646] Step 1(A)(11) may also be taken.[647]

B. Steps by the Appellee on an Appeal to the Supreme Court from an Intermediate Appellate Court

(1) Within fifteen days after service of the appellant's application for permission to appeal, prepare and file with the clerk of the supreme court six copies of an answer in opposition setting forth why the application should not be granted and any other matters necessary for correction of the application.[648]

(2) Serve a copy of the answer on each of the other parties and file proof of service with the clerk of the supreme court.[649]

(3) If permission to appeal is granted, steps 1(B)(4) and (5) become applicable.[650]

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646. *See* PROPOSED TENN. R. APP. P. 11(f); text accompanying notes 625-27 *supra*.

647. *See* text accompanying note 628 *supra*.

648. *See* PROPOSED TENN. R. APP. P. 11(d).

649. *See id;* text accompanying notes 585-89 *supra*.

650. *See* text accompanying notes 633-34 *supra*.

SURVEY OF TENNESSEE CONSTITUTIONAL LAW IN 1976-77

KENNETH L. PENEGAR*

I.	FREEDOM OF SPEECH AND PRESS	120
II.	FREEDOM OF RELIGION	126
III.	EQUAL PROTECTION	136
IV.	DUE PROCESS	140
	A. Mechanics' Liens	140
	B. Tenured Professors' Right to Hearing Prior to Dismissal	143
	C. Right to Hearing for University Students' Academic Status Change	144
	D. Tax Sales and Motion for New Trial	145
	E. Judicial Review of Administrative Rate-Making	146
V.	IMPAIRMENT OF CONTRACT	148
VI.	REGULATION OF BUSINESSES AND PROFESSIONS	151
VII.	REPRIEVES, PARDONS, AND COMMUTATIONS	153
VIII.	USURY	158

Of the hundreds of cases decided by the Tennessee Supreme Court during 1976-77, only a handful turned principally on an issue of constitutional law. The slightly more than a dozen cases in which the court did reach constitutional questions are significant, however, and several are of major importance. Some cases only foreshadow larger issues and debates still in progress. Together they provide a useful and interesting panorama of some of the major tensions of our times.

I. FREEDOM OF SPEECH AND PRESS

In *Shoppers Guide Publishing Co., Inc. v. Woods*[1] the Tennessee Supreme Court rejected the contention that a shoppers'

* A.B., J.D., University of North Carolina; LL.M., Yale University; Dean and Professor of Law, University of Tennessee.

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1. 547 S.W.2d 561 (Tenn. 1977).

guide composed exclusively of advertising items should be considered a "newspaper" for the purposes of the Sales and Use Tax Act. The publisher paid the tax under protest and then sued the Commissioner of Revenue to recover those taxes by relying on the exemption the Act provides for newspapers.[2] Tennessee, unlike some other jurisdictions, had not faced this question previously;[3] but the criteria employed by the Commissioner in evaluating the applicability of the newspaper exception to the publication[4] was supported by Tennessee case law.[5] The court agreed with the chancellor below that a publication that did not contain "even a modicum of local news" is not a newspaper in the common and popularly accepted usage of the term and does not qualify for the exemption granted to newspapers under the Act.[6]

The constitutional dimension of the case was less important to the court's decision than was the interpretation of the statute and the revenue regulations. The taxpayer contended that the imposition of a sales or use tax on this type of publication amounted to a tax on the transmission and privilege of communication from the advertiser to the general public, creating an infringement of the taxpayer's first amendment rights of freedom of speech and press. The court simply stated that the claim had no merit and concluded that the tax in question is not a tax on the privilege of informing the public but is, rather, a general tax on businesses that "fabricate tangible personal property."[7]

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2. TENN. CODE ANN. § 67-3012 (1977).

3. In Green v. Home News Publishing Co., 90 So. 2d 295 (Fla. 1956), the Florida court reached the same result even though the publication contained a "modicum" of local news.

4. [I]n order to constitute a newspaper, the publication must contain at least the following elements:

(1) It must be published at stated short intervals (usually daily or weekly).

(2) It must not, when its successive issues are put together, constitute a book.

(3) It must be intended for circulation among the general public.

(4) It must contain matters of general interest and reports of current events.

547 S.W.2d at 563 (quoting rule 46 of the State Sales and Use Tax Rules and Regulations).

5. Pope v. Craft, 1 Tenn. App. 356 (1925).

6. 547 S.W.2d at 562.

7. *Id.* at 564.

This summary disposition of the constitutional point is troublesome. Arguably one of the justifications for the legislature's exemption for newspapers is the fact that newspapers enjoy a special status under the first amendment.[8] If this publication had been more like a conventional newspaper, there would have been no need for the court to consider the constitutional issue since the exemption would have applied. The continued existence of the exemption itself, however, may cause difficulties in light of the recent demise of the conceptual distinction between commercial speech, traditionally not protected from governmental regulation, and other kinds of speech (such as political or literary), which have enjoyed the shield of the first amendment. In *Bates v. State Bar of Arizona*[9] and *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*[10] the Supreme Court decided that there is social value in the advertisements of lawyers and pharmacists based on the public's right to know as well as the advertisers' right to inform. It does not appear that any of the advertising in *Shoppers Guide* could qualify for first amendment protection under the Supreme Court's current social value standard. On the other hand, it is not clear that the application of these two Supreme Court decisions will or should be confined only to advertising by professionals. It seems probable that the newspaper exemption within Tennessee's Sales and Use Tax Act will have to be reexamined in light of these developments to define more clearly the scope of the statute.

A recent decision of the Tennessee Court of Appeals, *Horner-Rausch Optical Co. v. Ashley*,[11] dealt more specifically with a state ban on advertising. In this case, a firm of opticians sought a declaratory judgment that the Tennessee law prohibiting opticians from advertising prices for professional services[12] violated due process of law and freedom of speech, constituted an invalid exercise of the police power, and contributed to a restraint of

8. *See* Kaufman, *The Medium, the Message and the First Amendment*, 45 N.Y.U. L. REV. 761 (1970).

9. 433 U.S. 350 (1977).

10. 425 U.S. 748 (1976).

11. 547 S.W.2d 577 (Tenn. Ct. App. 1976), *cert. denied, id.* (Tenn. 1977).

12. TENN. CODE ANN. § 63-1404(h) (1977) provides that dispensing opticians may have their certifications suspended or revoked for "advertising any free professional services or prices for professional services."

trade. The court of appeals agreed that the challenged state law did indeed constitute a violation of the first amendment in light of the decision of the United States Supreme Court in *Virginia State Board of Pharmacy*. The court of appeals found no meaningful distinction between pharmacists and dispensing opticians and concluded that standards of professionalism (to whatever extent professionalism is involved in dispensing standardized products) could be adequately maintained by some other means than a complete ban on advertising prices for such services. The public's right to know and the optician's right to speak to the public are the values protected by this ruling, paralleling the reasoning of the Supreme Court in *Virginia State Board of Pharmacy*. The court of appeals was careful to point out that the case concerned a complete ban on professional advertising and that the decision should not be understood as invalidating *all* restrictions on advertising by dispensing opticians. Reasonable regulation of the time, place, or manner of such advertising remains within the legislative function.[13]

A third significant freedom of speech case decided within the survey period involved a challenge to the recently enacted Tennessee "Sunshine Act."[14] *Dorrier v. Dark*[15] presented the Tennessee Supreme Court with perhaps the most comprehensive attack on the open-meetings statute, and the court's response to this challenge is clearly its stoutest defense of that Act to date. *Dorrier* involved the termination of a public school teacher's employment by a board of education. The teacher maintained that the board's action was invalid since the decision to terminate his employment had been made in violation of the Act,[16] which requires a

13. Both the decisions of the court of appeals on October 29, 1976, and the denial of certiorari by the Tennessee Supreme Court on March 7, 1977, predate the decision of the United States Supreme Court in Bates v. State Bar of Ariz., 433 U.S. 350 (1977). If there is a trace of uncertainty revealed by the court of appeals regarding the reach of its decision over professions other than the quasi-commercial ones of pharmacy and opticians, it is safe to assume that *Bates* puts that to rest.

14. TENN. CODE ANN. §§ 8-4401 to 4406 (Cum. Supp. 1977).

15. 537 S.W.2d 888 (Tenn. 1976).

16. "All meetings of any governing body are declared to be public meetings open to the public at all times, except as provided by the Tennessee Constitution." TENN. CODE ANN. § 8-4402 (Cum. Supp. 1977). "Any action taken at a meeting in violation of any section of this chapter shall be void and of no effect . . . ." *Id.* § 8-4405.

governing body's meetings to be open to the public.

The school board apparently conceded that its decision to terminate the teacher's employment had been made in an executive session that was not open to the public. The board, however, contended that the Sunshine Act is impermissibly vague, broader in scope than its name suggests, and is unreasonable and arbitrary in its failure to allow closed meetings under any circumstances.[17] The court had little difficulty in rejecting these arguments. The school board, more imaginatively, also contended that its members would be inhibited in their discussion in open meetings, and thus would suffer a chilling effect on their freedom of speech. The court responded to this argument in the following terms:

> Clearly, the Open Meetings Act implements the constitutional requirement of open government. If it touches a freedom of speech issue, it is at most a subjective matter with the individual member of a covered body and is limited to a chilling effect upon free expression. The only legitimate "chilling effect upon free expression" (appellant's phrase) that a member of a covered body could entertain is that deliberation in open meeting of a particular matter would be detrimental to the public interest. The people, speaking through the Legislature, have determined that they are willing to assume those detriments to secure the benefits of open government as prescribed in the Act. We are not impressed by the argument that a citizen-member of a governing body suffers an infringement of his right to free speech by the requirement that any deliberation toward an official decision must be conducted openly.[18]

The school board's claims were grounded on the United States Constitution. The court, however, responded by referring to the Tennessee Constitution. The applicable provision in the Tennessee Constitution[19] contains not only the guarantees of free speech and religion but also a guarantee of open government.

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17. 537 S.W.2d at 889-90. Circumstances suggested by the school board include a provision for closed sessions in dealing with personnel matters. Such a closed session would arguably protect those faculty or students involved better than a public hearing. Also, members of school boards and city councils may feel the need to have prospective land acquisitions discussed privately before entering the market. *See id.* at 895.

18. *Id.* at 892.

19. TENN. CONST. art. I, § 19.

This provision conceivably gave the court a narrower guide for determining rights than it would have had using only the United States Constitution.[20]

An argument of the board that supports its principal chilled speech contention was that key terms of the statute were too vague and would result in differing opinions regarding what type of meetings were covered by the Act.[21] The board argued that this vagueness inhibited what a board member was willing to say and created uncertainty about where and when a member's speech was within the coverage of the Act. In dismissing this contention the court noted that the Act is not a penal statute but is a remedial provision whose sanction is nullification of official action rather than fine or imprisonment. The requirement of specificity of terms is therefore less stringent than it might otherwise be. The court also found sufficient meaning in the terms of the Act to satisfy a "purpose, objective and spirit" test for the meaning of words found in a statute.[22] In examining the whole Act and its purposes as declared in the caption and in section 8-4401, the court found it clear that the Act covers "any board, commission, committee, agency, authority or any other body by whatever name" that both traces its "origin and authority" to state, city, or county legislation and has members authorized to make policy and render administrative decisions or recommendations.[23]

The disposition of the board's novel freedom-of-speech argument was probably adequate in light of the arguments advanced. The proposition the board asserted was never fully presented. This proposition, that the federally protected right of individual free expression encompasses the speech of public officials governed by state open-meeting statutes, requires a more cogent analysis of the competing values and a more resourceful use of

20. The court also found that the federal precedents advanced by the school board, Keyishian v. Board of Regents, 385 U.S. 589 (1967); Ashton v. Kentucky, 384 U.S. 195 (1966), were sufficiently different factually from the *Dorrier* situation to be of little value in assessing the board's argument.

21. 537 S.W.2d at 893. The key terms of the statute were "to deliberate toward a decision" and "public body."

22. *Id.* at 892. "In the construction of a statute we must ascertain the intention of the legislature as it is expressed in the words of the statute and should look to the entire Act and give consideration to the purpose, objective and spirit behind the legislation."

23. *Id.*

precedent than was presented in *Dorrier*. The court chose to deal only with those issues necessary to answer the limited argument.[24]

II. FREEDOM OF RELIGION

In 1976-77 three cases arose in which the free exercise of religion or the establishment clause was the central issue. The first case, *State ex rel. Swann v. Pack*,[25] dealt with the practice of snake-handling by a Christian sect concentrated in the eastern part of the state. A second, *Steele v. Waters*,[26] involved a statute requiring the biblical account of creation to be included in biology textbooks. The third, *Paty v. McDaniel*,[27] upheld a provision of the Tennessee Constitution that prohibited ministers from serving as members of the General Assembly.

Probably the easiest of the three cases for the court to decide, both because of the clarity of the concepts involved as well as the explicit relevance of existing case authority, was *Steele*, the biology textbook case. This suit challenged the constitutionality of a 1973 amendment to the state textbook statutes that provided (1) no biology textbook could be used in the state schools if it tendered an opinion on man's origins "unless it specifically states that it is a theory"; and (2) the textbook also "shall give . . . commensurate attention to, and . . . emphasis on, the origins and creation of man and his world as the same is recorded in other theories, including, but not limited to, the Genesis account in the Bible."[28] The trial court declared these provisions unconstitutional because they violated the first amendment to the United States Constitution[29] as well as the Constitution of Tennessee.[30]

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24. See Little & Tompkins, *Open Government Laws: An Insider's View*, 53 N.C.L. REV. 451 (1975), for an excellent discussion of free speech interests of public officials.

25. 527 S.W.2d 99 (Tenn. 1975).

26. 527 S.W.2d 72 (Tenn. 1975).

27. 547 S.W.2d 897 (Tenn. 1977).

28. TENN. CODE ANN. § 49-2008 (1977).

29. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." U.S. CONST. amend. I.

30. That all men have a natural and indefeasible right to worship Almighty God according to the dictates of their own conscience; that no man can of right be compelled to attend, erect, or support any place of worship, or to maintain any minister against his consent; that no human authority can, in any case whatever, control or interfere with

While this case was on appeal, the United States Court of Appeals for the Sixth Circuit held in a parallel case, *Daniel v. Waters*,[31] that the act in question was unconstitutional on its face. In *Steele* the Tennessee Supreme Court affirmed the trial court's decision in a per curiam opinion citing the Sixth Circuit's decision and two United States Supreme Court decisions, *Epperson v. Arkansas*,[32] which struck down a comparable "anti-evolution" statute because of its infringement of the establishment of religion clause in the first amendment, and *Lemon v. Kurtzman*,[33] which invalidated a state scheme for salary supplements to teachers in private schools under which the only beneficiaries were parochial teachers.

The application of the establishment clause today has deviated little from the drafters' goal to avoid "sponsorship, financial support, and active involvement of the sovereign in religious activity."[34] To determine whether a particular statute offends this purpose, the Court has developed a three-pronged test. First, does the statute in question have a secular legislative purpose? Second, is its principal effect one that neither advances nor inhibits religion? Third, does the statute foster "an excessive government entanglement" with religion?[35] In *Daniel* the Sixth Circuit noted that " 'the state has no legitimate interest in protecting any or all religions from views distasteful to them' "[36] and held that the required preferential treatment of the Biblical account of creation would advance certain religions. The exclusion of satanical beliefs would "inextricably involve the State Textbook Commission in the most difficult and hotly disputed of theological argument"; this situation would violate all three parts of the test and clearly offend the establishment clause.[37] In *Steele* the Tennessee Su-

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the rights of conscience; and that no preference shall ever be given, by law, to any religious establishment or mode of worship.

TENN. CONST. art. I, § 3.

31. 515 F.2d 485 (6th Cir. 1975).

32. 393 U.S. 97 (1968).

33. 403 U.S. 602 (1971).

34. Walz v. Tax Comm'n, 397 U.S. 664, 668 (1970), *quoted in* Lemon v. Kurtzman, 403 U.S. 602, 612 (1971).

35. Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971).

36. 515 F.2d at 491 (quoting Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 505 (1952)).

37. *Id.*

preme Court relied on the same reasoning to hold that the act violated the Tennessee Constitution.

Neither the result nor the reasoning of these cases is surprising. What is surprising is that the legislature tried again to do what the Tennessee Supreme Court said in 1927 in *Scopes v. State*[38] would not be allowed. Unlike the legislation involved in *Scopes*, the 1973 legislation to suppress the theory of evolution was not a direct criminal measure, but as the Sixth Circuit observed: "[T]he purpose of establishing the Biblical version of the creation of man over the Darwinian theory of the evolution of man is as clear in the 1973 statute as it was in the statute of 1925."[39] It is difficult to believe that the sponsors of the 1973 legislation, or indeed the majority of members of the General Assembly who voted for it, could have reasonably believed that the act would withstand a constitutional challenge in the courts. One is compelled to conclude that the fundamental purpose must have been merely to symbolize a position or an attitude of the sponsors and/or their constituents. The result is surely an abuse of the democratic process under our constitutional form of government and serves only to stir public anxiety and create tensions among diverse religious groups within our society.[40] The capacity of our public officials for recurring deliberations on such matters is remarkable and not a little disturbing.[41]

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38. 154 Tenn. 105, 289 S.W. 363 (1927).

39. Daniel v. Waters, 515 F.2d 485, 487 (6th Cir. 1975).

40. For a full discussion of the legislation in question and the state's earlier experience, see Le Clercq, *The Monkey Laws and the Public Schools: A Second Consumption*, 27 VAND. L. REV. 209 (1974) (predating *Daniel*).

41. For example, as recently as the Constitutional Convention of 1977 a proposal was offered on the floor of one of the earlier plenary sessions that would permit the offering of prayers in the public schools. It was soundly defeated, but not until one delegate offered the following extemporaneous objections:

> Let me tell you what it is like to be a child in a classroom and the only child in a classroom who does not have the same religion as everybody else. When they read a prayer which is not your prayer from a bible which is not your bible, you kind of sit there and you shuffle and you kick our [*sic*] feet, you know, and you look embarrassed.
>
> Do you really want that for your child if you belong to a minority? I experienced this. Now I grew up and I made it, but I don't want anybody else to have to go through that and I don't think you do either.

Chattanooga Times, Sept. 29, 1977, § A, at 10, col. 3 (quoting Bernard E. Bernstein, delegate from Knoxville).

Philosophically, the most troublesome case the court decided in this sensitive area is *State ex rel. Swann v. Pack*,[42] the snake-handling case. A restrictive outcome could have been reasonably predicted, of course, because of the exceptionally dangerous nature of the practices involved: the active and public display and handling of poisonous snakes and the consumption of strychnine poison. By what means a restrictive result would be supported, what rationale, premises, and intermediate points of reason would be employed, were the critical issues. The court rose to the occasion. In an opinion written by Justice Henry the court first developed a history of the Holiness Church of God in Jesus Name. The practice of snake handling is traceable in the view of this "'charismatic sect . . . of the Pentecostal variety'"[43] to the Bible in the book of Mark, which says:

> And these signs shall follow them that believe; In my name shall they cast out devils; They shall speak with new tongues; *They shall take up serpents; and if they drink any deadly thing, it shall not hurt them;* they shall lay hands on the sick, and they shall recover.[44]

The purpose of handling snakes and the taking of poisons by those who lead the rituals of the church, according to testimony of one of the defendants, is to "'confirm the Word of God,'" not to test one's faith.[45]

Having characterized the church group as unconventional but enduring and sincere, Justice Henry affirmed the court's adherence to a fundamental principle of official tolerance. "The government must view all citizens and all religious beliefs with

42. 527 S.W.2d 99 (Tenn. 1975). There was no statute involved here. Rather, the state's involvement came through a petition to chancery court to enjoin the practices in question.

43. *Id.* at 105 (quoting W. LABARRE, THEY SHOULD TAKE UP SERPENTS 29 (1962)).

44. *Mark* 16:17-18 (King James) (emphasis added).

45. 527 S.W.2d at 106 (quoting R. PELTON & K. CARDEN, SNAKE HANDLERS 22 (1974)). In this connection, the court wanted to be explicit in correcting the assumption made earlier by the court in Harden v. State, 188 Tenn. 17, 216 S.W.2d 708 (1948), that the purpose of snake-handling was to test the sincerity of believers. *Harden* upheld a statute, TENN. CODE ANN. § 39-2208 (1975), only marginally involved here, making it a crime to handle snakes so as to endanger the life or health of another.

absolute and uncompromising neutrality. The day this country ceases to countenance irreligion or unusual or bizarre religions, it will cease to be free for all religions. We must prefer none and disparage none."[46]

Official tolerance of all beliefs and religions is one thing; tolerance of any kind of behavior or action is quite another.[47] Beginning with a reference to *Reynolds v. United States*[48] and

46. 527 S.W.2d at 107. The Tennessee court has employed this distinction in other settings. *See, e.g.*, Gaskins v. State, 490 S.W.2d 521 (1973) (statute against marijuana manufacture did not interfere with free exercise of religious beliefs).

47. This distinction is traceable at least to John Locke, who distinguished mental from material substances:

> The commonwealth seems to me to be a society of men constituted only for the procuring, preserving, and advancing their own civil interests.
>
> Civil interests I call life, liberty, health, and the indolency of body; and the possession of outward things, such as money, lands, houses, furniture and the like.
>
> . . . .
>
> Now that the whole jurisdiction of the magistrate reaches only to these civil concernments, and that all civil power, right and dominion, is bounded and confined to the only care of promoting these things; and that neither can nor ought in any manner to be extended to the salvation of souls, these following considerations seem unto me abundantly to demonstrate.
>
> . . . .
>
> In the second place, the care of souls cannot belong to the civil magistrate, because his power consists only in outward force; but the true and saving religion consists in the inward persuasion of the mind, without which nothing can be acceptable to God. And such is the nature of the understanding, that it cannot be compelled to the belief of anything by outward force.
>
> . . . .
>
> . . . For the political society is instituted for no other end, but only to secure every man's possession of the things of this life. The care of each man's soul and of the things of heaven, which neither does belong to the commonwealth nor can be subjected to it, is left entirely to every man's self. Thus the safeguard of men's lives and of the things that belong unto this life is the business of the commonwealth; and the preserving of those things unto their owners is the duty of the magistrate.

J. LOCKE, A LETTER CONCERNING TOLERATION, in 35 GREAT BOOKS OF THE WESTERN WORLD 3, 16-17 (W. Popple trans. 1971).

48. 98 U.S. 145 (1878).

concluding with *Wisconsin v. Yoder*,[49] the court found that "[t]he consistent holding of the courts has been that belief is *always* protected, but that conduct or action is subject to regulation."[50] Religious practice or conduct may be limited, curtailed, restrained, or prohibited only when such practice involves a clear and present danger to the interests of society, and such regulation must be reasonable, presumably proportional to the danger created by the practice. This conclusion is the first holding of the case.[51]

The court appreciated the difficulty of relying simply on the distinction between beliefs and conduct. This distinction would not suffice as a foundation to enjoin the practices of this religious group anymore than it would to allow the Supreme Court in *Wisconsin v. Yoder*[52] to permit the practice in question there. In *Yoder* the Court had to go further and hold that allowing the Amish to keep their children out of the public schools beyond the

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49. 406 U.S. 205 (1972).

50. 527 S.W.2d at 111 (emphasis in original). Other significant decisions drawn upon by the Tennessee courts were Sherbert v. Verner, 374 U.S. 398 (1963); Thomas v. Collins, 323 U.S. 516 (1945); West Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943); Cantwell v. Connecticut, 310 U.S. 296 (1940); Davis v. Beason, 133 U.S. 333 (1890).

51. There follows dictum that "[t]he right to the free exercise of religion is . . . a vague and nebulous notion, defying the certainties of definition and the niceties of description," which detracts but slightly from the otherwise grand march of the opinion. 527 S.W.2d at 111. Of potentially more significance is the assertion as an emergent guideline under both the federal and state constitutions of the proposition that "[f]ree exercise of religion does not include the right to violate statutory law." *Id.* Surely the author of the opinion had in mind as a necessary collorary that the statute in question itself not be offensive to the essentials of a free religious belief system. It must have been presumed that the religious practice being balanced against the social interests protected by the statute was itself relatively innocuous. For example, if some such qualification is not read into the court's statement, then it fails to take account of the holding in Wisconsin v. Yoder, 406 U.S. 205 (1972), in which Amish children were accorded an exemption from a state statute requiring school attendance beyond the eighth grade because the positive social values of the Amish educational alternative were documented and accepted by authorities. In contrast, any positive effects stemming from the religious practice in *Swann* are incapable of documentation. As it stands, the court's statement is simply too broad to comport with its own recitation of the rationale of the various Supreme Court decisions, including *Yoder*.

52. 406 U.S. 205 (1972); *see* note 51 *supra*.

eighth grade would not impair the health of the children or result in their inability to be self-supporting or to discharge the responsibilities of citizenship.

The magnitude of social impact was the final idea by which the court measured the practices at issue in *Swann*. The common-law concept of a public nuisance was employed to frame the factual situation:

> Under this record, showing as it does, the handling of snakes in a crowded church sanctuary, with virtually no safeguards, with children roaming about unattended, with the handlers so enraptured and entranced that they are in a virtual state of hysteria and acting under the compulsion of "annointment," we would be derelict in our duty if we did not hold that respondents and their confederates have combined and conspired to commit a public nuisance and plan to continue to do so. The human misery and loss of life at their [meeting] of April 7, 1970 is proof positive.[53]

What follows in the court's opinion is a subtle blending of the state's interest in preventing harm to others, long recognized in the common law and reaffirmed in modern anticontagion-type cases,[54] with perhaps a newly reasserted state interest in protecting the individual against his own improvidence. The reliance here was on a smaller category of authorities.[55] "Yes," the court stated boldly, "the state has a right to protect a person from himself and to demand that he protect his own life."[56] Presumably, then, the court intended that its injunction of the practices of the Holiness Church of God in Jesus Name could rest either

53. 527 S.W.2d at 113.

54. *See, e.g.*, McCartney v. Austin, 57 Misc. 2d 525, 293 N.Y.S.2d 188 (1968) (compulsory polio shots); Holcomb v. Armstrong, 39 Wash. 2d 860, 239 P.2d 545 (1952) (compulsory chest x-rays).

55. Perhaps the most relevant was Application of President & Directors of Georgetown College, Inc., 331 F.2d 1000 (D.C. Cir. 1964) (compelling the provision of medical care to a dying patient). Also cited and relied on by the court was a case upholding compulsory water fluoridation. Kraus v. City of Cleveland, 163 Ohio St. 559, 127 N.E.2d 609 (1955).

56. 527 S.W.2d at 113. The court's opinion conceded that suicide is not presently a crime, nor is the attempt to commit suicide, although it was at common law. Nevertheless, the court asserted that "such an attempt would constitute a grave public wrong, and we hold that the state has a compelling interest in protecting the life and promoting the health of its citizens." *Id.*

on the threat to the life of those other than the snake-handling elders or on the threat to the handlers themselves even in the absence of threat to others. Since this case factually involved both kinds of risk, the court found it unnecessary to distinguish them in legal import.

Swann is a far-reaching decision. Some of the foreseeable possibilities include challenges to state statutes requiring the wearing of motorcycle helmets,[57] inquiries into culpability for death of terminally ill patients, and efforts to regulate hazardous sports such as hang-gliding. Although the court might in the future qualify or limit the reach of its decision in *Swann* when pressed by different circumstances, there seems little doubt that conceptually the court is prepared to justify the state's interference with an individual's self-destructive conduct on the basis of the state's interest in that person's contribution to the common good and to the strength of the state. The court's view seems reasonably clear from the following lines: "Tennessee has the right to guard against the unnecessary creation of widows and orphans. Our state and nation have an interest in having a strong, healthy, robust, taxpaying citizenry capable of self-support and of bearing arms and adding to the resources and reserves of manpower."[58]

The strong expressions of tolerance in the *Swann* opinion leave the observer unprepared for the reasoning and result in *Paty v. McDaniel*.[59] In *Paty* the court upheld a provision of the Tennessee Constitution that makes any "Minister of the Gospel, or priest of any denomination whatever" ineligible for service in the legislature.[60] McDaniel, an active minister of a Baptist church

57. *See* Arutanoff v. Metropolitan Gov't, 223 Tenn. 535, 448 S.W.2d 408 (1969) (statute upheld). There is something of a division of authority among the states. *See, e.g.*, Note, *The Limits of State Intervention: Personal Identity and Ultra-Risky Actions*, 85 YALE L.J. 826 (1976). *See also* 1 MEM. ST. U.L. REV. 178 (1970); 36 TENN. L. REV. 405 (1969).

58. 527 S.W.2d at 113. This justification may be criticized as making individuals instruments of public policy rather than making the state serve the interests of the individual. On the other hand, there are other justifications that tend to support the supplanting of the state's judgment for that of the individual concerning what is in the individual's own best interest.

59. 547 S.W.2d 897 (Tenn. 1977).

60. TENN. CONST. art. IX, § 1. The court construed the term broadly enough to include clergy of any kind, thus avoiding an equal protection problem.

in Chattanooga, was elected from his district to serve in the 1977 Tennessee Constitutional Convention. A statute makes the qualifications for service in the legislature generally applicable to service in the Convention;[61] thus, McDaniel's role as a delegate to the Convention was challenged.

Apparently Tennessee was the only state in 1977 having such a provision,[62] although Maryland did have a comparable disqualification until 1974 when it was declared unconstitutional by federal court action.[63] In earlier times, such disqualification provisions were found in other states, including North Carolina, from which Tennessee apparently acquired its rule.[64]

In searching for a rationale behind the disqualification of ministers and priests, the court emphasized "the state's goal of maintaining the separation between church and state."[65] In support of this general goal the court recited two specific ways in which this policy would operate. First, the policy would keep the legislature free of the influence of clergy, who, in seeking to further the aims of religion, would create divisiveness and contribute to a possible return of religious wars.[66] Second, the policy would avoid the natural political advantage a minister of one of the large denominations would have "because of the far more extensive voter base from which to launch a campaign for office."[67]

In a robust dissenting opinion, Justice Brock found these reasons unconvincing and would have had the court rule that the

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61. 1976 Tenn. Pub. Acts ch. 848, § 4. McDaniel in fact took his seat in the convention as a result of the stay issued by Justice Stewart, noting probable Supreme Court jurisdiction on the eve of the convention. The United States Supreme Court ultimately reversed the Tennessee Supreme Court. *See* McDaniel v. Paty, 435 U.S. 618 (1978). For a fuller development of all aspects of the case, see Le Clercq, *Disqualification of Clergy for Civil Office*, 7 MEM. ST. U.L. REV. 555, 573 (1977).

62. Le Clercq, *supra* note 61.

63. *See* Kirkley v. Maryland, 381 F. Supp. 327 (D. Md. 1974).

64. Le Clercq, *supra* note 61, at 585.

65. 547 S.W.2d at 905.

66. *Id.* at 906.

67. *Id.* at 904. Mercifully, the court spared the reader any resort to the only explicit justification in the Tennessee constitution for the disqualification, namely, the "whereas" portion of article IX section 1, itself, which says: "Whereas Ministers of the Gospel are by their profession, dedicated to God and the care of souls, and ought not to be diverted from the great duties of their functions . . . ."

disqualification does indeed amount to a burden on the exercise of the minister's religion and that its effect is to make the minister choose between either holding public office or his professional position. This compelled choice does not confront persons in other vocations. Justice Brock stated that the constitution creates a classification without any rational state purpose and thus deprives ministers of equal protection in violation of the fourteenth amendment to the United States Constitution.[68]

It seems incredible that the court would search for justifications for this relic of the frontier.[69] At the time of the drafting of the state constitution, there was no doubt a distrust of members of an elite group of people who because of their education and their presumably better exercised powers of persuasion could be expected to prevail in debate over other men.[70] The fear, then, if that is indeed what lies behind the drafting of the challenged provision, was of a profession and was not so much a fear of the institution of the church, its dogma, or its practices. If the Tennessee Constitution, in harmony with the due process clause, equal protection clause, and the first amendment of the Federal Constitution, may prevent ministers from serving in the legislature, why would it not also be legitimate (and at least as desirable) to restrict lay leaders of religious groups from such service as well? Such a restriction would discourage religious involvement but would result in no advantage to the commonwealth. Indeed, the result would be an impregnable wall of separation, not merely between church and state but between organized society and many of its natural leaders. Surely we are not prepared to make so precious a sacrifice for such illusory benefits as those discussed by the court.[71]

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68. 547 S.W.2d at 910.

69. For an excellent historical development of this type of provision, see generally Le Clercq, *supra* note 61.

70. Jefferson, it is said, once entertained the fear that members of the clergy would undo the revolution and so sought to have them excluded from the public life of the commonwealth. He later changed his mind. Le Clercq, *supra* note 61, at 578-79.

71. The Tennessee Supreme Court grounded its decision too much in Braunfeld v. Brown, 366 U.S. 599 (1961), and not enough in Sherbert v. Verner, 374 U.S. 398 (1963). *Braunfeld* sustained a Sunday closing law even though it burdened Orthodox Jewish merchants. *Sherbert* allowed unemployment benefits to a Seventh Day Adventist unable to find work that did not require Satur-

The United States Supreme Court, treating the provision in question like the relic it is, weighed the interests and reversed the Tennessee Supreme Court.[72] The Court held that the provision prohibited *status* rather than belief and held the free exercise clause's absolute prohibition of infringements on the "freedom to believe" inapposite.[73] In its reversal, however, the Court acknowledged the changes brought by time:

> Tennessee has failed to demonstrate that its views of the dangers of clergy participation in the political process have not lost whatever validity they may once have enjoyed. The essence of the rationale underlying the Tennessee restriction on ministers is that if elected to public office they will necessarily exercise their powers and influence to promote the interests of one sect or thwart the interests of another, thus pitting one against the others, contrary to the anti-establishment principle with its command of neutrality. . . . However widely that view may have been held in the 18th century by many, including enlightened statesmen of that day, the American experience provides no persuasive support for the fear that clergymen in public office will be less careful of anti-establishment interests or less faithful to their oaths of civil office than their unordained counterparts.[74]

III. Equal Protection

The Tennessee Supreme Court has recently considered three cases in which legislatively created special classifications were

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day labor in violation of that church's creed. In *Braunfeld* there was not only a wide and long-established practice associated with Sunday closings; there had also been recent nonjudicial reassessment of the secular needs for a uniform day for commercial interruption. To the contrary, there was nothing in *Sherbert* but the convenience of the employer in moving the employee to a work schedule that had the effect of making her work on her Sabbath.

72. McDaniel v. Paty, 435 U.S. 618 (1978).

73. *Id.* at 627.

74. *Id.* at 628-29 (citations and footnotes omitted).

75. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV.

challenged as being in violation of either the equal protection clause of the fourteenth amendment of the United States Constitution[75] or of article XI, section 8, of the Tennessee Constitution.[76] All of the classifications were upheld as having a reasonable basis within the legislature's wide scope of discretion to promote legitimate state objectives.[77]

Norman v. Tennessee Board of Claims[78] was a challenge to a statute that permits only military personnel and their dependents to appeal decisions of the state Board of Claims;[79] others cannot appeal from the Board of Claims. The court held that there were reasonable purposes for this classification. First, the training, status, and civil services rendered by state national guardsmen are important to the state.[80] Second, all of the appellate procedures provided by the legislature contain exceptions and there is no requirement of uniformity for all citizens.[81] In at least two previous decisions the court had sustained this nonuniform appeals

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76. The Legislature shall have no power to suspend any general law for the benefit of any particular individual, nor to pass any law for the benefit of individuals inconsistent with the general laws of the land; nor to pass any law granting to any individual or individuals, rights, privileges, [immunities], or exemptions other than such as may be, by the same law extended to any member of the community, who may be able to bring himself within the provisions of such law. No corporation shall be created or its powers increased or diminished by special laws but the General Assembly shall provide by general laws for the organization of all corporations, hereafter created, which laws may, at any time, be altered or repealed and no such alteration or repeal shall interfere with or divest rights which have become vested.

TENN. CONST. art. XI, § 8.

77. A fourth case, State v. Bates, 553 S.W.2d 746 (Tenn. 1977), involved a judicial explanation or clarification that a school teacher is not prohibited from serving as a member of a county quarterly court while serving as a public school teacher. The prohibition of TENN. CODE ANN. § 49-217 (1977) is inapplicable to such a situation because the court of which the teacher was a member did not set his contract to teach.

78. 533 S.W.2d 719 (Tenn. 1975).

79. TENN. CODE ANN. § 7-147(4) (1973) is a part of the state's Military Code of 1970.

80. 533 S.W.2d at 723. In this connection the court noted that guardsmen are afforded certain immunities from jury duty and service of process not granted to citizens in general.

81. *E.g.*, TENN. CODE ANN. § 16-408 (1973) provides review of many civil cases in the court of appeals while leaving other cases to be processed on direct appeal to the supreme court.

structure created by the legislature against attacks on the grounds of arbitrariness or unreasonableness.[82]

The second holding in *Norman* was equally important and perhaps more significant as a reminder of the necessity for orderly conduct of state governmental affairs. The constitutional issue had been raised on appeal by the Board itself and not by the claimant. This procedure, the court said, was improper; absent any direct impact on the officials individually, the ministerial officials of a state agency have no standing to challenge the statutes under which their agency operates. This result is consistent with previous decisions of the Tennessee Supreme Court and other American courts.[83]

Two familiar patterns of governmental regulation appear in *Fleet Transport Co. v. Tennessee Public Service Commission*[84] and *City of Memphis v. International Brotherhood of Electrical Workers Union.*[85] *Fleet* concerned the application of a "grandfather clause" to operators already in business when a new regulatory scheme came into effect. *City of Memphis* dealt with a requirement that public employees reside within certain geographic boundaries, in this case within the limits of Shelby County.

A grandfather clause in new regulatory schemes, such as the clause in *Fleet,* may be based on the fairness of not forcing an entity already operating to justify its existence in terms of "public convenience and necessity." The rights of preexisting operators have vested, insofar as the need to obtain a certificate to operate is concerned. It would not, however, be immune from the new agency's rules. This rationale appeared in federal decisions approving a national scheme in 1935 similar to that enacted in Tennessee in 1975.[86]

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82. *See* Kentucky-Tennessee Light & Power Co. v. Dunlap, 181 Tenn. 105, 178 S.W.2d 636 (1944); Chattanooga v. Keith, 115 Tenn. 588, 94 S.W. 62 (1906).

83. *See* Barings v. Dabney, 86 U.S. 1 (1873); State v. Pooler, 105 Me. 224, 74 A. 119 (1909); Bricker v. Sims, 195 Tenn. 361, 259 S.W.2d 661 (1953); Porter v. City of Paris, 184 Tenn. 555, 201 S.W.2d 688 (1947); East Tenn. & W.N.C. Motor Transp. Co. v. Carden, 164 Tenn. 416, 50 S.W.2d 230 (1932); Beaver v. Hall, 142 Tenn. 416, 217 S.W. 649 (1920). *But see* Board of Educ. v. Allen, 392 U.S. 236 (1968).

84. 545 S.W.2d 4 (Tenn. 1976).

85. 545 S.W.2d 98 (Tenn. 1976).

86. *See* Crescent Express Lines, Inc. v. United States, 49 F. Supp. 92

Residence requirements for public employees require a justification comparable to the justification for regulation of businesses like Fleet. Finding the residence requirement in *City of Memphis* valid under both the fourteenth amendment and article XI, section 8, the court noted that the provision had several advantages for the city of Memphis. For example, living within the confines of Shelby County would place employees of Memphis closer to their jobs in emergencies. County taxes and other revenues are shared by city and county governments, and the city recaps general economic benefits from local expenditures by all county residents. Moreover, greater pride in the place of one's employment and a shared identity can be expected among those living within the county in which the city is located than among employees living beyond the county limits. This appears to be the first time a court in Tennessee has faced this particular kind of case, but there is ample authority elsewhere in harmony with the court's decision.[87]

It seems fair to say that few things are better settled in Tennessee constitutional law than that the legislature has a very wide latitude in choosing the specific ways and means of conducting the broad powers of state government, including devising classes to which certain benefits or detriments attach. As long as such classifications are made on a reasonable basis[88] or the classifications are natural and not arbitrary,[89] they are constitutional. "[I]f any state of facts can reasonably be conceived to justify" the classification, the Supreme Court has said it is acceptable.[90]

(S.D.N.Y.), *aff'd*, 320 U.S. 401 (1943). *See also* Alton R.R. Co. v. United States, 315 U.S. 15 (1942). There is an interesting subsidiary issue in *Fleet* because the original scheme of motor carriage regulation of petroleum and other hazardous products actually began in 1971, and the statute here in question was enacted in 1975. Both trial and reviewing courts had little difficulty in construing the 1975 act as a "belated" grandfather exemption for carriers operating the day before the effective date of the 1971 legislation.

87. *E.g.*, McCarthy v. Philadelphia Civil Serv. Comm'n, 424 U.S. 645 (1976). *See also* Pittsburgh Fed'n of Teachers v. Aaron, 417 F. Supp. 94 (W.D. Pa. 1976); Loiselle v. East Providence, 359 A.2d 345 (R.I. 1976). *But see* Fraternal Order of Police Youngstown v. Hunter, 49 Ohio App. 2d 185, 360 N.E.2d 708 (1975). These cases presented contentions that residence requirements for public employees were violations of one's federally protected freedom to travel.

88. Estrin v. Moss, 221 Tenn. 657, 430 S.W.2d 345 (1968).

89. Dibrell v. Morris' Heirs, 89 Tenn. 497, 15 S.W. 87 (1891).

90. Dandridge v. Williams, 397 U.S. 471, 485 (1970) (quoted with favor in

Although there may be few members of a class, if all will be subject to the same circumstances, the law is "general" and not "partial" under article XI, section 8 of the Tennessee Constitution.[91] Indeed, the court has rarely invalidated any legislation as creating an invidious classification.[92]

IV. Due Process

A. *Mechanics' Liens*

"Mechanics' lien statutes in favor of subcontractors and suppliers have been in force in Tennessee since at least 1845," the Tennessee Supreme Court noted in the recent case of *Silverman v. Gosset*.[93] Thus, the court called attention to the continuing commercial importance of this device by which the interests of those in the building and building-supply business are given tangible but limited security in the property of another.[94] This

City of Memphis v. International Brotherhood of Electrical Workers, 545 S.W.2d 98, 101 (Tenn. 1976)).

91. Parks v. Parks, 59 Tenn. 633 (1874); *cf.* Darnell v. Shapard, 156 Tenn. 544, 3 S.W.2d 661 (1928) (dog licensing statute in effect in only four counties was valid because the legislature reasonably classified the counties to which it applied); Budd v. State, 22 Tenn. 482 (1842) (embezzlement statute that applied only to a particular bank was partial and invalid because it did not apply to persons in like situations in other banks).

92. One such occurrence is the case of Shelton v. Olgiati, an unreported decision filed at Knoxville on November 16, 1954, in which the court reviewed a private act applicable to Chattanooga providing a special method of review of a local board and found it to be in contravention of a general statute that provided a different method of review for public employees under civil service. The court distinguished that decision from the situation in Norman v. Tennessee Bd. of Claims, 533 S.W.2d 719 (Tenn. 1975), in that the latter case did cover the whole class of state national guardsmen. The vice of the Chattanooga legislation apparently was that it did not cover all local public employees and gave no reason for treating some employees in this special way. *See also* Dilworth v. Tennessee, 204 Tenn. 522, 322 S.W.2d 219 (1959); Logan's Supermarkets v. Atkins, 202 Tenn. 438, 304 S.W.2d 628 (1957); Buntin v. Crowder, 173 Tenn. 388, 118 S.W.2d 221 (1938); State v. Kerby, 136 Tenn. 386 (1916).

93. 553 S.W.2d 581, 582 (Tenn. 1977).

94. Every journeyman or other person contracted with or employed to work on the buildings, fixtures, machinery, or improvements, or to furnish materials for the same, whether such journeyman, furnisher, or other person was employed or contracted with by the person who originally contracted with the owner of the premises, or by an immediate or remote subcontractor acting under contract with the orig-

case represents the first time a due process challenge to these statutes has been mounted in the Tennessee Supreme Court since the comparably "tight" financial times at the end of the last century.[95] The proceeding was brought to enforce suppliers' and subcontractors' liens. The landowner challenged the liens with the contention that due process was violated by permitting the recordation and initial attachment without bond, notice, or a hearing.

The court concluded that the statutes in question do not deprive the landowner of "sufficiently significant" property rights

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inal contractor, or any subcontractor, shall have this lien for his work or material; provided that, within ninety (90) days after the demolition and/or building or improvement is completed, or the contract of such laborer, mechanic, furnisher, or other person shall expire, or he be discharged, he shall notify, in writing, the owner of the property on which the building is being erected or improvement is being made, or his agent or attorney, if he reside out of the county, that said lien is claimed; and said lien shall continue for the period of ninety (90) days from the date of said notice in favor of such subcontractor, journeyman, furnisher, mechanic, or laborer, and until the final termination of any suit for enforcement brought within that period.

TENN. CODE ANN. § 64-1115 (1976).

Liens under §§ 64-1101 to 1142 shall be enforced by attachment only, in the following manner:

(1) Where the plaintiff or complainant lienor has a contract with the owner, the lien shall be enforced by attachment upon petition at law or bill in equity, filed under oath, setting forth the facts, describing the property, and making the necessary parties defendant; or before a justice of the peace, where the amount of the claim is within his jurisdiction, the affidavit for the writ to contain such recitals.

(2) Where there is no such contract, by attachment in court of law or equity in like manner; or before a justice of the peace, having jurisdiction, based upon like affidavit, the writ of attachment to be accompanied by a warrant for the sum claimed, to be served upon the owner and may within the discretion of the plaintiff or complainant be served upon the contractor, or subcontractor in any degree, with whom the complainant is in contractual relation, but the owner shall have the right to make said contractor or subcontractor a defendant by cross-action or cross-bill as is otherwise provided by law.

(3) The clerk of the court in which the suit is brought may issue the attachment writ, no fiat of a judge or chancellor being requisite.

Id. § 64-1126.

95. *See* Rushton v. Perry Lumber Co., 104 Tenn. 538, 58 S.W. 268 (1900); Green v. Williams, 92 Tenn. 220, 21 S.W. 520 (1893); Cole Mfg. Co. v. Falls, 90 Tenn. 466, 16 S.W. 1045 (1891).

without notice or hearing so as to amount to a violation of federal or state due process provisions. The court cited five factors supporting this conclusion. First, the periods within which the lien claims must be recorded and suit filed are relatively short.[96] Second, the landowner can require an adequate performance bond from his general contractor to protect against mechanics' liens.[97] Third, the landowner may force a lien claimant to commence the action or relinquish the claim within sixty days.[98] Fourth, the landowner may free his land at once by executing an indemnity bond himself.[99] Finally, there are express statutory limits on the amounts of claims for which liens can be sustained.[100]

The landowning developer in *Silverman* may well have been encouraged to question these mechanics' lien statutes by the relatively recent success of constitutional challenges to the garnishment, replevin, and personalty sequestration procedures of several states in *Mitchell v. W.T. Grant Co.*,[101] *Fuentes v. Shevin*,[102] and *Sniadach v. Family Finance Corp.*[103] There is, as the *Silverman* court emphasized, a significant contrast between seizure, impoundment, and repossession of wages and chattels on the one hand and the mere act of filing a claim to attach real property involved in a mechanics' lien that leaves the owner undisturbed in possession, enjoyment, and income. Even such a "limited intrusion" on the property rights of a landowner may, of course, have significant financial implications should the landowner want to sell the land while substantial encumbrances are outstanding. The court acknowledged this difficulty and prudently left open such a case for future disposition. The facts in this case simply did not warrant the finding of any such difficulty since the land in question with improvements had a value in

96. The Tennessee statute requires the landowner to be notified within 90 days after completion of the work or contract of the fact that the lien has been filed; 90 days thereafter the lienor must bring suit to perfect the lien. TENN. CODE ANN. § 64-1115 (1976). This term was contrasted with terms of six months and two years in other states. 553 S.W.2d at 584.

97. TENN. CODE ANN. § 64-1138 (1976).

98. *Id.* § 64-1130.

99. *Id.* § 64-1144.

100. *Id.* § 64-1141.

101. 416 U.S. 600 (1974).

102. 407 U.S. 67 (1972).

103. 395 U.S. 337 (1969).

excess of $1,000,000 whereas the lien claims amounted to about $33,000.

The court, supported by ample persuasive authority from sister jurisdictions,[104] concluded that the two sets of interests were well balanced in the Tennessee statute.

> The public policy of the state represented in the lien statutes is a strong one, and ought not to be impaired or invalidated because of the relatively slight inconvenience which a landowner may suffer by reason of having a lien claim filed.
>
> . . . .
>
> We are of the opinion that the procedures for perfecting and enforcing mechanics' liens in this state strike a proper balance between the interests of those engaged in the building and construction trades on the one hand and landowners on the other.[105]

B. Tenured Professors' Right to Hearing Prior to Dismissal

It is elementary that the concept of due process of law means at a minimum that if vested individual rights are divested or property taken or liberties deprived, an individual must be accorded notice and an opportunity to be heard.[106] If state law specifically creates the right to a hearing, then failure to provide that hearing clearly violates due process requirements. In *State ex rel. Chapdelaine v. Torrence*[107] a professor at Tennessee State University was discharged without the notification of charges and hear-

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104. The majority of courts that have considered the question have sustained mechanics' lien statutes. *E.g., In re* Northwest Homes of Chehalis, Inc., 526 F.2d 505 (9th Cir. 1975), *cert. denied*, 425 U.S. 907 (1976); Spielman-Fond, Inc. v. Hanson's, Inc., 379 F. Supp. 997 (D. Ariz. 1973), *aff'd*, 417 U.S. 901 (1974); Connally Dev., Inc. v. Superior Court, 17 Cal. 3d 803, 553 P.2d 637, 132 Cal. Rptr. 477 (1976); Tucker Door & Trim Corp. v. Fifteenth St. Co., 235 Ga. 727, 221 S.E.2d 423 (1975); Carl A. Morse, Inc. v. Rentar Indus. Dev. Corp., 56 App. Div. 2d 30, 391 N.Y.S.2d 415 (1977). *Contra*, Roundhouse Constr. Corp. v. Telesco Masons Supplies Co., 168 Conn. 371, 362 A.2d 778 (1976); Barry Properties, Inc. v. Fick Bros. Roofing Co., 277 Md. 15, 353 A.2d 222 (1976). The Maryland case is distinguishable from *Silverman* since there the landowner was prevented from marketing his land because of the lien claims. In the Connecticut case the statute provided for a four-year period in which the lien claimant could bring his suit, contrasted with 90 days in the Tennessee statute.

105. 553 S.W.2d at 585-86.

106. *See* Fuentes v. Shevin, 407 U.S. 67, 80 (1972). *But see* Board of Regents v. Roth, 408 U.S. 564 (1972).

107. 532 S.W.2d 542 (Tenn. 1975).

ings provided for tenured teachers under a Tennessee statute.[108] The troublesome issue was whether the professor was indeed tenured within the meaning of the statute, and the court concluded that he was.[109] The court determined that the dismissal without notice of charges or a hearing was an actionable violation of the professor's right to due process of law. In lieu of reinstatement,[110] payment of one year's salary was approved as a just and fair remedy.

C. *Right to Hearing for University Students' Academic Status Change*

A novel claim under the due process clause was rejected in *Horne v. Cox.*[111] In this case a student attending Memphis State University School of Law sought to have a grade reviewed by a faculty committee as a contested case under the Administrative Procedure Act[112] with all the procedural safeguards such a hearing would entail. The chancery court dismissed the petition, and the Tennessee Supreme Court affirmed. Petitioner's difficulty, unlike the tenured professor in *Torrence,*[113] was twofold. First, he enjoyed no special status or set of rights created by statute or otherwise concerning his academic performance. The court stated that "[t]here are no constitutional or statutory provisions granting any legal rights or privileges to students in the educational institutions of this state with respect to grades for academic performance."[114] Second, petitioner's reading of the Administrative Pro-

108. TENN. CODE ANN. § 49-1421 (1968), *repealed by* 1976 Tenn. Pub. Act ch. 389, § 1 (current version at TENN. CODE ANN. §§ 49-3255 to 3258 (1977)).

109. 532 S.W.2d at 547.

110. *Id.* at 550. The court stated that the measure of damages for the breach of an employment contract is what would have come to the plaintiff had the contract not been breached, less what he earned or might have earned in some other employment in the exercise of reasonable diligence. Plaintiff, after his discharge, wrote science fiction, learned surveying, worked in his family's business, and attempted various publishing endeavors. Although the return from these projects was minimal, the court felt that the projects with which plaintiff elected to proceed might in the long run prove more valuable than his position with the university and that ample material evidence supports the conclusion than an award of one year's salary was fair and just. *Id.*

111. 551 S.W.2d 690 (Tenn. 1977).

112. TENN. CODE ANN. §§ 4-507 to 527 (1968).

113. *See* text accompanying notes 107-10 *supra.*

114. 551 S.W.2d at 691.

cedure Act to include within the term "contested case" any type of proceeding involving state administrative actions would result in according a trial type hearing for "the most minor, informal agency action."[115] The court sharply distinguished the type of hearing petitioner sought from disciplinary proceedings by state colleges and universities, in which more formalties, such as a hearing, would be required.[116]

D. Tax Sales and Motion for New Trial

Two cases decided by the court in 1976 illustrate the ramifications of careless professional or official conduct. Both cases involved neglect or delay in the processing of civil suits in which the appropriate period of limitation had apparently cut off any further judicial review. In both situations the court was able to find one more opportunity still open to the losing party. In *Marlowe v. Kingdom Hall of Jehovah's Witnesses*[117] the court declined to rule that the notice by publication device by which tax liens on land are enforced violated the landowner's due process rights. The court did give relief, however, by nullifying the tax deed because it appeared there had been no judicial confirmation.[118]

Similarly, in *Jerkins v. McKinney*,[119] the court refused to find that ruling on a motion for a new trial without providing an oral hearing on the motion violated due process. While acknowledging that it is "prevailing and better practice" to allow oral argument,[120] the court maintained that due process was not violated by the absence of such argument. In *Jerkins* the debtor resisting enforcement of a creditor's judgment did not receive notice of the order overruling his motion for a new trial until the time for taking an appeal had run. The court indicated that this would be an appropriate case for application of Tennessee Rule of Civil

115. *Id.*

116. *See* Goss v. Lopez, 419 U.S. 565 (1976). *See also* Mahavongsanan v. Hall, 529 F.2d 448 (5th Cir. 1976).

117. 541 S.W.2d 121 (Tenn. 1976).

118. The court noted that "[t]he entire procedure for tax collection and enforcement in Franklin County . . . ranges from faulty and irregular to downright sloppy." *Id.* at 125.

119. 533 S.W.2d 275 (Tenn. 1976).

120. *Id.* at 279.

Procedure 60.02[121] but not for an "independent action" thereunder where "the only deficiencies were procedural . . . correctible in the main suit, or reviewable by appeal or writ of error" and no attack on the merits is made.[122] Accordingly, since the debtor elected not to pursue a timely appeal, the only remedy available was by writ of error.

E. Judicial Review of Administrative Rate-Making

The charge that administratively determined utility rates are confiscatory raises the question of the appropriate standard of judicial review. The United States Supreme Court fashioned in *Ohio Valley Water Co. v. Ben Avon Borough*[123] the so-called "independent judgment" rule.[124] This rule was reviewed and re-

121. TENN. R. CIV. P. 60.02 provides:

On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order or proceeding for the following reasons: (1) mistake, inadvertence, surprise or excusable neglect; (2) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (3) the judgment is void; (4) the judgment has been satisfied, released or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that a judgment should have prospective application; or (5) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1) and (2) not more than one year after the judgment, order or proceeding was entered or taken. A motion under this Rule 60.02 does not affect the finality of a judgment or suspend its operation, but the court may enter an order suspending the operation of the judgment upon such terms as to bond and notice as to it shall seem proper pending the hearing of such motion. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order or proceeding, or to set aside a judgment for fraud upon the court. Writs of error coram nobis, bills of review and bills in the nature of a bill of review are abolished, and the procedure for obtaining relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

122. 533 S.W.2d at 282.

123. 253 U.S. 287 (1920).

124. In all such cases, if the owner claims confiscation of his property will result, the state must provide a fair opportunity for submitting that issue to a judicial tribunal for determination upon its own independent judgment as to both law and facts; otherwise the order is

jected by the Tennessee court in *Public Service Commission v. General Telephone Co. of the Southeast.*[125] In the trial of this recent case the court reviewed a decision of the Public Service Commission to fix rates to allow the utility company a twelve percent return on its common equity. In reversing and remanding the issue to the Commission for a redetermination of a reasonable rate, the court concluded that the independent judgment rule is no longer followed by the United States Supreme Court[126] and that the substantial evidence test satisfies requirements of due process.[127] In abandoning the independent judgment rule, the court acknowledged that a division of authority exists among the states.[128] The court was satisfied that the state's new Administrative Procedure Act provides an adequate set of standards to enable the Tennessee courts to review Public Service Commission decisions.[129] It noted that there appeared to be three standards for review in such cases—common-law certiorari, review provided by

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void because [it is] in conflict with the due process clause [of the] Fourteenth Amendment.

Id. at 289.

125. 555 S.W.2d 395 (Tenn. 1977).

126. *Id.* at 402. To support this conclusion, the Tennessee Supreme Court quoted from Railroad Comm'n of Tex. v. Rowan & Nichols Oil Co., 310 U.S. 573, 580 (1940). 555 S.W.2d at 400-01.

127. "In such cases the judicial inquiry into the facts goes no further than to ascertain whether there is evidence to support the findings, and the question of the weight of the evidence . . . lies with the . . . agency . . . ." St. Joseph Stock Yards Co. v. United States, 298 U.S. 38, 51 (1936); *see* Permian Basin Area Rate Cases, 390 U.S. 747 (1968); Railroad Comm'n of Tex. v. Rowan & Nichols Oil Co., 310 U.S. 573 (1940).

128. The following cases put their respective states in support of the rule: General Tel. Co. of Southeast v. Alabama Pub. Serv. Comm'n, 335 So. 2d 151 (Ala. 1976); Bixby v. Pierno, 4 Cal. 3d 130, 481 P.2d 242, 93 Cal. Rptr. 234 (1971); Opinion of the Justices, 328 Mass. 679, 106 N.E.2d 259 (1952). The following decisions reject the rule: Keiner v. City of Anchorage, 378 P.2d 406 (Alaska 1963); Frank v. Assessors of Skowhegar, 329 A.2d 167 (Me. 1974); Michigan Consol. Gas Co. v. Michigan Pub. Serv. Comm'n, 389 Mich. 624, 209 N.W.2d 210 (1973); New York Tel. Co. v. Public Serv. Comm'n, 36 App. Div. 2d 261, 320 N.Y.S.2d 280 (1971).

129. TENN. CODE ANN. § 4-523(h) (Supp. 1977) provides that a court may reverse or modify the commission if the rights of the petitioner have been prejudiced because the decision is "(1) in violation of constitutional or statutory provisions; (2) in excess of the statutory authority of the agency; (3) made upon unlawful procedure; (4) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion."

statute,[130] and the independent judgment rule. The court, in rejecting the independent judgment rule in favor of the statutory standard, made it reasonably clear that as far as a constitutional challenge is concerned the statutory standard is adequate.[131]

Most persuasive of the reasons advanced for the choice to abandon the free-wheeling independent judgment rule are the policy arguments given by a New York court in a case that the Tennessee court quoted with approval:

> "There should be an end to legal process. The courts should not be overburdened with parallel determination of disputes already decided by agencies of tested proficiency in the administrative field. The time consumed, the expense involved, the cumbersome procedures, and the loss of public confidence in administrative agencies all militate against the maintenance of a dual system of determining issues in rate cases."[132]

The decision in *General Telephone* represents a significant development in the public law of Tennessee, perhaps marking the coming of age of a reciprocal relationship between the courts and the legislatively created administrative agencies that are responsible for so many of the decisions of modern government. It is to be hoped that future developments will demonstrate the soundness of the court's choice to accord administrative agency decisions more finality than they have enjoyed in the past.

V. Impairment of Contract

The role of the contract clause has fluctuated since the founding fathers incorporated it into the Constitution. It is true that while the nineteenth century saw numerous instances of judicial application of the contract clause to invalidate state and federal legislation, the twentieth century has seen few.[133] Indeed,

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130. *See id.* § 4-523.

131. There would seem to be little vitality left in any residual common-law petition to review such rate-making determination, although the court did not explicitly address the point.

132. 555 S.W.2d at 402 (quoting New York Tel. Co. v. Public Serv. Comm'n, 36 App. Div. 2d 261, 267-68, 320 N.Y.S.2d 280, 286 (1971)).

133. There was a significant Tennessee impairment of contract case following the Civil War. Furman v. Nichol, 75 U.S. 44 (1868), held that Tennessee could not withdraw its obligation from notes issued by the Bank of Tennessee during or before the war and in circulation at the time of repeal of the guaranty for the notes.

since the 1930's when there were several cases striking down statutes,[134] including the farm mortgage moratorium statutes,[135] the Supreme Court has only *upheld* legislation challenged under the contract clause.

El Paso v. Simmons,[136] decided in 1965, was the last time since 1941 that the United States Supreme Court passed on the validity of legislation under the contract clause, and in that case the legislation was sustained. Dissenting in *Simmons*, Justice Black lamented that the Court had balanced away the plain guarantee of the impairment of contract clause[137] and that the Court had assumed that a prior case[138] had "practically read the Contract Clause out of the Constitution."[139] The result of the majority opinion was to extinguish the redemption rights of those who purchase public lands and default on their payments. The Court concluded that the state's interest in the integrity of the market, title stability, and the avoidance of entangling litigation outweighed the burden imposed on purchasers and their assigns.

With appropriate deference to Justice Black, a broader reading of the modern contract impairment cases suggests that the contract clause is not banished but rather stretched between different poles—namely, a greater judicial deference to the police power and an expanded notion of due process for uncompensated public takings. Seen in that light, Professor Corwin's characterization of the contract clause as a "fifth wheel to the constitutional coach" may be an accurate assessment of its current position.[140]

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134. Wood v. Lovett, 313 U.S. 362 (1941) (holding that land bought at a tax sale, under a statute curing irregularities that the owner might otherwise have raised, was immune from a subsequent repeal of the statute); Indiana *ex rel.* Anderson v. Brand, 303 U.S. 95 (1938) (striking down an Indiana statute repealing teacher tenure rights).

135. Treigle v. Acme Homestead Ass'n, 297 U.S. 189 (1935); *see* W.B. Worthen Co. v. Kavanaugh, 295 U.S. 56 (1935).

136. 379 U.S. 497 (1965).

137. "No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . . ." U.S. CONST. art. I, § 10, cl. 2.

138. Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398 (1934).

139. 379 U.S. at 523 (Black, J., dissenting).

140. E. CORWIN, THE CONSTITUTION OF THE UNITED STATES 362 (rev. ed. 1952). Another commentator has noted an "almost total demise of the contract impairment limitation as a separate principle of constitutional law." Kirby, *Constitutional Law—1961 Tennessee Survey*, 14 VAND. L. REV. 1171, 1183 (1961).

In a recent case the Tennessee court infused the contract clause with new vitality and restored it to an effective, functional role by declaring legislative changes in the state retirement system invalid. In *Miles v. Tennessee Consolidated Retirement System*[141] seven state judges suing the Tennessee Consolidated Retirement System claimed, *inter alia*, that the state had impaired their retirement contracts by legislatively reducing in 1975[142] the retirement benefit base previously established in 1970[143] and incorporated into 1972 legislation.[144] Two of plaintiff-judges had already left office, one by retirement and one by resignation. Five others were elected to their present positions in 1974 and remained in their judicial capacity at the time of this suit. On the claims of all plaintiffs the court sustained the chancellor's finding that a contract existed between the judges and the state; the contract was completed upon their retirement or resignation. The contract included the retirement benefits established by the 1970 legislation and incorporated into the 1972 legislation. These benefits were reduced by the 1975 legislation; and this reduction, the court held, constituted a violation of both the Tennessee[145] and United States Constitutions.[146] In regard to the claim of the judges first elected in 1974, the court held that the 1975 legislation violated the impairment of contract clause of both state and federal constitutions and article VI, section 7 of the Tennessee Constitution because this benefit reduction was found to be a diminution of compensation.[147]

The legislature in enacting the 1975 act evidently thought that it was not dealing with contractual rights. The court had little difficulty, however, in construing the relationship between plaintiff-judges and the state to be governed by a contract. Part

141. 548 S.W.2d 299 (Tenn. 1977).

142. *See* TENN. CODE ANN. §§ 8-3905, -3909, -3935, -3951 (1977).

143. The retirement benefit base was defined in the statute as "a sum equal to the annual salary the retired judge would receive if he continued in the office from which he retired." TENN. CODE ANN. § 17-313(e) (1972).

144. TENN. CODE ANN. § 8-3935(d) (Cum. Supp. 1977).

145. "That no retrospective law, or law impairing the obligation of contracts, shall be made." TENN. CONST. art. I, § 20.

146. *See* note 137 *supra*.

147. "The Judges of the Supreme or Inferior Courts, shall, at stated times, receive a compensation for their services, to be ascertained by law, which shall not be increased or diminished during the time for which they are elected."

of the consideration for that contract was found to be the promise of certain retirement benefits. "State statutes may contain provisions which, when accepted as a basis for actions by individuals, become contracts between them and the State, within the protection of Article 1, Section 10 of the United States Constitution."[148]

Citing the United States Supreme Court decision in *Home Building & Loan v. Blaisdell*,[149] the *Miles* court held that barring a showing of a vital interest of the state, these public employee benefits are protected by the contract clause of both federal and state constitutions. Testimony was introduced in the instant case to the effect that through the 1975 legislation the General Assembly had sought to "alleviate the funding problems of the pension system."[150] Mere economics, the court implied, did not rise to the level of a *Blaisdell* type of "vital interest of the state."[151] The state must find alternative ways of dealing with its financial woes. *Miles* clearly establishes a strong new standard for the security of public employment in Tennessee.

VI. Regulation of Businesses and Professions

In the exercise of its police power Tennessee may legitimately regulate the practice of professions, vocations, and businesses "affecting the public interest and having a direct relationship to public health and welfare."[152] Under so broad a power it should not be surprising to find Tennessee courts sustaining a growing list of occupations that the legislature has brought within the reach of state regulation. One recent addition to the list is the practice of electrolysis, hair removal by electrical device, which was at issue in *Kree Institute of Electrolysis v. State Board of Electrolysis Examiners*.[153] The court focused on land surveying in

148. 548 S.W.2d at 304. The court cited Indiana *ex rel.* Anderson v. Brand, 303 U.S. 95 (1938), in support of this proposition. Additional parallel authority was found in Tennessee private pension cases. Collins v. City of Knoxville, 180 Tenn. 483, 176 S.W.2d 808 (1944); State *ex rel.* Thompson v. City of Memphis, 147 Tenn. 658, 251 S.W. 46 (1922); *see* Weesner v. Electric Power Bd., 48 Tenn. App. 178, 344 S.W.2d 766 (1961).

149. 290 U.S. 398 (1934), *cited in* 548 S.W.2d 299, 305.

150. 548 S.W.2d at 305.

151. *Id.*

152. Tennessee Bd. of Dispensing Opticians v. Eyear Corp., 218 Tenn. 60, 75, 400 S.W.2d 734, 741 (1966).

153. 549 S.W.2d 158 (1977). The statutes in question, regulating the prac-

Chapdelaine v. Tennessee Board of Examiners for Land Surveyors.[154] In both cases plaintiffs challenged licensing requirements by seeking to establish that the practices were so common and required so little skill that they fell beyond the scope of the state's power to regulate in the public interest. However, the court found plaintiff's proof insufficient. Indeed, in *Kree Institute* plaintiff's proof tended to show there was some skill involved in the practice of electrolysis.[155]

In both cases plaintiffs relied on *Livesay v. Tennessee Board of Watchmaking*[156] in which the court characterized watchmaking as sufficiently ordinary so as not to affect the general welfare or public morals. In *Kree Institute* the court concluded that plaintiff's own proof distinguished this case from *Livesay* in that electrolysis does require skill and knowledge without which there would be a danger to persons being treated.[157] In *Chapdelaine* the court went further and cast a shadow on *Livesay* by citing a more recent decision, *Ford Motor Co. v. Pace.*[158] *Chapdelaine* emphasized the following language from that opinion: " 'Of course, the Legislature of the State cannot prohibit an ordinary business but it may, however, regulate the business to promote the health, safety, morals or general welfare of the public.' "[159] *Ford Motor Co.* involved the licensing of automobile dealers and salesmen. Drawing from this precedent the *Chapdelaine* court concluded that "if the regulation of automobile dealers and . . . salesmen

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tice of electrolysis, were TENN. CODE ANN. §§ 62-2401 to 2420 (1976).

154. 541 S.W.2d 786 (Tenn. 1976). The statutes in question, regulating surveyors, were TENN. CODE ANN. §§ 62-1801 to 1822 (1976).

155. Appellant's evidence showed that the process of electrolysis requires the insertion of a needle into the human skin, and the sending of an electrical charge through the needle so as to destroy the hair papilla, preventing further growth and loosening the hair itself for easy removal. . . . The operator is required to be skilled in the operation of the machine, and to have knowledge of certain human illnesses and allergies.

549 S.W.2d 158, 159 (Tenn. 1977).

156. 204 Tenn. 500, 322 S.W.2d 209 (1959).

157. *See* note 155 *supra*. The court noted also that statutes requiring licensure for barbers had been upheld in State *ex rel.* Melton v. Nolan, 161 Tenn. 293, 30 S.W.2d 601 (1930). 549 S.W.2d at 161 n.1.

158. 206 Tenn. 559, 335 S.W.2d 360 (1960).

159. 541 S.W.2d at 787 (quoting Ford Motor Co. v. Pace, 206 Tenn. 559, 564, 335 S.W.2d 360, 362 (1960)).

is within the police power of the state, then *a fortiori* activities affecting the establishment of land corners and boundaries" are also embraced within that power.[160]

These cases are instructive in two respects. First, *Chapdelaine* clearly corrected the imprecision and limited the authority of *Livesay*.[161] Second, together *Chapdelaine* and *Kree Institute* indicate that the limits of legitimate state licensing under the police power are somewhat like legislative classifications challenged under the equal protection clause;[162] that is, they are so broad as to defy prediction. Thus, there is hardly any occupation imaginable that does not serve to promote the health, safety, morals, or general welfare of the public and that therefore might be regulated. If no reason justifying the regulation is given by the legislature, the courts will likely find one. It seems inevitable that given the complexity and interdependency of modern life, the state will eventually regulate to some extent every occupation. Lamentable though it be, there no longer appears to be a private market ethic that is strong enough to protect consumers of goods or services in our society. Conceding that much, however, it remains to be seen how effectively licensing and public regulation will ensure greater competence and integrity in the marketplace.

VII. Reprieves, Pardons, and Commutations

The Tennessee Supreme Court recently addressed the controversial question of the constitutionality of the death penalty. *Collins v. Tennessee*[163] invalidated the death penalty imposed in two first degree murder convictions and declared unconstitutional the 1974 public act automatically fixing the penalty of death for that crime.[164] This result was required by three 1976

160. *Id.* at 788.

161. The opinion in *Livesay* did not explicitly acknowledge the earlier authority of Bowen v. Hannah, 167 Tenn. 451, 71 S.W.2d 762 (1934), in which it had been said that occupations having danger to public safety could be regulated or, if necessary for complete protection, prohibited.

162. *See* Part III *supra*.

163. 550 S.W.2d 643 (Tenn. 1977).

164. Tenn. Code Ann. §§ 39-2405 to 2406 (1975). "Every person convicted of murder in the first degree, or as accessory before the fact to such crime, shall suffer death by electrocution." *Id.* § 39-2405. "When a person is

decisions of the United States Supreme Court that interpreted the eighth and fourteenth amendments.[165] Setting aside the sentences left intact the convictions and had the effect of reviving that part of the sentencing statute that was not invalidated by the 1972 Supreme Court decision in *Furman v. Georgia*.[166] On remand for resentencing, therefore, appellants could be sentenced to life imprisonment or for some period over twenty years.[167]

In a separate opinion written by Justice Henry, the practical difficulties with these cases were addressed at some length. Justice Henry's principal objection was the great expense incurred in resentencing these individuals. The procedure would essentially require a retrial of the matters raised in the original convictions even though these matters were fairly determined apart from the issue of the death penalty. He suggested that the Tennessee Supreme Court should not remand the cases but should enter judgment and not give these individuals "a second opportunity to plead their causes to a jury."[168] In the alternative, it was suggested that *Collins* could properly be certified to the governor as a case appropriate for commutation of a death penalty to life imprisonment.[169]

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convicted of the crime of murder in the first degree, or as an accessory before the fact of such a crime, it shall be the duty of the jury convicting him in their verdict to fix his punishment at death as provided by law." *Id.* § 39-2406.

165. Williams v. Oklahoma, 428 U.S. 907 (1976); Roberts v. Louisiana, 428 U.S. 325 (1976); Woodson v. North Carolina, 428 U.S. 280 (1976).

166. 408 U.S. 238 (1972). After *Furman*, 1973 Tenn. Pub. Acts ch. 192 was passed, redefining first-degree murder. This act was declared unconstitutional on unrelated grounds in State v. Hailey, 505 S.W.2d 712 (Tenn. 1974). Then the statute involved in *Collins*, 1974 Tenn. Pub. Acts ch. 462 was passed, providing for a mandatory death penalty. This appears to be an effort to avoid the arbitrary imposition of the death penalty that was objectionable to the *Furman* Court. However, the 1976 Supreme Court cases, *see* note 165 *supra*, explicitly held a mandatory death penalty unconstitutional.

167. 550 S.W.2d at 646. In Hunter v. State, 496 S.W.2d 900, 904 (Tenn. 1972), the court said that the effect of *Furman* "is to render void the penalty of death as it exists under the statutes of Tennessee."

168. 550 S.W.2d at 648 (Henry, J., concurring in part & dissenting in part). This would be authorized, Justice Henry believed, under TENN. CODE ANN. § 40-3409 (1977) wherein the court is required in all criminal cases to "render such judgment on the record as the law demands."

169. "The governor may, likewise, commute the punishment from death to imprisonment for life, upon the certificate of the Supreme Court, entered on

Within seven days of the entry of the court's order of remand, the governor commuted the death sentences of defendants to life imprisonment. The state then filed a petition with the court for a rehearing seeking to modify or set aside the remand. On rehearing the court found the commutation effective as an executive modification of the sentence imposed in the trial courts. The court stated that "[t]he commutation was exercised within the constitutional power of the executive, and we cannot refuse to recognize its validity. Life imprisonment is a less severe penalty than death, and an accused has no basis for complaint."[170]

The only legal issue in the rehearing of *Collins* was whether the trial court's judgment had been vacated by the remand order of the state supreme court. The supreme court held in an opinion written by Justice Harbison that no final judgment had been entered on its original opinion of January 24, 1977. In this connection the court relied on *Bowen v. Tennessee*,[171] in which an order of commutation had been issued in the wake of *Furman* but before the release of the opinion and remand order of the Tennessee Supreme Court. The court maintained that the fact that the *Collins* court's opinion had been released before the commutation did not materially distinguish *Collins* from *Bowen*. "It is fundamental that no final judgment can be entered on an opinion of the Court until the time expires for the filing of a petition to rehear or until disposition of such a petition which was timely filed."[172]

A dissenting opinion, filed by Justice Brock in which Chief Justice Cooper concurred, sharply criticized the court's disposition on rehearing. The dissent argued that the court's decision effectively deprived appellants of sentencing by jury, which is a statutory right under Tennessee law.[173] There is considerable merit to this view since the jury in the original trial did not have a choice of sentence because the death penalty was automatic upon a jury verdict of guilty on the murder charge.[174] It is specula-

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the minutes of the court, that in their opinion, there were extenuating circumstances attending the case, and that the punishment ought to be commuted." TENN. CODE ANN. § 40-3506 (1975).

170. 550 S.W.2d at 650 (Tenn. 1977).

171. 488 S.W.2d 373 (Tenn. 1972).

172. 550 S.W.2d at 650.

173. *Id.* at 652 (Brock, J., dissenting). *See also* TENN. CODE ANN. § 39-2406 (1977).

174. *See also* Swain v. State, 290 Ala. 123, 274 So. 2d 305 (1973); Bowen

tive, the dissent pointed out, to conclude that a jury on rehearing for sentencing would necessarily choose life imprisonment rather than a twenty-year term. Since the automatic death penalty is invalid as a result of a United States Supreme Court decision, the jury should have been permitted to decide what alternative penalty was appropriate. By allowing the governor's order of commutation to operate as it did, the court effectively permitted circumvention of jury discretion, the only kind of sentencing contemplated under the statutes of Tennessee. The dissent noted that this situation amounted to a violation of the doctrine of separation of powers, which is fundamental to our system of government. "The Governor has no power to impose sentence; he has power only to *diminish* the punishment provided by a sentence imposed by the courts."[175]

The *Collins* case is difficult and the anguish of the court is obvious. The many practical considerations elaborated in Justice Henry's separate opinion cannot be ignored. Moreover, on rehearing the dissent's reasoning is compelling when it asks, "What kind of 'commutation' is it that fixes the punishment at *the maximum permitted by law . . .*?"[176] At one level of analysis there is a short answer to the dissent, and Justice Brock concedes there are important precedents against the position taken in his dissenting opinion. In *Rose v. Hodges*,[177] a case very comparable to *Collins*,[178] the United States Supreme Court held that the extent of the governor's power to commute a sentence was a matter of

v. State, 488 S.W.2d 373 (Tenn. 1972) (jury had choice and selected death penalty under law prior to 1973).

175. 550 S.W.2d at 655 (Brock, J., dissenting) (emphasis in original). The dissenting opinion distinguished the limited office of commutation as operating only on a final judgment, as opposed to a pardon that "lawfully obliterates both guilt and punishment, without depriving the defendant of any vested right." *Id.*

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

177. 423 U.S. 19 (1975).

178. Following the Supreme Court's decision in Furman v. Georgia, 408 U.S. 238 (1972), the Tennessee Court of Criminal Appeals in *Hodges* held that the death penalty statute was unconstitutonal and remanded the case to the trial court for resentencing. Hodges v. State, 491 S.W.2d 624 (Tenn. Crim. App. 1972). On rehearing the court took notice of the governor's intervening commutation of the prisoner's sentence from death to 99 years imprisonment and modified its original judgment in compliance with the executive order. *Id.* at 629. Thereafter the prisoner brought a habeas corpus proceeding in the federal district court. Hodges v. Rose, 570 F.2d 643 (6th Cir. 1978).

Tennessee law. The Court stated that "[i]f Tennessee chooses to allow the governor to reduce a death penalty to a term of years without resort to further judicial proceedings, the United States Constitution affords no impediment to that choice."[179]

There is a more fundamental policy question at stake in a case like *Collins* than merely whether convicted murderers shall be promptly and severely punished with as little further expense and trouble to the state as possible. The rapid changes in the constitutional law of the death penalty have of course been unsettling. Even so, the states should find a way to deal with these changes without at the same time doing violence to independent institutions like executive clemency and the separation of powers. The use of the executive prerogative in this kind of case to commute a sentence was in reality a device for retaining the next highest sentence on persons convicted of murder without encountering the risk that a jury might impose a lesser sentence. This device was made possible by a very technical reading of the function of finality of court judgments in the scheme of constitutional litigation.[180] It is questionable whether the long-term interest of the state in widespread citizen respect for the legal system is best served by a decision that seems more the product of expediency for the state than fundamental justice for the convicted.[181]

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179. 423 U.S. at 22. Two state courts have also followed the path taken by the *Collins* Court. North Carolina v. Hill, 279 N.C. 371, 183 S.E.2d 97 (1971); Whan v. Texas, 485 S.W.2d 275 (Tex. Crim. App. 1972).

180. Specifically, the final result in *Collins* turned on whether or not the first sentence of death had been vacated by the Supreme Court's opinion and remand order. If so, the commutation had nothing on which to operate. As a matter of federal constitutional law these sentences lost their vitality at an even earlier point in time—when the United States Supreme Court in Williams v. Oklahoma, 428 U.S. 907 (1976), Roberts v. Louisiana, 428 U.S. 325 (1976), and Woodson v. North Carolina, 428 U.S. 280 (1976), declared invalid sentences of death rendered under the automatic death penalty in state statutes similar to that of Tennessee. All that remained was for the Tennessee court formally to set them aside.

181. The judicial "invitation" for the involvement of gubernatorial discretion in the determination of appropriate sentences may create expectations of greater involvement in cases in which the competing considerations are not so clear. See, for example, the political furor recently generated over the proposed pardon of a convicted murderer. Daughtrey, *Humphreys Case Hurts Public Confidence, Lawmakers Say*, The Tennessean (Nashville), Sept. 28, 1977, at 15, col. 1.

VIII. USURY

Certainly one of the most significant cases decided by the court in recent years is *Cumberland Capital Corp. v. Patty*,[182] in which the Industrial Loan and Thrift Act[183] was held to violate article XI, section 7 of the Tennessee Constitution, which set a ten percent ceiling on interest rates charged in the state.[184] The Act permitted the deduction of interest at a rate not in excess of seven and one-half percent per annum in advance on the face amount of the loan for the full term. As applied to the transactions in question the monthly installment type payments aggregated to a rate of interest of about fifteen percent. The court's opinion, written by Justice Henry, is a comprehensive history of the constitutional, statutory, and decisional law of interest rates in Tennessee.

The result of the decision was twofold. First, it dried up money markets for Tennessee at a time when such conventional loans were commanding a higher rate than ten percent in surrounding states. Secondly, the decision undoubtedly prompted the constitutional convention to adopt a proposed article that left the question of a maximum rate of interest to be settled by statute.[185]

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182. 556 S.W.2d 516 (Tenn. 1977).

183. TENN. CODE ANN. §§ 45-2001 to 2017 (1977).

184. "The Legislature shall fix the rate of interest, and the rate so established shall be equal and uniform throughout the State; but the Legislature may provide for a conventional rate of interest, not to exceed ten per centum per annum."

185. That this was the way the court itself would prefer to have the matter determined as a matter of future policy was candidly revealed in the court's opinion. "We recognize the insistence that the insertion of a fixed limitation in a constitution . . . thus constitutionalizing with fixed rigidity, matters better left to statutory flexibility, violates recognized principles." 556 S.W.2d at 530.

Another important dimension of this landmark case was developed in the court's opinion on rehearing. There the court held that the original opinion would not have retroactive effect but would be operative in the instant case and all future transactions, i.e., those arising on and after August 23, 1977. *Id.* at 537. The court declined to adopt the "void ab initio" approach proferred by the debtors. Nor did the court adopt a completely prospective approach urged by the lenders. The better and more equitable rule, the court concluded, is that an act is not void but only voidable and has vitality until declared unconstitutional by a court. And this "presumption of validity" rule finds wide support in Tennessee as well as in other states. *See, e.g.*, Perkins v.

The proposed article was approved,[186] thus giving the legislature the power to raise interest rates. In the event of legislative inaction, the maximum interest rate remains ten percent.[187] No such legislation has yet been passed, but the referendum itself resulted in the reopening of Tennessee money markets.[188]

According to an opinion of the attorney general the proposal revived the statute that was declared unconstitutional by the court in *Cumberland Capital.*[189] A remaining question concerns the treatment of loan contracts made during the hiatus period. Treatment of that question arising in any subsequent cases must necessarily be undertaken in some future survey.

Eskridge, 278 Md. 619, 366 A.2d 21 (1976); Bricker v. Sims, 195 Tenn. 361, 259 S.W.2d 661 (1953). Moreover, the court was persuaded that the practical equities lay with a limited prospective application. "Applying this decision on a wholly retroactive basis would not only result in a financial disaster to the affected lending agencies that have loaned in the manner and at the rate authorized by the . . . Act, but would clog the courts for years to come with untold lawsuits." 556 S.W.2d at 542.

186. The Tennessean (Nashville), Mar. 7, 1978, at 1, col. 1.

187. TENN. CONST. art. XI, § 7 (amended Mar. 31, 1978). *See* The Tennessean (Nashville), Mar. 9, 1978, at 1, col. 1.

188. *See* The Tennessean (Nasvhille), Mar. 7, 1978, at 1, col. 1.

189. 89 OP. TENN. ATTY. GEN. 153 (1978).

SURVEY OF TENNESSEE PROPERTY LAW

TOXEY H. SEWELL*

I. INTRODUCTION . . . 160
II. ESTATES IN GENERAL . . . 161
A. *Tenancies by the Entirety* . . . 161
B. *Joint Tenancies* . . . 164
C. *Marital Estates—Adoption* . . . 165
D. *Leaseholds* . . . 169
III. CONVEYANCES . . . 171
A. *Statute of Frauds* . . . 171
B. *Tax Deeds* . . . 174
IV. FUTURE INTERESTS . . . 177
A. *Vesting of Class Gifts* . . . 177
B. *Presumption of Fertility* . . . 179
C. *Gifts Over upon "Dying Without Issue"* . . . 180
V. TRUSTS . . . 182
A. *Proof To Establish Oral Trusts* . . . 184
B. *Deviation and Cy Pres* . . . 184
C. *Life Tenant as Trustee* . . . 186
VI. EASEMENTS AND SERVITUDES . . . 187
A. *Restrictive Covenants* . . . 187
B. *Public Easements* . . . 189
C. *Easements by Necessity* . . . 191
VII. REGISTRATION OF INSTRUMENTS . . . 193
A. *Judgments* . . . 193
B. *Mechanics' and Materialmen's Liens* . . . 194
C. *Parties Affected by Recordation* . . . 200

I. INTRODUCTION

The legislature and appellate courts of Tennessee have been extraordinarily active of late in the property law field, necessitating a somewhat more extended treatment of the subject than would ordinarily be anticipated in a survey of this nature. Many of the developments that will subsequently be considered are very basic and far-reaching and can be expected to influence the study and practice of law in the state for years to come. This survey will

* B.S., J.D., University of Alabama; LL.M., George Washington University. Professor of Law, University of Tennessee.

accord special emphasis to areas of particular interest and to those subjects that have proved to be especially troublesome for one reason or another. Some selection is inevitable, as space limitations realistically preclude in-depth coverage of every development that might be considered. Some of these matters will be examined in sufficient detail and with sufficient exposition to provide a basis for full analysis and understanding. Others will be treated more casually.

II. ESTATES IN GENERAL

A. *Tenancies by the Entirety*

A "tenancy by the entirety," recognized under the English law, is a species of joint ownership by husband and wife in which each spouse was regarded as owning the "entire" interest in the property. The most important characteristic of property held in this manner was survivorship. That is, on the death of either partner, the surviving spouse retained his or her entire interest. Tenancies by the entirety are recognized in Tennessee today and can, in fact, be created by conveyances between the spouses.[1] Although the historical justification for doing so was dubious, the Tennessee courts in a series of decisions linked the tenancy by the entirety form of ownership with the *jus uxoris*, the common-law right of the husband to control the property of the wife during coverture.[2] In spite of the fact that married women have otherwise been emancipated since 1913,[3] property owned by the spouses as tenants by the entirety was held subject to the control of the husband, and he was not required to account to the wife for rents and profits.[4] In addition, any cause of action for damage to the property was vested exclusively in the husband.[5]

1. TENN. CODE ANN. §§ 64-109 to 110 (1976). Under the common law, a married person could not, by direct conveyance to himself and spouse, create a tenancy by the entirety. R. POWELL & P. ROHAN, POWELL ON REAL PROPERTY § 622 (abr. ed. 1968).

2. The *jus uxoris* gave the husband control over all property of the wife as an incident of the marital relationship. It was unrelated to her form of ownership and thus applied whether she owned absolutely, as a tenant by the entirety, or otherwise. H. BIGELOW, INTRODUCTION TO THE LAW OF REAL PROPERTY 30, 68 (3d ed. 1945).

3. TENN. CODE ANN. § 36-601 (1977).

4. *In re* Guardianship of Plowman, 217 Tenn. 487, 398 S.W.2d 721 (1966).

5. Mitchell v. Sinclair Ref. Co., 221 Tenn. 516, 428 S.W.2d 299 (1968).

In *Robinson v. Trousdale County*[6] the status of this form of ownership was again evaluated by the Tennessee Supreme Court. The case involved an inverse condemnation suit against a county for the taking of land held by the husband and wife plaintiffs as tenants by the entirety. The husband had previously conveyed the property to the county, purportedly in fee simple, and was thus barred from further compensation. It would appear from earlier cases, which treated the husband as having the "right to possession, control, rents and profits from the estate,"[7] that the wife would also be barred from further compensation. The court did not agree and overruled prior decisions that held that the disability of coverture attached to the wife's joint interest. The earlier decisional law was characterized as being "not only nebulous and confusing, but . . . in substantial conflict and out of harmony with justice, reason and logic."[8] The holding was clear and forthright:

> We abolish the last vestige of the common law disability of coverture in Tennessee.
>
> We do not abolish the estate of tenancy by the entirety, but we strip it of the artificial and archaic rules and restrictions imposed at the common law, and we fully deterge it of its deprivations and detriments to women and fully emancipate them from its burdens.[9]

A judgment creditor of both spouses owning property as tenants by the entirety can reach their present joint interests, but the above decision leaves a question of whether a creditor of only one of the marital partners has any similar right with respect to that partner's interest.[10] The earlier case law was that a judgment creditor of the husband alone could reach the entire present interest in the property since the husband had dominion and control over it.[11] Now that the husband's rights are disavowed, it is possi-

6. 516 S.W.2d 626 (Tenn. 1974), *noted in* 6 MEM. ST. U.L. REV. 137 (1975); 42 TENN. L. REV. 815 (1975).

7. *Id.* at 631.

8. *Id.* at 627.

9. *Id.* at 632.

10. The statement in the text relates only to the present interest of each spouse during coverture. The law is clear that either can alienate his or her "right of survivorship," and it is also reachable by a creditor of either. Covington v. Murray, 220 Tenn. 265, 416 S.W.2d 761 (1967).

11. Weaks v. Gress, 225 Tenn. 593, 474 S.W.2d 424 (1971).

ble that a creditor of only one of the spouses will be unable to reach any present interest in the property. A tenancy by the entirety is theoretically different from other forms of joint ownership. Each tenant is said to own the whole and "there [is] no way for the purchaser of [one spouse's] interest to dispossess him without at the same time dispossessing the [other]."[12] This concept is influenced by ancient notions of the marriage relationship, which treated husband and wife as one, and could be one of the "artificial and archaic rules" intended to be swept away by the *Robinson* court.[13]

It is essential for the creation of a tenancy by the entirety that the parties be lawfully married,[14] and interesting questions can arise when this requisite has not been satisfied. In *Duke v. Hopper*[15] the court of appeals considered a situation in which certain real property had been conveyed to a man and woman who, at the request and instruction of the grantees, were described as "husband and wife." The two had held themselves out as husband and wife for over twelve years but had never been lawfully married. The purported husband died, and his partner conveyed the property to an innocent purchaser. In a holding that finds support in other jurisdictions,[16] the court concluded that the heirs of the purported husband were estopped to deny the existence of a tenancy by the entirety as against a wronged innocent party. In *Knight v. Knight*[17] the court of appeals held in a similar situation that a conveyance to an unmarried couple would be interpreted as creating a tenancy in common with right of survivorship if such an intention is evidenced by words specifying survivorship or describing the grantees as "tenants by the entirety." This result is also consistent with the general law on the subject.[18]

12. Cole Mfg. Co. v. Collier, 95 Tenn. 115, 122, 31 S.W. 1000, 1002 (1895).
13. *See* text accompanying note 9 *supra*.
14. Mitchner v. Taylor, 56 Tenn. App. 670, 412 S.W.2d 1 (1966).
15. 486 S.W.2d 744 (Tenn. Ct. App. 1972), *noted in* 40 TENN. L. REV. 527 (1973).
16. *See* R. POWELL & P. ROHAN, *supra* note 1, § 622.
17. 62 Tenn. App. 70, 458 S.W. 803 (1970), *noted in* 39 TENN. L. REV. 196 (1971).
18. *See* R. POWELL & P. ROHAN, *supra* note 1, § 622.

B. *Joint Tenancies*

As the preceding discussion indicates, it is possible in Tennessee to create a joint estate with right of survivorship by the use of express language to achieve that result.[19] In *Lowry v. Lowry*,[20] a decision of considerable importance in this general area, the Tennessee Supreme Court was presented with a rather common situation. A mother had opened two joint savings accounts with her son. She apparently had contributed the entire amount of funds deposited, and the son's only participation had been to sign the signature cards. While the terms of the signature cards differed slightly, both provided for joint ownership of the accounts "with right of survivorship." The mother died, and the issue was whether the son survived to the accounts or whether they became assets of her estate. In support of the latter alternative, it was argued that the son's purported interest could only have been acquired if the accounts had been transferred as a gift, and the requisites of a valid gift had not been satisfied. The court did not agree and held that the accounts passed to the son under a "contract" theory. Thus, certain essentials, such as delivery and relinquishment of control by the donor, did not have to be proved.

Of particular interest in the *Lowry* case is the type of ownership said to be created by the signature cards. In the face of an acknowledgement by the tribunal that "common-law joint tenancy with right of survivorship has been abolished by statute,"[21] the court described the form of ownership involved as a "joint tenancy with right of survivorship."[22] It may be of no consequence that the arrangement was viewed as creating a joint tenancy rather than a tenancy in common (in either case, with right of

19. *See* Knight v. Knight, 62 Tenn. App. 70, 458 S.W. 803 (1970).

20. 541 S.W.2d 128 (Tenn. 1976), *noted in* 7 MEM. ST. U.L. REV. 332 (1977).

21. *Id.* at 131. A more literal rendition of the effect of the statute is that it does not abolish joint tenancies but only their survivorship aspect. The provision is now codified at TENN. CODE ANN. § 64-107 (1976):

> In all estates, real and personal, held in joint tenancy, the part or share of any tenant dying shall not descend or go to the surviving tenant or tenants, but shall descend or be vested in the heirs, executors, or administrators, respectively, of the tenant so dying, in the same manner as estates held by tenancy in common.

22. 541 S.W.2d at 132-33.

survivorship), but the latter treatment would have been the more cautious one.

The English law accorded certain unusual characteristics to joint tenancies, including the fiction that each joint tenant was regarded as owning the entire estate as well as an undivided part.[23] Moreover, the technical requirements imposed on the creation of joint tenancies did not obtain in the case of tenancies in common. One can see little reason in observing these characteristics and requirements today, and it is likely, as the court has said on one occasion, that the matter is largely "academic."[24] A more pointed expression on the subject is the following: "It is immaterial whether the language of this first sentence be construed to create a joint tenancy or a tenancy in common since the result is the same. The testatrix can, by express language or by necessary implication, create in the property devised a right of survivorship."[25]

C. *Marital Estates—Adoption*

Of foremost interest and significance in this area is a 1976

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23. Moynihan states the rule as follows:

> On the death of one of the joint tenants his interest does not descend to his heirs or pass under his will; the entire ownership remains in the surviving joint tenants. The interest of the deceased joint tenant disappears and the whole estate continues in the surviving tenants or tenant.

C. MOYNIHAN, INTRODUCTION TO THE LAW OF REAL PROPERTY 220 (1962).

24. Jones v. Jones, 185 Tenn. 586, 591, 206 S.W.2d 801, 803 (1947).

25. Peebles v. Peebles, 223 Tenn. 221, 226, 443 S.W.2d 469, 471 (1969). Certainly it makes no difference what the estate is called if the only issue is whether it can be made to survive by an express provision. But there are other issues not so easily resolved. In theory, a surviving joint tenant does not "inherit" from the deceased one. *See* note 23 *supra*. The obvious problem involving inheritance taxation seems to be foreclosed by our statutes and judicial decisions. *See In re* Estate of Abernathy, 211 Tenn. 168, 364 S.W.2d 350 (1962); Murfreesboro Bank & Trust Co. v. Evans, 193 Tenn. 34, 241 S.W.2d 862 (1951); TENN. CODE ANN. § 30-1602 (1977). There is a basis upon which to argue, however, that a surviving joint tenant is not disqualified by a statute, TENN. CODE ANN. § 31-117 (1977), that prohibits a murderer from "inheriting" from his victim. *See* Beddingfield v. Estill, 118 Tenn. 39, 100 S.W. 108 (1906). Furthermore, the interest of each joint tenant is "vested" within the meaning of the Rule Against Perpetuities, even while all are living, whereas the interest of a tenant in common with right of survivorship is "contingent" within the meaning of the Rule. *See* Whitby v. Von Luedecke, [1906] 1 Ch. 783.

enactment of the General Assembly that abolished dower and curtesy.[26] These are replaced by provisions specifying that both realty and personalty, in case of intestacy, will descend equally to the surviving spouse and children, the surviving spouse taking not less than one-third.[27] In case there is a will that does not adequately provide for the surviving spouse, he or she may dissent from it and receive a third of the estate.[28]

The statutes dealing with the legal effect of adoption on inheritance and similar matters have been revised,[29] the addition of the following provision being of particular interest:

> In the construction of any instrument, whether will, deed or otherwise, and whether executed before or after March 29, 1976, [the date of approval of the act] a child so adopted and the descendants of such child shall be deemed included within a class created by any limitation contained in such instrument restricting a devise, bequest or conveyance to the lawful heirs, issue, children, descendants, or the like, as the case may be, of the adoptive parents, or of an ancestor or descendant of one of them and such adopted child shall be treated as a member of such a class unless a contrary intention clearly shall appear by the terms of such instrument or unless the particular estate so limited shall have vested in and as to the person or persons entitled thereto on March 29, 1976.[30]

The problem addressed by this provision is an old and troublesome one. Adoption was unknown to the common law, and consequently any rights of the modern adopted child to inherit or be inherited from rest purely on statute. The laws of most jurisdictions today accord substantial equality to adopted children in this respect. A different issue is presented, however, by the attempted inclusion of adopted chidren in such class descriptions

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26. 1976 Tenn. Pub. Acts ch. 529, § 1 (current version at TENN. CODE ANN. §§ 31-614 to 621 (1977)).

27. TENN. CODE ANN. §§ 31-101 to 103, -203 to 204, -602 (Supp. 1977) (as revised by 1977 Tenn. Pub. Acts ch. 25, §§ 1, 3, 4).

28. TENN. CODE ANN. §§ 31-601 to 603 (Supp. 1977) (as revised by 1977 Tenn. Pub. Acts ch. 25, §§ 3, 4, 4(f)).

29. 1976 Tenn. Pub. Acts ch. 751, § 1 (current version at TENN. CODE ANN. § 36-126 (1977)). *See also* TENN. CODE ANN. § 31-206 (Supp. 1977) (as revised by 1977 Tenn. Pub Acts ch. 25, § 4(c)). In general the statutes are designed to equate the inheritance rights of adopted and natural children.

30. *Id.* § 36-126 (1977).

as "children," "heirs," "issue," or "descendants" in a will or deed.

> In determining the right of an adopted child to take under the will of a person other than the adopter, it is not a question of the adopted child's right to inherit, but simply a question of the testator's intent with respect to those who are to share in his estate.[31]

While results vary from state to state and, indeed, from instrument to instrument,[32] the governing principle seems to be that adopted children are included within such generic classes created by an instrument executed by the adopting parent but are excluded when the instrument is executed by another.[33] It should be remembered that the intention of the grantor or testator is the central issue.

Present constructional preferences have been criticized on the grounds that modern adoption statutes put the adopted child in the same legal position as a natural child and that the adopted child is so regarded by the average family.[34] Statutes of the sort represented by the new Tennessee legislation are designed to remedy this supposed injustice.[35] However, a potential problem underlies that part of the new statute applying its provisions to any "will, deed, or otherwise" executed before its effective date but under which no interests have "vested."[36] The argument against

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31. Union Planters Nat'l Bank v. Corbitt, 63 Tenn. App. 430, 436, 474 S.W.2d 139, 142 (1971), *noted in* 40 TENN. L. REV. 134 (1972).

32. *See* R. POWELL & P. ROHAN, *supra* note 1, §§ 358, 361.

33. 5 AMERICAN LAW OF PROPERTY §§ 22.34, .36 (A. Casner ed. 1952); Oler, *Construction of Private Instruments Where Adopted Children Are Concerned*, 43 MICH. L. REV. 705 (1945). This is the approach of the Tennessee courts. *See, e.g.*, Union Planters Nat'l Bank v. Corbitt, 63 Tenn. App. 430, 437, 474 S.W.2d 139, 142 (1971).

34. 5 AMERICAN LAW OF PROPERTY, *supra* note 33, § 22.34; Halbach, *The Rights of Adopted Children Under Class Gifts*, 50 IOWA L. REV. 971 (1965).

35. 5 AMERICAN LAW OF PROPERTY, *supra* note 33, § 22.34 (citing statutes from Georgia, Illinois, Indiana, Maryland, Massachusetts, Ohio, and Pennsylvania). UNIFORM PROBATE CODE § 2-611 contains a provision favoring inclusion of adopted children in class descriptions.

36. The concluding phrase in the statutory excerpt, quoted in text accompanying note 30 *supra*, is presumably intended to avoid interference with "vested" rights. *See* Ford Motor Co. v. Moulton, 511 S.W.2d 690 (Tenn. 1974); TENN. CONST. art. I, § 20.

such application might run as follows: (1) ascertainment of a testator's intent in construing a will, which is the instrument usually involved, is an individual matter; (2) his intent is influenced by laws in effect when the document is executed but not those subsequently enacted; (3) determination of this intent is necessarily a judicial matter to be ascertained from the "four corners of the will"; and (4) legislation proposing to institute a different rule is an objectionable interference with the judicial process.[37] Although there are other instances in which the state legislature has enacted presumptive rules for the construction of written instruments,[38] the Tennessee courts have generally construed them as prospective in application, affecting only instruments executed or wills probated after the effective date of the statute in question.[39] It has been asserted that legislation such as the new Tennessee enactment, designed to prefer the inclusion of adopted children in class descriptions, should apply to existing instruments in order to be effective.[40] Perhaps to the extent there may be a problem with the new law in this respect, the courts may avoid it by retroactively adopting a judicial rule that conforms with the new statutory principles.[41]

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37. The state constitution restrains the legislature from encroaching on the judiciary. TENN. CONST. art. II, § 2. Thus, a statutory interpretation is a judicial matter, and a statute "interpreting" prior legislation may be disregarded by the courts. *See* Board of Educ. v. Shelby County, 207 Tenn. 330, 339 S.W.2d 569 (1960); Erwin v. State, 116 Tenn. 71, 93 S.W. 73 (1905); Arrington v. Cotton, 60 Tenn. (1 Baxt.) 316 (1872).

38. TENN. CODE ANN. § 32-301 (1977) (devise presumed to include entire estate); *id.* § 32-305 (issue substituted for deceased class members, unless contrary intent appears); *id.* § 64-104 (1976) ("dying without issue," etc., refers to the death of parent or ancestor, unless otherwise shown), *id.* § 64-501 (1977) (grants and devises presumed to include entire estate).

39. *See, e.g.*, Walker v. Applebury, 218 Tenn. 91, 400 S.W.2d 865 (1965); Moulton v. Dawson, 215 Tenn. 184, 384 S.W.2d 233 (1964); Jennings v. Jennings, 165 Tenn. 295, 54 S.W.2d 961 (1932). The new legislation differs in that it expressly applies to instruments executed before its effective date. There are statements in some of these cases suggesting that a statute of this nature may validly apply to wills probated after, as distinguished from executed after, its enactment.

40. J. RITCHIE, N. ALFORD, & R. EFFLAND, DECEDENTS' ESTATES AND TRUSTS—CASES AND MATERIALS 979 (5th ed. 1977); Halbach, *supra* note 34.

41. *See* Estate of Coe, 42 N.J. 485, 201 A.2d 571 (1964).

D. Leaseholds

Of interest in this subject area is a new "Uniform Residential Landlord and Tenant Act,"[42] which applies only in counties having a population of more than 200,000.[43] This Act contains a wide variety of provisions affecting the landlord-tenant relationship, including the specific extension of "long-arm" jurisdiction to absentee landlords,[44] a requirement that a landlord maintain any security deposit in a separate account,[45] and a prohibition against certain unconscionable provisions in leases, such as authorizations to confess judgment, and exculpatory and indemnity clauses.[46]

Another statute, enacted in 1973, is designed to ensure that premises in the lower rental classification are fit for human habitation.[47] The operative provision of this statute permits the tenant to deposit rents with the county court clerk, with subsequent forfeiture to the state in the event the landlord fails to remedy deficiencies within certain specified times.[48]

In *North American Capital Corp. v. McCants*[49] the Tennessee Supreme Court applied the contract law doctrine of "commercial frustration" to a lessee's obligation to pay rent. The lease in question was for a five-year term and provided that the premises would be used exclusively for a federal savings and loan association. It also prohibited subletting without the consent of the lessor. The federal agency charged with approving savings and loan associations refused to issue a charter to the lessee, who subsequently ceased to make rental payments on the ground that the property could no longer be used for the intended purpose. Under the traditional view, a lease is a conveyance of a property interest rather than a contract, and it follows that the obligation

42. TENN. CODE ANN. §§ 64-2801 to 2864 (1976).

43. *Id.* § 64-2802.

44. *Id.* § 64-2805.

45. *Id.* § 64-2821.

46. *Id.* §§ 64-2813, -2814.

47. *Id.* §§ 53-5501 to 5507 (1977). Portions of the act were held unconstitutional in Moore v. Fowinkle, 381 F. Supp. 587 (E.D. Tenn. 1974), *rev'd on other grounds*, 512 F.2d 629 (6th Cir. 1975), *noted in* 44 TENN. L. REV. 169 (1976).

48. TENN. CODE ANN. § 53-5504 (1977).

49. 510 S.W.2d 901 (Tenn. 1974), *noted in* 5 MEM. ST. U.L. REV. 452 (1975).

to pay rent is not dependent on the ability to use the property as intended.[50] Under the more modern contract law principles, however, the obligation to make payments could have been excusable on the ground that the payor's principal purpose had been substantially frustrated "by the occurrence of an event the nonoccurrence of which was a basic assumption on which the contract was made."[51] Although acceptance has been a grudging one, the modern trend has been to discard ancient notions surrounding leasehold interests and to apply the more modern contract principles. Following a leading case advocating the modern view,[52] the *North American* court adopted the "commercial frustration" principle for leases. This is an important step. On the merits, the court declined to absolve the lessee from his rental obligation on the ground that "[t]he supervening event (failure of federal officials to approve the site) was not wholly outside the contemplation of the parties."[53]

An assignment of a lease occurs when the lessee transfers the whole of the remaining term to another. The transaction is a sublease when the lessee retains some reversionary interest. The distinction is especially important with relation to the rental obligation of the new holder of the term. An assignee is said to be "in privity of estate" with the lessor and is thus liable to pay rent directly to him. The sublessee, on the other hand, is liable only to the original lessee. A case of first impression in Tennessee, and presenting an unusual factual twist on the above principles, was before the supreme court in *First American National Bank v. Chicken System of America, Inc.*[54] The lessor had leased the premises in question to the lessee under a lease that permitted the latter to "sublease [the] property . . . only with the written consent of the lessor, which shall not be unreasonably withheld."[55] The lessee subsequently transferred the entire remaining term to the principal defendant in the case under circumstances

50. *See* R. POWELL & P. ROHAN, *supra* note 1, § 221(1).

51. RESTATEMENT (SECOND) OF CONTRACTS §§ 285-286 (Tent. Draft No. 9, 1974).

52. Lloyd v. Murphy, 25 Cal. 2d 48, 153 P.2d 47 (1944).

53. 510 S.W.2d at 905.

54. 510 S.W.2d 906 (Tenn. 1974). *See also* Performance Sys., Inc. v. First Am. Nat'l Bank, 554 S.W.2d 616 (Tenn. 1977).

55. 510 S.W.2d at 904.

that would have constituted an assignment, but the lessor refused to approve it. There was a default in rental payments and the lessor sued both the original lessee and the purported assignee. The court first concluded that the lease prohibition against any "sublease" without the lessor's consent covered an assignment without his permission.[56] It then held that the assignment without the lessor's consent "had no effect on the validity of said assignment. It results therefore, that in cases such as the instant case . . . the validity of an assignment is totally unblemished unless the lessor takes affirmative legal action to avoid the transfer."[57]

III. CONVEYANCES

A. Statute of Frauds

The Tennessee Statute of Frauds prohibits an action from being brought "[u]pon any contract for the sale of lands, tenements, or hereditaments" unless the promise, or some memorandum thereof, is in writing and signed by the party to be charged or someone authorized by him.[58] This provision still causes its share of trouble, as several recent appellate court decisions have demonstrated.

In *Alexander v. C.C. Powell Realty Co., Inc.*[59] the court of appeals had under consideration a suit by a real estate broker to recover a commission from the owner-seller. The purported authorization for the broker to sell the property was not in writing. Acting pursuant to an alleged verbal understanding, the broker had obtained a willing buyer. The court of appeals reaffirmed the existing Tennessee law on the subject and held that an authorization to a real estate agent is valid although oral and not in compliance with the statute.[60] Interestingly, the court then turned to the quantum of proof necessary to establish such an unwritten authorization. Drawing upon Tennessee principles relative to the

56. This holding appears to have been influenced by another provision in the lease that absolved the original lessee from liability if a transfer of the term were approved.

57. 510 S.W.2d at 908.

58. TENN. CODE ANN. § 23-201 (1955).

59. 535 S.W.2d 154 (Tenn. Ct. App. 1975).

60. *Id.* at 157 (citing Cobble v. Langford, 190 Tenn. 385, 230 S.W.2d 194 (1950); Lowe v. Wright, 40 Tenn. App. 525, 292 S.W.2d 413 (1956)).

establishment of oral trusts in realty,[61] the court concluded that a strict standard of proof would be required in such instances:

> While a broker's contract to sell or find a buyer for real estate does not technically create a trust estate or interest in the real estate of the principal, such contract may and often does give the broker the legal right to bind the principal's interest in such real estate in many ways. We hold that in Tennessee a broker's contract for sale of real estate may be oral but, by analogy, the same quantum of proof necessary to establish a trust in real estate by parol evidence is necessary to prove an oral contract between a principal and a broker for the sale of real estate and that the contract must be proven by clear, cogent and convincing evidence though the evidence need not be uncontradicted.[62]

Consider the situation in which the owner gives an agent written authorization to sell land, but the sale is an oral one, such as at a public auction. Obviously the Statute of Frauds would be satisfied by the subsequent execution of a deed or other writing. If this is not done, a significant issue is presented whether a specifically performable obligation arose at the earlier oral sale by reason of the fact that a written authorization was given by the owner. This was the basic question before the court of appeals in *Johnson v. Haynes*.[63] The owner had entered into a written contract with an auctioneer, obligating the former to deliver a warranty deed to a successful purchaser but reserving the right to ratify any sale. The auctioneer had distributed printed posters describing the property and specifying "terms announced at sale." At the public auction, certain terms, including an option to pay cash were announced. Plaintiffs were the successful bidders and elected to pay cash, and an entry of sale was made on a "bid sheet" maintained by the auctioneer. Subsequently the owner-principal, apparently because of some misunderstanding or change of mind, attempted to collect a year's interest on one-half of the purchase price before delivering the deed. The court concluded that "upon the fall of the hammer, there was a valid

61. Section VII of the English Statute of Frauds is not in effect in Tennessee, and oral trusts in realty are therefore permissible. *See* Part V *infra*.

62. 535 S.W.2d at 157-58. On the merits, the court concluded that the evidence of brokerage authorization did not satisfy this test.

63. 532 S.W.2d 561 (Tenn. Ct. App. 1975).

contract of sale of the land to the plaintiffs for . . . cash."[64] The written authorization to the auctioneer, the printed posters, and the auctioneer's bid sheet were held to satisfy the Statute of Frauds. "Upon the fall of the hammer there was a sale to the plaintiff evidenced by a memorandum in writing signed by the party to be charged."[65] It is uncertain whether or not the court really meant that an agent may be authorized in writing to make oral sales of land.

In *Southern Industrial Banking Corp. v. Delta Properties, Inc.*[66] the supreme court reaffirmed the proposition that an oral agreement to loan money on the security of a deed of trust to real estate is "equivalent to a promise to sell an interest in land, and is therefore governed by section four of the statute of frauds."[67] In so doing the court relied heavily on certain statements from a 1972 supreme court decision.[68] The court also discussed the basic requirements that must be satisfied by a writing or memorandum in order to comply with the Statute of Frauds. First, the owner of the interest in real property to be conveyed is the "party to be charged" and his or his agent's signature on the writing is indispensable.[69] Second, the writing " 'must contain the essential terms of the contract, expressed with such certainty that they may be understood from the memorandum itself or some other writing to which it refers or with which it is connected, without resorting to parol evidence.' "[70]

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64. *Id.* at 564.

65. *Id.* at 566.

66. 542 S.W.2d 815 (Tenn. 1976).

67. *Id.* at 817. The matter is not that certain. Although a trust deed conveys an interest in land, it is not clear why this should be true with respect to the promise to make the loan. Only by regarding the transaction as a composite one, in which the borrower promises to convey an interest by trust deed and the lender agrees to pay for it by making the loan, does the proposition make complete sense.

68. Lambert v. Home Fed. Sav. & Loan Ass'n, 481 S.W.2d 770 (Tenn. 1972). In a sense the *Lambert* court's statement on the subject was gratuitous since the appeal was dismissed for late filing.

69. 542 S.W.2d at 818; *accord*, Watson v. McCabe, 527 F.2d 286, 288 (6th Cir. 1975). Therefore, a signing by the vendee or grantee alone will not suffice.

70. 542 S.W.2d at 817 (quoting Lambert v. Home Fed. Sav. & Loan Ass'n, 481 S.W.2d 770, 773 (Tenn. 1972) (quoting 49 AM. JUR. *Statute of Frauds* §§ 353, 363-364 (1943))). An undelivered deed will comply with the Statute provided it is signed by the grantor and satisfies the other essentials noted above. *See* Black

Although it is necessary that the writing contain the "essential terms" of the agreement, there is no requirement that it incorporate the complete agreement. The precise scope of the undertaking may be "fleshed out" by parol evidence as long as the writing is not altered or contradicted in the process. Writings containing vague descriptions of the real property to be conveyed can invoke a sort of interplay between the parole evidence rule and the Statute of Frauds. In *Branstetter v. Barnett*,[71] for instance, the issue was whether an otherwise adequate option agreement satisfied the Statute in describing the property merely as "120 acres located in 7th C.D. of Morgan county"[72] when coupled with a covenant that the seller was "the owner thereof."[73] The evidence disclosed that the seller owned only one 120-acre tract of land in Morgan County, and the issue was whether the description could be rounded out by such extrinsic considerations. Based on an early precedent,[74] the court of appeals concluded that "the distinction lies in those cases where the tract is an indefinite one (a tract) as opposed to a definite one (my tract)."[75] In the latter instance, parol evidence is admissible to particularize the description. The *Branstetter* court felt that the covenant of ownership coupled with the description was equivalent to saying "my" 120 acres. Consequently, the court held that the extrinsic evidence was properly admitted to complete the description.

B. Tax Deeds

Proceedings for the enforcement of tax liens are in rem and conducted according to the rules of procedure of chancery courts. The validity of the ensuing tax deed is dependent upon the regularity of the supporting proceedings, it being said that a void decree will not support a tax title. In this area the matter of notice has been especially acute. It is obvious that personal service of process upon the delinquent taxpayer would suffice, but judging

v. Black, 185 Tenn. 23, 202 S.W.2d 659 (1947); Southern States Dev. Co., Inc. v. Robinson, 494 S.W.2d 777 (Tenn. Ct. App. 1972).

71. 521 S.W.2d 818 (Tenn. Ct. App. 1974).

72. *Id.* at 819.

73. *Id.* at 821.

74. Dobson v. Litton, 45 Tenn. (5 Cold.) 616 (1868).

75. 521 S.W.2d at 821.

from the reported decisions, this has not been done with the same regularity as in other types of judicial proceedings. Notice by publication, according to the statutes, may only be effected after the sheriff has made a "not to be found" return,[76] and failure to comply with this prerequisite will render the proceedings nugatory as to a nonappearing landowner.[77] After a "not to be found" return has been made, the clerk may cause an order to be published requiring the defendant to appear. The supreme court has recently held that no order of the court allowing publication is necessary.[78]

The decision of the Tennessee Supreme Court in *Marlowe v. Kingdom Hall of Jehovah's Witnesses*[79] deserves particular attention in this regard. In this case several delinquent tax suits, involving hundreds of delinquent taxpayers, were consolidated and process was issued to all of the defendants on a single day. Apparently the sheriff made a blanket "not to be found" return as to all defendants on the following day, and on this basis notice by publication was thereafter effected. The supreme court characterized the entire procedure as "faulty and irregular to downright sloppy" and asserted that "[i]t is obvious that the sheriff could not have made an accurate return as to all these property owners in a single day."[80] As to the defendant landowner in the case (a merged corporation), the court observed that "the return was accurate if inadvertently so."[81] In spite of these irregularities, the notice by publication was held adequate, the court stating that "[w]hile these procedures are unfortunate and, for the most part, unlawful, we cannot say that any of them individually, or all taken together, operate to void the tax sale in this suit."[82]

The court's rationale in *Marlowe* seems to be based squarely on the premise that notice by publication alone is sufficient to support tax foreclosure proceedings, regardless of the reasonableness of the notice. The following is an excerpt of the reasoning:

> [S]ince a proceeding for the collection of delinquent taxes is a

76. TENN. CODE ANN. § 21-212(3) (1955).
77. Naylor v. Billington, 213 Tenn. 614, 378 S.W.2d 737 (1964).
78. Rast v. Terry, 532 S.W.2d 552 (Tenn. 1976).
79. 541 S.W.2d 121 (Tenn. 1976), *noted in* 44 TENN. L. REV. 159 (1976).
80. *Id.* at 125.
81. *Id.*
82. *Id.*

> proceeding in rem, the parties are bound by actual or constructive notice. To our knowledge, no Tennessee case has ever held actual notice to be mandatory . . . .
>
> Every landowner knows that his property is subject to taxes and that they are paid to the county trustee on an annual basis. He is charged with the knowledge that taxes become a first lien upon his property from the first day of January of the year for which they are assessed . . . .
>
> . . . .
>
> . . . We particularly do not agree that the publication in this case was offensive "under the due process clause." In view of the consistent holdings of this Court as to the sufficiency of constructive notice, and for the further reasons hereinabove pointed out, we are not willing to extend the rationale of *Mullane v. Central Hanover Bank & Trust Co.* . . . to suits for the enforcement of tax liens. In our view neither the due process clause of the Constitution of the United States, nor the "law of the land clause" of the Constitution of Tennessee, or any other provision of either constitution, requires that we depart from the established law in this jurisdiction, that constructive notice is sufficient in such cases.[83]

What emerges from this reasoning[84] is an attitude of the court favoring the stability of tax titles. This is clearly reflected in a statement in the court's opinion quoting from a recent decision: " 'This Court will not look with favor upon an attack made upon a tax sale, where the taxes sued for were actually delinquent and unpaid at the time of the sale and adequate public notice was given.' "[85]

Finally, another aspect of the *Marlowe* decision warrants brief comment. The tax deed in question was actually held in-

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83. *Id.* at 124-25 (citation omitted). The court cited *Mullane*, in which the Supreme Court held unconstitutional a state law permitting the trustee of a common trust fund to settle accounts in a proceeding in which the beneficiaries were notified only by publication. Reasonable methods of affording actual notice to affected parties were held to be required.

84. This survey is not the place in which to challenge the court's assertions, although there may be some basis for doing so. *See* 44 TENN. L. REV. 159-69 (1976). *See also* Shaffer v. Heitner, 433 U.S. 186 (1977). But the Supreme Court has shown extraordinary lenience to proceedings for the collection of taxes. *See* Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974).

85. 541 S.W.2d at 124 (quoting Rast v. Terry, 532 S.W.2d 552, 555-56 (Tenn. 1976)).

valid on the ground that it was not preceded by a decree of confirmation. The court stated that "[i]t is fundamental to our law that a tax sale is not completed until it is confirmed by the court and legal title does not pass until a vestiture is made by the decree of confirmation."[86] In *Marlowe* this final step had not been perfected.

IV. FUTURE INTERESTS

A. *Vesting of Class Gifts*

Foremost among the developments in this area of the law is a new doctrine relative to the vesting of future gifts to classes. In the opinion of the writer, the new principles are a definite step forward. Since the midnineteenth century, the "Tennessee Class Doctrine" had been in vogue in this state.[87] Its general outlines have been stated as follows:

> "Where a bequest is made to a class of persons, subject to fluctuation by increase or diminution of its number in consequence of future births or deaths, and the time of payment or distribution of the fund is fixed at a subsequent period, or on the happening of a future event, the entire interest vests in such persons only as at that time fall within the description of persons constituting such class."[88]

Basically the doctrine held class gifts to be contingent until the time fixed for distribution. Much scholarly criticism was directed against the concept on the basis that it was not generally in consonance with policies favoring vesting of interests.[89] The distinction between "vested" and "contingent" gifts to class members has important implications. If the gift is "contingent," the Tennessee courts have normally implied a condition requiring class members to survive to the time of distribution in order to

86. *Id.* at 125 (noting with approval the procedure for confirmation of such sales "correctly" set forth in H. GIBSON, GIBSON'S SUITS IN CHANCERY § 675 (5th ed. 1955)).

87. The decision originating the doctrine appears to have been Satterfield v. Mayes, 30 Tenn. (11 Hum.) 58 (1849).

88. Walker v. Applebury, 218 Tenn. 91, 95, 400 S.W.2d 865, 866 (1965) (quoting Satterfield v. Mays, 30 Tenn. (11 Hum.) 58, 59 (1849)).

89. *See* commentaries summarized in *id.* at 95-101, 400 S.W.2d at 867-69.

participate.[90] Furthermore, a contingent class gift is not "vested" within the meaning of the Rule Against Perpetuities,[91] and members may not be able to alienate their interests.[92]

In *Walker v. Applebury*[93] the Tennessee Supreme Court made a clear break with past decisions. The testatrix had devised a life estate, followed by remainder interests given in varying terms, to "the Applebury's," "the Applebury kin," and "the Appleberry heirs." One of the remaindermen predeceased the life tenant and the issue was whether his interest was contingent upon surviving until the remainder became possessory. While the earlier precedents did not make the matter entirely certain, it was argued that the Class Doctrine required survivorship of the remainderman. The court faced the issue directly and abolished the doctrine as to instruments effective after 1927.[94] It concluded that class members take a vested transmissible interest in the estate in remainder, unless

> (1) the will taken as a whole, in the light of all the circumstances, requires the remainder to remain contingent, and not vest during the life of the life tenant, in order to carry out the clear intention of the Testatrix, or (2) there is language in the will expressly providing the remainder not vest during the life of the life tenant.[95]

The *Walker* case has been followed and reaffirmed in a subsequent case.[96] Tennessee is thus now in line with other jurisdictions, and a "vested" construction is to be preferred for class gifts, it would seem, to the same extent as gifts to individuals.[97] More-

90. *See* Burdick v. Gilpin, 205 Tenn. 94, 325 S.W.2d 547 (1959); Denison v. Jowers, 192 Tenn. 356, 241 S.W.2d 427 (1951).

91. Warner, *The Rule Against Perpetuities*, 21 TENN. L. REV. 641, 646 (1951).

92. Hobson v. Hobson, 184 Tenn. 484, 201 S.W.2d 659 (1947).

93. 218 Tenn. 91, 400 S.W.2d 865 (1965).

94. The decision is based in large part on 1927 Tenn. Pub. Acts ch. 13, § 1, which became effective on March 21, 1927, and is now codified at TENN. CODE ANN. § 32-305 (1977). While the caption of the statute purported to change the "Class Doctrine," the text does not demand this result. Instead, it substitutes the "issue" of a class member dying before distributon unless a contrary intent appears from the instrument.

95. 218 Tenn. at 101, 400 S.W.2d at 869.

96. Nicholson v. Nicholson, 496 S.W.2d 477, 479 (Tenn. 1973).

97. *See* 5 AMERICAN LAW OF PROPERTY, *supra* note 33, § 21.3(a).

over, a condition that class members survive until the time of distribution must be expressed in order to be given effect; it will not be implied.[98]

B. *Presumption of Fertility*

Under the English law it was conclusively presumed that a person of any age or physical condition was capable of bearing children. This presumption was applied no matter how old[99] or how young[100] the prospective parent happened to be. The presumption was assimilated into the common law of Tennessee and has caused various problems when contingent future interests are given to unborn remaindermen and beneficiaries. The presumption has been applied most unrealistically to invalidate interests for not vesting with absolute certainty within the period of the Rule Against Perpetuities.[101] Difficulties can also be presented when it is necessary to bind the interests of unborn takers by a decree terminating a trust, quieting title, partitioning undivided interests, or condemning property.[102]

In 1965 the Tennessee General Assembly enacted a statute that purports to modify the common-law presumption on this subject and could do much to alleviate the difficulties associated with it. No reported judicial decision directly construing the provision has been discovered. In the experience of this writer, the existence of the statute is not generally known, possibly due to the fact that it is codified under the "Evidence" headings in the code. For this reason, the provision is quoted here in full, although it is not truly a "recent" development in property law: "The present absolute common law presumption which prevails in Tennessee that men and women are presumed capable of having children as long as they live shall be only a prima facie presumption and rebuttable by competent evidence."[103]

98. *Id.* § 21.11; RESTATEMENT OF PROPERTY § 296 (1948).

99. *See* Jee v. Audley, 1 Cox 324, 29 Eng. Rep. 1186 (1787).

100. *See In re* Gaite's Will Trusts, [1949] 1 All E.R. 459 (Ch.).

101. *See* Crockett v. Scott, 199 Tenn. 90, 284 S.W.2d 289 (1956).

102. *See* Sanford v. Louisville & Nashville R.R. Co., 225 Tenn. 350, 469 S.W.2d 363 (1971); Rodgers v. Unborn Child or Children of Rodgers, 204 Tenn. 96, 315 S.W.2d 521 (1958); Frank v. Frank, 153 Tenn. 215, 280 S.W. 1012 (1926); Barnett v. Daniel, 11 Tenn. App. 443 (1930).

103. 1965 Tenn. Pub. Acts ch. 54, § 1 (codified at TENN. CODE ANN. § 24-516 (Cum. Supp. 1977)).

C. *Gifts Over upon "Dying Without Issue"*

Tennessee has had more than its share of difficulties with deed and will provisions giving a future estate conditioned upon the first taker "dying without issue" or employing similar terminology.[104] The most important observation that can be made with respect to this matter is that such expressions should be avoided if at all possible, or at least they should be carefully qualified. For historical reasons, the phrase "dying without issue" is fundamentally ambiguous in the context of the modern law relating to estates in land. Its enduring popularity can be explained on the basis of the historical practice in England and our assimilation of the common law and its heritage into the law of this state. It is pertinent to observe that entailed estates were the rule in England for centuries and phrases such as that described were commonly used to create them:

> 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.[105]

Estates tail have not been permissible, however, since Tennessee became a state, the applicable statute converting them into fee simple interests.[106] The only explanation one can offer for the use of this "dying without issue" terminology in modern instruments is that the phrase must have been copied mechanically from some ancient document drafted for a different time and legal system.

In light of the foregoing considerations, the recent decision of the Tennessee Supreme Court in *Harris v. Bittikofer*[107] assumes

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104. *See* W. LEACH & J. LOGAN, FUTURE INTERESTS AND ESTATE PLANNING 483 (1961); R. POWELL & P. ROHAN, *supra* note 1, § 336 ("The quantity of decisional material on this topic is stupendous."); 16 TENN. L. REV. 479 (1940); 3 VAND. L. REV. 345 (1950). A fair sampling of Tennessee decisions in this area is contained in Harris v. Bittikofer, 541 S.W.2d 372 (Tenn. 1976).

105. Machell v. Weeding, 8 Sim. 4, 7, 42 Rev. R. 79, 81 (1836) (Shadwell, V.C.). Sir Shadwell's statement is frequently quoted in Tennessee cases. *See, e.g.*, Harris v. Bittikofer, 541 S.W.2d 372, 376 (Tenn. 1976).

106. TENN. CODE ANN. § 64-102 (1976). This section is derived from a 1784 enactment.

107. 541 S.W.2d 372 (Tenn. 1976).

considerable importance. The issue in the case involved the construction of a devise 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. It was argued, with some support from earlier decisions,[108] that the will should be construed as vesting a fee tail in *A*, which was converted to a fee simple by the statute.[109] The court did not agree, and held that *A* received a life estate under the devise, with alternate contingent remainders to (1) *A*'s issue, if any; or (2) if none, and *A*'s husband survived her, to *B* in fee. If *A* left neither issue nor a husband surviving, the property would revert to the estate of the testatrix.

The court issued an extraordinarily extensive opinion in support of its conclusions in *Harris*. It stated that when the first taker has received only a life estate, a gift over on "dying without issue" will not transform the life estate into a fee tail, which is converted by the statute[110] to a fee simple interest. When the first taker is given an absolute interest, coupled with a gift over on "dying without issue," it "continues to be the law" that the first taker receives a fee tail, which is reconverted to a fee simple.[111] The

108. *See* Harwell v. Harwell, 151 Tenn. 587, 271 S.W. 353 (1925); Anderson v. Lucas, 140 Tenn. 336, 204 S.W. 989 (1918); Skillin v. Loyd, 46 Tenn. 563 (1869). Each of these decisions was disapproved by the *Harris* court, either expressly or by implication.

109. 541 S.W.2d at 374. Presumably the interest in favor of *B* would be void for remoteness. *See* Armstrong v. Douglas, 89 Tenn. 219, 14 S.W. 604 (1890). It is pertinent to observe that a remainder could follow a fee tail at common law. C. MOYNIHAN, *supra* note 23, at 112.

110. 541 S.W.2d at 374-77; *see* note 111 *infra*.

111. 541 S.W.2d at 375. It is perhaps fortunate that this conclusion is dictum. This writer finds the approach of the court on this and the preceding point troublesome. The English law treated the phrase "dying without issue" as creating an estate tail due to an irrational preference for construing the phrase to mean an indefinite failure of issue. In effect, a person did not "die without issue" until his line of lineal descendants ultimately ran out, even long after his death. R. POWELL & P. ROHAN, *supra* note 1, § 340. Tennessee decisions construing earlier conveyances and devises tended to follow the same preference for an "indefinite failure of issue" construction. *See* authorities cited note 108 *supra*. In 1851 a Tennessee statute, now TENN. CODE ANN. § 64-104 (1976), was enacted that was designed to reverse this preference and create a presumption that a "definite" failure of issue is normally intended, i.e. one occurring, if at all, on the death of the ancestor. *See* Frank v. Frank, 120 Tenn. 569, 111 S.W. 1119 (1908). "This is the only effect of [TENN. CODE ANN.] § 64-104." Shannon

court also addressed itself to the "seeming inconsistency" between the statute abolishing estates tail and the statute abolishing the Rule in Shelley's Case.[112] In this regard, the court concluded that a devise in the form "to *A* for life, and her bodily heirs, if any," created a life estate in *A* with a contingent remainder to her "issue."[113] Finally, the vexing constructional problem of *when* the first taker must "die without issue" to effectuate the condition was also considered by the court.[114]

In the *Harris* case, the devise was to the life tenant with the gift to the alternate remainderman taking place if the life tenant "should die leaving no bodily issue." The quoted phrase is subject to at least two common interpretations as to the circumstances that will effectuate the condition.[115] Under the so-called "substitutional" construction, the life tenant must predecease the testator, leaving no surviving issue, to invoke the condition.[116]

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v. Union Planters Nat'l Bank, 537 S.W.2d 919, 922 (Tenn. 1976). But the statute creates only a presumed intention and if an indefinite failure of issue is clearly intended, an estate tail will be created, converted to a fee simple by the earlier statute. *See* Armstrong v. Douglas, 89 Tenn. 219, 14 S.W. 604 (1890). Instruments taking effect before the 1851 statute were not subject to its provisions. *See* authorities cited note 108 *supra*. The *Harris* court did not consider the effect of the 1851 statute upon gifts such as this, although it seems clear that a "definite" failure of issue was intended by the devise in question (*viz.* if the taker "should die *leaving* no bodily issue"). Instead, its decision appears to be based on an artificial distinction between an absolute or lesser interest in the first taker.

112. TENN. CODE ANN. § 64-103 (1976). This section is also derived from an 1851 enactment.

113. 541 S.W.2d at 380-83. The term "issue" in the court's holding should be taken to mean "heirs of the body" of the life tenant. For instance, a child born to the life tenant would take a vested interest on birth if "issue" were intended; whereas, the child would have to survive the life tenant to be an "heir of the body." It seems clear that the latter meaning is intended.

114. It is to be reiterated that the will in question would appear relatively innocuous to the uninitated, but it gave rise to the most complex sort of litigation. There is ample basis to expect that we will see more of it, as long as gifts over continue to be conditioned on the first taker "dying without issue."

115. Other constructions are possible in the case of gifts conditioned generally upon "dying without issue": (1) courts may rely on the English "indefinite" construction described in note 111 *supra;* and (2) the phrase may mean "die without having had issue," even though the issue predeceases the parent. *See* Kendall v. Taylor, 245 Ill. 617, 92 N.E. 562 (1910).

116. *See* Martin v. Taylor, 521 S.W.2d 581 (Tenn. 1975). The parent case is said to be Meacham v. Graham, 98 Tenn. 190, 39 S.W. 12 (1897). It is appar-

Under the alternative construction, if the life tenant dies at any time, before or after the testator, leaving no surviving issue, the condition takes effect. Although the latter interpretation is the more probable intention of the average testator,[117] Tennessee courts have gone both ways on the issue. Consequently, extreme care should be used in drafting clauses such as this to avoid unforeseen results. The *Harris* court surveyed the various judicial decisions on the matter and concluded that the alternate contingent remainderman would take if the life tenant died after the testator and left no surviving issue.

In the course of its opinion, the court acknowledged that it "continues to be a valid rule of law in this jurisdiction" that an absolute gift followed by a limitation over on the taker dying without issue will vest in the taker absolutely if he survives the testator, whether or not he ever has issue.[118] However, this was said to be merely a "rule of construction" and had no application if, as in the instant case, the first taker was given only a life estate.[119]

The *Harris* court relied in large part on its recent decision in *Shannon v. Union Planters National Bank*,[120] which involved a testamentary trust specifying that if an income beneficiary should "die without issue" his share would shift to others. The beneficiary survived the testator but later died without children. The court held that this caused the interest to shift under the terms of the will and that it was not sufficient that the beneficiary had survived the testator. The court acknowledged that the rule of *Meacham v. Graham*[121] is still recognized in Tennessee but stated that it "is not a rule of property but merely a rule of construction which yields in all cases to the intention of the testator."[122] It was reasoned that the rule does not ordinarily apply

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ent that the substitutional construction is not appropriate in the case of interests created by deed.

117. *See* Trautman, *Decedents' Estates, Trusts and Future Interests—1960 Tennessee Survey*, 13 VAND. L. REV. 1101, 1113-14 (1960).

118. 541 S.W.2d at 378.

119. *Id.* at 378-80.

120. 537 S.W.2d 919 (Tenn. 1976).

121. 98 Tenn. 190, 39 S.W.12 (1897). This case originated the "substitutional" construction. *See* note 116 *supra* & text accompanying note 123 *infra*.

122. 537 S.W.2d at 923.

when, as in *Shannon*, the first taker receives less than an absolute interest, such as a life estate. In explaining this distinction, the *Harris* court quoted from the *Meacham* decision:

> "The rule is that, *where an absolute power of disposition is given by will in the first instance*, followed by a limitation over in the event of the death of the first taker without living children, it will be held to mean death occurring before the death of the testator, unless a contrary intention clearly appear[s] from other provisions, *for he cannot be presumed to intend to cut down a fee already given by prior provisions under the items of a subsequent provision.*"[123]

V. TRUSTS

A. *Proof To Establish Oral Trusts*

Section VII of the English Statute of Frauds[124] is not in effect in Tennessee and oral trusts in realty are permissible, although hardly advisable.[125] It has long been the rule, however, that the evidence to establish such a trust must be "clear and convincing."[126] Two recent decisions, one relating to corporate stock allegedly held in trust[127] and the other relating to the proceeds of a life insurance policy,[128] emphasized that this stringent standard of proof also applies to express oral trusts involving personalty. In the latter decision, the supreme court reiterated that the proof to establish such an oral trust must be " 'clear, cogent, convincing, and irrefragable.' "[129]

B. *Deviation and Cy Pres*

As a general proposition, Tennessee courts have been reluc-

123. *Id.* at 922 (emphasis in original) (quoting Meacham v. Graham, 98 Tenn. 190, 207-08, 39 S.W. 12, 15 (1897)).

124. 29 Car. II, c. 3, § 7 (1676) (declarations of trusts in lands "shall be utterly void and of none Effect" unless in writing).

125. *See* Hoffner v. Hoffner, 32 Tenn. App. 98, 221 S.W.2d 907 (1949).

126. *Id. See also* Linder v. Little, 490 S.W.2d 717 (Tenn. Ct. App. 1972).

127. Calcutt v. First Nat'l Bank of Memphis, 544 S.W.2d 622 (Tenn. Ct. App. 1976).

128. Cook v. Cook, 521 S.W.2d 808 (Tenn. 1975).

129. *Id.* (quoting Seaton v. Dye, 37 Tenn. App. 323, 263 S.W.2d 544 (1953) (quoting Fuchs v. Fuchs, 2 Tenn. App. 133, 139 (1926))). There are earlier indications that strict standards of proof might be required in the case of oral trusts of personalty. *See* McDowell v. Rees, 22 Tenn. App. 336, 122 S.W.2d 839 (1938).

tant to disturb a settlor's scheme in creating a private or charitable trust in the face of changed conditions or circumstances. A broad power is recognized in courts of chancery, however, to permit deviation from the terms of a trust when, due to circumstances not known to the settlor and not anticipated by him, compliance on a literal basis would impair the accomplishment of his purposes.[130] Even though it is said that the doctrine of *cy pres*, which is applicable only to charitable trusts, is not in effect in this state,[131] the same result appears to be attainable on other grounds[132] when a court becomes convinced that justice demands it.

Illustrative of the problems in this area is a recent holding that land held in trust by a municipality for "school purposes" could not be used for a public library.[133] In another decision, *Givens v. Third National Bank in Nashville*,[134] the supreme court refused to sanction the immediate distribution of income to charitable remaindermen to prevent the heavy taxation of accumulations. It was argued that various and unforeseeable events had occurred that were not anticipated by the settlor, among them being the dramatic increase in trust income that he had ordered to be accumulated during the lives of certain private income beneficiaries and the fact that his widow had successfully prosecuted a lawsuit invalidating a portion of the trust on the ground that it was a fraud on her rights as surviving spouse. While acknowledging that "the present case presents most appealing circumstances," the court declined to disturb the explicit provisions for accumulation made by the settlor, whom the court characterized as an "experienced businessman."[135]

130. *See generally* Givens v. Third Nat'l Bank in Nashville, 516 S.W.2d 356, 361 (Tenn. 1974).

131. *See* Henshaw v. Flenniken, 183 Tenn. 232, 191 S.W.2d 541 (1946). "*Cy pres*" means "as near as possible." The term describes the power of the English chancellor, and courts of equity in many states, to approximate the purposes of the settlor when literal performance becomes impracticable. *See* G. BOGERT & G. BOGERT, LAW OF TRUSTS 524-31 (5th ed. 1973).

132. *See* Bell v. Shannon, 212 Tenn. 28, 367 S.W.2d 761 (1963); Hardin v. Independent Order of Odd Fellows of Tenn., 51 Tenn. App. 586, 370 S.W.2d 844 (1963); Goodman v. State, 49 Tenn. App. 96, 351 S.W.2d 399 (1960).

133. War Memorial Library v. Franklin Special School Dist., 514 S.W.2d 874 (Tenn. Ct. App. 1974).

134. 516 S.W.2d 356 (Tenn. 1974).

135. *Id.* at 361.

C. *Life Tenant as Trustee*

Past court decisions have occasionally referred to a life tenant as a "trustee" for the remainderman. It is obvious that this concept is not to be taken literally,[136] although some semblance of a fiduciary relationship appears to be involved when the life tenant has a power to use or consume the principal. In *Holley v. Marks*[137] the supreme court had under consideration a will leaving all of the testator's property to his wife for life to be used "as she sees fit," with remainder to a third party on condition that she survive the wife. The suit was brought by the remainderman to require an inspection of the life tenant's records to determine whether she was giving the property away. The nature of the property was not disclosed, but it is presumed that at least a part of it was personalty. The court acknowledged that at times a life tenant had been termed a "quasi-trustee" for the remainderman but stated that he did not have a duty to account for his use of the property. On a proper showing, which the court felt had not been made in this case, security could be required or other relief afforded to prevent a wrongful defeat of the remainder interest.

The *Holley* opinion is regrettably short and tends to avoid certain basic questions with respect to dispositions of this nature. The earlier law in the state was that a life estate in personalty, coupled with an unlimited power of disposition by the life tenant, vested an absolute interest in him, and any gift over after the life estate by way of remainder or otherwise was void.[138] A 1932 statute would seem to have changed this by providing that the first taker's interest was converted to a "fee absolute," subject to the future estate insofar as the property was not consumed.[139] Since this statute was enacted, the case law dealing with the situation has not been consistent.[140] In all likelihood the *Holley* court, be-

136. *See* Skovron v. Third Nat'l Bank in Nashville, 509 S.W.2d 497 (Tenn. Ct. App. 1973).

137. 535 S.W.2d 861 (Tenn. 1976).

138. *See* Bradley v. Carnes, 94 Tenn. 27, 27 S.W. 1007 (1894).

139. TENN. CODE ANN. § 64-106 (1976); *see* Magevney v. Karsch, 167 Tenn. 32, 65 S.W.2d 562 (1933). The probable purpose of the statute was to permit creditors to reach property subject to a general power of appointment without the donee-debtor having executed it.

140. *See* Jones v. Jones, 225 Tenn. 12, 462 S.W.2d 872 (1971) (devise to wife "to do with as she sees fit during her life" gives power to convey absolute

cause of the limited fashion in which the case was presented, did not feel compelled to explore issues of this nature in more depth.

VI. Easements and Servitudes

A. *Restrictive Covenants*

The most orderly way to impose restrictions on land being subdivided is for the developer to record them at the outset along with the subdivision plat. The written restrictions should clearly specify those parts of the land burdened by the covenants and identify the parties who are entitled to enforce them. Recording would then afford notice to all persons affected or interested in the land.[141] But things are not always done as they should be done, and serious questions can arise when restrictions are imposed in a less orderly manner.

In *Land Developers, Inc. v. Maxwell*[142] the supreme court rendered what appears to be an important new decision in this area. The developer of a large tract of land filed neither a plat nor a list of restrictions in the register's office. He sold a number of large lots or tracts to individuals, and in each case the deed restricted to residential purposes the use of the land being conveyed. These deeds were silent on the burdened status of land retained by the developer. Subsequently, the developer died, and his brother, who had no knowledge of the original plans for the property, succeeded to the retained land. The brother sold part of the land to an innocent purchaser for value. He then entered into a contract to sell another part of the land to an innocent vendee. After a portion of the consideration was furnished, but before the latter contract was carried out, certain of the residential landowners filed suit to declare the restrictions valid as to all of the property. No abstract of the proceeding was filed with the register, however, as now required by statutes dealing with *lis pendens*.[143]

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fee); Haskins v. McCampbell, 189 Tenn. 482, 226 S.W.2d 88 (1949) (remainder in personalty void after gift to wife of "fee" with "whatever may remain" to remainderman); Abernathy v. Adams, 31 Tenn. App. 559, 218 S.W.2d 747 (1948) (life estate with unlimited power of disposition converted to fee but future limitation over valid).

141. *See* Clayton v. Haury, 224 Tenn. 222, 452 S.W.2d 865 (1970).

142. 537 S.W.2d 904 (Tenn. 1976). *See also* Maxwell v. Land Developers, Inc., 485 S.W.2d 869 (Tenn. Ct. App. 1972).

143. Tenn. Code Ann. § 20-301 (1955).

The court concluded that the original circumstances were such as to permit inference of a reciprocal negative easement or servitude. This holding is important, proceeding as it does on the basis that the burden of a covenant may be imposed on retained land of the developer by implication alone, without any express undertaking on his part or, for that matter, any writing in compliance with the Statute of Frauds.[144] As to retained land still in the hands of the developer's successor, therefore, the restrictions were held to apply. With respect to the portion conveyed to the innocent purchaser for value, however, it was concluded that the restrictions were no longer applicable because they were not recorded in the "chain of title"[145] and the innocent party had no actual notice of them. The portion of the land subject to the sales contract received an interesting disposition. Inasmuch as the *lis pendens* statute was not complied with and the vendee had no actual notice, he was held to be a "bona fide encumbrancer for value" who took free and clear of the restrictions.[146] The definitive nature of the case provides occasion for restatement of its obvious teaching: a first step in subdivision development should be the careful preparation and recording of the restrictions to be applied, with particular attention to the parties who are to be entitled to enforce them.

In *Land Developers* the supreme court referred to the established doctrine in Tennessee that restrictive covenants are to be "strictly construed and all doubts resolved in favor of the free use of property."[147] This statement reflects an understandable policy against encumbrances on land use. When there is a true ambiguity in a particular restriction, the doctrine can and should be realistically applied.[148] There have been occasions, however, when a particular covenant has been given a strained and artificial reading to permit a particular use that realistically seems to fall within its prohibition.[149]

144. In support of this view the court cited the leading case of Sanborn v. McLean, 233 Mich. 227, 206 N.W. 496 (1925).

145. 537 S.W.2d at 913.

146. *Id.* at 917.

147. *Id.* at 918.

148. *See* Shea v. Sargent, 499 S.W.2d 871 (Tenn. 1973) (area and resubdivision restriction did not prevent use for private school).

149. The most striking illustration is Turnley v. Garfinkel, 211 Tenn. 125,

In *Waller v. Thomas*[150] the court of appeals was presented with a case involving subdivision covenants providing that "[n]o structure shall be erected . . . or permitted to remain on any of said lots other than buildings for residential purposes . . . . No mercantile business or industrial trade or activity shall be carried on upon any lot."[151] Following the established rules with respect to strictness of interpretation, the court concluded that the covenants did not preclude a garage in one of the homes being used as a beauty salon. It was reasoned that the activity was not a "mercantile business or industrial trade or activity." The court also gave recognition to another, seemingly conflicting, rule of construction requiring "a fair and reasonable meaning to restrictive covenants in order to determine the parties' intention and once the intention of the parties is ascertained, the covenant will be enforced, provided it serves a legitimate purpose and does not constitute a nuisance per se."[152] Applying this latter rule, the court of appeals also recently held that operation of a small church in a subdivision constituted a violation of a covenant providing that "[n]o buildings . . . shall be erected upon . . . said land to be used otherwise [than] as a private dwelling house, . . . and no such building shall be used . . . as a place of public gathering."[153]

B. Public Easements

In *Cole v. Dych*[154] the supreme court had before it a case involving the closing of a roadway to a cemetery. Apparently the cemetery had been in existence as early as 1865, and the access roadway had been in use for many years, but it was used in its present form only since 1952. City and county officials had provided some maintenance for the road but there had been no formal dedication to public use. In fact, it would seem the roadway had not been continuously open to the public but was available

362 S.W.2d 921 (1962), in which the court declined to construe a restriction against "more than one dwelling" on any lot as precluding resubdivision of a lot into two parcels with a dwelling on each.

150. 545 S.W.2d 745 (Tenn. Ct. App. 1976).

151. *Id.* at 746.

152. *Id.* at 747.

153. McDonald v. Chaffin, 529 S.W.2d 54, 55 (Tenn. Ct. App. 1975).

154. 535 S.W.2d 315 (Tenn. 1976).

only sporadically for burials, decorations, and other normal cemetery purposes. The problem arose when the present owner of the burdened estate excavated approximately seventy-five feet of the road to a considerable depth, thereby making it impassable. Both the chancellor and the court of appeals concluded that an easement for cemetery access had been impliedly dedicated to the public. The supreme court agreed,[155] holding that the actions of certain predecessors in title were sufficient to establish a dedication. In so holding, the court quoted and adhered to the following principles from an earlier decision:

> "Dedication . . . may be . . . by implication arising by operation of law from the conduct of the owner and the facts and circumstances of the case. To establish it by implication, there must be proof of facts from which it positively and unequivocally appears that the owner intended to permanently part with his property and vest it in the public, and that there can be no other reasonable explanation of his conduct. In other words dedication is a question of intention, and the intent must be clearly and satisfactorily proven."[156]

Interestingly, the *Cole* case involved a roadway that received only limited and sporadic use rather than use as a true public road. Furthermore, the court stated that the "fact that all owners of the subservient estate maintained gates or other forms of obstructions to prevent unauthorized entry does not alter the character of this roadway. The maintenance of gates is not necessarily inconsistent with the existence of an easement."[157]

The supreme court held in *Knierim v. Leatherwood*[158] that a

155. Such a concurrent finding by the lower courts is "virtually conclusive" on the supreme court. *Id.* at 319 n.3. Nevertheless, the court considered the case "of sufficient importance to justify a full discussion of this issue." *Id.* at 318.

156. *Id.* at 319 (quoting McKinney v. Duncan, 121 Tenn. 265, 271, 118 S.W. 683, 684 (1909)).

157. *Id.* at 320. It is also interesting that the court allowed a mandatory injunction requiring restoration of the roadway or the provision of a satisfactory alternate route. *Id.* at 322-23. Compare Henry County v. Summers, 547 S.W.2d 247, 251 (Tenn. Ct. App. 1976), in which the Tennessee Court of Appeals for the Western Section refused a mandatory injunction to open a road since it "would result in no benefit whatever to the Plaintiffs," even assuming there had been an implied dedication.

158. 542 S.W.2d 806 (Tenn. 1976).

private landowner who sustains some special injury or damage from the obstruction of a public road by another private party may sue to enjoin the obstruction without joining the county as a party to the suit.[159] The court reasoned that the nature of public roadways and streets affords citizens two classes of rights. The first is a public right enjoyed in common with all other citizens and presumably can be redressed only by the governmental agency owning the right-of-way. In addition, citizens have private rights enforceable by them alone in roads and streets upon which their lots are situated or such as are necessary or convenient for their ingress or egress.[160]

C. *Easements by Necessity*

An "easement by necessity" arises by implication when the owner of a tract conveys a land-locked portion of it to another.[161] A standard situation for the application of this principle was before the court of appeals in *City of Whitwell v. White.*[162] Defendant had conveyed to plaintiff's predecessor a small tract on the edge of his property. There was no right of access to the granted parcel except through the grantor's retained land, although a neighbor had accorded permissive use for that purpose. The court concluded that an easement by necessity was created at the time of the conveyance and that the grantor could not later change his mind and revoke what he intended to be a permissive right-of-way across his property.[163] The court concluded that the fact that plaintiff was actually using the alternate way was insufficient to defeat the rights she obtained from her predecessor since the alternate way was "temporary and not arising to the dignity of an enforceable right."[164] It also concluded that the statute author-

159. That part of Ledbetter v. Turnpike Co., 110 Tenn. 92, 73 S.W. 117 (1902), to the contrary was expressly overruled.

160. 542 S.W.2d at 810-11.

161. Pearne v. Coal Creek Mining & Mfg. Co., 90 Tenn. 619, 18 S.W. 402 (1891). Such an easement can also arise if the owner of a tract conveys the portion surrounding him to another. *See* R. POWELL & P. ROHAN, *supra* note 1, § 410. In either case, the easement will not arise if there is reasonable access other than over the retained or granted land.

162. 529 S.W.2d 228 (Tenn. Ct. App. 1974).

163. *Id.* at 233.

164. *Id.* at 234.

izing condemnation of private rights-of-way under similar circumstances[165] had no application in true easement-by-necessity situations.[166]

An interesting aspect of *City of Whitwell* is the fact that the parties to the initial conveyance apparently intended, or at least defendant-grantor "honestly thought,"[167] that a mere revocable license would be granted over the retained premises. The court did not regard this as significant, however, since it appeared "conclusively, as a matter of law," that an easement by necessity was created at the time of the conveyance.[168] It is regrettable that more consideration was not given to this phase of the case. Easements by necessity are said to be based on the presumed intention of the parties. "The decisions repeatedly say that an easement by necessity can be excluded by any evidence showing that the parties did not intend one to arise."[169]

When land is partitioned in kind by court decree, as held in *Edminston Corp. v. Carpenter*,[170] an easement to an isolated tract provided by the decree is not an "easement by necessity" but is in effect an easement by grant. Consequently, creation in this manner of a right-of-way thirty feet in width is not affected by statutes "governing easements by necessity" that would limit the width to fifteen feet.[171] Likewise, nonuse of the entire thirty feet does not constitute an abandonment of the unused portion in absence of proof of an intention to abandon it.[172] *Edminston* is significant in holding that an easement may be created by an order effecting partition in kind. The statutes dealing with partition contain no reference to the creation of easements,[173] and there is apparently a lack of judicial precedent in Tennessee on the

165. TENN. CODE ANN. §§ 54-1901 to 1917 (1968).

166. 529 S.W.2d at 231. In other words, when a true easement by necessity exists, there is no occasion to use the statute.

167. *Id.* at 232-33.

168. *Id.* at 233.

169. R. POWELL & P. ROHAN, *supra* note 1, § 410.

170. 540 S.W.2d 260 (Tenn. Ct. App. 1976).

171. *Id.* at 262 (citing TENN. CODE ANN. §§ 54-1901 to 1917 (1968)). These provisions do not "govern" easements by necessity, as the language of the court might indicate. In fact, they have no application to true easement-by-necessity situations. *See* notes 165-66 *supra* and accompanying text.

172. 540 S.W.2d at 262.

173. TENN. CODE ANN. §§ 23-2101 to 2152 (1955 & Cum. Supp. 1977).

issue. Relying on an early New Hampshire case, however, the court reasoned that such jurisdiction " 'is necessarily implied . . . because in numerous cases, a judicious and convenient partition could not be had without it.' "[174]

VII. REGISTRATION OF INSTRUMENTS

A. *Judgments*

A 1967 enactment changed the recording statutes to require that an abstract of the judgment or decree from a court of record must be filed in the appropriate register's office to constitute a lien upon land belonging to the judgment debtor.[175] The same statute also made certain changes in the provisions relating to *lis pendens*.[176] In *American Bank & Trust Co. of Chattanooga v. Wilds*[177] the court of appeals held that an abstract is similarly required to be filed before a prejudgment attachment will affect the rights of bona fide purchasers and encumbrancers for value.[178]

In 1976 the General Assembly enacted the Uniform Enforcement of Foreign Judgments Act.[179] The statute is generally designed to extend to foreign judgments the same effect as judgments rendered by Tennessee courts. It provides that an authenticated copy of a foreign judgment may be filed with the clerk of any state court of record, whereupon the clerk "shall treat the foreign judgment in the same manner as a judgment of a court of record of this state."[180] It seems doubtful that this provision is sufficient to permit a judgment lien to be created by the further filing of an abstract of the foreign judgment with the register. The sections of the code dealing with judgment liens cover only judgments and decrees obtained in courts "of this state."[181]

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174. 540 S.W.2d at 262 (quoting Cheswell v. Chapman, 38 N.H. 14, 17 (1859)).

175. 1967 Tenn. Pub. Acts ch. 375, § 1 (codified at TENN. CODE ANN. § 25-501 (Cum. Supp. 1977)).

176. The statute repealed TENN. CODE ANN. § 20-302 (1955).

177. 545 S.W.2d 749 (Tenn. Ct. App. 1976).

178. *See also* Land Developers, Inc. v. Maxwell, 537 S.W.2d 904 (Tenn. 1976); text accompanying notes 142-43 *supra*.

179. 1976 Tenn. Pub. Acts ch. 530, §§ 1-7 (current version at TENN. CODE ANN. §§ 26-801 to 807 (Supp. 1977)).

180. TENN. CODE ANN. § 26-802 (Cum. Supp. 1977).

181. *Id.* § 25-501.

B. *Mechanics' and Materialmen's Liens*

The statutory provisions relative to this subject are complex.[182] Foremost among the number of recent developments that have taken place in this field is a 1975 enactment[183] that permits the owner of property, following the completion of an improvement or demolition, to protect himself against unregistered lien claims by filing a "notice of completion" with the county register. The contents of the notice are specified in the act,[184] and lien claims are barred ten days after the filing unless notice has been communicated to the owner or his designee within that time.[185] Also in 1975 legislation was enacted requiring protection, in a separate escrow account, of funds being withheld by the owner or contractor to pay materialmen, subcontractors, and the like,[186] and the Truth in Construction and Consumer Protection Act of 1975 became law.[187] This latter statute requires contractors to notify owners of the basic provisions of the lien law and to provide, upon completion of the work, a sworn statement that subcontractors, laborers, and materialmen have been paid.[188] Criminal penalties are provided for contractors who do not comply with certain provisions of the Act.[189]

Mechanics' and materialmen's liens relate back to and take

182. Filing, notice, and similar requirements differ with respect to lien claims by contractors and subcontractors. This is not always obvious from the code provisions themselves. *See* 5 MEM. ST. U.L. REV. 359, 359-67 (1975). In Silverman v. Gossett, 553 S.W.2d 581 (Tenn. 1977), the Tennessee Supreme Court held various provisions of the mechanics' and materialmen's lien statutes constitutional.

183. 1975 Tenn. Pub. Acts ch. 307, §§ 1-3 (codified at TENN. CODE ANN. §§ 64-1145 to 1147 (1976)).

184. TENN. CODE ANN. § 64-1145 (1976).

185. *Id.* § 64-1147. This section requires that the notice be forwarded by "registered or certified mail."

186. 1975 Tenn. Pub. Acts ch. 345, §§ 1-4 (codified at TENN. CODE ANN. §§ 64-1148 to 1151 (1976)).

187. 1975 Tenn. Pub. Acts ch. 364, §§ 1-7 (codified at TENN. CODE ANN. §§ 64-1152 to 1158 (1976)) was later amended by 1977 Tenn. Pub. Acts ch. 456, §§ 1-4 (current version at TENN. CODE ANN. §§ 64-1152 to 1158 (Cum. Supp. 1977)). In general, the 1977 amendment eliminates a requirement that the owner expressly accept or reject the contract.

188. TENN. CODE ANN. §§ 64-1154 to 1156 (1976).

189. *Id.* § 64-1157.

effect from the "time of visible commencement" of the work.[190] By virtue of this retroactive aspect, a lien subsequently perfected will have preference over interim encumbrances.[191] In *Kemp v. Thurmond*[192] the supreme court had under consideration the relative priority of such a lien and a trust deed given to secure a construction loan. The trust deed described the secured loan as involving an initial payment of $2,500, with subsequent payments to be made up to a total of $25,000. Before visible commencement of the work, the trust deed was executed and recorded, and the initial $2,500 was paid. Thereafter the remaining $22,500 of the loan was released. The issue was whether the entire amount of the trust deed or only that portion initially paid over before the visible commencement of the work should be given priority over the lien. The court gave preference to the entire amount, stating that " '[i]n determining the priority of the lien of a party lending money under a trust deed and that of materialmen, it [is] wholly immaterial whether the party lending the money [has] advanced the entire amount at the time the material was furnished if the obligation to advance the money exist[s].' "[193] The court concluded that a legal obligation for the creditor to pay over the entire amount of the loan was created when the trust deed was executed.

The right to obtain mechanics' and materialmen's liens is statutory in nature and the applicable statutes are strictly construed. In particular, "lien notices must be given, lien suits must be filed, and attachments must be obtained as specified by statute."[194] For instance, before recent amendments were enacted, the statutes provided that to preserve the priority of the lien against purchasers or encumbrancers for valuable consideration

190. *Id.* § 64-1104, *as amended by* 1977 Tenn. Pub. Acts ch. 424, § 1. As to the effect of the 1977 amendment, see text accompanying note 206 *infra*.

191. Williams Lumber & Supply Co. v. Poarch, 221 Tenn. 540, 428 S.W.2d 308 (1968). The lien may even take precedence over an earlier mortgage with the consent of the mortgagee. If the mortgagee does not object within ten days after written notice, his consent is implied. TENN. CODE ANN. § 64-1108 (1976).

192. 521 S.W.2d 806 (Tenn. 1975).

193. *Id.* at 807 (quoting Theilin v. Chandler, 9 Tenn. App. 345, 347 (1928)).

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

without notice, the lienor must file with the register a sworn statement "within ninety (90) days after the building or structure or improvement is demolished, altered and/or completed . . . or the contract of the lienor expires or is terminated or he is discharged."[195]

In *Concrete Supply Co. of Oak Ridge, Inc. v. Union Peoples Bank*[196] the court of appeals applied the materialmen's lien statute to a series of events involving a supplier of materials and an owner-builder. After "visible commencement" of construction began, the supplier furnished materials to the owner-builder and delivery ceased. The owner-builder executed trust deeds on the property that were recorded but the lender had no notice that the supplier had delivered the materials. The project was abandoned and never completed. The materialman recorded his lien within ninety days after the project was abandoned but more than ninety days after he had supplied the materials. It was argued that the statutory phrase "demolished, altered, and/or completed" should be interpreted to include an abandonment, but the court did not agree. Instead the court concluded that the language of the statute required the lienor to record his lien either within ninety days after the work is completed or within ninety days after his contract expired; that is, in the factual situation presented, the supplier would have had to record his lien within ninety days after delivery of the materials. The essence of the holding is that only the second alternative is available if the project is abandoned.

A related case was before the supreme court in *Tindell Home Center v. Union Peoples Bank.*[197] In that case, after visible commencement of the construction, the owner-builder executed a trust deed that was recorded, with the secured creditor being a "good faith encumbrancer." Sometime either before or after the trust deed was recorded the lien claimant furnished materials to the owner-builder.[198] Subsequently, the owner-builder abandoned

195. TENN. CODE ANN. § 64-1112 (1976). This requirement applies only if the contract to supply materials or services was not itself recorded. See notes 202-05 *infra* and accompanyng text for the effect of 1977 amendments.

196. 540 S.W.2d 250 (Tenn. Ct. App. 1976).

197. 543 S.W.2d 843 (Tenn. 1976). The same construction project was apparently involved in *Concrete Supply* and the instant case, but this was not expressly acknowledged by the court.

198. It is unclear whether the materials were furnished wholly or partially

the project. More than ninety days after the materials were delivered by the lien claimant, the trust deed was foreclosed, and the lender purchased at the sale. Thereafter the lender completed the construction, and the materialman then recorded his notice of lien within ninety days after completion of the construction but, as noted above, more than ninety days after delivery of the material. The court, citing *Concrete Supply,* gave the trust deed priority. It held that when a project is abandoned, "the materialman must file his notice of lien within ninety days from the completion or termination of his contract for it to be effective against bona fide encumbrancers or purchasers."[199]

In *Tindell Homes Center* it was argued that the structure was ultimately completed by the purchaser at the foreclosure sale and that filing of the lien notice was therefore timely because it was effected within ninety days of the completion of the work. The court rejected this argument and stated that "at the time of the mortgage foreclosures and sales, the statutory time allowed [the materialman] to perfect its materialman's lien had passed; consequently, . . . the purchaser of the properties at the public sale, took them free of liens for material furnished."[200] The following reasons were advanced by the court in support of this conclusion:

> First, the foreclosure sales did not occur until after the time of perfecting [the] lien had passed and the mortgages were the superior lien. Second, to impose such a limitation on a purchaser of property abandoned by an owner/builder would result in such property going for a greatly reduced price since the purchaser, of necessity, could not complete the property on peril of making his interest subject to materialmen's liens that otherwise could not be perfected.[201]

The harshness of the *Concrete Supply* and *Tindell Homes Center* decisions in situations in which the project has been aban-

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before or after the trust deed was recorded, but this is immaterial as the lien of a properly recorded materialman's lien will relate back to the visible commencement of the work. *See* text accompanying notes 190-91 *supra.*

199. 543 S.W.2d at 845.

200. *Id.* There are problems with this language. It is unclear whether the court was indicating that if the 90-day period had not expired at the time of the foreclosure sale, the lienor would then have until 90 days after the purchaser completed the building in which to file his notice.

201. *Id.*

doned has been ameliorated by a recent enactment of the Tennessee General Assembly.[202] The new legislation amends pertinent sections of the Tennessee Code Annotated[203] to enable the lienor to preserve his lien as against purchasers or encumbrancers for value without notice by filing his sworn statement with the register "within ninety (90) days after the building or structure or improvement is . . . abandoned and the work not completed."[204] In conjunction with this amendment, the following definition of abandonment is included:

> A building structure or improvement shall be deemed to have been abandoned for purposes of this chapter when there is a cessation of operation for a period of sixty (60) days and an intent on the part of the owner or contractor to cease operations permanently, or at least for an indefinite period.[205]

A related statute specifies that when there has been a "cessation of all operations at the site . . . for more than ninety (90) days any lien for labor . . . or for materials . . . furnished after the visible resumption of operations shall relate to and take effect only from said visible resumption of operations."[206] It is expressly provided that nothing in the enactment will affect the "priority or parity of any liens" otherwise established.[207]

A subcontractor, or other person not in privity of contract with the owner, who furnishes labor or materials must provide written notice to the owner within ninety days after demolition or completion of the improvement or within ninety days after his contract expires or he is discharged.[208] The lien continues for

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202. 1977 Tenn. Pub. Acts ch. 373, §§ 1, 3 (codified at TENN. CODE ANN. §§ 64-1112, 1117 (Cum. Supp. 1977)).

203. TENN. CODE ANN. §§ 64-1112, -1117 (1976).

204. TENN. CODE ANN. § 64-1112 (Cum. Supp. 1977). The new legislation is not exactly a model of clarity, but then neither was the basic statute. It is possible to read the amendatory language as not extending the period generally in case of lien claims by subcontractors and laborers, but only to those contracting to drill wells for structures that are abandoned. *See id.* § 64-1117 (Supp. 1977); *id.* § 64-1143 (1976).

205. *Id.* § 64-1112 (Cum. Supp. 1977). The reference to the "intention" of the owner or contractor may add an unfortunate vagueness to the situation.

206. *Id.* § 64-1104.

207. *Id.*

208. *Id.* § 64-1115 (1976). The new legislation summarized in the text accompanying notes 202-05 *supra*, does not purport to change this section and thus leaves the notice period unclear in cases in which the work is abandoned.

ninety days after the date of the notice, during which period enforcement proceedings must be instituted.[209] In the past, it has been held that unless a suit is commenced and a writ of attachment issued and levied within the ninety-day period following the notice, the lien is lost.[210]

In *Eatherly Construction Co. v. DeBoer Construction, Inc.*[211] a subcontractor furnished labor and materials for certain construction work being performed by a contractor. A notice of lien was filed more than ninety days later while the project was still being completed. An enforcement action was instituted and an attachment issued and levied, likewise before the project was completed. After the project was finished, the claimant filed a second notice of lien and amended his complaint in the enforcement action but did not seek a new attachment. The court held this to be fatal. It was observed that the statutes relating to mechanics' and materialmen's liens are to be strictly construed. Since the first notice of lien was premature, the lien was void; and since the subcontractor "had no cause of action,"[212] the ancillary attachment was likewise void.

More recently, in *General Electric Supply Co. v. Arlen Realty & Development Corp.*,[213] the supreme court relaxed somewhat the strictness of prior holdings in this area. Timely notice had been given to the property owner and suit was properly instituted by the filing of a complaint within ninety days after the date of the notice of lien. On the ninetieth day after the date of notice, regular process was issued for defendants. A writ of attachment was also issued on the same day, but it was not receipted for by the sheriff nor actually levied until the ninety-fifth day after the date of the lien notice. Regarding as mandatory the levy of the writ of attachment within the ninety-day period, the court of appeals held that the lien was lost. The supreme court reversed and expressly overruled a prior holding[214] that the at-

209. TENN. CODE ANN. § 64-1115 (1976).

210. Knoxville Structural Steel Co. v. Jones, 46 Tenn. App. 518, 330 S.W.2d 559 (1959).

211. 543 S.W.2d 333 (Tenn. 1976) (per curiam) (adopting verbatim the opinion of the court of appeals).

212. *Id.* at 335.

213. 546 S.W.2d 210 (Tenn. 1977).

214. Knoxville Structural Steel Co. v. Jones, 46 Tenn. App. 518, 330 S.W.2d 559 (1959).

tachment must actually be levied within the ninety-day period. The court stated:

> We have no disposition to depart from a strict construction of the statutes, but we are reluctant to see engrafted upon them any further or greater technicalities than their terms contain. We are of the opinion that when a lien claimant has timely filed his complaint with the clerk, praying for writ of attachment, and when that writ has actually been issued by the clerk to the sheriff within the time period prescribed in T.C.A. § 64-1115, then the suit has been brought within the meaning of the statute.[215]

C. Parties Affected by Recordation

The Tennessee recording statutes proclaim that registration affords "notice to all the world."[216] This puts the matter too broadly, and a more accurate concept is that registration of an eligible instrument constitutes notice to creditors of and bona fide purchasers from the grantor, mortgagor, or vendor.[217] This is further emphasized by the recent decision of the supreme court in *Huffine v. Riadon.*[218] Plaintiffs filed suit alleging that they had been the holders of a second mortgage on certain property but that they had been induced to subordinate their lien to that of a new second mortgage placed thereon by defendant. Plaintiffs had agreed to this arrangement upon receiving payment of a substantial part of the indebtedness and with the understanding that defendant's new second mortgage would not exceed the amount of $20,000.

In fact, it was alleged, defendant took and recorded a new second mortgage in the amount of $38,000, thus impairing plaintiffs' security. It was argued that there could be no fraud in the transaction, since defendant had recorded his mortgage, and had thereby provided notice to plaintiffs. The court found this contention unacceptable and said:

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215. 546 S.W.2d at 213-14.

216. TENN. CODE ANN. § 64-2602 (1976).

217. *See* Moore v. Cole, 200 Tenn. 43, 289 S.W.2d 695 (1956); Dixon v. Morgan, 154 Tenn. 389, 405, 285 S.W. 558, 563 (1926); Embry v. Galbreath, 110 Tenn. 297, 75 S.W. 1016 (1903); Parker v. Meredith, 59 S.W. 167 (Tenn. Ch. App. 1900).

218. 541 S.W.2d 414 (Tenn. 1976).

> [T]he plaintiffs had no occasion to search the records. No *prior* lien is involved. They made no mistake about any defect in the title of which the records would have been constructive notice. Their sole error was to rely on [defendant] to carry out the transaction as agreed upon. That in deceiving the plaintiffs he did not conceal his alleged delictions from those who might have occasion in the future to search the records is no defense.[219]

219. *Id.* at 417 (emphasis in original).

RECENT DEVELOPMENTS

Constitutional Law—Equal Protection—Imposing Money Bail

Plaintiffs, indigent pretrial detainees who were unable to make bail, challenged[1] the constitutionality of the pretrial release system administered by the state of Florida.[2] Although the state rules of criminal procedure[3] provided for nonmonetary conditions under which pretrial release could be granted,[4] there was no pre-

1. Plaintiffs' class action was brought under 42 U.S.C. § 1983 (1974). Pugh v. Rainwater, 332 F. Supp. 1107 (S.D. Fla. 1971), *rehearing denied, id.* (1972).

2. Named as defendants were the sheriff, police chiefs, state attorney, justices of the peace, and judges of small claims courts of Dade County, Florida.

3. FLA. R. CRIM. P. 3.130(b)(4).

4. FLA. R. CRIM. P. 3.130(b)(4), as amended in 1977, provides:

(4) Hearing at First Appearance.

(i) The purpose of bail is to insure the defendant's appearance. For the purpose of this rule, bail is defined as any of the following forms of release:

(1) Personal recognizance of the defendant;

(2) Execution of an unsecured appearance bond in an amount specified by the judge;

(3) Placing the defendant in the custody of a designated person or organization agreeing to supervise him;

(4) Placing restrictions on the travel, association, or place of abode of the defendant during the period of release;

(5) Requiring the execution of a bail bond with sufficient solvent sureties, or the deposit of cash in lieu thereof; or

(6) Imposing any other condition deemed reasonably necessary to assure appearance as required, including a condition requiring that the defendant return to custody after specified hours.

(ii) The judge shall at the defendant's first appearance consider all available relevant factors to determine what form of release is necessary to assure the defendant's appearance. If a monetary bail is required, then the judge shall determine the amount.

(iii) In determining which form of release will reasonably assure appearance, the judge shall, on the basis of available information, take into account the nature and circumstances of the offense charged, the weight of the evidence against the defendant, the defendant's family ties, employment, financial resources, character and mental condition, the length of his residence in the community, his record of convictions, and his record of appearance at court proceedings or of flight to avoid prosecution or failure to appear at court proceedings.

sumption in favor of such alternatives.[5] Plaintiffs alleged that conditioning pretrial release on an accused's ability to make bail discriminated against poor persons as a class and that such discrimination violated their rights to equal protection under the fourteenth amendment. The trial court found that plaintiffs' detention was not the result of a classification based solely on wealth[6] and rejected the equal protection claim.[7] A three-judge panel of the United States Court of Appeals for the Fifth Circuit reversed, holding that the pretrial detention of an indigent *solely* because he cannot afford to pay money bail is unconstitutional and that equal protection requires that the judge consider "less financially onerous forms of release" prior to imposing money bail.[8] At rehearing en banc, *held*, vacated. An express presumption against money bail and in favor of other forms of release is not a prerequisite to a valid bail statute. *Pugh v. Rainwater*, 572 F.2d 1053 (5th Cir. 1978) (en banc).

The bail system is based on the assumption that an accused would rather risk trial than forfeit his property.[9] The present case concerns the fourteenth amendment rights of those without property to forfeit. The imposition of bail in any amount effectively denies indigents pretrial freedom. Most courts, however, have refused to view this situation as an equal protection problem. Instead, complaints involving the inability to make bail have traditionally been handled under the excessive bail clause of the

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See Florida Bar *re* Fla. Rules of Criminal Procedure, 343 So. 2d 1247 (Fla. 1977).

5. *See In re* Fla. Rules of Criminal Procedure, 272 So. 2d 65, 70-71 (Fla.) (per curiam) (Ervin, J., concurring in part & dissenting in part), *rehearing denied, id.* (Fla. 1973). The Florida rule, *see* note 4 *supra*, was modeled after the Federal Bail Reform Act of 1966, 18 U.S.C. § 3146 (1969), which does provide for such a presumption. 272 So. 2d at 70-71.

6. The district court noted as a general matter that "[t]he severity of the crime along with the accused's ties to the community, past criminal record, and financial resources are all considered in the setting of bail." 332 F. Supp. at 1115. The court found that in the instant case there were other factors besides their poverty that distinguished plaintiffs from released persons. *Id.*

7. Plaintiffs also alleged that defendants' practice of holding plaintiffs in custody without a judicial determination of probable cause violated the fourth amendment. Plaintiffs prevailed on this issue. Gerstein v. Pugh, 420 U.S. 103 (1975). For a summary of the complex procedural history of both issues, see Pugh v. Rainwater, 557 F.2d 1189, 1193-94 (5th Cir. 1977).

8. 557 F.2d at 1201.

9. *See, e.g.*, Bandy v. United States, 81 S. Ct. 197, 197 (Douglas, Circuit Justice, 1960).

eighth amendment.[10]

Eighth amendment analysis has frustrated the indigent's efforts to gain pretrial release in two ways. First, by eighth amendment standards, the mere fact that an indigent cannot gain his freedom is of no independent significance. The eighth amendment has not been authoritatively interpreted to grant the right to bail,[11] much less the right to pretrial release.[12] More impor-

10. "Excessive bail shall not be required . . . ." U.S. CONST. amend. VIII. While language in several of the Supreme Court's opinions has indicated that the eighth amendment's proscriptions apply to the states through the due process clause of the fourteenth amendment, *see* Robinson v. California, 370 U.S. 660, 666, 675 (1962) (punishment clause); Francis v. Resweber, 329 U.S. 459, 463 (1947) (punishment clause), the Court has not had occasion to decide this point directly. Nevertheless, lower federal courts have taken incorporation for granted. *See, e.g.*, Anderson v. Nosser, 438 F.2d 183, 189 (5th Cir. 1971), *rehearing granted, id.* (1971), *aff'd in pert. part*, 456 F.2d 835 (5th Cir. 1972) (en banc), *cert. denied*, 409 U.S. 848 (1972); Mastrain v. Hedman, 326 F.2d 708, 710 (8th Cir.), *cert. denied*, 376 U.S. 965 (1964). The uncertain state of the law in this area is not of major significance because most state constitutions contain provisions similar to the eighth amendment. *See* Note, *Preventive Detention Before Trial*, 79 HARV. L. REV. 1489, 1495 (1966).

11. Dictum in Stack v. Boyle, 342 U.S. 1 (1951), indicated that the Supreme Court might be willing to find an eighth amendment right to bail: "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 . . . would lose its meaning." *Id.* at 4. *See also* United States v. Motlow, 10 F.2d 657, 659 (7th Cir. 1926) ("The provision . . . would be futile if magistrates were left free to deny bail."); Trimble v. Stone, 187 F. Supp. 483, 484-85 (D.D.C. 1960); United States v. Fiala, 102 F. Supp. 899, 899 (W.D. Wash. 1951). Nevertheless, in Carlson v. Landon, 342 U.S. 524 (1952), the Court announced, again in dictum, that the eighth amendment does not confer a constitutional right to bail and that Congress may define nonbailable offenses. *Id.* at 545.

The controversy over whether the eighth amendment grants the right to bail remains unsettled. *See generally* Note, *supra* note 10, at 1498-99. *Stack* has been distinguished on the grounds that it was dealing with a statutory right to bail. Blunt v. United States, 322 A.2d 579 (D.C. 1974). On the other hand, the interpretation in *Carlson* has been refuted on the basis that the decision was a "special case involving [the deportation of communist aliens and] the Internal Security Act of 1950." Martain v. State, 517 P.2d 1389, 1393 (Alaska 1974). *See also* Foote, *The Coming Constitutional Crisis in Bail* (pt. 1), 113 U. PA. L. REV. 859, 879 (1965) (suggesting that *Carlson* misinterpreted the history of the eighth amendment).

The more recent cases, however, have permitted pretrial detention without

tantly, accepted interpretations of the excessive bail clause reject the assertion that an accused's inability to make bail in and of itself necessitates a finding of excessiveness. The Supreme Court established the standard for the determination of eighth amendment excessiveness in *Stack v. Boyle.*[13] "Excessiveness" was evaluated under the principle that the purpose of bail was merely to assure the presence of the defendant at trial. An accused's ability to pay was only one factor to be weighed. Petitioners in *Stack* had been indicted for conspiracy. Bail was set for each at $50,000—far more than for other offenses carrying similar penalties.[14] Finding that the sole permissible function of bail is to assure an accused's presence at trial,[15] the court announced that "bail set at a figure

bail. *See, e.g.*, United States v. Cozzetti, 441 F.2d 344 (9th Cir. 1971); United States v. Gilbert, 425 F.2d 490 (D.C. Cir. 1969) (per curiam); Blunt v. United States, 332 A.2d 579 (D.C. 1974).

As opposed to bail pending trial, bail pending appeal has never been considered a matter of eighth amendment right. *See* Williamson v. United States, 184 F.2d 280, 281 (2d Cir., Jackson, Circuit Justice, 1950).

12. Although the more recent decisions have not interpreted the eighth amendment to grant the right to bail, *see* note 11 *supra*, federal law, 18 U.S.C. § 3146; FED. R. CRIM. P. 46(a), and many state constitutions, *see, e.g.*, FLA. CONST. art. 1, § 14; TENN. CONST. art. I, § 15, grant the right in noncapital cases. Courts since *Carlson*, *see* note 11 *supra*, have outlined the circumstances under which it is permissible to deny bail in the absence of a statute. As long as there is a hearing, United States v. Gilbert, 425 F.2d 490, 492-93 (D.C. Cir. 1969) (per curiam), the court may detain an accused if he has threatened a witness, Carbo v. United States, 82 S. Ct. 662, 668 (Douglas, Circuit Justice, 1962) (must be an "extreme or unusual case"), if he has tampered with witnesses, United States v. Cozzetti, 441 F.2d 344, 350 (9th Cir. 1971), or if his freedom presents a "danger of significant interference with the progress or order of the trial." Bitter v. United States, 389 U.S. 15, 16 (1967) (per curiam). A court may not, however, deny bail "to protect society from predicted but unconsummated offenses," Williamson v. United States, 184 F.2d 280, 282 (2d Cir., Jackson, Circuit Justice, 1950), or because of an accused's evil reputation. Carbo v. United States, 82 S. Ct. 662, 665 (Douglas, Circuit Justice, 1962).

13. 342 U.S. 1 (1951).

14. *Id.* at 5.

15. *Id.* This was generally accepted by preexisting state law. *See, e.g., Ex parte* Jagles, 44 Nev. 370, 371, 195 P. 808, 808 (1921); *Ex parte* Hayworth, 34 Okla. Crim. 41, 42, 244 P. 827, 829 (1926). It also represents present legal thought. *See, e.g.*, Duran v. Elrod, 542 F.2d 998 (7th Cir. 1976); Anderson v. Nosser, 438 F.2d 183 (5th Cir.), *rehearing granted, id.* (1971). *But see* Martin v. State, 517 P.2d 1389, 1397 (Alaska 1974) (holding that although court may not *deny* bail, it is permissible to consider danger defendant poses to community when setting *amount* of bail).

higher than an amount reasonably calculated to fulfill this purpose is 'excessive' under the Eighth Amendment."[16] Evidence must be produced at a hearing in the event that "an amount greater than that usually fixed for serious charges of crimes is required."[17] Under eighth amendment analysis, as long as the *Stack* test is met, one's inability to make bail is of no independent consequence[18] except as one factor bearing on the amount of bail needed to assure an accused's presence.

In 1956 the Supreme Court decided the landmark case of *Griffin v. Illinois*,[19] a plurality opinion that opened the door to wealth-based equal protection claims in the context of criminal proceedings. Although that case did not concern bail, the Court's treatment of the equal protection clause[20] gave birth to the idea

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The "presence at trial" limitation has had impact on the area of pretrial detention. *See* Duran v. Elrod, 542 F.2d 998 (7th Cir. 1976); Anderson v. Nosser, 438 F.2d 183, 190 (5th Cir.), *rehearing granted, id.* (1971). *Duran* based its decision that "pre-trial detainees may suffer no more restrictions than are reasonably necessary to ensure their presence at trial" on the due process clause of the fourteenth amendment. 542 F.2d at 999. The *Anderson* court found punitive measures in the context of pretrial incarceration to be "out of harmony with the presumption of innocence" since the purpose was "simply . . . to assure presence at trial." 438 F.2d at 190.

16. 342 U.S. at 5.

17. *Id.* at 6. Professor Foote has interpreted this language to sanction the determination of bail from prefabricated scales and to require the courts to individualize only when the amount set is greater than that ordinarily imposed for like crimes. Foote, *supra* note 11, at 995.

18. Prior to *Stack* it was arguable that setting bail in an amount greater than an accused was able to pay was "excessive" by eighth amendment standards. Some cases so held. *See* Bennett v. United States, 36 F.2d 475 (5th Cir. 1929); United States v. Brawner, 7 F. 86 (W.D. Tenn. 1881); United States v. Lawrence, 26 F. Cas. 887 (C.C.D.C. 1835) (No. 15,577). The most recent cases, however, have rejected this notion. *See, e.g.*, United States v. Radford, 361 F.2d 777 (4th Cir.), *cert. denied*, 385 U.S. 877 (1966); White v. United States, 330 F.2d 811 (8th Cir.), *cert. denied*, 379 U.S. 855 (1964). In *Radford* the court held that the financial status of an accused is only one of the factors to be considered in determining the amount of bail "and certainly should not control and require that the other considerations be ignored." 361 F.2d at 780. In *White*, after restating the *Stack* formula for "excessiveness," the Eighth Circuit held that "[t]he mere financial inability of the defendant to post an amount otherwise meeting the aforesaid standard does not automatically indicate excessiveness." 330 F.2d at 814.

19. 351 U.S. 12 (1956).

20. "[N]or shall any state . . . deny to any person within its jurisdiction

that eighth amendment analysis should not be the sole determinative of the constitutionality of the imposition of bail on an indigent. At issue in *Griffin* was a statute that denied appellate review to defendants who did not supply the court with a trial transcript. Petitioners were indigents who alleged that the state's failure to provide free transcripts effectively denied them an appeal. The Court agreed, holding that while the Constitution does not require a state to provide an appellate system,[21] if it chooses to do so the state may not discriminate on the basis of poverty.[22] The Court found no "rational relation" between an accused's

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the equal protection of the laws." U.S. CONST. amend. XIV.

The Court has formulated three tests under which equal protection claims are analyzed: the rational basis test, the compelling state interest test, and the newer, intermediate standard. Using the traditional "rational basis" test, a state-created classification that withholds a benefit from a given group will be invalidated only if the classification does not bear a rational relation to a permissible state objective. *See, e.g.*, United States Dep't of Agriculture v. Moreno, 413 U.S. 528, 533 (1973) ("[A] legislative classification must be sustained if it is rationally related to a legitimate governmental objective."); McGowan v. Maryland, 366 U.S. 420, 425 (1966) (defendant's conviction for violation of Maryland's Sunday "blue laws" affirmed; equal protection "is offended only if the classification is wholly irrelevant to the achievement of the State's objective.").

On the other hand, the stricter, compelling state interest test requires that the state-created classifications be "necessary" to a compelling state interest. San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 34 n.73 (1973). The court will apply this "strict scrutiny" test whenever the classification involves a "suspect class," Graham v. Richardson, 403 U.S. 365 (1971) (alienage); Loving v. Virginia, 388 U.S. 1 (1967) (race); Oyama v. California, 332 U.S. 633 (1948) (national origin), or infringes on a "fundamental right." Dunn v. Blumstein, 405 U.S. 330 (1972) (right to vote); Shapiro v. Thompson, 394 U.S. 618 (1969) (right to travel). In *Rodriguez* the Court refuted the idea that a right may be fundamental merely because of its "societal significance." To reach "fundamental" status, a right must be "explicitly or implicitly guaranteed by the Constitution." 411 U.S. at 33-34.

Recent cases indicate the Court's willingness to apply an intermediate standard when passing on classifications based on illegitimacy, *see* Trimble v. Gordon, 430 U.S. 762 (1977), or sex, *see* Califano v. Webster, 430 U.S. 313 (1977) (per curiam); Califano v. Goldfarb, 430 U.S. 199 (1977); Craig v. Boren, 429 U.S. 190 (1977). In these cases the Court requires that classifications be substantially related to an important state interest. *See generally The Supreme Court, 1976 Term*, 91 HARV. L. REV. 1, 177-88 (1977).

21. The same may be true of a state provision of a bail system. *See* note 11 *supra* and accompanying text.

22. 351 U.S. at 18.

wealth and his guilt or innocence.[23] In sweeping language the Court announced:

> [O]ur own constitutional guaranties of due process and equal protection both call for procedures in criminal trials which allow no invidious discriminations between persons and different groups of persons. . . . In criminal trials a State can no more discriminate on account of poverty than on account of religion, race, or color.[24]

Dissenting Justices Burton and Minton felt that the precedent set by the plurality had dangerous implications: "Some can afford bail, some cannot. Why fix bail at any reasonable sum if a poor man can't make it?"[25]

The fears of the *Griffin* dissenters first became realized in the dicta of Justice Douglas, sitting as Circuit Justice, in the *Bandy v. United States* cases. In *Bandy I*[26] Justice Douglas cited *Griffin* and expressed the view that the bail system, as applied to an indigent, "raises considerable problems for the equal administration of the law."[27] Petitioner was an indigent whose bond pending appeal had been set at $5,000. Recognizing the constitutional tension between the *Stack* "excessiveness" formula[28] and the case of the indigent defendant when "the fixing of bail in even a modest amount may have the practical effect of denying him release,"[29] Justice Douglas questioned whether an indigent may "be denied freedom, where a wealthy man would not, because he does not happen to have enough property to pledge for his freedom?"[30]

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23. *Id.* at 17-18.

24. *Id.* at 18. Despite this language, the Supreme Court has never held that wealth-based classifications, per se, are suspect. *See* San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 29 (1973). Even so, post-*Griffin* decisions have extended its rationale to other areas of criminal procedure. *See, e.g.*, Meyer v. Chicago, 404 U.S. 189 (1971) (free transcripts in nonfelony cases punishable only by fines); Douglas v. California, 372 U.S. 353 (1963) (counsel for indigent's first and only appeal); Smith v. Bennett, 365 U.S. 708 (1961) (invalidating filing fees for postconviction proceedings); Burns v. Ohio, 360 U.S. 252 (1959) (invalidating filing fees for appeals).

25. 351 U.S. at 29. Justices Reed and Harlan joined. Justice Harlan also wrote a separate dissenting opinion. *Id.*

26. Bandy v. United States, 81 S. Ct. 197 (Douglas, Circuit Justice, 1960).

27. *Id.* at 197.

28. *See* text accompanying note 16 *supra.*

29. 81 S. Ct. at 198.

30. *Id.*

Unfortunately, the court did not resolve the issue but rather deferred Bandy's case to the court of appeals.[31]

In *Bandy II*[32] Justice Douglas reviewed the same petitioner's request for release on personal recognizance pending the disposition of his application for certiorari to the Eighth Circuit.[33] Although he again declined to offer relief,[34] Justice Douglas added the following observation to his opinion in *Bandy I*:

> Further reflection has led me to conclude that no man should be denied release because of indigence. Instead, under our constitutional system, a man is entitled to be released on "personal recognizance" where other relevant factors make it reasonable to believe that he will comply with the orders of the Court.[35]

The Supreme Court's first post-*Griffin* decisions that considered the issue of indigency and detention were *Williams v. Illinois*[36] and *Tate v. Short*.[37] In these cases the Court used the *Griffin* equality principle to ban the practice of incarcerating indigents because of their inability to pay criminal fines. By so doing, the Court moved closer toward recognizing the applicability of wealth-based equal protection analysis to the area of pretrial detention. Petitioner in *Williams* had been convicted of petty theft[38] and received the maximum possible sentence: im-

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31. *Id.* Bandy's application was denied without prejudice to an application to the court of appeals, where the facts could be more readily explored.

32. Bandy v. United States, 82 S. Ct. 11 (Douglas, Circuit Justice, 1961).

33. The procedural history of Bandy's litigation is long and complex. *See generally* Foote, *The Coming Constitutional Crisis in Bail* (pt. 2), 113 U. PA. L. REV. 1125, 1154-55 n.274 (1965).

34. To grant relief would have made Bandy's petition for certiorari to the Eighth Circuit moot. 82 S. Ct. at 13.

35. *Id.* In Pelletier v. United States, 343 F.2d 322, 323 (D.C. Cir. 1965), the United States Court of Appeals for the District of Columbia in dicta expressly concurred with Justice Douglas' views. The court felt that it would be "constitutionally compelled" to consider nonmonetary forms of pretrial release if a defendant could not afford bail in an amount sufficient to ensure his presence. *Id.* In a 1973 class action suit, however, a New York court avoided the issue by holding that since many factors are considered when bail is set, petitioners did not constitute a proper class. Bellamy v. Judges, 41 App. Div. 2d 196, 342 N.Y.S.2d 137 (1973).

36. 399 U.S. 235 (1970).

37. 401 U.S. 395 (1971).

38. *See* ILL. ANN. STAT. ch. 38, § 16-1 (Smith-Hurd 1977).

prisonment for one year and a $500 fine.[39] The criminal code provided that if an accused did not pay the fine at the expiration of his sentence, he would be further confined in the workhouse.[40] Petitioner alleged that in order to work off his fine, the duration of his imprisonment would exceed the greatest possible sentence for his offense.[41] Citing *Griffin*, the Court found an impermissible wealth-based discrimination and held that petitioner's right to equal protection had been violated.[42] The holding was limited, however, to situations in which "the aggregate imprisonment exceeds the maximum period fixed by the statute and results directly from an involuntary nonpayment of a fine."[43] In *Tate* the Court examined the analogous problem of the fine-or-imprisonment procedure. State law limited the penalty for petitioner's offense to a fine but converted it into a prison sentence in the event of nonpayment. After finding that such practices did not bear a rational relationship to either a penal or a revenue interest,[44] the Court extended the *Williams* rationale beyond the situation in which a defendant's imprisonment exceeded the maximum statutory sentence. Thus, as long as nonpayment is involuntary, equal protection " 'prohibits the State from imposing a fine as a sentence and then automatically converting it into a jail term.' "[45]

In *United States v. Gains*[46] the Second Circuit faced the issue of whether the *Williams-Tate* rationale should be extended to the area of *pretrial* incarceration. Subsequent to his conviction for a federal offense, the petitioner in *Gains* was released on bail pending sentencing. In the interim, he was arrested on a state charge for which he was unable to make bail. Although this charge was later dismissed, petitioner remained in state custody during a time when he could have been serving his federal sentence. The Second Circuit originally denied petitioner's motion to have his federal sentence reduced by the number of days he had spent in

39. *See id.*
40. *Id.* § 1-7(k).
41. 399 U.S. at 238.
42. *Id.* at 240-41.
43. *Id.*
44. The cost of maintaining a prisoner exceeded the revenue gained from payment of the fine. 401 U.S. at 399.
45. *Id.* at 398 (quoting Morris v. Schoonfield, 399 U.S. 508, 509 (1970)).
46. 449 F.2d 143 (2d Cir. 1971) (per curiam).

state custody.[47] The Supreme Court vacated and remanded,[48] ordering the court of appeals to view petitioner's claims in light of its decisions in *Williams* and *Tate*. The Second Circuit then interpreted the Supreme Court's decisions as indicating that "a man should not be kept imprisoned solely because of his lack of wealth."[49] The fact that petitioner's poverty subjected him to a longer sentence than he would have served were he wealthy was "an impermissible discrimination according to *Tate* and *Williams*."[50]

Despite its apparent readiness to apply wealth-based equal protection analysis to the area of pretrial release, the Supreme Court in *Schilb v. Kuebel*[51] upheld the Illinois bail system against an attack under the *Griffin* equality principle. Petitioners in *Schilb* were a class of persons who were denied release on personal recognizance[52] and who were unable to afford release by depositing the full amount of their bail.[53] Under these circumstances, a newly created state law provided that an accused could gain pretrial release by depositing ten percent of his bail with the state[54] and that only one percent of the total amount of bail would be retained if the accused were present at trial.[55] While this option was also available to persons with the financial capability to avoid the one percent forfeiture by depositing the full amount, petitioners argued that the loss was imposed on only the poorer segment of those gaining release and therefore violated their

47. United States v. Gains, 436 F.2d 1069 (2d Cir.), *vacated and remanded*, 402 U.S. 1006 (1971).

48. 402 U.S. at 1006.

49. 449 F.2d at 144.

50. *Id. See also* White v. Gilligan, 351 F. Supp. 1012 (S.D. Ohio 1972). In *White* the district court applied the *Williams-Tate* rationale and ordered the state to credit time spent in pretrial detention to convicted defendants' sentences. In addition, the court ordered that credit be given for any "good behavior" exhibited by a pretrial detainee.

51. 404 U.S. 357 (1971), *rehearing denied*, 405 U.S. 948 (1972).

52. *See* ILL. ANN. STAT. ch. 38, § 110-2 (Smith-Hurd 1977).

53. *See id.* § 110-8. The court noted that petitioners did not allege that they were indigents and thus unable to gain release under the 10% cost provision. 404 U.S. at 370. Had they done so, a more serious equal protection argument could have been made.

54. *See* ILL. ANN. STAT. ch. 38, § 110-7(a) (Smith-Hurd 1977).

55. *See id.* § 110-7(f).

rights to equal protection.[56] The Court found this argument "paradoxical."[57] Under the professional bondsman system, which the one percent cost-retention provision was designed to replace, petitioners would have lost the entire ten percent deposit. Finding neither a suspect classification nor an infringement of fundamental rights, the Court chose to analyze the equal protection claim under the traditional "rational basis" test.[58] This lenient approach, the Court noted, permits a legislature "to take reform 'one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind.' "[59] Applying this minimal scrutiny standard, the Court found administrative and financial justifications for the state's no-charge policy toward defendants not utilizing the ten percent deposit provision.[60] While it rejected petitioners' reliance on *Griffin*'s equality approach, the Court emphasized that "[i]n no way do we withdraw from the *Griffin* principle. That remains steadfast."[61] The Court found no

56. Petitioners also attacked the provision on the ground that it amounted to a court cost assessed against an acquitted individual. 404 U.S. at 370. Justice Douglas, dissenting, would have accepted this argument. *Id.* at 377. Justices Stewart and Brennan also dissented. *Id.* at 381.

57. *Id.* at 366.

58. *See* note 20 *supra.*

59. 404 U.S. at 364 (quoting McDonald v. Board of Election Comm'rs, 394 U.S. 802, 809 (1969)). In declining to apply the compelling state interest test, *see* note 20 *supra,* the Court emphasized:

> [W]e are not at all concerned here with any fundamental right to bail or with any Eighth Amendment-Fourteenth Amendment question of bail excessiveness. Our concern, instead, is with the 1% cost-retention provision. This smacks of administrative detail and of procedure and is hardly to be classified as a "fundamental" right or as based upon any suspect criterion.

404 U.S. at 365. The fact that the Court recognized that the "excessiveness" question in bail could be seen in terms of both the eighth and fourteenth amendments gives credence to Justice Douglas' dicta in the *Bandy* opinions. *See* text accompanying notes 26-35 *supra.*

60. 404 U.S. at 367. When a defendant is released on his own recognizance, the state is not required to hold anything for safekeeping and thereby avoids administrative responsibility and additional paperwork. *Id.* When he deposits the full amount of his bail, the state not only gets the use of the defendant's entire "productive asset" during the period of deposit but also is afforded greater protection against the expenses incurred if the defendant does not appear for trial. *Id.*

61. *Id.* at 369.

proof that the full-amount provision was for the benefit of the rich or that the ten percent deposit provision was solely for the less affluent. The Court speculated that the wealthy would find the latter provision more attractive because it avoided tying up capital. Finally, "[i]t should be obvious that the poor man's real hope and avenue for relief is the personal recognizance provision of [the Illinois act]."[62]

In *Pugh v. Rainwater*,[63] the instant case, the issue of whether the Constitution demands a presumption in favor of this "poor man's hope" was squarely addressed for the first time.[64] There was no eighth amendment question concerning the right to bail[65] since plaintiffs were entitled to bail by virtue of the Florida Constitution.[66] Because of the precedent set by *Griffin* and its successors,[67] an equal protection issue was presented: Does the equal protection clause of the fourteenth amendment entitle an indigent accused of a bailable offense to a presumption against money bail and in favor of other forms of release?

At the outset, the Fifth Circuit panel in its 1977 opinion rejected the lower court's conclusion that the state's bail system did not violate the equal protection clause since plaintiffs' detention was not the result of a wealth-based classification.[68] The mere fact that factors in addition to an accused's wealth were weighed by the state prior to imposing bail did not dispose of the contention that plaintiffs were, in essence, detained solely because they could not afford to pay money bail.[69] Citing *Williams*[70]

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62. *Id.*

63. 572 F.2d 1053 (5th Cir. 1978) (en banc).

64. While on point, the observations of Justice Douglas in *Bandy II* and those of the United States Court of Appeals for the District of Columbia in Pelletier v. United States, 343 F.2d 322, 323 (D.C. Cir. 1965), were both dicta. *See* note 35 *supra* and accompanying text.

65. *See* note 11 *supra* and accompanying text.

66. "Until adjudged guilty, every person charged with a crime . . . shall be entitled to release on reasonable bail with sufficient surety unless charged with a capital offense or an offense punishable by life imprisonment and the proof of guilt is evident or the presumption is great." FLA. CONST. art. 1, § 14.

67. See the discussions of *Bandy I* and *II* in text accompanying notes 26-35 *supra*, *Williams* in text accompanying notes 36-43 *supra*, *Tate* in text accompanying notes 44-45 *supra*, and *Gains* in text accompanying notes 46-50 *supra*.

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

69. 557 F.2d at 1195-96. But see Bellamy v. Judges, 41 App. Div. 2d 196, 342 N.Y.S.2d 137 (1973), which frustrated a class action suit over an identical

for the proposition that a de facto wealth-based classification is sufficient to invoke an equal protection inquiry, the panel found the *effect* of the bail decision to be determinative. Two classes of defendants were created—those who could make bond and those who could not. While nonindigents gained their freedom, indigents remained incarcerated.

Unlike the Court in *Schilb*,[71] the 1977 *Pugh* panel chose to analyze petitioners' claim under the "compelling state interest" test: "The factors of a wealth-based classification in the context of a criminal prosecution,[72] *combined with* its effect on the fundamental right to be presumed innocent[73] *and* to prepare an adequate defense,[74] persuade us that the challenged bail practices

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issue to that raised in *Pugh* by holding that such factors prevented petitioners from becoming a proper class.

70. "[A] law nondiscriminatory on its face may be grossly discriminatory in its operation." 399 U.S. at 242 (citing Griffin v. Illinois, 351 U.S. 12, 17 n.11 (1956)); *see* text accompanying notes 36-43 *supra*.

71. *See* text accompanying note 58 *supra*.

72. The court relied on the Supreme Court's decisions in *Griffin*, *Tate*, and *Williams* for its decision that the instant classification was "suspect." 557 F.2d 1196-97. *See generally* note 20 *supra*.

73. That the presumption of innocence in a pretrial situation is a "fundamental right" for the purposes of applying the strict scrutiny test is not settled law. *See generally* note 20 *supra*. A leading authority to the contrary is Blunt v. United States, 322 A.2d 579 (D.C. 1974). The *Blunt* court stated that the presumption "has never been applied to situations other than the trial itself." *Id.* at 584. To do so "would make any detention for inability to meet conditions of release unconstitutional." *Id.*

The authority cited by the *Pugh* court is not persuasive. *In re* Winship, 397 U.S. 358 (1970), which held that the beyond-a-reasonable-doubt standard must apply at juvenile proceedings, is in accord with the *Blunt* analysis. Anderson v. Nosser, 438 F.2d 183, 189, *rehearing granted*, *id.* (5th Cir. 1971), discussed the presumption with respect to pretrial circumstances but did not concern itself with the "fundamental right" issue. The same is true of the language cited in *Stack*. *See* note 11 *supra*.

Although the court's position on the presumption of innocence has little support in case authority, it has much scholarly backing. *See generally* Note, *supra* note 10, at 1501; Note, *Bail and Its Discrimination Against the Poor: A Civil Rights Action as a Vehicle of Reform*, 9 VAL. U.L. REV. 167, 183 (1974) [hereinafter cited as *Discrimination*]; Note, *Bail: An Ancient Practice Reexamined*, 70 YALE L.J. 966, 970 (1961).

74. The authorities cited by the court for the proposition that the right to prepare an adequate defense is a fundamental right recognized only that pretrial detention may interfere with an accused's right to a fair trial. They did not

require strict judicial scrutiny."[75] The statutory classification in *Schilb* imposed only a monetary burden.[76] In the instant case, petitioners were effectively denied pretrial freedom, with all the attending detriments.[77] Such a classification could be upheld only if it were necessary to a compelling state interest.[78]

Applying the strict scrutiny test, the 1977 panel found that the state's interest in assuring petitioners' presence at trial was clearly "compelling." Nevertheless, imposing bail on an indigent was not only unnecessary but also "irrelevant in promoting the state's interest."[79] Under the bondsman system, the threat of forfeiture is not a deterrent to flight. It is the bondsman who forfeits; the accused's collateral is lost in any event.[80] The court reasoned

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discuss this problem with respect to the fundamental rights doctrine. *See* Barker v. Wingo, 407 U.S. 514, 532-33 (1972) (speedy trial); Stack v. Boyle, 342 U.S. 1, 5 (1951) (eighth amendment); Bandy v. United States, 81 S. Ct. 197, 198 (Douglas, Circuit Justice, 1960). Nevertheless, scholars have generally accepted the *Pugh* court's position. *See* Foote, *supra* note 33, at 1141-42; Note, *supra* note 10, at 1489; Note, *supra* note 73, at 969.

The court also discussed studies that tend to show an adverse correlation between the fact of pretrial detention and the outcome of trials. 557 F.2d at 1198 n.19. *See generally* Foote, *supra* note 33, at 1148-50; *Discrimination, supra* note 73, at 179-80. It did not, however, express a view on the validity of such studies.

75. 557 F.2d at 1198 (emphasis added). Whether the court would have applied strict scrutiny in the event that any of these components were missing is left to the imagination.

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

77. Apart from being subjected to an environment that is normally reserved for convicted criminals, *see, e.g.*, Duran v. Elrod, 542 F.2d 998, 999 (7th Cir. 1976), the pretrial detainee suffers a variety of detriments that are not incurred by those gaining freedom. These include the inability to contact favorable witnesses or to gather evidence when the defendant's attorney is either unwilling or unable to do so, *see, e.g., Discrimination, supra* note 73, at 179-80, the impaired opportunity to confer with counsel, Foote, *supra* note 33, at 1147, and the increased chance of being convicted and of serving a longer sentence. *Id.* at 1148-50. Pretrial detention may also cause loss of employment, resulting in strain on family relations and the inability to employ private counsel. *Id.* at 1146.

78. *See generally* note 20 *supra*.

79. 557 F.2d at 1200.

80. By analogy to Lane v. Brown, 372 U.S. 477 (1963), which invalidated an Indiana statute that gave the public defender the power to deny an indigent the transcript necessary for an appeal, the *Pugh* court also observed that the bondsman system *itself* might be constitutionally suspect as an improper delegation of judicial power. 557 F.2d at 1200 n.23.

that the real assurance of an accused's presence is that the bondsman will become a "bounty hunter" in order to prevent forfeiture.[81] Since the police would perform this same function were an indigent released on his own recognizance, the imposition of bail does not in reality promote the state's interest in any significant way. "The incongruity . . . is apparent: Those who can afford to pay a bondsman do so and thus avoid risking forfeiture of their property; indigents, who cannot afford to pay a bondsman, have no property to forfeit in the first place."[82]

Prior to finding that the pretrial detention of indigents solely because they cannot afford to pay money bail is unconstitutional, the 1977 panel had to consider whether less drastic alternatives to money bail were available in Florida. The Florida rule,[83] which was modeled after the Federal Bail Reform Act,[84] provided for various nonmonetary forms of pretrial release. Unlike the federal act, however, the state's system did not create a presumption in favor of those alternatives. The panel reasoned that such a presumption would accommodate both the indigent defendant's interest in pretrial release and the state's interest in assuring his presence at trial and held that "equal protection standards are not satisfied unless the judge is required to consider less financially onerous forms of release before he imposes money bail."[85]

While the 1978 en banc majority[86] agreed, on rehearing, that "[t]he incarceration of those who cannot [meet the requirements of the master bond schedule], without *meaningful consideration* of other possible alternatives, infringes on both due process [87] and equal protection requirements,"[88] the en banc court

81. 557 F.2d at 1200. The bondsman rarely, if ever, performs this function. *See* Foote, *supra* note 33, at 1162-63; Note, *supra* note 10, at 1490. It has been suggested that the real deterrent to jumping bail is the threat of recapture and its subsequent penalties. *See* Foote, *supra* note 33, at 1163.

82. 557 F.2d at 1200.

83. *See* notes 4-5 *supra* and accompanying text.

84. 18 U.S.C. § 3146 (1969).

85. 557 F.2d at 1201.

86. 572 F.2d 1053 (5th Cir. 1978) (en banc). Judges Simpson, Gewin, Goldberg, and Godbold dissented. *Id.* at 1059. Judge Rubin concurred. *Id.* at 1071. Judge Clark, joined by Judge Tjoflat, specially concurred. *Id.* at 1068. Judge Coleman, *id.* at 1069, and Judge Gee, *id.* at 1070, also specially concurred.

87. The idea that pretrial detention can also involve the due process clause did not originate with the majority. It has often come up in response to the

nonetheless vacated the panel's decision and held that Florida's failure to utilize an express presumption against money bail did not render its pretrial release statute facially invalid.[89] The grounds chosen by the majority for declining to rewrite the state's bail statute, however, left the practical impact of the panel's decision unimpaired. Rather than reject the 1977 panel's constitutional analysis, the majority merely refused to rewrite a statute that it felt was capable of constitutional application.[90] In other words, despite the majority's position that an express presumption against money bail is not a prerequisite to a facially valid bail statute, it remains unconstitutional in the Fifth Circuit to impose bail on an indigent unless some consideration is given to whether less onerous forms of release will ensure his presence at trial. The question that the decision does not answer is how much consideration will suffice.

Both the panel[91] and the majority[92] of the en banc court agreed that any resolution of the problems of bail and indigency demanded a "delicate balancing"[93] of the state's interest in assuring an accused's presence at trial against the individual's interest

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denial of bail and the conditions of pretrial detention. See Duran v. Elrod, 542 F.2d 998 (7th Cir. 1976), which held that the failure to grant visitation and recreation privileges to pretrial detainees violated their constitutional rights:

> Strictly speaking, pretrial detainees may not be punished at all because they have been convicted of no crime. The sole permissible interest of the state is to ensure their presence at trial . . . . [Therefore,] [w]e hold that as a matter of *due process*, pretrial detainees may suffer no more restrictions than are reasonably necessary to ensure their presence at trial.

Id. at 999 (emphasis added). *See also* Carbo v. United States, 82 S. Ct. 662, 667 (Douglas, Circuit Justice, 1962) (As a matter of due process, "[d]enial of bail should not be used as an indirect way of making a man shoulder a sentence for unproved crimes.").

On the other hand, the majority's position extends the due process argument beyond situations involving the denial of bail and the conditions of pretrial detention. The view that granting bail could violate due process appears to break new ground. Plaintiffs did not make this argument. *See* note 95 *infra*.

88. 572 F.2d at 1057 (emphasis added).
89. *Id.* at 1059.
90. *Id.* at 1058.
91. 557 F.2d at 1201.
92. 572 F.2d at 1056.
93. *Id.*

in pretrial freedom. In all cases, the majority felt that the constitutionality of a state's action should be analyzed in terms of whether that action was "necessary to reasonably assure defendant's presence at trial."[94] Thus, the majority announced that "in the case of the indigent, whose appearance at trial could reasonably be assured by one of the alternate forms of release, pretrial confinement for inability to post money bail would constitute imposition of an excessive restraint."[95]

The real point of divergence between the panel and the majority was in the judges' views concerning the explicitness with which a state's bail statute must protect an indigent's constitutional rights. The panel had ordered that Florida expressly provide for a presumption against money bail.[96] While the en banc majority acknowledged that such a presumption met minimum constitutional demands,[97] it could "perceive of no reason . . . less explicit requirements [could] not be applied in an altogether constitutional manner."[98] Florida's newest statute[99] postdated any evidence that the state had engaged in an unconstitutional bail practice.[100] In the absence of such evidence, said the majority,

94. *Id.* at 1057. This, of course, is the *Stack* test for determining whether bail is excessive under the eighth amendment. *See* text accompanying notes 15-16 *supra*.

95. 572 F.2d at 1058. As the dissent pointed out, the majority dealt with issues that were not raised by either the 1977 panel or plaintiffs. *Id.* at 1059-60. Both had limited their discussion to the equal protection rights of indigents. On the other hand, the majority's inquiry extended to nonindigents, *id.* at 1057, and encompassed the due process clause, *see* text accompanying note 87 *supra*, as well as the prohibition against excessive restraint.

Judges Clark and Tjoflat, in a special concurring opinion, disagreed with the majority position that bail questions could be handled under the fourteenth amendment. 572 F.2d at 1068. They felt that the sole constitutional principle governing the use of bail should be the eighth amendment, which permits the imposition of money bail on indigents. *See generally* note 18 *supra*. According to these judges, any injection of fourteenth amendment analysis into the area of pretrial release could only lead to a determination that money bail is unconstitutional. 572 F.2d at 1068-69.

96. *See* text accompanying note 85 *supra*.

97. 572 F.2d 1057. Furthermore, the majority conceded that "[s]ystems which incorporate a presumption favoring personal recognizance avoid much of the difficulty inherent in the entire subject area." *Id.*

98. *Id.* at 1057-58.

99. *See* note 4 *supra*.

100. 572 F.2d at 1058-59. Because of this fact, the technical ground of the

the mere fact that the statute might *permit* unconstitutional application is not a sufficient reason to render it facially invalid. As long as the state does not intend to circumvent constitutional requirements and as long as its rule can be "construed so as to avoid constitutional infirmity,"[101] federal courts should decline to interfere with state bail laws. Thus, plaintiffs were told that "[f]urther adjudication of the merits of a constitutional challenge addressed to the [Florida rule] should await presentation of a proper record reflecting application by the courts of the State of Florida."[102]

Notwithstanding its position that the absence of an express presumption does not render a bail statute facially invalid, the en banc majority refrained from holding that the presumption is unnecessary in actual practice. In fact, there are indications in the opinion that something very close to the presumption is constitutionally indispensable. For example, the majority tells us that the fourteenth amendment calls for the state to engage in "meaningful consideration of other possible alternatives"[103] if an accused cannot meet the requirements of the master bond schedule. Furthermore, on two occasions the majority indicated that the constitution requires "the judge to determine the *least onerous form of release* which will still insure the defendant's appearance."[104] These statements appear incompatible with the assertion that something less than a presumption would meet minimum constitutional requirements.

The en banc majority's refusal to make it clear that state courts must "read in" a presumption against money bail is likely to create uncertainty in Fifth Circuit judicial administration. While it is clear from the decision that the indigent is entitled to some protection against the wealth-based release system, the majority leaves the crucial question unanswered—what are the

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majority's decision was that plaintiffs' claim had been mooted. *Id.* The panel had expressly rejected this argument. 557 F.2d at 1201. The en banc dissent agreed with the panel, pointing out that "the 1977 rule merely codifies the 1971 practice." 572 F.2d at 1061.

101. 572 F.2d at 1058.

102. *Id.*

103. *Id.* at 1057.

104. *Id.* at 1058 n.8 (citing FLA. R. CRIM. P. 3.130, Committee Note, 343 So. 2d 1247, 1251 (1977)) (emphasis in original). *See also* text accompanying note 94 *supra.*

minimum procedures that will satisfy the Constitution?

Because of the approach taken by the en banc majority, the extent of the state's responsibility to ensure that the indigent receives the least onerous form of pretrial release will remain uncertain until plaintiffs bring another suit, this time challenging Florida's *application* of its bail statute. Until then, both parties are in an awkward position. The state has retained its rule, but short of reading in a presumption against money bail, it has no certain way to protect itself from further constitutional attack. The plaintiffs have new constitutional rights, but the majority refuses to delineate the extent of those rights. The question thus becomes whether the concerns of abstention[105] that prompted the majority's approach outweigh the problems of uncertainty that have been created.

By directing that Florida write the presumption against money bail into its statute, the 1977 panel ordered a procedural remedy that has been tested in the federal courts for over a decade[106]—a remedy that would clearly solve the problem—but the en banc court refused to accept this solution.

In all probability, there will be one of two results of the en banc decision. First, it is possible that Florida will apply its statute as though there were a presumption. In this event, the differences in approach between the panel and the en banc court appear unimportant. The second possible result of the en banc decision becomes critical only if Florida chooses to operate without the presumption. It then becomes likely that plaintiffs, armed with the dicta of the en banc majority, will bring a second suit. At that time the court could hardly refuse to face the issue and, given the direction of its prior decision, decide in favor of plaintiffs. If this is true, then it is only a matter of time until plaintiffs' constitutional rights to equal protection are safeguarded.

CRAIG WM. SOLAND

105. 572 F.2d at 1058. The dissent argued that when the relevant state law is clear, *id.* at 1063, and the state courts have had a "*reasonable opportunity*" to decide the question presented in the case, *id.* at 1062 (quoting Harrison v. NAACP, 360 U.S. 167, 176-77 (1959)) (emphasis in *Pugh*), then the doctrine of abstention does not apply. Plaintiffs brought this suit in 1971. *See* note 1 *supra*. Since that time, Florida has twice rejected the express presumption against money bail. *See* Florida Bar *re* Fla. Rules of Criminal Procedure, 343 So. 2d 1247 (1977); *In re* Fla. Rules of Criminal Procedure, 272 So. 2d 65 (1973) (per curiam). Thus, the argument goes, the reasons for abstaining have disappeared.

106. *See* note 5 *supra*.

Constitutional Law—Equal Protection—Sex Discrimination in Secondary School Athletics

Plaintiff, a guard on a high school girls basketball team, played under rules promulgated by defendant Tennessee Secondary School Athletic Association.[1] Significant differences existed between defendant's rules for girls teams and those for boys teams; female teams consisted of six players of whom only three participated offensively.[2] Plaintiff brought an action in federal district court alleging that as a defensive player under the TSSAA rules she was unable to attain the physical benefits of the full-court game and to develop fully her offensive basketball skills, thereby significantly decreasing her chances of obtaining a college scholarship.[3] The district court held that defendant's rules violated the equal protection clause of the fourteenth amendment[4] because they were not rationally related to legitimate state objectives.[5] On appeal to the United States Court of Appeals for the Sixth Circuit, *held*, reversed and remanded. The

1. The Tennessee Secondary School Athletic Association (TSSAA) is a voluntary organization of approximately 525 junior and senior high schools. Its rules for interscholastic athletics are enforced by the member schools. Since the Association's activities are intertwined with the activities of its member state-supported schools, the Association is considered to act under the color of state law. *See* Brenden v. Independent School Dist., 477 F.2d 1292, 1295 (8th Cir. 1973); Bucha v. Illinois High School Ass'n, 351 F. Supp. 69, 73 (N.D. Ill. 1972); Reed v. Nebraska School Activities Ass'n, 341 F. Supp. 258, 260-61 (D. Neb. 1972); Haas v. South Bend Community School Corp., 259 Ind. 515, 519-21, 289 N.E.2d 495, 497-98 (1972).

TSSAA is a member of the National Federation of State High School Associations (NFSHSA). The basketball rules promulgated by NFSHSA for boys and girls teams are identical. TSSAA follows the NFSHSA rules for boys but adds a different set of rules for girls.

2. The TSSAA rules provide for a split-court game for girls. The three offensive forwards play on one-half of the court while the three defensive guards play on the other half.

3. Cape v. Tennessee Secondary School Athletic Ass'n, 424 F. Supp. 732, 735-36 (E.D. Tenn. 1976). In testimony at the district court level, basketball coaches indicated that plaintiff would have difficulty obtaining a scholarship because colleges prefer offensively trained players. *Id.* at 737.

4. U.S. CONST. amend. XIV, § 1 provides in part, "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."

5. 424 F. Supp. at 744.

imposition of different rules for boys and girls basketball by an association governing secondary school athletic participation does not violate the equal protection clause of the fourteenth amendment if such rules merely reflect the different physical characteristics and abilities of the sexes. *Cape v. Tennessee Secondary School Athletic Association*, 563 F.2d 793 (6th Cir. 1977).

Courts have recently begun to invalidate gender-based statutory classifications as violative of the equal protection clause of the fourteenth amendment. In 1971 the United States Supreme Court in *Reed v. Reed*[6] invalidated such a classification, striking down an Idaho statute that established a preference for males over females as estate administrators. Prior to *Reed* the Court had developed a two-tiered standard of review for equal protection cases: strict scrutiny[7] for classifications involving a suspect class[8] or affecting a fundamental interest[9] and a rational basis[10]

6. 404 U.S. 71 (1971).

7. In Loving v. Virginia, 388 U.S. 1 (1967), the Court stated that when strict scrutiny is applied, classifications must "be subjected to the 'most rigid scrutiny,' . . . and, if they are ever to be upheld, they must be shown to be necessary to the accomplishment of some permissible state objective, independent of . . . discrimination." *Id.* at 11 (quoting Korematsu v. United States, 323 U.S. 214, 216 (1944)). The Court in Roe v. Wade, 410 U.S. 113 (1973), added that the permissible or legitimate state objective must also be "compelling," *id.* at 156, and "that legislative enactments must be narrowly drawn to express only the legitimate state interests at stake." *Id.* at 155. Another aspect of the strict scrutiny standard was stated by the Court in Shapiro v. Thompson, 394 U.S. 618 (1969). A classification will not be upheld under strict scrutiny if "less drastic means are available" to accomplish the state purpose. *Id.* at 637. *See generally Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1087-1132 (1969) [hereinafter cited as *Developments in the Law*]; Comment, *Compelling State Interest Test and the Equal Protection Clause—An Analysis*, 6 CUM. L. REV. 109 (1975).

8. *See, e.g.*, Nyquist v. Mauclet, 432 U.S. 1 (1977) (alienage); Graham v. Richardson, 403 U.S. 365 (1971) (alienage); Hunter v. Erickson, 393 U.S. 385 (1969) (race); McLaughlin v. Florida, 379 U.S. 184 (1964) (race); Oyama v. California, 332 U.S. 633 (1948) (ancestry); Korematsu v. United States, 323 U.S. 214 (1944) (national origin); *cf.* Trimble v. Gordon, 430 U.S. 762 (1977) (Court rejected idea that classifications based on illegitimacy are suspect and subject to strict scrutiny but appeared to apply a standard more demanding than rational basis test); Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307 (1976) (classifications based on age not suspect); James v. Faltierra, 402 U.S. 137 (1971) (Court, by implication, declined to recognize the poor as suspect class).

9. In addition to first amendment protections, the Court has recognized

or rational relationship[11] test for all other classifications. In *Reed* the unanimous Court applied a standard for determining the validity of a gender-based classification[12] that has sometimes been considered to be an intermediate standard.[13] The Court declared that a gender-based classification must bear a rational relationship to the state objective being advanced by the classification so that "all persons similarly circumstanced shall be treated alike."[14] The Court, however, also employed the phrase " 'fair and substantial relationship,' "[15] suggesting that a standard higher than minimal scrutiny was being applied although the phrase had

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certain other rights as so fundamental that strict scrutiny is invoked. *See, e.g.*, Carey v. Population Servs. Int'l, 431 U.S. 678 (1977) (procreation); Roe v. Wade, 410 U.S. 113 (1973) (personal privacy); Kramer v. Union Free School Dist., 395 U.S. 621 (1969) (voting); Shapiro v. Thompson, 394 U.S. 618 (1969) (right to travel); Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966) (voting); Griswold v. Connecticut, 381 U.S. 479 (1965) (marital privacy); Aptheker v. Secretary of State, 378 U.S. 500 (1964) (right to travel). *But see* Eisenstadt v. Baird, 405 U.S. 438 (1972) (privacy interests analyzed under rational basis test).

10. The Court explained the rational basis test in McGowan v. Maryland, 366 U.S. 420 (1961), stating that the fourteenth amendment

> 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.

Id. at 425-26; *see* Dandridge v. Williams, 397 U.S. 471 (1970); Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61 (1911). *See generally* Bice, *Standards of Judicial Review Under the Equal Protection and Due Process Clauses*, 50 S. CAL. L. REV. 689, 698-702 (1977); *Developments in the Law, supra* note 7, at 1077-87; Note, *Legislative Purpose, Rationality, and Equal Protection*, 82 YALE L.J. 123 (1972).

11. Some courts use the term "rational relationship" rather than "rational basis" to refer to the standard of review discussed in note 10 *supra*. For example, the district court in *Cape* referred to "the traditional rational relationship test." 424 F. Supp. at 740.

12. Whether this "intermediate" standard applies only to gender-based classifications is not clear. *See generally* Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972).

13. *See* Craig v. Boren, 429 U.S. 190, 218 (1976) (Rehnquist, J., dissenting); notes 27-33 *infra* and accompanying text.

14. Reed v. Reed, 404 U.S. 71, 76 (1971) (quoting Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920)).

15. *Id.* (quoting *Royster*, 253 U.S. at 415).

originated in a 1920 decision and had traditionally been used to articulate the rational basis test. The Court concluded that Idaho's interest in administrative convenience, an objective that probably would have sustained the statute had the traditional rational basis test been used, was insufficient to justify the state's discriminatory statute.[16]

Two years after *Reed* a plurality of the Court declared sex a suspect class and employed strict scrutiny in *Frontiero v. Richardson.*[17] The plurality[18] invalidated regulations requiring female members of the uniformed services to show that their husbands were dependents in order to qualify for certain benefits; the regulations imposed no comparable requirement upon married male service members whose wives were assumed to be dependent. The plurality, finding "at least implicit support"[19] for their contention that sex was a suspect class, relied on *Reed* and viewed the standard announced in that case as a departure from the less rigorous rational basis test.[20] They also emphasized concern over the "gross, stereotyped distinctions between the sexes"[21] that were furthered by the challenged regulations. The Court noted that the statutes were "not in any sense designed to rectify the effects of past discrimination against women," an objective

16. *Id.* at 76-77; *cf.* Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974) (use of irrebuttable presumption of incapacity for four- and five-month pregnant teachers violated due process); Stanley v. Illinois, 405 U.S. 645 (1972) (use of irrebuttable presumption of unfitness as a parent for unwed fathers violated due process and equal protection).

17. 411 U.S. 677 (1973). Federal equal protection challenges such as the one in this case are brought under the fifth amendment provision of due process of law. "This Court's approach to Fifth Amendment equal protection claims has always been precisely the same as to equal protection claims under the Fourteenth Amendment." Weinberger v. Wiesenfield, 420 U.S. 636, 638 n.2 (1975).

18. Four members of the *Frontiero* Court (Justices Douglas, Brennan, White, and Marshall) clearly supported the decision to make sex a suspect class, 411 U.S. 677, 682; three (Chief Justice Burger and Justices Blackmun and Powell) clearly opposed it, *id.* at 691-92; and two (Justices Stewart and Rehnquist) expressed no opinion. *Id.* at 691.

19. *Id.* at 682.

20. *Id.* at 684. Arguably, under the *Reed* standard this gender-based classification would fail without resort to strict scrutiny since administrative convenience, the only objective advanced by the government to justify the classification, was held insufficient to sustain such classifications in *Reed.* 404 U.S. at 76-77.

21. 411 U.S. at 685.

that has been viewed as sufficient to sustain certain gender-based classifications.[22]

In *Weinberger v. Wiesenfeld*[23] the Supreme Court relied on *Frontiero* in striking down a social security gender-based classification that allowed benefit payments to wives, but not husbands, of deceased wage earners. This classification, the Court felt, was based on the outmoded generalization that female wage earners do not make significant contributions to the support of their families.[24] Despite its reliance on the *Frontiero* plurality opinion, the Court failed to declare sex a suspect class, a categorization that would have triggered the demanding strict scrutiny standard of review. Instead, it apparently applied the "intermediate" standard of *Reed*.[25]

In 1976 in *Craig v. Boren*[26] the Court again addressed the issue of the proper standard of review in sex discrimination cases. The *Craig* decision struck down an Oklahoma statute prohibiting the sale of beer to males under eighteen and females under

22. *Id.* at 689 n.22; *see* Califano v. Webster, 430 U.S. 313 (1977) (per curiam); Schlesinger v. Ballard, 419 U.S. 498 (1975); Kahn v. Shevin, 416 U.S. 351 (1974). In *Webster* the Court upheld a social security provision that was favorable to women. This unequal treatment of men and women was sustained in order "to compensate women for past economic discrimination." 430 U.S. at 318. In *Schlesinger* navy provisions that allowed female officers to serve longer than male officers before mandatory discharge were upheld. The Court found that since women had had restricted service opportunities, the longer tenure for women was justified. 419 U.S. at 508. In *Kahn* the Court approved a Florida statute that allowed a property tax exemption for widows that was unavailable to widowers. The exemption was permissible since by "cushioning the financial impact of spousal loss upon the sex for which the loss imposes a disproportionate burden," it would lessen the effects of economic discrimination against women. 416 U.S. at 355. *See generally* Dixon, *The Supreme Court and Equality: Legislative Classifications, Desegregation, and Reverse Discrimination*, 62 CORNELL L. REV. 494, 549-62 (1977); *The Supreme Court, 1973 Term*, 88 HARV. L. REV. 41, 135-39 (1974).

23. 420 U.S. 636 (1975).

24. *Id.* at 643.

25. Although the Court seemed to base its holding on *Frontiero* and *Reed*, *id.* at 653, it might have reached the same result without the heightened level of scrutiny present in those cases. Its statement that given the purpose of the statute to allow the surviving parent to stay at home with the child, the classification is irrational, *id.* at 651, suggests that the Court might have been willing to strike down the statute under the rational basis standard of review.

26. 429 U.S. 190 (1976).

twenty-one. In evaluating this statute the Court applied the standard "that classifications by gender must serve important governmental objectives and . . . be substantially related to achievement of those objectives."[27] The Court traced the origin of this standard of review to *Reed*. Viewing *Reed* as the foundation for decisions rejecting administrative convenience[28] and "archaic and overbroad generalizations"[29] about the social position of women[30] as justifications for gender-based classifications, the *Craig* Court characterized the *Reed* standard as synonymous with the standard it was enunciating.[31] Although the Court stopped short of declaring sex a suspect class, the requirement of a "substantial" relationship between the statutory classification and an "important" governmental objective confirmed prior interpretations[32] of the *Reed* standard as an intermediate level of review for equal protection challenges to gender-based classifications.[33]

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27. *Id.* at 197. While Oklahoma's objective of promoting traffic safety was an important governmental objective, the proof offered did not show that the gender-based classification was "substantially related to achievement of" that objective; therefore, the classification could not withstand the equal protection challenge. *Id.* at 200.

Use of the *Craig* standard was reaffirmed in Califano v. Goldfarb, 430 U.S. 199 (1977), which invalidated a social security provision that required husbands of deceased wage earners to prove dependency while wives were presumed dependent. *Id.* at 210-11.

28. *See, e.g.*, Frontiero v. Richardson, 411 U.S. 677, 690 (1973); Stanley v. Illinois, 405 U.S. 645, 656 (1972).

29. Schlesinger v. Ballard, 419 U.S. 498, 508 (1975).

30. *See, e.g.*, Stanton v. Stanton, 421 U.S. 7, 15 (1975); Weinberger v. Wiesenfeld, 420 U.S. 636, 643 (1975); Frontiero v. Richardson, 411 U.S. 677, 684-87 (1973).

31. 429 U.S. at 197-200, 204.

32. *See* Frontiero v. Richardson, 411 U.S. 677, 682-84 (1973). *See also* Stanton v. Stanton, 421 U.S. 7, 13-14 (1975); Schlesinger v. Ballard, 419 U.S. 498, 507, 510 (1975).

33. Justices Brennan, White, Marshall, Blackmun, Powell, and Stevens joined the Court's discussion of the standard of review. In a concurring opinion Justice Powell expressed dissatisfaction with the characterization of the standard as a " 'middle-tier' approach" but recognized that the standard was "sharper" than the rational basis standard. 429 U.S. at 210 n.* (unnumbered footnote). Justice Stevens, concurring, stated that the Court was actually applying only one standard of review in equal protection cases. *Id.* at 212. Justice Stewart, concurring, *id.* at 215, Chief Justice Burger, dissenting, *id.* at 216-17, and Justice Rehnquist, dissenting, *id.* at 217-28, utilized the rational basis standard.

As the Supreme Court was developing a standard of review for gender-based classifications, lower courts were struggling to apply the correct standard to the specific problem of sex discrimination in high school athletics. Because most of these cases were decided before *Craig*, they usually relied upon *Reed*.[34]

In *Brenden v. Independent School District*[35] two Minnesota girls were denied the opportunity to participate in the tennis, cross-country running, and skiing activities provided for boys. There were no girls teams provided for these sports, and defendant state high school athletic association barred mixed-sex participation in interscholastic athletics. Disposing quickly of two preliminary arguments advanced by defendant,[36] the United States Court of Appeals for the Eighth Circuit articulated the issue as "whether the plaintiffs can be denied the benefits of activities provided by the state for male students."[37] Although apparently viewing *Reed* as articulating a rational basis standard, the court emphasized that care must be taken in sex discrimination cases to ascertain "whether the state has demonstrated a substantial rational basis for the classification."[38] The court found that defendant had not "demonstrated a sufficient rational basis for [its] conclusion that women are incapable of competing with men in non-contact sports."[39] This conclusion, said the court, was based upon unacceptable "assumptions about the nature of females as a class"[40] and was used to deny plaintiffs "an individualized determination of their [own] qualifications

34. *See* Brenden v. Independent School Dist., 477 F.2d 1292 (8th Cir. 1973); Morris v. Michigan State Bd. of Educ., 472 F.2d 1207 (6th Cir. 1973); Haas v. South Bend Community School Corp., 259 Ind. 515, 289 N.E.2d 495 (1972). *But see* Gilpin v. Kansas State High School Activities Ass'n, 377 F. Supp. 1233 (D. Kan. 1974) (strict scrutiny); Ritacco v. Norwin School Dist., 361 F. Supp. 930 (W.D. Pa. 1973) (rational basis).

35. 477 F.2d 1292 (8th Cir. 1973).

36. Defendant maintained that since it was a voluntary organization, there was no state action to bring it within the jurisdiction of the court, *id.* at 1295, and that plaintiffs had no constitutional right to participate in interscholastic athletics. *Id.* at 1297. The court had no difficulty in finding the requisite state action. *Id.* at 1295. *See generally* note 1 *supra*. The court also pointed out that defendant was incorrectly stating the issue. *Id.* at 1297.

37. 477 F.2d at 1297.

38. *Id.* at 1300.

39. *Id.*

40. *Id.* at 1302. *See generally* text accompanying notes 29-30 *supra*.

for a benefit provided by the state."[41] The court specifically left open two important questions: (1) whether a denial of the opportunity for females to participate in *contact* sports with males would be justified,[42] and (2) whether the provision of separate but equal opportunities for females in interscholastic sports would be acceptable under the fourteenth amendment.[43]

Both of the issues left unanswered by *Brenden* were addressed by the federal district court for Colorado in *Hoover v. Meiklejohn.*[44] Plaintiff was a female student who was denied participation in an interscholastic soccer program. The reason advanced by defendant athletic association for the restriction was the likelihood of injury to female players.[45] Declining to follow the Supreme Court's recent articulation in *Craig* of the appropriate standard of review,[46] the court applied a balancing test based on "the relative importance of the individual interest affected compared with the governmental objective" advanced.[47] Under this novel standard[48] the court found that the objective of protecting

41. 477 F.2d at 1302.

42. In Morris v. Michigan State Bd. of Educ., 472 F.2d 1207 (6th Cir. 1973), this difficult question was avoided because plaintiff females only desired to play the noncontact sport of tennis. *Id.* at 1209.

43. 477 F.2d at 1295.

44. 430 F. Supp. 164 (D. Colo. 1977).

45. *Id.* at 166.

46. *See id.* at 168-69, 171. The *Hoover* court agreed, *id.* at 168, with the concurring opinion of Justice Powell in Craig v. Boren, 429 U.S. 190, 210 (1976). Justice Powell expressed dissatisfaction with the use in equal protection cases of two standards of review "viewed by many as a result-oriented substitute for more critical analysis." *Id.* at 210 n.* (unnumbered footnote). Justice Stevens' suggestion in his concurring opinion in *Craig* that the Court has used the two-tiered approach (rational basis and strict scrutiny) to explain decisions actually decided under a single standard, *id.* at 211-12, was also cited approvingly by the *Hoover* court. 430 F. Supp. at 168. Further, the court believed that use of the traditional standards of review in athletic cases would involve the court in inappropriate considerations of particular rules and games rather than considerations of overall equality of opportunity. *Id.* at 171.

47. 430 F. Supp. at 430. The court based its standard on a suggestion in Wilkinson, *The Supreme Court, the Equal Protection Clause, and the Three Faces of Constitutional Equality*, 61 VA. L. REV. 945, 991 (1975). The court advocated this standard as the most appropriate equal protection standard for cases involving athletics in education "[b]ecause of its flexibility and sensitivity to the notion of equality itself." 430 F. Supp. at 169.

48. The court stated that the same conclusion would have been reached under the rational basis test. 430 F. Supp. at 170.

females from injury could not support defendant's rule since the practice of allowing all males but no females to participate failed to take into account individual differences that could make it safer for some females to play soccer than for some small or weak males to play.[49] In fashioning a remedy the court ordered defendants to examine their entire athletic program and to provide equal opportunities for females and males within that program.[50]

The problem of determining whether high school athletic opportunities for males and females are constitutionally equal if separate teams with different rules are provided was presented in *Cape v. Tennessee Secondary School Athletic Association*,[51] the instant case. Plaintiff did not challenge the maintenance of separate teams for boys and girls basketball in Tennessee. Rather, she challenged the disparate rules under which females were required to play.[52]

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49. See Carnes v. Tennessee Secondary School Athletic Ass'n, 415 F. Supp. 569 (E.D. Tenn. 1976), in which the court found a rule barring female participation in baseball to be similarly defective. *Id.* at 571. *See also* note 72 *infra* and accompanying text.

50. 430 F. Supp. at 172. The court probably viewed this reassessment of the athletic program as a more reasonable alternative than ordering defendant to allow plaintiffs to play on the male team in the contact sport of soccer. Instead, defendant could decide to offer no soccer program, separate but equal single-sex teams, or one mixed-sex team. *Id.* The court viewed the use of separate but equal single-sex teams as a viable alternative to ensure equal opportunity for females, apparently agreeing with the position of both parties that mixed-sex teams would probably be dominated by males. *Id.* at 170. If females were provided with separate teams on which to play, they would have more opportunities to become involved in athletics, thereby furthering the "legitimate objective" of encouraging "female involvement in sports." *Id.; see* Carnes v. Tennessee Secondary School Athletic Ass'n, 415 F. Supp. 569 (E.D. Tenn. 1976); Ritacco v. Norwin School Dist., 361 F. Supp. 930 (W.D. Pa. 1973); *cf.* Vorchheimer v. School Dist. of Philadelphia, 532 F.2d 880 (3d Cir. 1976), *aff'd per curiam by an equally divided court*, 430 U.S. 703 (1977) (upholding single-sex schools). But mere provision of separate teams for girls would not ensure that the programs could withstand an equal protection challenge. The *Hoover* court further required "substantially equal support" from the school system and "substantially comparable programs." 430 F. Supp. at 170. The court also discussed other factors, such as interests and abilities of the athletes, that should be considered in developing an athletic program with equality of opportunity for males and females. *Id.* at 170-72.

51. 563 F.2d 793 (6th Cir. 1977).

52. According to defendant only five other states (Arkansas, Iowa, New York, Oklahoma, and Texas) apply these rules. Cape v. Tennessee Secondary

The district court[53] did not decide which standard of review should be applied to this classification,[54] concluding that the distinction represented by the different rules failed to satisfy even the least rigorous standard, the rational basis test.[55] After identifying and discussing five legitimate objectives that defendant offered in support of the differing rules,[56] the district court concluded that the sex-based classification was not rationally related to those objectives and, hence, was not valid.[57] The case reached the United States Court of Appeals for the Sixth Circuit after the Supreme Court's pronouncement in *Craig*. The appellate court acknowledged the "substantial relationship" standard of *Craig* as the proper standard of review for the issue.[58] It recognized the objectives delineated by the district court but failed to examine the questions of whether the state objectives were

School Athletic Ass'n, 424 F. Supp. 732, 735 n.1 (E.D. Tenn. 1976). A comparison of the TSSAA girls rules and the rules proposed for boys and girls by the National Federation of State High School Associations of which TSSAA is a member is found in an addendum to the court of appeals' decision at 563 F.2d at 795-96.

53. Cape v. Tennessee Secondary School Athletic Ass'n, 424 F. Supp. 732 (E.D. Tenn. 1976). The district court based jurisdiction upon 28 U.S.C. § 1343(3) (1976), finding the requisite state action in defendant's activities, *see* note 1 *supra*, but at the same time refused to recognize a private cause of action under Title IX of the Education Amendments of 1972. 20 U.S.C. §§ 1681-1686 (1978). The district court also held that plaintiff was entitled to relief since her injury was not de minimis. These findings were accepted without comment by the court of appeals. 563 F.2d at 794 & n.1 (6th Cir. 1977).

54. The district court acknowledged that the court of appeals in Smith v. Troyan, 520 F.2d 492, 495 (6th Cir. 1975), *cert. denied*, 426 U.S. 934, *rehearing denied*, 429 U.S. 933 (1976), had determined that the rational basis test was the appropriate level of scrutiny for sex-based classifications, but it also noted that the Sixth Circuit had indicated in Kalina v. Railroad Retirement Bd., 541 F.2d 1204 (6th Cir. 1976), *aff'd mem.*, 431 U.S. 909 (1977), "that it might reconsider that holding." 424 F. Supp. at 740. In *Kalina* the court of appeals simply refused to reach the issue of whether sex is a suspect class, relying instead on the reasoning of *Frontiero* and *Weinberger* to invalidate a requirement that husbands, but not wives, of retired railroad workers must prove dependency to be eligible for a spouse's annuity. 541 F.2d at 1206, 1210.

55. 424 F. Supp. at 740. The court, acting prior to *Craig*, did not interpret the *Reed* standard as an intermediate level of scrutiny. Instead, it found that *Reed* "articulated a test for determining whether a classification is rationally related to a state objective." *Id.* at 740-41.

56. *See* text accompanying note 69 *infra*.

57. 424 F. Supp. at 742.

58. 563 F.2d at 795.

"important" and whether the rules promulgated by defendant were "substantially related" to achievement of the objectives. Instead, the court seized upon plaintiff's failure to challenge "the most apparent sex-based classification in this case":[59] the maintenance of separate teams for both sexes.[60] The court concluded that the constitutionality of the separate teams must "be assumed, for the purposes of this case,"[61] under the *Craig* standard since this classification was substantially related to the important governmental objective of providing "meaningful opportunity for athletic involvement"[62] for girls. Separate teams, the court reasoned, furthered that objective because of "the distinct differences in physical characteristics and capabilities between the sexes."[63] Moreover, the court concluded that separate teams increased female athletic involvement by preventing male domination.[64] The court added, "[W]e see no reason why the rules

59. *Id.*

60. The court of appeals also seemed troubled by plaintiff's decision to bring a private rather than a class action. *Id.* In prior cases relief had been granted under both types of actions. *Compare* Brenden v. Independent School Dist., 477 F.2d 1292 (8th Cir. 1973), *and* Reed v. Nebraska School Activities Ass'n, 341 F. Supp. 258 (D. Neb. 1972) (private action), *with* Morris v. Michigan State Bd. of Educ., 472 F.2d 1207 (6th Cir. 1973), *and* Haas v. South Bend Community School Corp., 259 Ind. 515, 289 N.E.2d 495 (1972) (class action). Perhaps the court's difficulty was caused by the scope of the relief granted by the district court since the holding that defendant's six-player girls rules were unconstitutional, 424 F. Supp. at 744, would have required change by all TSSAA-member schools with a girls basketball team. Relief in private actions had ordinarily been limited to a declaration that the particular plaintiff would be allowed to play and that no sanctions could be imposed upon her school or other schools with which games were played. *E.g.*, Brenden v. Independent School Dist., 477 F.2d 1292, 1295 (8th Cir. 1973). For a discussion of the relevant considerations involved in the decision to bring a class action in cases of this type, see Comment, *Sex Discrimination in Interscholastic High School Athletics*, 25 SYRACUSE L. REV. 535 (1974).

61. 563 F.2d at 795.

62. *Id.*

63. *Id.*

64. *Id.* The court failed to discuss the relevance, if any, to its decision of the fact that basketball is a contact sport. Its holding that separate teams for males and females were constitutionally permissible was not ostensibly limited to contact sports. In this respect the court's opinion was clearly out of harmony with most prior decisions striking down the maintenance of separate teams in noncontact sports. *See* Brenden v. Independent School Dist., 477 F.2d 1292 (8th Cir. 1973) (tennis, cross-country running, and skiing); Morris v. Michigan State

governing play cannot be tailored to accommodate [the differing physical characteristics and capabilities of the sexes] without running afoul of the Equal Protection Clause."[65]

The analysis of the court of appeals in *Cape* centered on the maintenance of separate teams[66] rather than on the real question presented by the case: can different rules for female and male teams survive an equal protection challenge under the *Craig* standard? The court of appeals seemed to reason that if sexual characteristics justified separate teams, they would also justify different rules of play within those separate teams. Had plaintiff challenged the maintenance of separate teams, the court's discussion of the important state interest in promoting athletic involvement of girls and the substantial relationship of separate teams to achievement of that goal would have been relevant. However, the conclusion that female athletic involvement is furthered by separate teams[67] provides no logical support for the holding that differing rules may be used for the separate teams.[68] Different rules can hardly be said to increase female sports involvement by preventing male domination and, therefore, do not meet the

Bd. of Educ., 472 F.2d 1207 (6th Cir. 1973) (tennis); Carnes v. Tennessee Secondary School Athletic Ass'n, 415 F. Supp. 569 (E.D. Tenn. 1976) (baseball); Reed v. Nebraska School Activities Ass'n, 341 F. Supp. 258 (D. Neb. 1972) (golf). *Contra,* Bucha v. Illinois High School Ass'n, 351 F. Supp. 69 (N.D. Ill. 1972), *noted in* 50 CHI.-KENT L. REV. 169 (1973) (swimming). *See also* Yellow Springs Exempted Village School Dist. Bd. of Educ. v. Ohio High School Athletic Ass'n, 443 F. Supp. 753 (S.D. Ohio 1978) (holding unconstitutional on due process gounds a prohibition on mixed-sex competition in contact sports).

65. 563 F.2d at 795.

66. The apparent approach of the court on the issue of separate teams is subject to some criticism. *See* Haas v. South Bend Community School Corp., 259 Ind. 515, 527-28, 289 N.E.2d 495, 502-03 (1972) (De Bruler, J., concurring); Note, *Sex Discrimination in High School Athletics,* 57 MINN. L. REV. 339, 368-70 (1972); Comment, *Sex Discrimination in Athletics,* 21 VILL. L. REV. 876, 898-902 (1976) (criticizing the allowance of separate teams under 45 C.F.R. § 86.41 (1975) of the Department of Health, Education and Welfare's implementing regulations for Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-1686 (Supp. V. 1975)). *See also* notes 50 & 64 *supra.*

67. Although the overall number of girls participating may be increased by provision of separate teams, the exceptional female athlete may not receive the most benefits from her athletic experience if the girls team does not provide her with as suitable a competitive level as she would have with the boys team. *See* Note, *supra* note 66, at 369-70; Comment, *supra* note 60, at 556.

68. 563 F.2d at 795.

Craig requirement of being "substantially related" to that objective.

Although the court of appeals discussed the objective of increasing female sports involvement, it failed to focus on any of the other objectives offered as justifications for the challenged rules that were discussed by the district court. The objectives were

> 1. To protect those student athletes who are weaker and incapable of playing the full-court game from harming themselves.
> 2. To provide the opportunity for more student athletes to play in basketball games.
> 3. To provide the opportunity for awkward and clumsy student athletes to play defense only.
> 4. To provide a "more interesting" and "faster" game for the fans.
> 5. To ensure continued crowd support and attendance (game receipts) because the fans are accustomed to a split-court game.[69]

The district court held that although the objectives were legitimate,[70] there was no rational relationship between them "and the sex-based classification chosen to implement" them.[71] The district court rejected objectives one and three as justifications for the sex-based classification because that classification was both overinclusive and underinclusive; weak and awkward males were allowed to play the full-court game but capable and agile females were not.[72] Objective two was rejected both because the full-court game might actually provide more opportunities for participation and also because a sex-based classification was not considered to be a rational means of increasing participation.[73] The district court rejected objectives four and five because sustaining crowd interest and support, like administrative convenience,[74] could not justify a sex-based classification and also because support would not necessarily be lost by a change in the rules.[75] The court of appeals ignored this well-reasoned analysis by the district court.

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69. 424 F. Supp. at 740.
70. *Id.*
71. *Id.* at 742.
72. *Id.* at 741; *see* note 79 *infra* and accompanying text.
73. 424 F. Supp. at 741; *see* text accompanying note 76 *infra*.
74. *See* notes 20 & 28 *supra*.
75. 424 F. Supp. at 741.

It failed to discuss four of the five objectives and discussed objective two in the context of a discussion of separate teams rather than in the proper context of a discussion of the different sets of rules.[76] The failure of the court of appeals adequately to discuss the objectives offered by defendant in support of its sex-based classification in the face of the rejection of the classification by the district court under the rational basis or relationship test weakens the appellate court's determination that the differing rules can satisfy the *Craig* standard.

The analysis of the court of appeals is not supported by United States Supreme Court opinions stating that different treatment for males and females cannot be based on "archaic and overbroad generalizations"[77] about women. The court's assumption that girls should play under different basketball rules than boys because of physical differences between the sexes is such a generalization,[78] contradicted by the fact that large numbers of female athletes currently play the full-court game.[79] Moreover, the different rules, instead of offering some advantage or remedial help[80] to girls who have little sports experience, could obviously hinder females in their athletic development. Although the court of appeals did not discuss plaintiff's contention that the prohibition against offensive participation by guards hampered them in their efforts to obtain college basketball scholarships, the district court found that the difficulties of obtaining scholarships were indeed significant.[81] The split-court rules denied defensive female basketball players the opportunity to develop essential shooting skills, a disadvantage not shared by any male players. The dis-

76. *See* text accompanying notes 59-64 *supra*.

77. Schlesinger v. Ballard, 419 U.S. 498, 508 (1975).

78. The district court stated that the "assumption that female student athletes are weaker, less capable, and more awkward than their male counterparts" was the type of sex-based generalization rejected by the Supreme Court. 424 F. Supp. at 742; *see* text accompanying notes 29-30 *supra*.

79. Testimony of basketball coaches in the district court indicated that women's college and Olympic basketball competition is played under the full-court rules. 424 F. Supp. at 737. Also, both parties agreed that only a few states play girls basketball under the split-court rules. *Id.* at 735 n.1. Thus, women have amply demonstrated their ability to play full-court basketball at various levels of competition.

80. *See* note 22 *supra* and accompanying text.

81. 424 F. Supp. at 743-44.

trict court's opinion also suggested, based on testimony by experts, that other disadvantages might be caused by the split-court rules.[82]

The controversy surrounding sex discrimination in high school athletics is far from over. One important factor that has a significant impact on decisions such as *Cape* is Title IX of the Education Amendments of 1972.[83] Although Title IX does not prohibit all separate athletic programs for males and females,[84] it does prohibit the type of separate but unequal program challenged in *Cape*. In fact, the Sixth Circuit's decision in *Cape* has recently been affected by an order promulgated under Title IX[85] by the Department of Health, Education, and Welfare Office of Civil Rights.[86] HEW has determined that split-court rules do not

82. Plaintiff's contention that females are deprived of the full physical benefits of the more strenuous full-court game was accepted by the court as established by the proof. *Id.* at 743. Testimony was offered that even offensive female players are deprived of the opportunity to learn certain basketball skills such as the ability to handle the ball among a large group of players. *Id.* at 737.

83. 20 U.S.C. §§ 1681-1686 (1978). *See generally* Kadzielski, *Title IX of the Education Amendments of 1972: Change or Continuity?*, 6 J. L. & EDUC. 183 (1977); Comment, *Title IX's Promise of Equality of Opportunity in Athletics: Does it Cover the Bases?*, 64 KY. L.J. 432 (1975).

84. 45 C.F.R. § 86.41(b) (1977). This section of the Title IX implementing regulations promulgated by the Department of Health, Education, and Welfare allows separate teams if the activity is a contact sport or if selection is based on competition. If a team in a noncontact sport is provided for one sex, members of the other sex must be allowed to try out for that team only if athletic opportunities for that sex previously had been limited. Equal athletic opportunities for both sexes are required, however. 45 C.F.R. § 86.41(c) (1977). Title IX seems to follow the trend of court decisions finding equality of educational opportunities even though some separation of the sexes is allowed. Although in Brown v. Board of Educ., 347 U.S. 483 (1954), the Supreme Court rejected separate but equal educational opportunities when the separation was because of race, since sex is not a suspect class and is subject to a less stringent level of judicial scrutiny, courts may continue to uphold separate but equal educational classifications based on sex. An equally divided Supreme Court recently upheld such a classification that provided for single-sex schools. Vorchheimer v. School Dist. of Philadelphia, 532 F.2d 880 (3d Cir. 1976), *aff'd per curiam*, 430 U.S. 703 (1977). *But see* note 66 *supra*.

85. 20 U.S.C. § 1682 (1978).

86. In the instant case plaintiff had attempted to assert jurisdiction for her claim under Title IX. 424 F. Supp. at 738. The district court, however, agreed with the holding in Cannon v. University of Chicago, 559 F.2d 1063 (7th Cir. 1976), *aff'd on rehearing*, 559 F.2d 1077 (7th Cir. 1977), that Title IX does not

meet the requirements of Title IX and has required schools to offer evidence of a change to full-court rules for girls.[87] Since Title IX applies to all school systems that receive federal funds,[88] the HEW finding, issued to the *Cape* plaintiff's school system, should alert TSSAA that the time has come for an end to outmoded split-court rules for girls.[89] The HEW finding, which would provide the relief sought by plaintiff, demonstrates federal governmental recognition of a serious constitutional problem and reflects an HEW decision that sex-based classifications that disadvantage female athletes will not be allowed to stand despite the continuing reluctance of some courts to strike down such classifications.

KATHERINE ANN AUSTIN

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grant a private cause of action. The court further stated that even if a private cause of action existed under Title IX, plaintiff would first have to exhaust her administrative remedies. 424 F. Supp. at 738.

Another possible remedy, which the court of appeals suggested might have been the most appropriate one, is action within the administrative framework of the association making the rules. 563 F.2d at 795. Such a remedy, however, has not been effective for the problem presented in *Cape*. Although a majority of the coaches and principals of TSSAA-member schools voted to change to full-court rules for girls, the TSSAA Board of Control voted in March 1978 to retain the present half-court rules. Knoxville News-Sentinel, Apr. 30, 1978, § C, at 1, col. 5. In June the Board voted to allow girls full-court play by mutual agreement of the competing schools, but tournaments will continue to be played under the half-court rules. *Id.*, June 12, 1978, at 1, col. 1-2.

87. Letter from William H. Thomas, Director, HEW Office of Civil Rights, Region IV, to Dr. Kenneth H. Loflin, Superintendent of Schools, Oak Ridge, Tennessee, (Jan. 19, 1978). Several other changes in the school system's athletic programs were required including equalizing coaching supplements for coaches of male and female teams, establishing girls junior varsity basketball teams, and providing comparable equipment to male and female athletes.

88. 20 U.S.C. § 1681 (1978). Section 1681 does, however, exempt a number of educational institutions such as those controlled by certain religious groups.

89. *But see* note 86 *supra*.

Domestic Relations—Jurisdiction—Extension of Comity to Foreign-Nation Divorce

Plaintiff-husband and defendant-wife, residents of Memphis, Tennessee, decided to obtain a divorce. A backlog of pending divorce cases in the Shelby County courts would possibly have caused a two-year delay in securing the divorce,[1] however, prompting the couple to obtain the divorce in the Dominican Republic. Defendant appeared personally with her attorney; and plaintiff, who was not present, filed a power of attorney with the court and was represented by counsel. These appearances satisfied the Dominican Republic jurisdictional requirements,[2] and a divorce decree incorporating a property settlement and child support agreement was awarded by the Dominican court on the ground of incompatibility of temperaments. Two years later, plaintiff filed suit in chancery court seeking a declaratory judgment to recognize the validity of the Dominican Republic divorce decree.[3] In the alternative plaintiff sought a divorce. Additionally, defendant-wife sought recognition of the Dominican decree and, in the alternative, counterclaimed for divorce.[4] The Shelby County divorce referee appeared to contest the validity of the Dominican decree. The chancellor granted summary judgment for plaintiff. On direct appeal perfected by the divorce referee to the Tennessee Supreme Court, *held*, affirmed. A foreign-nation divorce decree issued to Tennessee domiciliaries who raise no question of the jurisdiction of a foreign court and who assert that they are both bound by the property settlement may be extended comity if the decree is not contrary to the state's public policy and if the lack of equivalent jurisdictional requirements is not preju-

1. Brief for Appellee at 3, Hyde v. Hyde, 562 S.W.2d 194 (Tenn. 1978).
2. Law 142 of May 18, 1971, amends previous laws on subject and allows foreigners, even if not residents of country, to obtain divorce by *mutual consent* provided one spouse is physically present before court and other one is represented by a special attorney. In this case, court, after a short period of time, and previous approval of public ministry, *must* grant divorce. Judgment is recorded in civil registry and a summary of same is published in a local newspaper.
VII MARTINDALE-HUBBELL LAW DIRECTORY 3419 (1978) (emphasis added).
3. 562 S.W.2d at 195.
4. *Id.*

dicial to the parties. *Hyde v. Hyde,* 562 S.W.2d 194 (Tenn. 1978).

State recognition of foreign-nation divorce decrees has been effectuated by the doctrine of comity,[5] which has traditionally involved an examination of public policy to determine whether comity should be extended.[6] Because of the state interest in and control over the institution of marriage, the majority of courts have stated that the determinative public policy consideration is the jurisdictional basis upon which the divorce decree was rendered.[7] In *Hyde* the Supreme Court of Tennessee was confronted for the first time with the question of whether to honor a divorce decree rendered by a foreign country in which neither party was a domiciliary or bona fide resident at the time the divorce was granted.[8]

In the United States marriage is considered

> more than a mere contract. . . . [A] relation between the parties is created which they cannot change. Other contracts may be modified . . . or entirely released upon the consent of the parties. Not so with marriage. The relation once formed, the law steps in and holds the parties to various obligations and liabilities.[9]

Since property rights, protection of offspring, and support responsibilities are legal rights and duties that the state imposes and enforces, each state also determines its own grounds for divorce as a statement of its public policy concerning marriage.[10]

An action to dissolve a marriage has traditionally been deemed founded upon the authority of the domiciliary state of one of the parties.[11] Domicile has been considered a sufficient

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5. "Writers and most courts agree that all that is meant by comity is that the state of the forum is not obliged by any superior power or force to apply foreign law." E. STIMSON, CONFLICTS OF LAWS 71 (1963) (footnotes omitted).

6. *See* text accompanying notes 14-17 *infra.*

7. *E.g.,* Ryder v. Ryder, 2 Cal. App. 2d 426, 37 P.2d 1069 (1934) (mail-order divorce denied comity); Warrender v. Warrender, 79 N.J. Super. 114, 190 A.2d 684 (1963), *aff'd per curiam,* 42 N.J. 287, 200 A.2d 123 (1964) (bilateral divorce denied comity); *In re* Gibson's Estate, 7 Wis. 2d 506, 96 N.W.2d 859 (1959) (ex parte divorce denied comity).

8. 562 S.W.2d at 195.

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

10. *See* Williams v. North Carolina, 317 U.S. 287, 298-99 (1942).

11. "Under our system of law, judicial power to grant a divorce—jurisdiction, strictly speaking—is founded on domicil. . . . The framers of

nexus between a state and a person to establish that state's paramount interest in the marital status, and the subsequent dissolution of a marriage by a domiciliary state must receive full faith and credit from sister states.[12]

Full faith and credit does not apply to foreign-nation judgments.[13] Therefore, recognition of a foreign-nation divorce decree involves the discretionary extension of comity.[14] The Supreme

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the Constitution were familiar with this jurisdictional prerequisite, and since 1789 neither this Court nor any other court in the English-speaking world has questioned it." Williams v. North Carolina, 325 U.S. 226, 229 (1945) (citations omitted). Domicile differs from residence in that there is a subjective intent to remain more or less permanently in the state. *See generally* RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 70-72 (1971) (deals with domicile as basis of jurisdiction in divorce actions and supports additional bases if there is a sufficient relationship with the state to justify dissolution).

12. *See generally* 3 W. NELSON, NELSON ON DIVORCE AND ANNULMENT 451-75 (2d ed. 1945). One commentator suggests that three Supreme Court cases can be interpreted as a sanction for personal jurisdiction for state courts in divorce actions. Paulsen, *Divorce Jurisdiction by Consent of the Parties—Developments Since "Sherrer v. Sherrer,"* 26 IND. L.J. 380, 386 (1951). Numerous commentators have urged the adoption of bases of jurisdiction other than domicile. *See, e.g.*, Griswold, *Divorce Jurisdiction and Recognition of Divorce Decrees—A Comparative Study*, 65 HARV. L. REV. 193 (1951); Stimson, *Jurisdiction in Divorce Cases: The Unsoundness of the Domiciliary Theory*, 42 A.B.A.J. 222 (1956); Weintraub, *An Inquiry into the Utility of "Domicile" as a Concept in Conflicts Analysis*, 63 MICH. L. REV. 961 (1965). *See generally* R. LEFLAR, AMERICAN CONFLICTS LAW §§ 9-10 (3d ed. 1977); E. STIMSON, *supra* note 5, at 248-50. A perceptible trend toward the *Restatement* view has developed in some states to allow residency as a sufficient jurisdictional basis to justify power to dissolve a marriage. *E.g.*, Wheat v. Wheat, 229 Ark. 842, 318 S.W.2d 793 (1958) (validity of statute requiring three-month residency, defined simply as actual presence, as a basis for jurisdiction of divorce action upheld); Craig v. Craig, 143 Kan. 624, 56 P.2d 464 (1936) (statute providing for one-year residency on military reservation held valid as jurisdictional basis for granting divorce).

13. Full faith and credit in the area of divorce actions only applies to certain types of divorces rendered by sister-states. For an overview of Supreme Court cases dealing with jurisdiction of divorce actions in the context of full faith and credit, see 3 W. NELSON, *supra* note 12, at 451-75. However, in dealing with foreign-nation divorces, some courts have mistakenly spoken in terms of full faith and credit instead of comity. *E.g.*, Clagett v. King, 308 A.2d 245 (D.C. 1973).

14. Comity is defined as "[l]iterally, courtesy or civility, to which the law adds some refinements in defining the term for the purposes of conflicts of laws and international law." BALLETINE'S LAW DICTIONARY 220 (3d ed. 1969); *see* note 5 *supra*.

Court has described comity as " 'the voluntary act of the nation by which it is offered, and is inadmissible when contrary to its policy, or prejudicial to its interests.' "[15] All decisions determining the propriety of extending comity involve considerations of public policy and prejudice to the state, its citizens, and the parties.[16] Yet, as a result of the deep interest claimed by each state in the institution of marriage, the majority of courts have focused primarily on the prejudice to the domiciliary state that results when traditional jurisdictional requirements are not fulfilled, thus depriving the domiciliary state of the opportunity to apply its own laws.[17]

Courts generally have been willing to enlarge the acceptable jurisdictional basis for the extension of comity to foreign-nation divorces to include not only domicile but also the bona fide residence of one of the spouses in the foreign nation, concluding that bona fide residence provides a sufficient basis for foreign countries to dissolve a marriage.[18] The majority of challenges to foreign-nation divorces have arisen, however, from three types of foreign-nation divorces[19]—mail order,[20] ex parte,[21] and bilat-

15. Hilton v. Guyot, 159 U.S. 113, 165 (1895) (quoting Bank of Augusta v. Earle, 38 U.S. 519, 589 (1839)).

16. *See, e.g.*, Warrender v. Warrender, 79 N.J. Super. 114, 190 A.2d 684 (1963), *aff'd per curiam*, 42 N.J. 287, 200 A.2d 123 (1964); Golden v. Golden, 41 N.M. 356, 68 P.2d 928 (1937); *In re* Estate of Steffke v. Wisconsin Dep't of Revenue, 65 Wis. 2d 199, 222 N.W.2d 628 (1974).

17. *E.g.*, Wells v. Wells, 230 Ala. 430, 161 So. 794 (1935); *In re* Nolan's Estate, 56 Ariz. 361, 108 P.2d 388 (1940); Bethune v. Bethune, 192 Ark. 811, 94 S.W.2d 1043 (1936); Bergeron v. Bergeron, 287 Mass. 524, 192 N.E. 86 (1934).

18. *E.g.*, Rosenbaum v. Rosenbaum, 210 A.2d 5 (D.C. 1965); Annot., 13 A.L.R.3d 1447 (1967). *Contra*, Bonner v. Reandrew, 203 Iowa 1355, 214 N.W. 536 (1927) (bona fide residence not a sufficient basis for power to dissolve a marriage).

19. The divorce law prior to 1971 in Mexico provided three bases for jurisdiction of divorces: (1) mail-order, (2) residency—required signing of municipal registry, (3) submission to jurisdiction of court by both parties or submission by one party and absent party represented by duly empowered attorney. Note, *Isle of Hispaniola: American Divorce Haven?*, 5 CASE W. RES. J. OF INT'L L. 198, 199-200 (1973).

20. Mail-order divorces were secured without the appearance of either party in the foreign court. A decree of divorce was returned by mail. Annot., 13 A.L.R.3d 1429 (1967); *see* text accompanying note 23 *infra*.

21. Ex parte divorces are defined as those in which only one party is present in the rendering jurisdiction and the absent party is provided construc-

eral[22]—rendered without either domicile or bona fide residence as the basis for the exercise of jurisdiction. Historically, courts have uniformly refused to grant comity to mail-order[23] and ex parte divorces granted by other countries.[24] Nevertheless, foreign-nation bilateral divorces, in which the jurisdictional requirements of the foreign-nation were satisfied and both parties appeared in the foreign-nation court or one party appeared and the other was represented by counsel,[25] have been accorded varied treatment.

All but three jurisdictions[26] that have confronted foreign-nation divorces in which neither domicile nor bona fide residence was a basis for jurisdiction have refused to extend comity.[27] Certain types of cases, however, have prompted some courts to deny comity and yet to invoke estoppel as a bar to certain parties attacking the legitimacy of a foreign divorce decree.[28] The deci-

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tive or personal service. Annot., 13 A.L.R.3d 1431 (1967). In foreign-nation divorces these are not recognized unless the party in the rendering jurisdiction was a bona fide domiciliary or resident. *See* cases cited note 24 *infra*.

22. *See* text accompanying note 25 *infra*. Parties are ordinarily deemed unable to confer subject-matter jurisdiction on a court. Therefore, many courts that have addressed the question have refused to extend comity to bilateral divorces, contending it is not possible to consent to the jurisdiction of a court because jurisdiction of the subject matter arises only when one of the spouses is a domiciliary or bona fide resident. *E.g.*, Golden v. Golden, 41 N.M. 356, 68 P.2d 928 (1937).

23. *E.g.*, *In re* Chong Jah Alix, 252 F. Supp. 313 (D. Hawaii 1965); Rudnick v. Rudnick, 131 Cal. App. 2d 227, 280 P.2d 96 (1955); Ryder v. Ryder, 2 Cal. App. 2d 426, 37 P.2d 1069 (1934); Bergeron v. Bergeron, 287 Mass. 524, 192 N.E. 86 (1934). The three types of divorces mentioned in text accompanying notes 20-22 *supra* are identified and discussed in Annot., 13 A.L.R.3d 1419 (1967).

24. *E.g.*, Wells v. Wells, 230 Ala. 430, 161 So. 794 (1935); *In re* Nolan's Estate, 56 Ariz. 361, 108 P.2d 388 (1940); Lorenzo v. Lorenzo, 85 N.M. 305, 512 P.2d 65 (1973); Butler v. Butler, 239 A.2d 616 (D.C. 1968).

25. *See* Annot., 13 A.L.R.3d 1419, 1433 (1967).

26. New York has extended comity to bilateral foreign-nation divorces for many years. *See* cases cited note 38 *infra*. Recently Connecticut and the Virgin Islands extended comity to a foreign-nation bilateral divorce. Perrin v. Perrin, 408 F.2d 107 (3d Cir. 1969); Yoder v. Connecticut, 31 Conn. Supp. 344, 330 A.2d 825 (1974). Two jurisdictions have suggested in dicta the possibility of the extension of comity to bilateral foreign divorces in spite of refusing comity to ex parte foreign-nation divorces. Wells v. Wells, 230 Ala. 430, 161 So. 794 (1935); *In re* Nolan's Estate, 56 Ariz. 361, 108 P.2d 388 (1940).

27. *See* Annot., 13 A.L.R.3d 1419 (1967).

28. *E.g.*, Sears v. Sears, 293 F.2d 884 (D.C. Cir. 1961) (plaintiff-husband

sion to extend or deny comity to the foreign-nation bilateral divorce depends on an analysis of public policy considerations.

In *Golden v. Golden*[29] a woman sued for divorce in New Mexico, and her husband asserted the defense of a Mexican bilateral divorce granted upon the appearance of both parties in a Mexican court.[30] In denying comity and refusing to invoke estoppel, the New Mexico Supreme Court reasoned that it would be contrary to the public policy of the state to validate the divorce when the parties were residents and domiciliaries of New Mexico and there was no semblance of either bona fide domicile or bona fide residence in Mexico.[31] In explaining the importance of a bona fide residence or domicile, the court declared that

> [a]n action in divorce . . . is not an action between the parties alone; . . . there are three parties involved, the husband and wife who represent their respective interests, and the state protecting the morals of the community, to see that . . . the status of marriage will [not] be reduced to a matter of temporary convenience.[32]

Thus, the court concluded, a divorce could not be obtained by

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estopped from securing an annulment to escape future obligations because he secured the mail-order divorce in order to marry defendant in spite of possible invalidity and both had relied on its validity); Oakley v. Oakley, 30 Colo. App. 292, 493 P.2d 381 (1971) (husband defended divorce action contending the marriage was invalid because of an invalid Mexican divorce); Pawley v. Pawley, 46 So.2d 464 (Fla. 1950) (three-year silence prevented wife from contesting the validity of a Cuban divorce); Pandelides v. Pandelides, 182 Misc. 819, 47 N.Y.S.2d 247 (1944) (arranged for wife to go to Island of Cyprus to secure divorce).

The estoppel argument, however, has not always been successfully invoked. *See, e.g.*, Warrender v. Warrender, 79 N.J. Super. 114, 190 A.2d 684 (1963), *aff'd per curiam*, 42 N.J. 287, 200 A.2d 123 (1964) (estoppel denied based on the circumstances presented in the case); Golden v. Golden, 41 N.M. 356, 68 P.2d 928 (1937) (estoppel argument rejected because remarriage did not justify its application and there was no finding of laches or acquiescence).

29. 41 N.M. 356, 68 P.2d 928 (1937).

30. *Id.* at 362-63, 68 P.2d at 931-32. One spouse had signed the Municipal Residence Registry although a domiciliary and resident of New Mexico. Since the spouses were found at no time to have been domiciled in or bona fide residents of Mexico, the parties had actually submitted to the jurisdiction of the court. *See* note 22 *supra*.

31. 41 N.M. at 368, 68 P.2d at 935.

32. *Id.* at 370, 68 P.2d at 936.

consent of the parties to jurisdiction of a foreign-nation court since the state would not be represented.[33] Concern was expressed that the extension of comity to the Mexican "quickie" divorce would "permit couples impatient of marital restraints, and in moments of emotional impulses, irrespective of their duty to their children, their families, or the state . . . by a mere flourish of the pen [to] dissolve the matrimonial tie and then remarry at will irrespective of consequences."[34] The ground upon which the divorce was granted in Mexico was not discussed in the majority opinion, possibly reflecting judicial cognizance of the automatic nature of the Mexican decree and the court's desire for the state to maintain its control over the marriages of its citizens.[35] Yet two partially concurring and dissenting opinions argued that since the legislature had adopted incompatibility as a ground for divorce in New Mexico, the state's interest in the maintenance of marriages had diminished.[36]

The 1965 landmark decision of *Rosenstiel v. Rosenstiel*[37] confirmed the validity of the Mexican bilateral divorce in New York. For twenty-five years the lower New York courts had been the only courts in the United States to extend comity to foreign-nation bilateral divorces without a domicile or bona fide residence basis for jurisdiction.[38] Concern for the vitality of these decisions had lingered since the highest court in the state had never addressed the issue.[39] In extending comity to a bilateral divorce rendered on a divorce ground that was not available in the state, a divided New York Court of Appeals held in *Rosenstiel*

33. *Id.*

34. *Id.* at 369, 68 P.2d at 935.

35. *See id.* at 369, 68 P.2d at 936.

36. *Id.* at 375, 381, 68 P.2d at 940, 943.

37. 16 N.Y.2d 64, 209 N.E.2d 709, 262 N.Y.S.2d 86 (1965), *cert. denied*, 384 U.S. 971 (1966).

38. *See, e.g.*, Hytell v. Hytell, 44 Misc. 2d 663, 254 N.Y.S.2d 851 (Sup. Ct. 1964); Leviton v. Leviton, 6 N.Y.S.2d 535 (Sup. Ct.), *modified*, 254 App. Div. 670, 4 N.Y.S.2d 992 (Sup. Ct. 1938).

39. The New York view of foreign-nation bilateral divorces has been attributed to at least two factors. First, New York does not consider domicile essential to confer jurisdiction over a divorce action. *E.g.*, Glaser v. Glaser, 276 N.Y. 296, 12 N.E.2d 305 (1938). Second, the restrictive nature of the state's divorce code has been attributed with causing liberal recognition of foreign-nation divorces. Note, *supra* note 19, at 206.

that "[a] balanced public policy now requires that recognition of the bilateral Mexican divorce be given rather than withheld and such recognition as a matter of comity offends no public policy."[40] The court conceded that "the State or country of true domicile has the closest real public interest in a marriage"[41] but reasoned that domicile is not indispensable to jurisdiction in a divorce action. Since the personal appearances of the parties satisfied the Mexican jurisdictional requirements and were sufficient to confer jurisdiction in most classes of actions, the decree should be recognized.[42] Furthermore, the court asserted that

> [t]he duration of domicile in sister States providing by statute for a minimal time to acquire domicile as necessary to matrimonial action jurisdiction is in actual practice complied with by a mere formal gesture having no more relation to the actual situs of the marriage or to true domicile than the formality of signing the Juarez city register.[43]

Since the *Rosenstiel* decision, Connecticut and the Virgin Islands[44] have joined New York in extending comity to Mexican bilateral divorces without domicile or a bona fide residence as a basis for jurisdiction. In *Yoder v. Yoder*,[45] a 1974 Superior Court of Connecticut decision, neither party challenged the validity of their Mexican bilateral divorce but the wife sought to enforce a

40. 16 N.Y.2d at 74, 209 N.E.2d at 713, 262 N.Y.S.2d at 91. A companion case to *Rosenstiel* was also extended comity. Unlike *Rosenstiel*, jurisdiction was provided under Chihauhau Divorce Law (art. 23) that did not require proof of registration as a resident but allowed jurisdiction with the personal appearance of one party and the absent party represented by power of attorney. Wood v. Wood, 16 N.Y.2d 64, 209 N.E.2d 712, 262 N.Y.S.2d 86 (1965), *cert. denied*, 383 U.S. 945 (1966). For an analysis of *Rosenstiel* written before the court of appeals review, see Flint, *Divorce by Personal Jurisdiction of the Parties—A Support of the Mexican Bilateral Divorce*, 29 ALBANY L. REV. 328 (1965).

41. 16 N.Y.2d at 73, 209 N.E.2d at 712, 262 N.Y.S.2d at 90.

42. *Id.* at 72-73, 209 N.E.2d at 712, 262 N.Y.S.2d at 90. Although the court of appeals apparently assumed that Mexico's jurisdictional requirements had in fact been satisfied, one author suggests that the *Rosenstiel* divorce may have been invalid in Mexico. Caballer, *A Re-examination of Mexican "Quickie" Divorces*, 4 INT'L LAW. 871 (1969).

43. 16 N.Y.2d at 73, 209 N.E.2d at 712, 262 N.Y.S.2d at 90.

44. Perrin v. Perrin, 408 F.2d 107 (3d Cir. 1969) (holding relied on the *Rosenstiel* reasoning).

45. 31 Conn. Supp. 344, 330 A.2d 825 (1974).

child-support agreement incorporated into the decree.[46] The *Yoder* court relied on the *Rosenstiel* reasoning to justify its extension of comity, yet more deference was given to the public policy of Connecticut as established by the legislature since the court felt compelled to examine the grounds upon which the Mexican decree was rendered.[47] The Mexican divorce ground of incompatibility, the court concluded, was substantially equivalent to the Connecticut divorce ground of irretrievable breakdown of the marriage; thus, the extension of comity was not violative of Connecticut public policy.[48] Although the court conceded that, at the time the Mexican decree was rendered, irretrievable breakdown was not a ground for divorce in Connecticut, it concluded that the determinative public policy was that evidenced by the presently available grounds for divorce.[49]

Following Mexico's adoption in 1971 of stringent jurisdictional requirements for foreigners seeking divorces,[50] new divorce havens quickly appeared. Within two months after amendment of the Mexican laws, Haiti and the Dominican Republic seized the opportunity to profit from migratory divorce seekers and amended their divorce laws to permit foreigners to submit to the jurisdiction of their courts.[51]

In the instant case, *Hyde v. Hyde*,[52] the Supreme Court of Tennessee followed the growing minority and extended comity to a Dominican divorce decree rendered upon the submission of Tennessee domiciliaries to the jurisdiction of a foreign-nation court. The court equated the Tennessee divorce ground, irreconcilable differences, with the Dominican divorce ground, incompatibility of temperaments.[53] The court attached little significance to the fact that in 1974 the divorce ground of irreconcilable

46. *Id.* at 348, 330 A.2d at 827.

47. *Id.* at 347-48, 330 A.2d at 827.

48. *Id.*

49. *Id.*

50. Mexican law now requires aliens to present an official certificate from the Ministry of the Interior establishing that the parties are legal residents of Mexico. VII MARTINDALE-HUBBELL LAW DIRECTORY 3715 (1978).

51. For an excellent comparison of the Mexican divorce law prior to 1971 with the present Haiti and Dominican Republic divorce laws, see Note, *supra* note 19.

52. 562 S.W.2d 194 (Tenn. 1978).

53. *Id.*

differences was unavailable in Tennessee. *Yoder* was quoted for the proposition that " '[t]oday . . . is the point in time from which we should evaluate the state's public policy regarding permissible grounds for divorce.' "[54] Noting that the Tennessee statute[55] requires a settlement agreement as a prerequisite to utilizing the irreconcilable differences ground, the court maintained that incorporation of the parties' settlement into the divorce decree by the Dominican tribunal satisfied that condition.[56] The court concluded, therefore, that the ground upon which the Dominican decree was rendered did not contravene any public policy of Tennessee.[57]

The *Hyde* court rejected the divorce referee's contention that a bona fide domicile was essential for subject-matter jurisdiction over a divorce action.[58] Remarking that "in the proper case, the domiciliary requirement may serve an important function," the court reasoned that the parties had not been prejudiced by the difference between the jurisdictional requirements of the Dominican Republic and those of Tennessee.[59]

A fault in the *Hyde* decision lies in the court's failure to scrutinize critically the ground for the Dominican divorce as embodied in the Dominican divorce statute. The statute allows nonresident foreigners to obtain a divorce by mutual consent as long as at least one of the parties is physically present and the other is represented by an attorney.[60] Since Tennessee's divorce statutes do not contain a mutual consent provision, the court's justification for extending comity is at least technically weakened because one of the primary bases for the holding was the substantial equivalency of "irreconcilable differences" and "incompatibility." One commentator has noted that

> [u]nlike the Dominican Republic, no American jurisdiction to

54. *Id.* at 197 (quoting Yoder v. Yoder, 31 Conn. Supp. 344, 348, 330 A.2d 825, 827 (1974).

55. TENN. CODE ANN. § 36-801(II) (Cum. Supp. 1977).

56. 562 S.W.2d at 197.

57. *Id.*

58. *Id.*

59. *Id.* This is an unusual focus on prejudice since most courts consider the prejudice to the state rather than prejudice to the parties. *See* text accompanying notes 32-34 *supra*.

60. VII MARTINDALE-HUBBELL LAW DIRECTORY 3419 (1978).

> date will grant a divorce solely on the ground of mutual consent. . . . Dominican divorces are essentially *groundless*; plaintiff and defendant need only ask the court to dissolve their marriage. No allegations of fault or incompatibility, irreconcilable differences or irretrievable breakdown are required. . . . If both parties are represented before the court the decree of dissolution *must be granted*.[61]

The explanation for the *Hyde* decision can be found in the Dominican divorce decree. While no allegations by the parties are required under the Dominican statute, the divorce decree in *Hyde* indicated that the parties asserted their incompatibility as the basis for their mutual consent to the divorce.[62]

Arguably, a divorce rendered on the ground of mutual consent is contrary to Tennessee's public policy. Yet, a close examination of Tennessee's irreconcilable-differences statute suggests that while the court's conclusion may be true in form, it is not so in substance. Unlike the no-fault divorce statutes in some states, the Tennessee statute does not require proof of irreconcilable differences. Without the proof requirement, the distinction between irreconcilable differences and mutual consent appears to be merely one of terminology. Furthermore, the statute provides that "[n]o divorce shall be granted on the ground of irreconcilable differences where there has been a contest or denial."[63] Thus, it appears that *only* parties who mutually consent to a divorce can use the irreconcilable-differences divorce ground.

A more viable criticism of the court's analysis arises from the following portion of the Tennessee irreconcilable-differences statute that the court failed to mention:

> Bills for divorce on the ground of irreconcilable differences must have been on file for sixty (60) days before being heard if the parties have no unmarried child under eighteen (18) years of age and the same *must have been on file at least ninety (90) days before being heard if the parties have an unmarried child under age eighteen (18) years of age* [*sic*].[64]

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61. Note, *Caribbean Divorce for Americans: Useful Alternative or Obsolescent Institution?*, 10 CORNELL INT'L L.J. 116, 119-20 (1976) (emphasis in original).

62. Brief for Appellee at Exhibit III, Hyde v. Hyde, 562 S.W.2d 194 (Tenn. 1978).

63. TENN. CODE ANN. § 36-801(II) (Cum. Supp. 1977).

64. *Id.* (emphasis added).

The time delay between filing and hearing is unique to the irreconcilable-differences statute. The absence of the sixty-day filing requirement in the more difficult to obtain "fault" grounds[65] suggests that the legislature intended the filing requirement to serve as a cooling-off period. Implicit in this requirement is the concern expressed in *Golden*[66] that the availability of a "quickie" divorce would not encourage couples to reflect carefully upon the decision to dissolve a marriage. Further support for the contention that the legislature intended to provide a cooling-off period is found in the additional thirty-day filing requirement for couples with minor children; it manifests the legislative concern for maintenance of the family unit whenever possible.

While the legislature in its passage of the irreconcilable-differences statute wisely recognized the reality that public policy is not served by preserving a broken marriage through making fault the only ground for dissolution, the cooling-off period indicates that the state maintains an interest in the institution of marriage and intends that the decision to dissolve a marriage be a deliberate one. Since the Dominican Republic has assured foreigners of access to the Dominican divorce courts within seventy-two hours,[67] it must be concluded that the Dominican divorce decree is contrary to the legislatively established public policy of Tennessee. It is interesting to note that Dominican courts require a thirty- to sixty-day cooling-off period for its own citizens,[68] suggesting that while the Dominican Republic retains an interest in the marital status of native couples, the country's interest in the marital status of foreigners has apparently succumbed to economic self-interest.

The most disturbing consequence of the *Hyde* decision is the uncertainty it may have generated. Since the Supreme Court of Tennessee has now sanctioned a Dominican divorce, it might be assumed that Tennessee citizens who desire a "quickie" divorce and can afford to go to the Dominican Republic are safe in pursuing that alternative. More caution, however, is indicated as a

65. *See id.* § 36-813.

66. 41 N.M. 356, 68 P.2d 928 (1937); *see* text accompanying note 34 *supra*.

67. One commentator stated that the Dominican Republic's New York consulate issued a memorandum with this assurance of access to the courts. Note, *supra* note 19, at 203.

68. *Id.*

result of two atypical aspects of the instant case.

First, in *Hyde* a rare situation confronted the court in that neither spouse challenged the validity of the Dominican divorce decree; rather, both spouses sought to establish the validity of the decree in Tennessee by a declaratory judgment. The overwhelming majority of litigation related to foreign-nation divorces has involved one of the spouses challenging the validity of a decree in spite of that spouse's participation in the foreign-nation proceedings. Thus, since the court did not base its holding on the fact that both parties asserted the validity of the decree but rather on the basis that neither party had been prejudiced, it is uncertain whether the court would find prejudice solely in the fact that a party attacks the legitimacy of the divorce. The logical assumption is that the court would require a showing of actual prejudice that would not automatically preclude the extension of comity merely because one of the parties asserts invalidity. Since this is, however, only an assumption, the *Hyde* decision may not be a reliable indicator of the outcome in the typical action in which a party challenges the legitimacy of the foreign-nation divorce. Furthermore, since the court indicated in dictum that prejudice to *any citizens* of the state would bar the extension of comity,[69] a prejudiced third party could possibly attack the divorce decree successfully in spite of the wishes of the parties to the divorce.

Second, the discretionary nature of comity significantly diminishes the value of this case as precedent for the recognition of other foreign-nation divorces. Unlike the decisive opinion in *Rosenstiel*, which established that New York public policy *requires* the extension of comity to bilateral foreign-nation divorces,[70] the *Hyde* decision stresses that the decision to extend or deny comity will continue to be made on a case-by-case basis.[71] This type of decision is particularly troublesome for attorneys who must attempt to advise Tennesseans concerning the validity of a foreign-nation divorce. Couples might proceed with a Dominican divorce and seek a declaratory judgment to recognize its validity or take the chance that the decree will never be challenged. If the validity is challenged and the court refuses comity,

69. 562 S.W.2d at 197.

70. *See* note 40 *supra* and accompanying text.

71. 562 S.W.2d at 196, 198.

a party could seek to invoke an estoppel argument.[72]

In spite of these options, the risk of invalidation of the decree lingers in an area of the law that demands certainty and permanency because of its far-reaching impact on many parties. For this reason when Tennessee courts are confronted with another foreign-nation divorce, an attempt should be made to establish more clearly the judicial standards that will be applied. The Tennessee legislature could provide more certainty in the law pertaining to foreign-nation divorces. A legislative determination that the decision was not contrary to public policy would further incline the courts to extend comity. Legislative dissatisfaction with the decision could be expressed by the enactment of a divorce recognition act to establish in unmistakable terms the state's continued interest in determining the marital status of its own residents. The choice of either option by the legislature is not as important as the need for a decisive statement about the future validity of foreign-nation divorces in Tennessee.

REBECCA O. GILLEN

72. The purpose of estoppel is to prevent inequities, not to provide an additional basis for divorce jurisdiction. Professor Clark explains that estoppel "is not a function of the decree but a personal disability of the party attacking the decree. It is not a rule of jurisdiction." Clark, *Estoppel Against Jurisdictional Attack on Decrees of Divorce,* 70 YALE L.J. 45, 47 (1960). Confusion is created from statements in some of the opinions because parties are sometimes left uncertain as to their marital status and for what purpose, such as property rights, they may be deemed married. *Id.* at 55. The RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 74 (1971) provides for estoppel in foreign divorces. In the comments it is noted that the use of estoppel is not limited to reliance situations.

Torts—Defamation—Public-Figure Status

Plaintiff, a former professional football player, sued the team for which he had played, alleging that he was defamed when the team physician stated to the press that plaintiff was suffering from a fatal blood disease.[1] After being instructed that plaintiff was a public figure within the *New York Times* standard,[2] the jury found for defendant. On plaintiff's appeal from a denial of his posttrial motion for a new trial, *held*, reversed and remanded.[3] A professional athlete is a limited-purpose public figure who must satisfy the *New York Times* requirements in a defamation action arising from a publication discussing his playing career. *Chuy v. Philadelphia Eagles Football Club*, Nos. 77-1411, 77-1412 (3d Cir. Mar. 15, 1978), *rehearing granted* (May 9, 1978).

A communication is defamatory if it diminishes the reputation of another, thereby lowering him in the estimation of the community or deterring others from associating with him.[4] For

1. Claims to recover the balance due on the contract and damages for intentional infliction of mental distress were also brought. The jury held for plaintiff on both claims and this result was affirmed on appeal. Chuy v. Philadelphia Eagles Football Club, Nos. 77-1411, 77-1412 (3d Cir. Mar. 15, 1978), *rehearing granted* (May 9, 1978).

2. Under the *New York Times* standard, a plaintiff bringing an action for defamation must prove a defamatory falsehood made with knowledge of its falsity or in reckless disregard of the truth. New York Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964). *See* text accompanying notes 11-15 *infra*.

3. The appeals court affirmed the trial court's conclusion that plaintiff was a public figure but remanded the cause for a new trial limited to the defamation claim because the district court had incorrectly instructed the jury about the relevant recipient of defamatory remarks published in a newspaper. Nos. 77-1411, 77-1412 at 30-31. The trial court instructed the jury that it was necessary that the reporter who was told by the team physician that plaintiff was suffering from an incurable disease must have personally understood the remarks as having a tendency to injure plaintiff's reputation. Chuy v. Philadelphia Eagles Football Club, 431 F. Supp. 254, 258 (E.D. Pa. 1977), *aff'd in part and rev'd and remanded in part*, Nos. 77-1411, 77-1412 (3d Cir. Mar. 15, 1978). The appeals court held that the relevant recipient of the defamatory remark was the readership of the newspaper and that the crucial question was whether the average reader understood the physician's remarks as defamatory. Nos. 77-1411, 77-1412 at 30.

4. RESTATEMENT (SECOND) OF TORTS § 559 (1976). There are two forms of defamatory communication: libel and slander. *Id.* § 568. "Libel consists of the

defamation to be actionable, there must be an unprivileged[5] publication[6] to a third party[7] of a false[8] and defamatory[9] statement

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publication of defamatory matter by written or printed words, by its embodiment in physical form or by any other form of communication that has the potentially harmful qualities characteristic of written or printed words." *Id.* § 568(1). "Slander consists of the publication of defamatory matter by spoken words, transitory gestures or by any form of communication other than those stated in Subsection (1)." *Id.* § 568(2). "The area of dissemination, the deliberate and premeditated character of its publication and the persistence of the defamation are factors to be considered in determining whether a publication is a libel rather than a slander." *Id.* § 568(3).

5. *Id.* §§ 583-612. Under the *Restatement* analysis there are three kinds of privileges: absolute, conditional, and special. The absolute privilege permits judges, attorneys, parties, witnesses, and jurors to publish defamatory matter in performance of their functions in (and sometimes prior to) judicial proceedings if the matter published has some relation to the proceeding. *Id.* §§ 585-589. Legislators and witnesses in legislative proceedings are also absolutely privileged to publish defamatory matter if the matter has some relation to the legislative function. *Id.* §§ 590-590A. Executive and administrative officers of the United States and the governor and superior executive officers of a state are absolutely privileged to publish defamatory matter in the performance of official duties. *Id.* § 591. For a discussion of absolute privileges relating to publications between husband and wife and to publication required by law, see *id.* §§ 592, 592A. Publication of defamatory matter concerning another is absolutely privileged if the other person has consented to such publication. *Id.* § 583.

A conditional privilege to publish defamatory matter concerning another exists if publication is made in any of the following situations: (1) to protect the interests of the publisher, *id.* § 594, (2) to protect the interests of the recipient or a third person, *id.* § 595, (3) when the publisher and recipient have a common interest that will be protected by the communication, *id.* § 596, (4) to protect the well being of a member of the immediate family of the publisher, *id.* § 597, (5) when matter communicated to one who may act in the public interest affects a sufficiently important public interest, *id.* § 598, and (6) by an inferior state officer in the performance of official duties. *Id.* § 598A. A conditional privilege will be lost if it is abused. *See id.* §§ 599-605A.

The publication of defamatory matter in a report of an official proceeding or public meeting that deals with a matter of public interest is accorded a special privilege if the report is accurate and complete or a fair abridgement of the occurrence. *Id.* § 611. One who provides a means of publication of defamatory matter published by another is privileged under certain circumstances. *See id.* § 612(1)(b).

6. *Id.* § 577. "Any act by which the defamatory matter is intentionally or negligently communicated to a third person is a publication." *Id.*, comment a.

7. *Id.* § 577(1) & comment b. Since defamation law primarily protects the interest in reputation, it is essential that the defamatory matter be communicated to someone other than the person defamed. Furthermore, the defamatory

concerning another. If a plaintiff has been classified as a "public official" or "public figure," he may, depending on the rule applied in the jurisdiction, be required to show a greater degree of fault on the part of the defendant than would a private person who had been defamed.[10] The issue in *Chuy* was whether a professional athlete should be considered a public figure.

In *New York Times Co. v. Sullivan*[11] the 1964 Supreme Court first applied constitutional limitations to state defamation law. This case involved an action for libel brought in an Alabama state court by a public official who alleged that he had been defamed by an advertisement in the *New York Times*. The advertisement

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statement must be actionable irrespective of special harm or the existence of special harm caused by the publication must be shown. Special harm is that which is likely to cause pecuniary loss, such as the loss of job, business opportunities, or social opportunities. 1 T. STARKIE, SLANDER * 190-208; *see* RESTATEMENT (SECOND) OF TORTS § 575, comment b (1976). "Special harm," which may be an element of plaintiff's case, should be distinguished from "actual harm," which relates to the measure of damages and includes "impairment of reputation . . ., personal humiliation, . . . mental anguish and suffering" as well as out-of-pocket loss. Gertz v. Robert Welch, Inc., 418 U.S. 323, 350 (1974). Under the *Restatement* view special harm is not a required element in actions for libel or in actions for the four types of slander per se, which include slander that imputes to another (1) a criminal offense; (2) a loathsome disease; (3) matter affecting business, trade, profession, or office; or (4) serious sexual misconduct. RESTATEMENT (SECOND) OF TORTS §§ 569-574 (1976). Special harm is required in all other slander actions. *Id.* § 575.

8. RESTATEMENT (SECOND) OF TORTS § 518A (1976). "One who publishes a defamatory statement of fact is not subject to liability . . . if the statement is true."

9. The appellate court noted that under the facts of the instant case, the statement that plaintiff was suffering from a fatal disease was capable of defamatory meaning. The court found that a reader could have understood the fatal blood disease to be the cause of plaintiff's retirement from professional football and that those who dealt with plaintiff in his professional capacity might have refrained from associating with him professionally. Nos. 77-1411, 77-1412 at 29-30 (3d Cir. Mar. 15, 1978).

10. When the plaintiff is not a public official or public figure, the Supreme Court has held that "so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher . . . of defamatory falsehood injurious to a private individual." Gertz v. Robert Welch, Inc., 418 U.S. 323, 347 (1974). Thus, there is a constitutional requirement that the publisher must have been at least negligent in his publication of the statement.

11. 376 U.S. 254 (1964).

criticized police handling of 1960 racial disturbances in the South but did not mention plaintiff by name or indirectly refer to him in his official capacity as supervisor of the Montgomery Police Department. Alabama law maintained the privilege of "fair comment" for expression of opinion only when the facts underlying the comment were absolutely true.[12] The *New York Times*, therefore, could not assert this "fair comment" privilege since the statements in the advertisement were at least minimally inaccurate.[13] As a result, the trial court held the *Times* liable to plaintiff for $500,000 presumed and punitive damages. On appeal from the Alabama Supreme Court, the United States Supreme Court unanimously reversed, holding that the Alabama law was constitutionally deficient because it failed "to provide the safeguards for freedom of speech and of the press that are required by the First and Fourteenth Amendments in a libel action brought by a public official against critics of his official conduct."[14] The Court ruled that a public official cannot recover damages for a defamatory falsehood concerning his official conduct unless he proves that the statement was made with knowledge of its falsity or in reckless disregard of the truth.[15]

Three years later, in the companion cases of *Curtis Publishing Co. v. Butts* and *Associated Press v. Walker*,[16] the Supreme

12. *Id.* at 267.

13. *Id.* at 259. For example, the police did not "ring" the Alabama State College as stated but were simply deployed in large numbers nearby. Also, Dr. Martin Luther King had been arrested four times, not seven as the publication claimed.

14. *Id.* at 264.

15. *Id.* at 279-80. This is known as the *New York Times* standard.

16. 388 U.S. 130 (1967). *Butts* was a libel action brought by the athletic director of the University of Georgia against a magazine publisher who printed an article stating that plaintiff had "fixed" a college football game. At the federal district court level, judgment was for plaintiff in the amount of $460,000 damages. The holding of the court of appeals that Butts was a public figure was upheld by the Supreme Court for reasons mentioned in the text accompanying notes 21-23 *infra*.

In *Walker*, a retired army general brought a libel action in a Texas state court against the Associated Press for distribution of a news release that purported to be an eyewitness account of racial riots at the University of Mississippi. The release stated that plaintiff had personally led a charge against federal marshalls who were attempting to enforce a federal court order. Walker admitted that he was on campus at the time but denied leading the charge,

Court extended the *New York Times* standard by applying it not only to public officials but also to "public figures."[17] Unfortunately, the Court failed to supply a definition of "public figure" that the lower courts could uniformly apply.

The designation of General Walker as a public figure is not problematical since his well-organized opposition to federal intervention in racial disturbances had received national media coverage. As Justice Harlan noted in the plurality opinion, Walker had thrust "his personality into the 'vortex' of an important public controversy."[18] Further insight into the Court's definition of the term "public figure" comes from Chief Justice Warren's statement in his concurring opinion that some "individuals . . . who do not hold public office . . . are nevertheless intimately involved in the resolution of important public questions or, by reason of their fame, shape events in areas of concern to society at large . . . [and] often play an influential role in ordering society."[19] This description was apparently limited to a person of General Walker's stature[20] since it did not seem to apply to Wally Butts, athletic director and former football coach at the University of Georgia, who was held to be a public figure in the companion case to *Walker*. Justice Harlan's plurality opinion noted, however, that Butts "commanded a substantial amount of independent *public interest* at the time of the publications . . . [and that he] may have attained . . . [public figure] status by position alone."[21] Although Justice Harlan also mentioned Butts' oppor-

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stating that he had advocated only nonviolent means of protest. A verdict for plaintiff for $500,000 was ultimately reversed by the Supreme Court.

17. Chief Justice Warren, joined by Justices Douglas, Black, Brennan, and White in Parts I and II of his concurring opinion, stated the view of the majority of the Court that the *New York Times* standard was applicable to public figures. 388 U.S. at 164. Justice Harlan was joined by Justices Clark, Stewart, and Fortas in the plurality opinion. These members of the Court declined to apply the *New York Times* standard and held that in a defamation action a public figure must prove "highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers." *Id.* at 155.

18. *Id.*

19. *Id.* at 164. This part of Chief Justice Warren's opinion constitutes the view of a majority of the Court. *See* note 17 *supra*.

20. Chief Justice Warren stated, "Under any reasoning, General Walker was a public man in whose public conduct society and the press had a legitimate and substantial interest." 388 U.S. at 165.

21. *Id.* at 154-55 (emphasis added).

tunity to rebut defamatory statements through his access to the media as a reason for holding him to be a public figure,[22] the use of the term "public interest"[23] intimated the direction the Court would take in the future. This language gave lower courts sufficient justification to make frequent application of the *New York Times* standard to those in whom the public had displayed a relatively minor interest.[24]

In *Rosenbloom v. Metromedia, Inc.*[25] an extremely divided Court[26] held that any individual who brought a defamation action against a publication that reported his involvement in a matter of "public or general interest" would have to satisfy the *New York Times* standard.[27] The plurality opinion held that the purpose of

22. *Id.* at 155.

23. Justice Harlan also stated, "[T]he public interest in the circulation of the materials here involved, and the publisher's interest in circulating them, is not less than that involved in *New York Times*." *Id.* at 154. Thus, the plurality opinion apparently held that the public interest in the "fixing" of a college football game is equal to the public interest in struggles for racial equality.

24. *See, e.g.*, Bon Air Hotel, Inc. v. Time, Inc., 426 F.2d 858 (5th Cir. 1970) (hotel allegedly defamed by magazine article that mentioned hotel accommodations); Wasserman v. Time, Inc., 424 F.2d 920 (D.C. Cir. 1970) (attorney not identified as such was pictured in photograph accompanying article about alleged "Cosa Nostra hoodlums"); United Medical Laboratories v. Columbia Broadcasting Sys., 404 F.2d 706 (9th Cir. 1968) (medical testing lab); Cerrito v. Time, Inc., 302 F. Supp. 1071 (N.D. Cal. 1969) (person referred to as head of Cosa Nostra family in San Jose); Arizona Biochemical Co. v. Hearst Corp., 302 F. Supp. 412 (S.D.N.Y. 1969) (alleged organized crime connection of plaintiff garbage collecting company); Sellers v. Time, Inc., 299 F. Supp. 582 (E.D. Pa. 1969) (golfer sued because of bad golf shot); Garfinkel v. Twenty-First Century Publishing Co., 30 App. Div. 2d 787, 291 N.Y.S.2d 735 (1968) (publisher of high school scouting report); Grayson v. Curtis Publishing Co., 72 Wash. 2d 999, 436 P.2d 756 (1967) (former college basketball coach).

25. 403 U.S. 29 (1971). Rosenbloom, a magazine distributor arrested for possession and distribution of obscene literature, was described as a "smut distributor" and "girlie-book peddler" in radio broadcasts that did not mention him by name. Following his acquittal on criminal obscenity charges, Rosenbloom instituted a defamation action against Metromedia, Inc., the owner of the radio station. The jury's verdict of $750,000 for Rosenbloom was reduced to $275,000 by the district court. The court of appeals reversed, holding that publishers of "hot news" items that involved matters of public interest deserved first amendment protection. The Supreme Court upheld the decision of the court of appeals for reasons discussed in text accompanying notes 26-29 *infra*.

26. The eight Justices taking part in the decision wrote five different opinions.

27. 403 U.S. at 43-44.

the first amendment was "to encourage ventilation of public issues."[28] Basing constitutional protection on the status of the individual defamed was illogical, the Court found, because "the public focus is on the conduct of the participant and the content, effect, and significance of the conduct, not the participant's prior anonymity or notoriety."[29] Justice Marshall, in a dissenting opinion, expressed his fear that a constitutional privilege for defamation that was conditioned on "public interest" would not give sufficient protection to the private individual's interest in preserving his reputation "since all human events are arguably within the area of 'public or general concern.' "[30] Justice Marshall's fear was well founded, as illustrated by subsequent decisions that deemed many events that were only "newsworthy" to be matters of public interest, requiring those allegedly defamed to satisfy the *New York Times* requirements.[31]

In *Gertz v. Robert Welch, Inc.*[32] the Supreme Court abandoned the "public interest" test of *Rosenbloom* and held that the

28. *Id.* at 46. Justice Brennan was joined by Chief Justice Burger and Justice Blackmun in the plurality opinion.

29. *Id.* at 43.

30. *Id.* at 78-79. Justice Stewart joined in this dissent, and Justice Harlan voiced his agreement with Part I.

31. *See, e.g.*, Casano v. WDSU TV, Inc., 464 F.2d 3 (5th Cir. 1972) (attorney mentioned in newscast dealing with a local politician's alleged connections with alleged members of the underworld); Gospel Spreading Church v. Johnson Publishing Co., 454 F.2d 1050 (D.C. Cir. 1971) (real estate left to church by founder); Time, Inc. v. Johnston, 448 F.2d 378 (4th Cir. 1971) (former professional basketball player retired for nine years); Washington v. New York News, Inc., 37 App. Div. 2d 557, 322 N.Y.S.2d 896 (1971) (bishop who allegedly attended a night club performance); Twenty-Five E. 40th St. Restaurant Corp. v. Forbes, Inc., 37 App. Div. 2d 546, 322 N.Y.S.2d 408 (1971) (quality of food in restaurant).

32. 418 U.S. 323 (1974). Elmer Gertz was an attorney who represented a murder victim's family in civil litigation against the convicted murderer, a policeman. Defendant's magazine printed an article that falsely stated that plaintiff Gertz had arranged the "frame-up" of the police officer, that plaintiff had a police record, and that he was a "Leninist" and a "Communist-fronter." In plaintiff's action for defamation, the district court reversed a jury verdict for him on the ground that the defamatory article discussed a matter of public concern. The court of appeals affirmed this decision, which was later reversed by the Supreme Court. For a discussion of the issues raised by *Gertz*, see Phillips, *Defamation, Invasion of Privacy, and the Constitutional Standard of Care*, 16 SANTA CLARA L. REV. 77 (1975).

New York Times standard is applicable only when a public official or public figure is defamed.[33] The Court held that the states' legitimate interest in protecting private citizens from defamatory falsehoods had been abridged by the *Rosenbloom* decision.[34] The Court also noted that the *Rosenbloom* holding made it necessary for trial courts to make ad hoc determinations of which matters are of "general or public concern," thereby "committing this task to the conscience of judges."[35] Instead, the Court preferred "broad rules of general application"[36] that would allow future courts to avoid "unpredictable results and uncertain expectations."[37]

Gertz held that "so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher . . . of defamatory falsehood injurious to a private individual."[38] Nevertheless, the first amendment requires that a public figure or official prove that the defamatory remark was published "with knowledge of its falsity or in reckless disregard [of] the truth."[39] The Court further stated that the application of different standards to different individuals based on their status as either public or private persons was justified because a public figure or official has greater access to the channels of communication to rebut false statements and has "voluntarily[40] exposed . . . [himself] to increased risk of injury from defamatory falsehood."[41] Since neither of these characteristics applies to a private individual, the state interest in protecting such a private person from injury to reputation is not overridden by first amendment considerations.

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33. 418 U.S. at 342.

34. *Id.* at 345-46.

35. *Id.* at 346.

36. *Id.* at 343-44.

37. *Id.* at 343.

38. *Id.* at 347. The RESTATEMENT (SECOND) OF TORTS states that "negligence will . . . meet the constitutional requirement, though a lesser degree of fault probably would not," *id.* § 580, comment c, and that "one who publishes a false and defamatory communication concerning a private person . . . is subject to liability . . . only if he (a) knows that the statement is false and that it defames the other, (b) acts in reckless disregard of these matters, or (c) acts negligently in failing to ascertain them." *Id.* § 580B.

39. 418 U.S. at 342.

40. The Court stated that hypothetically there could be an involuntary public figure but that such an occurrence would be exceedingly rare. *Id.* at 345.

41. *Id.* at 344-45.

Although the *Gertz* Court specifically noted that the decision in *Butts* was correct in extending the *New York Times* standard to public figures, the Court narrowed the definition of "public figure" so that many individuals who were held to be public figures as a result of the "public interest" language in *Butts*[42] probably would not be viewed as public figures under the *Gertz* definition. *Gertz* recognized two classes of public figures. Some individuals "occupy positions of such pervasive power and influence that they are deemed public figures for all purposes . . . [but] [m]ore commonly, . . . [individuals] have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issue involved"[43] and are classified as public figures for limited purposes. "In either case, such persons assume special prominence in the resolution of public questions."[44] The Court was careful to note that an individual should not be held to be a public figure for all purposes unless there was "clear evidence of general fame or notoriety . . . and pervasive involvement in the affairs of society."[45] In holding that petitioner Gertz was not a public figure, the Court reasoned that "the public-figure question . . . [could be reduced] to a more meaningful context by looking to the nature and extent of an individual's participation in the particular controversy giving rise to the defamation."[46]

Two years later, in *Time, Inc. v. Firestone*,[47] the Supreme Court again narrowed the definition of public figure thereby requiring fewer persons to meet the *New York Times* standard in an action for defamation. In *Firestone* the former wife of a member of a wealthy family brought suit in a Florida state court against defendant news magazine, alleging that she had been defamed by an article stating that her ex-husband had been granted a divorce on the grounds of her adultery and extreme cruelty. Although Mrs. Firestone was so prominent in Palm

42. For the public-interest language in *Butts*, see text accompanying note 21 *supra*. For examples of those held to be public figures as a result of this language, see cases cited note 24 *supra*.

43. 418 U.S. at 345.

44. *Id.* at 351.

45. *Id.* at 352.

46. *Id.*

47. 424 U.S. 448 (1976).

Beach society that she subscribed to a press clipping service and held several news conferences during the divorce proceedings, the Supreme Court upheld the determination of the Florida Supreme Court that she was not a "public figure" subject to the *New York Times* standard. The Court noted that Mrs. Firestone had not "thrust herself to the forefront of any particular public controversy in order to influence the resolution of the issues involved"[48] and that, therefore, she did not satisfy the requirements of *Gertz*.[49] Justice Rehnquist's majority opinion[50] noted that the characterization of the Firestone divorce as a "cause celebre" by the Florida Supreme Court did not make Mrs. Firestone a public figure because " 'public controversy' [is not to be equated] with all controversies of interest to the public."[51] The Court further commented that a divorce "is not the sort of 'public controversy' referred to in *Gertz*"[52] and that Mrs. Firestone did not voluntarily "choose to publicize issues as to the propriety of her married life . . . [but] was compelled to go to court by the State in order to obtain legal release from the bonds of matrimony."[53]

In stressing the *voluntary* aspect of limited public figure status, the *Firestone* Court narrowed the definition of public figure given in *Gertz* since *Gertz* had stated that hypothetically one could become a public figure involuntarily.[54] Implicitly, therefore, the *Firestone* Court concluded that a person can become a limited-purpose public figure only by his own volitional act.[55]

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48. *Id.* at 453.

49. The *Firestone* Court characterized *Gertz* as having "further defined" the meaning of "public figure." *Id.* The Court's use of the term "further defined" implies that the majority opinion held that *Gertz* narrowed the *Butts* definition of public figure. *See* text accompanying note 42 *supra*.

50. *Firestone* is a majority opinion although it has sometimes been mistakenly referred to as a plurality decision. Justice Rehnquist delivered the opinion of the Court and was joined by Chief Justice Burger and Justices Stewart, Blackmun, and Powell. Justice Powell filed a concurring opinion in which Justice Stewart joined. Justice Powell explicitly stated that he joined in the opinion of the Court and used his concurring opinion to give his interpretation of the record that would be reviewed by the Florida courts. 424 U.S. at 464. The evidentiary matters that Justice Powell discussed were not before the Court.

51. *Id.* at 454.

52. *Id.*

53. *Id.*

54. *See* note 40 *supra*.

55. *See* Ashdown, *Gertz and Firestone: A Study in Constitutional Policy-Making*, 61 MINN. L. REV. 645, 660 (1977).

The elements of the *Gertz-Firestone* test[56] can be stated as follows: To become a public figure for a limited range of issues, one must *voluntarily* inject himself into a *public controversy* in order to *influence* the resolution of particular issues.[57] Furthermore, the defamatory publication must relate to the specific public controversy in which the plaintiff is involved before the plaintiff becomes a limited public figure to whom the *New York Times* standard applies. The *Firestone* Court emphasized the *Gertz* holding that both limited- and all-purpose public figures assume "'special prominence in the resolution of public questions,'"[58] thereby implying that involvement in a public controversy is a requirement for classification as either type of public figure.

Defamation cases that have addressed the public figure question since *Firestone* generally fall into two categories. The first group of cases actually followed the *Gertz-Firestone* test and required that before a plaintiff can be classified as a public figure, there must be evidence that he voluntarily injected himself into a public controversy in an effort to affect its outcome.[59] The second group of cases failed to adhere to the restricted definition of "public figure" given by *Gertz* and *Firestone* and based the determination of "public figure" status on a "public interest" test.[60]

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56. This term will be used to signify the *Gertz* test as it was narrowed by the *Firestone* decision.

57. *But see* Ashdown, *supra* note 55, at 679-80 (stating a somewhat different test).

58. 424 U.S. at 454-55 (quoting Gertz v. Robert Welch, Inc., 418 U.S. 323, 351 (1974)).

59. *See, e.g.*, Jenoff v. Hearst Corp., 453 F. Supp. 541, 545-46 (D. Md. 1978) (undercover police informant who had been the subject of several articles was not a public figure because there was no evidence that he "ever attempted to . . . propagandize his views on . . . any . . . subject"); Mashburn v. Collin, 341 So. 2d 1236, 1238 (La. Ct. App. 1976) (restaurant owner held not to be a public figure because he "in no way attempted to influence society by . . . operating a restaurant"); Foster v. Laredo Newspapers, Inc., 541 S.W.2d 809, 817 (Tex. 1976) (civil engineer who did private consultation work for county held not a public figure because he "did not assume a special prominence in the resolution of this controversy" over a flooding problem).

60. *See, e.g.*, Wolston v. Reader's Digest Ass'n, 578 F.2d 427, 431 (D.C. Cir. 1978) (man who, sixteen years before alleged defamation, did not respond to a subpoena by a grand jury investigating his uncle was held to be a public figure because his failure to respond had "invited public attention and comment"); Appleyard v. Transamerican Press, Inc., 539 F.2d 1026 (4th Cir. 1976) (the court, taking the truckdriver-plaintiff's word that he was a public figure,

Chuy v. Philadelphia Eagles Football Club,[61] the instant case, falls into the second category of post-*Firestone* decisions: the United States Court of Appeals for the Third Circuit, accepting the conclusion of the district court, did not apply the *Gertz-Firestone* test but instead classified plaintiff as a public figure because of his status as a professional football player. Although the court of appeals did not expressly adopt the lower court's rationale, the district court's analysis merits close scrutiny because of the rather limited and superficial approach by the Third Circuit to the issue of what qualifies one to be a public figure. There were two bases for the district court's categorization of plaintiff as a public figure: first, plaintiff chose to engage in a

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made no mention of a "controversy"); Logan v. District of Columbia, 447 F. Supp. 1328 (D.D.C. 1978) (person arrested in connection with undercover police fencing operation in Washington, D.C.); Rosanova v. Playboy Enterprises, Inc., 411 F. Supp. 440 (S.D. Ga. 1976) (plaintiff was a public figure because of publicity received and alleged contacts and involvements relating to subject matter of article); James v. Gannett Co., Inc., 40 N.Y.2d 415, 353 N.E.2d 834, 386 N.Y.S.2d 871 (1976) (belly dancer was public figure since she welcomed publicity).

61. Nos. 77-1411, 77-1412 (3d Cir. Mar. 15, 1978), *rehearing granted* (May 9, 1978). *Chuy* is the first case to ignore the holding of *Gertz* by using a public-interest analysis to extend public-figure status to a professional athlete. It was apparently not necessary for the court to consider the status of plaintiff since the court of appeals affirmed the trial court's denial of defendant's posttrial motion for a new trial of the mental distress claim. The appellate court held that the district court had acted properly in making the determination that there was sufficient evidence from which the jury could infer that defendant intentionally or recklessly inflicted mental distress on plaintiff. *Id.* at 12-14. Thus, a jury could find that the physician made the statement with knowledge of its falsity. It was conceded at trial by defendant Eagles that the physician knew that Chuy was not suffering from a fatal blood disease, but defendant denied that the alleged defamatory remark was made by the physician. 431 F. Supp. 254, 258 (E.D. Pa. 1977). The reporter with whom the physician had spoken claimed that the statement as reported had been made by the physician. *Id.* The jury apparently believed the reporter and held in favor of Chuy on the intentional infliction of mental distress claim. *Id.*

In *Chuy* the court of appeals gave *New York Times* protection to a nonmedia defendant. The appeals court did not discuss this matter but the district court referred to Davis v. Schuchat, 510 F.2d 731 (D.C. Cir. 1975), in which such protection was also extended to a nonmedia defendant. *Id.* at 265 n.20. Closely analogous to the situation in *Chuy* is the case of Garrison v. Louisiana, 379 U.S. 64 (1964), in which the defamatory remarks of a nonmedia defendant uttered at a press conference were held to warrant constitutional protection. *See* Saint Amant v. Thompson, 390 U.S. 727 (1968); Sindorf v. Jacron Sales Co., Inc., 27 Md. App. 53, 341 A.2d 856 (1975), *aff'd*, 276 Md. 580, 350 A.2d 688 (1976).

profession that regularly drew him into regional and national view; second, the American public directs massive attention to professional sports.[62] These reasons do not satisfy the *Gertz-Firestone* test, however. Had the district court applied that test, plaintiff would not have been held to be a public figure, for although he chose a profession that placed him in the public eye, plaintiff certainly did not enter a public controversy in an attempt to influence the resolution of the issues involved. The emphasis the district court placed on "public interest" is shown by its statement that "the Nielsen ratings . . . [demonstrate that] the American public is fascinated by professional sports."[63] Such a statement is irrelevant, however, because *Gertz* held that "public interest" is not an acceptable basis for imposing public-figure status.[64]

The interest shown by the public in plaintiff's career was apparently the reason for the court of appeals' classification of plaintiff as a public figure. The court stated that plaintiff's position as a starting player for defendant football team coupled with the publicity that accompanied his trade to Philadelphia elevated the litigation between him and his former employer to something more than a "mere private contractual matter."[65] Professional athletes' "contractual disputes, as well as their athletic accomplishments, command the attention of sports fans," the appellate court noted.[66] Although the court repeatedly stated that plaintiff was a person of "public prominence," it only gave examples of the public interest he generated (rather than any controversy in which he was entangled) as justification for this conclusion.[67] Plaintiff's supposed "public prominence" apparently was the sole reason the appeals court classified him as a public figure.

Comparing the prominence of plaintiff in *Chuy* with that of plaintiff in *Firestone*, the appeals court expressed its belief "that Don Chuy's public prominence was a good deal more marked than [Mrs. Firestone's]."[68] The court further explained, "While

62. 431 F. Supp. at 266-67.
63. *Id.* at 267.
64. 418 U.S. at 346.
65. Nos. 77-1411, 77-1412, at 32.
66. *Id.*
67. *Id.*
68. *Id.* at 32 n.29.

the marital troubles of the wealthy did not make them public figures, a pro athlete's contractual troubles relating to his playing performance commands the attention of a more sustained and wider public audience."[69] The Third Circuit's public-interest-based determination of "public figure status, however, is contrary to *Firestone*'s holding that public-figure status is controversy-related and that public interest alone is not sufficient to classify someone as a public figure.[70]

The court of appeals presumably was aware that participation in a public *controversy* enters into the determination of public-figure status. The court quoted the *Gertz* statement that sometimes " 'an individual voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues.' "[71] *Firestone* was summarized by the appellate court as having made the finding that "[t]he former Mrs. Firestone [had] not . . . attained a role of prominence in the affairs of society and her divorce action was . . . not a public controversy."[72] In spite of its ostensible recognition that public-figure status is controversy-related, the appeals court failed to apply this standard to plaintiff, thus avoiding the *Gertz-Firestone* test, which would have prevented plaintiff's classification as a public figure since he clearly had not entered a public controversy in order to influence the resolution of the issues involved.

Unlike the court of appeals, the district court apparently realized that the controversy element must at least be explained away when applying public-figure status to someone who is not involved in a controversy. The district court conceded that "*Gertz* gave the *appearance* of contemplating an issue oriented characterization of public figure"[73] and that *Firestone* had relied on the fact that plaintiff had " 'not thrust herself to the forefront of any particular public controversy in order to influence [its] resolution.' "[74] Nevertheless, the district court chose not to read

69. *Id.* at 32 (citation omitted).

70. 424 U.S. at 453-54.

71. Nos. 77-1411, 77-1412, at 32 (quoting Gertz v. Robert Welch, Inc., 418 U.S. 323, 351 (1974)).

72. *Id.* at 32 n.29 (citing Time, Inc. v. Firestone, 424 U.S. 448, 453-54 (1976)).

73. 431 F. Supp. at 266.

74. *Id.* at 267 (quoting Time, Inc. v. Firestone, 424 U.S. 448, 453 (1976)).

such language as requiring that a person must be involved in a public controversy to be accorded public figure status. The district court maintained that the *Gertz* requirement that a public figure be involved in the affairs of society was intended only to overrule *Rosenbloom*'s holding that one could become a public figure involuntarily.[75] The district court's interpretation of this aspect of *Gertz* is clearly erroneous since *Gertz* found that hypothetically one could become an involuntary public figure.[76] If the district court's analysis of *Gertz* were correct, the *Firestone* holding could be interpreted as merely reiterating *Gertz* rather than as inflexibly requiring that any public figure must have thrust himself into a public controversy.

The district court's reasoning and the failure of the appeals court to address the issue is difficult to reconcile with the clear language of *Gertz* and *Firestone*. *Gertz* explicitly emphasized the "controversy" aspect of public-figure status, using the word "controversy" three times,[77] and stated that public figures "assume special prominence in the resolution of public questions"[78] and are "'influential . . . in ordering society.'"[79] *Firestone* stated the same principle even more directly, suggesting that one is accorded public-figure status only if he *voluntarily* becomes involved in a public controversy. Thus, *Firestone* did not merely appear to stress the controversy-related issue element but treated it as an essential element of public-figure status.

The appeals court failed to justify its apparent holding that "public prominence" is a sufficient basis for classifying a plaintiff as a public figure. The district court felt that once public interest was directed to a particular activity, it should not be the court's responsibility to determine whether that activity or its participants deserve to be accorded the prominence that gives rise to public-figure status.[80] The district court noted that "one of the

75. *Chuy* tried to avoid the definition of public figure by stating "[w]e believe . . . that the language in *Gertz* to which Justice Rehnquist referred [as a definition of public figure] was meant to be in contradistinction . . . of Rosenbloom v. Metromedia, Inc." 431 F. Supp. at 267. For the language in *Gertz* to which Justice Rehnquist referred, see text accompanying notes 43-44 *supra*.

76. *See* note 40 *supra*.

77. 418 U.S. at 345, 351-52.

78. *Id.* at 351.

79. *Id.* at 345 (quoting Curtis Publishing Co. v. Butts, 388 U.S. 130, 164 (1967)).

80. The district court interpreted the spirit of *Gertz* to be that it was

reasons why the [Supreme Court] abandoned the *Rosenbloom* approach was that the task of defining . . . 'general or public interest' should not be left to the 'conscience of judges.' "[81] Like the Third Circuit, the district court's method of determining public-figure status, however, apparently was dependent on the degree of public interest generated by a particular plaintiff. This procedure, in contravention to *Gertz,* appears to necessitate, rather than avoid, an ad hoc determination of who is a public figure. Just as the appellate court assigned public-figure status to plaintiff because he was a person of "public prominence," the district court found plaintiff to be a public figure because he "has . . . *chosen* to engage in a profession which draws him regularly into . . . national view and leads to 'fame and notoriety in the community.' "[82] By emphasizing plaintiff's prominence in his occupation and the attention given him by the media, the implication of both the district and circuit courts' opinions is that courts will have to make a case-by-case determination of whether the requisite degree of prominence and media attention is present.

The district and appellate courts could have avoided such an ad hoc approach by examining the *Gertz-Firestone* requirement of controversy. The term "controversy" is defined as "a cause, occasion, or instance of disagreement or contention . . . marked especially by the expression of opposing views."[83] The district court's fear of having to evaluate the affairs of society would be unfounded if this course of inquiry were taken. Instead, the court would first ascertain whether there actually was a controversy (that is, whether a segment of society had "taken sides" on the matter). If this prerequisite had been met, the court would further determine if the plaintiff had voluntarily thrust himself into the controversy in order to influence the resolution of particular issues. All these elements would have to be present before a plaintiff could be classified as a public figure.

"unacceptable for a court . . . to pass qualitatively upon the 'affairs of society' " in determining who was a public figure. 431 F. Supp. at 267 (quoting Gertz v. Robert Welch, Inc., 418 U.S. 323, 345 (1974)).

81. *Id.* at 267 n.23 (citing Gertz v. Robert Welch, Inc., 418 U.S. 323, 346 (1974)).

82. *Id.* at 267 (emphasis in original).

83. WEBSTER'S THIRD INTERNATIONAL DICTIONARY 497 (1971).

A controversy-related determination of public-figure status is desirable because this method is in keeping with the rationale for the status-related *New York Times* standard that "a public figure . . . might be assumed to 'have voluntarily exposed . . . [himself] to increased risk of injury from defamatory falsehood[s].' "[84] A person who injects himself into a controversy in an effort to influence the issues involved realizes that he is opening himself to the possibility of attack by those with an opposite viewpoint. One who voluntarily encounters such a situation can be assumed to have been aware of the potential dangers and should be required to meet the *New York Times* standard.

In holding that the plaintiff in *Chuy* was a public figure the Third Circuit failed to take into account the constitutional considerations articulated in *Gertz* and *Firestone*. These cases held that the states have a legitimate interest in protecting private individuals from defamatory falsehood. *Firestone* defined a private individual as a person who *does not* enter a particular public controversy in order to influence the resolution of the issues involved. Public policy demands that only those who attain special prominence in the resolution of public questions be designated public figures, for such persons voluntarily encounter the risk of defamation by taking part in the discussion of controversial matters. The Third Circuit, therefore, improperly classified plaintiff as a public figure who had to satisfy the *New York Times* requirement. A football player faces the risk of physical injury when he enters professional football, but he certainly should not be required to assume the risk of injury to his reputation by an overly broad constitutional protection of defamation.

SUELLEN WIDEMAN

84. Time, Inc. v. Firestone, 424 U.S. 448, 456 (1976) (quoting Gertz v. Robert Welch, Inc., 418 U.S. 323, 345 (1974)). Since the *Firestone* Court did not mention Mrs. Firestone's access to the media for rebuttal (the other justification *Gertz* gave for according public-figure status) even though Mrs. Firestone obviously commanded the attention of the media, the Supreme Court apparently has determined that opportunity for rebuttal is not an important element of public-figure status.

BOOK REVIEW

HOW TO PROVE DAMAGES IN WRONGFUL PERSONAL INJURY AND DEATH CASES (2d ed.) By I. Duke Avnet. Englewood Cliffs, N.J.: Prentice-Hall, Inc. 1978. Pp. 279. $19.95.

Mr. Avnet's book is intended as a practical guide, primarily for the personal injury plaintiff's attorney, and it serves that function well. It is replete with common sense advice covering issues from the decision to accept a case to the process of jury summation. The chapter on medical witness preparation and examination (pp. 65-97) is detailed and thorough, with helpful material on basic examination questions. Throughout the book the author includes useful checklists, sample questions, and instructions. The book should prove valuable for any attorney with a personal injury practice. This second edition updates the first (published in 1973) and contains some important new sections, including discussions of psychic injury, obtaining verdicts in rural areas, the nature of pain, and recent no-fault automobile insurance developments.

One of the most interesting and informative chapters concerns the use of expert testimony to prove pecuniary loss (pp. 139-63). There have been significant developments in this area within the past few years, and Mr. Avnet examines the issues thoroughly. The material in this section primarily concerns the use of testimony of economists to determine loss of future earnings, a factor that can have a decisive effect on the amount of the jury award. The author knows that a good case of liability with poor proof of damages adds up to a bad case. It is his goal "to give damages at least equal importance in preparation to that of liability" (p. 17), and he probably achieves this goal most effectively in this chapter on pecuniary loss.

The last chapter surveys the developing law in no-fault automobile liability and describes the various plans that have been proposed and adopted. The author is surprisingly objective in his critique of these plans. One hardly expects a seasoned personal injury plaintiff's attorney to concede any merit in no-fault, but Mr. Avnet recognizes that there is much to be said in favor of no-fault, especially for the small claim. He also makes helpful, practical suggestions regarding the handling of no-fault claims.

The no-fault issue raises a basic concern regarding the continued viability of the negligence litigation system. There have been numerous critics of the system over the years, and recently the criticism has become more widespread and vociferous. Mr. Avnet makes about as good a case for the fault system as can be made, resting his conclusions on the reality of pain and suffering damages (p. 238) and on the just claim of every citizen to be made whole for wrongs done to him (pp. 171-73).

Perhaps Mr. Avnet is right in his defense of the fault system. It is somewhat disconcerting, however, to read that a "recent Chicago survey shows that about 80 percent of the jurors polled did not change their vote after the opening statement" (p. 167). He disputes the validity of the poll's results and concludes that "the closing arguments can change jurors' minds" particularly with regard to "the amount of damages to award" (p. 168). Either conclusion, that of the poll or that of Mr. Avnet, raises fundamental doubts. One conclusion indicates snap judgment, and the other uncertainty of judgment. Maybe this result is as it should be. Trial lawyers admit that there is a large element of gambling in the litigation process, and the aleatory nature of the system may be a salutary factor for encouraging settlement. One would like to feel more confident in the justice of the outcome, however, especially for those cases that go all the way to verdict.

JERRY J. PHILLIPS

Professor of Law
University of Tennessee

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A SURVEY OF CIVIL PROCEDURE IN TENNESSEE—1977

JOHN L. SOBIESKI, JR.*

I. INTRODUCTION 273

II. SELECTING A PROPER FORUM 273
A. *Jurisdiction over the Person or His Property* 273
B. *Jurisdiction over the Subject Matter* 285
C. *Venue* 286
D. *Refusal to Take Jurisdiction* 292
E. *Giving Notice of the Action* 293

III. STANDING: AN ASPECT OF JUSTICIABILITY 305

IV. PRETRIAL PROCEDURE 308
A. *Pleading* 308
1. The Complaint 309
a. Specificity and Substantive Legal Sufficiency 309
b. Timeliness 318
c. Verification 324
2. Responsive Pleading 325
3. Amendments 326
B. *Joinder of Claims and Parties* 328
1. Counterclaims—Timeliness 329
2. Impleader 332
3. Need to Make the Attorney General a Party 334

* B.S., Loyola University (Chicago); J.D., University of Michigan; Associate Professor of Law, University of Tennessee.

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C. *Disposition Without a Full Trial* 335
D. *Obtaining Information: Discovery* 345

V. TRIAL PROCEDURE 347
A. *Trial by Jury: Selection and Composition* 347
B. *Withdrawing the Case from the Jury* 348
1. Directed Verdict 348
2. Judgment Notwithstanding the Verdict 353
C. *Putting the Case to the Jury: Instructions* 357

VI. MOTIONS AFTER TRIAL 357
A. *Nunc Pro Tunc* 357
B. *New Trial* 361
C. *Relief from Judgment* 364

VII. APPELLATE REVIEW OF THE DISPOSITION 366
A. *The Timing of Appellate Review* 367
B. *The Availability of Appellate Review by Way of Writ of Error* 368
C. *Choosing the Correct Appellate Court* 370
D. *Who May Appeal* 372
E. *Security on Appeal* 374
F. *Informing the Appellate Court of the Proceedings Below* 375
1. Preparation of the Bill of Exceptions 375
2. Incomplete Bill of Exceptions 379
3. Wayside Bill of Exceptions 381
4. Matters Includable in the Technical Record 383
G. *Discretionary Review by the State Supreme Court of Judgments of the Intermediate Appellate Courts* 383
1. Assignment of Errors and Supporting Brief 383
2. Effect of Denial of Review 385
H. *The Scope of Appellate Review* 387
1. Administrative Proceedings 387
2. County Court to Circuit Court 391
3. Interlocutory Review 393
4. Assignment of Errors 395
I. *Relief; Waiver* 395
J. *Frivolous Appeals* 396
K. *Publication of Opinions* 398

VIII. THE BINDING EFFECT OF ADJUDICATIONS 399
A. *Persons Affected* 400
B. *Issue Preclusion* 403
C. *Law of the Case* 403
IX. MISCELLANEOUS 405

I. INTRODUCTION

The decision of the United States Supreme Court in *Shaffer v. Heitner*[1] is an obvious and appropriate point of entry into this survey of developments in 1977 in Tennessee civil procedure.[2] After avoiding judicial jurisdiction questions for nearly two decades,[3] the Court in *Shaffer* held that the exercise of judicial jurisdiction traditionally justified by the mere presence of property within the forum must now be evaluated according to the due process standard of reasonableness initially embraced in *International Shoe Co. v. Washington.*[4] While the precise impact *Shaffer* will have in this area of the law remains somewhat uncertain, "it is quite clear that the consequences will be many and substantial."[5] In addition to the obvious significance of the decision itself, *Shaffer* is also an appropriate point of entry into this survey because selection of a proper forum lies at the threshold of the litigation process.

II. SELECTING A PROPER FORUM

A. *Jurisdiction over the Person or His Property*

Shaffer involved a shareholder's derivative action brought in Delaware by a nonresident owner of one share of stock in the Greyhound Corporation, incorporated in Delaware with its prin-

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

2. This survey encompasses state and federal decisions concerning Tennessee procedure reported in the National Reporter System during the calendar year 1977. *Shaffer* is also included because it is a federal constitutional decision binding on all the states.

3. Prior to *Shaffer*, the Court's latest decisions in the area were McGee v. International Life Ins. Co., 355 U.S. 220 (1957), and Hanson v. Denckla, 357 U.S. 235 (1958).

4. 326 U.S. 310 (1945).

5. W. REESE & M. ROSENBERG, CONFLICT OF LAWS: CASES AND MATERIALS xix (7th ed. 1978).

cipal place of business in Arizona. The defendants included twenty-eight present and former officers and directors of Greyhound and a wholly-owned subsidiary, which along with Greyhound was also a defendant. Plaintiff alleged that as a result of a breach of their duties owing to the corporation, the individual defendants caused Greyhound to be subjected to substantial antitrust damages and a large fine for criminal contempt. To obtain jurisdiction over the individual defendants, shares of common stock belonging to nineteen of the defendants and options belonging to two others were seized pursuant to a Delaware sequestration statute.[6] Seizure was effected by placing stop-transfer orders or their equivalents on the books of Greyhound, none of the certificates representing the seized property being physically present in Delaware. Defendants were notified of institution of plaintiff's lawsuit by certified mail and publication. Those defendants whose shares and options had been seized appeared specially and sought dismissal of the action on the ground that under *International Shoe* they did not have the requisite contacts with Delaware to sustain the assertion of jurisdiction by that state's courts.[7] The chancery court and supreme court of Delaware rejected defendants' jurisdictional challenge;[8] on appeal, the United States Supreme Court reversed.

After a lengthy discussion of the evolution of the law of in personam jurisdiction from the physical presence rule of *Pennoyer v. Neff*[9] through the reasonableness standard of *International Shoe*,[10] the Court noted the absence of a corresponding evolution of the law of in rem jurisdiction,[11] which the Court defined to include both strict in rem actions as well as quasi-in-rem actions.[12] The Court's case for applying the minimum con-

6. DEL. CODE ANN. tit. 10, § 366 (1974).

7. Defendants also argued that the sequestration statute was inconsistent with the due process line of analysis initially enunciated in Sniadach v. Family Fin. Corp., 395 U.S. 337 (1969). *See also* North Ga. Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601 (1975); Mitchell v. W.T. Grant Co., 416 U.S. 600 (1974); Fuentes v. Shevin, 407 U.S. 67 (1972). The Supreme Court in *Shaffer* did not reach this procedural due process issue.

8. Greyhound Corp. v. Heitner, 361 A.2d 225 (Del. 1976), *rev'd sub nom.*, Shaffer v. Heitner, 433 U.S. 186 (1977).

9. 95 U.S. 714 (1877).

10. 433 U.S. at 196-205.

11. *Id.* at 205-06.

12. *Id.* at 199 n.17.

tacts standard of *International Shoe* to in rem actions was based on the fact that the traditional distinction between in rem and in personam actions is not airtight. Jurisdiction in rem is, in reality, jurisdiction over the interests of people, and its assertion affects their interests in important ways.[13] Recognition of this fact led the Court to conclude that the jurisdictional standards of *International Shoe* and its offspring must be satisfied in order to exercise jurisdiction in rem.[14]

The Court was careful to point out, in what must be considered conscious dictum, that not all assertions of jurisdiction based solely on the presence of property within a state would violate due process:

> [T]he presence of property in a State may bear on the existence of jurisdiction by providing contacts among the forum State, the defendant, and the litigation. For example, when claims to property itself are the source of the underlying controversy between the plaintiff and the defendant, it would be unusual for the State where the property is located not to have jurisdiction. In such cases, the defendant's claim to property located in the State would normally indicate that he expected to benefit from the State's protection of his interest. The State's strong interests in assuring the marketability of property within its borders and in providing a procedure for peaceful resolution of disputes about the possession of that property would also support jurisdiction, as would the likelihood that important records and witnesses will be found in the State. The presence of property may also favor jurisdiction in cases, such as suits for injury suffered on the land of an absentee owner, where the defendant's ownership of the property is conceded but the cause of action is otherwise related to rights and duties growing out of that ownership.[15]

On the other hand, in quasi-in-rem actions like *Harris v. Balk*[16] and *Shaffer*, in which the property that supplies the basis of the court's adjudicatory authority is completely unrelated to plaintiff's claim for relief,[17] "the presence of the property alone [will]

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13. *Id.* at 207 & n.22.

14. *Id.* at 207, 212.

15. *Id.* at 207-08 (footnotes omitted); *see* Smit, *The Enduring Utility of In Rem Rules: A Lasting Legacy of Pennoyer v. Neff*, 43 BROOKLYN L. REV. 600 (1977); *Developments in the Law—State-Court Jurisdiction*, 73 HARV. L. REV. 909, 955-66 (1960) [hereinafter cited as *Developments*].

16. 198 U.S. 215 (1905).

17. 433 U.S. at 208-09.

not support the State's jurisdiction."[18]

The Court rejected the traditional justification for quasi-in-rem jurisdiction—that a debtor should not be able to avoid payment of his obligations by removing his assets to a jurisdiction where he is not subject to an in personam action—maintaining that this rationale "does not explain why jurisdiction should be recognized without regard to whether the property is present in the State because of an effort to avoid the owner's obligations."[19] Moreover, if the justification for attaching the defendant's property is simply to assure satisfaction of the judgment, this purpose requires only that the assets be seized pending a judgment, not that the underlying controversy be litigated in the forum in which attachment is accomplished. "[A] State in which property is located should have jurisdiction to attach that property, by use of proper procedures, as security for a judgment being sought in a forum where the litigation can be maintained consistently with *International Shoe*."[20] Besides, the Court continued, in light of the full faith and credit clause, which makes a valid in personam judgment of one state enforceable in others, there is little to justify the assumption that a debtor can avoid his obligations simply by removing his property to a jurisdiction in which his creditor cannot obtain personal jurisdiction over him.[21]

> Once it has been determined by a court of competent jurisdiction that the defendant is a debtor of the plaintiff, there would seem to be no unfairness in allowing an action to realize on that debt in a State where the defendant has property, whether or not that State would have jurisdiction to determine the existence of the debt as an original matter.[22]

The Court also rejected the arguments that permitting in rem jurisdiction assures the plaintiff a forum and avoids the uncertainty inherent in *International Shoe*'s rather vague tests of "minimum contacts"[23] and "fair play and substantial justice."[24] "This case," the Court responded, "does not raise, and we therefore do not consider, the question whether the presence of a defen-

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18. *Id.* at 209.
19. *Id.* at 210.
20. *Id.* (footnote omitted).
21. *Id.*
22. *Id.* at 210 n.36.
23. 326 U.S. at 316.
24. *Id.*

dant's property in a State is a sufficient basis for jurisdiction when no other forum is available to the plaintiff."[25] The Court was of the opinion that in most cases the *International Shoe* tests can be easily applied,[26] and that the price of not applying the *International Shoe* standards to in rem actions is simply too great. The history of permitting states to exercise jurisdiction based solely upon the presence of property, the Court concluded, did not require a different result.[27]

Applying the *International Shoe* tests to the facts of *Shaffer*, the Court held that jurisdiction could not be sustained. The seized shares of stock and options were not the subject matter of the litigation, nor was the underlying claim of breach of duty to the corporation related to the seized property.[28] In addition, the Court noted that it was not alleged or argued that defendants whose property had been seized had "ever set foot in Delaware," nor had any "act" related to the underlying claim "taken place in Delaware."[29] With regard to the argument that Delaware had an interest in asserting judicial jurisdiction over defendants because they were officers and directors of a Delaware corporation, the Court stated that "[t]his argument is undercut by the failure of the Delaware Legislature to assert the state interest appellees find so compelling. Delaware law bases jurisdiction not on appellants' status as corporate fiduciaries, but rather on the presence of their property in the State."[30] Moreover, even if Delaware had such an interest, the Court found it insufficient to demonstrate that Delaware was a fair forum. Delaware law may be applicable but that fact standing alone did not justify adjudication of the

25. 433 U.S. at 211 n.37. It has been suggested that *Shaffer* could have upheld the assertion of jurisdiction on this rationale. *The Supreme Court, 1976 Term*, 91 HARV. L. REV. 72, 162 (1977).

26. 433 U.S. at 211.

27. *Id.* at 211-12.

28. *Id.* at 213.

29. *Id.* Given the fact that *International Shoe*, the principal case upon which the majority relied in *Shaffer*, repudiated the physical presence rule of *Pennoyer*, it is difficult to understand the relevance of the fact that defendants never set foot in Delaware. Also, the intangible nature of defendants' breach of their duties to the corporation makes it somewhat unrealistic to speak of "where" the cause of action arose. In a realistic sense, the location of the cause of action is indeterminable. *See The Supreme Court, 1976 Term*, *supra* note 25, at 162.

30. 433 U.S. at 214.

action in Delaware.[31] Finally, the Court rejected the idea that defendants impliedly consented to suit in Delaware. Unlike other states, Delaware did not by statute treat acceptance of a directorship as consent to jurisdiction, and thus defendants had "no reason to expect to be haled before a Delaware court."[32] Also, it was unreasonable to suggest that "anyone" buying securities in a Delaware corporation impliedly consents to subject himself to jurisdiction in Delaware on "any" cause of action.[33] Whatever else due process may mean, the Court concluded that it is clear that a state may not make binding a judgment against individuals who, like the defendants in *Shaffer*, "had nothing to do with . ... Delaware."[34]

In separate concurring opinions, Justices Powell[35] and Stevens[36] stated that perhaps quasi-in-rem jurisdiction based on real property would be constitutional. Justice Stevens also stressed that fair warning of amenability to suit should be considered an essential element of due process.[37] Justice Brennan concurred in the entire majority opinion of the Court[38] except that portion holding that officers and directors are not amenable to suit in the state of incorporation.[39]

Justice Brennan's partial dissent was prompted by his belief that it was not necessary to reach the question of whether the minimum contacts standard of *International Shoe* was satisfied. In his opinion it was sufficient to hold only that the asserted basis

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31. *Id.* at 215.

32. *Id.* at 216. In an earlier portion of its opinion, the Court stated that nothing in Hanson v. Denckla, 357 U.S. 235 (1958), was inconsistent with the essential meaning of *International Shoe*. In *Hanson* the Supreme Court stated that restrictions on state court jurisdiction "are a consequence of territorial limitations on the power of the respective states." *Id.* at 251. Thus, *Hanson* could be viewed as at least a partial return to the territorialist theory of Pennoyer v. Neff, 95 U.S. 714 (1877). However, the Court in *Shaffer* explained that the language in *Hanson* quoted above "simply makes the point that the States are defined by their geographical territory." 433 U.S. at 204 n.20. This explanation is irrefutable, if somewhat disingenuous.

33. 433 U.S. at 216 (citing Folk & Moyer, *Sequestration in Delaware: A Constitutional Analysis*, 73 COLUM. L. REV. 749, 785 (1973)).

34. *Id.*

35. *Id.* at 217 (Powell, J., concurring).

36. *Id.* at 219 (Stevens, J., concurring).

37. *Id.* at 217-19 (Stevens, J., concurring).

38. *Id.* at 219-20 (Brennan, J., concurring in part & dissenting in part).

39. *Id.* at 220-28 (Brennan, J., concurring in part & dissenting in part).

of jurisdiction—mere presence of the stock within Delaware—did not provide the requisite minimum contacts among the parties, the forum state, and the litigation.[40] Since the majority did rule on the minimum contacts question, however, Justice Brennan expressed his conviction that "as a general rule a state forum has jurisdiction to adjudicate a shareholder derivative action centering on the conduct and policies of the directors and officers of a corporation chartered by that State."[41]

Some of the legal literature that has emerged since *Shaffer* has found Justice Brennan's dissent persuasive,[42] and the majority opinion itself left open the possibility that the outcome might have been different if Delaware had enacted a statute treating acceptance of a directorship as consent to jurisdiction[43] —something that came to pass within days after announcement of the decision in *Shaffer*.[44] It seems premature, therefore, to administer last rites to the assertion of judicial jurisdiction over directors and officers by the state of incorporation, but it is far from clear what precise sin, if any, the Court might identify as the source of its condemnation in *Shaffer*. *International Shoe*, the cornerstone on which the Court built its *Shaffer* opinion, recognized that implied consent is simply a legal fiction that can justify the assertion of jurisdiction only if the minimum contacts test is otherwise satisfied.[45] As one commentator has observed, "[i]f expression of interest by the state were a determinative factor, a state might bootstrap itself into jurisdiction simply by enacting a statute expressing its interest."[46] On the other hand, there appears to be no vice in the absence of a statute expressly authorizing the assertion of judicial jurisdiction, unless the Court is prepared to hold that the Constitution requires the bases of adjudicatory authority to be prescribed by statute, not by adjudication or, alternatively, that the Constitution would prohibit the retroactive application of a statute authorizing the assertion of juris-

40. *Id.* at 220-22 (Brennan, J., concurring in part & dissenting in part).

41. *Id.* at 222 (Brennan, J., concurring in part & dissenting in part).

42. *E.g.*, Leathers, *Substantive Due Process Controls of Quasi in Rem Jurisdiction*, 66 KY. L.J. 1, 20-23 (1977); Comment, *The Expanded Scope of the Sufficient Minimum Contacts Standard: Shaffer v. Heitner*, 63 IOWA L. REV. 504, 523-25 (1977); 45 TENN. L. REV. 501, 510-13 (1978).

43. 433 U.S. at 216.

44. *See* DEL. CODE tit. 10, § 3114 (Supp. 1977).

45. 326 U.S. at 318.

46. Comment, *supra* note 42, at 519.

diction over directors and officers of a domestic corporation.[47] Delaware's recent enactment of a consent statute may afford the Court an opportunity to clarify this portion of its opinion sooner than it imagined.

It does seem reasonably clear, however, that jurisdiction based solely on the presence of property within the forum is constitutionally impermissible, even if judgment were limited to the value of the property that provided the basis of jurisdiction. Delaware law did not permit defendants in *Shaffer* to enter a limited appearance,[48] and they were therefore faced with the difficult choice of either appearing and thereby submitting to personal jurisdiction or defaulting and losing the seized property. The Court could have held that limited appearances in cases like *Shaffer* are required by due process.[49] Instead, it concluded that "[t]he fairness of subjecting a defendant to state court jurisdiction does not depend on the size of the claim being litigated,"[50] but rather is a function of the relationship among the defendant, the forum, and the litigation.[51]

Perhaps paradoxically, limited appearances may play a more important role in post-*Shaffer* adjudication. For example, if, as suggested by the Court,[52] property is attached as security for a judgment being sought in another forum in which the litigation can be maintained consistently with the standard of *International Shoe*, the forum attaching the property would apparently not be able to assert personal jurisdiction based solely on the defendant's appearance to contest the attachment.[53] Similarly, limited appearances may be constitutionally compelled in cases in which the forum adjudicates the interests of nonresidents based on a foreign transaction concerning property located within the forum.[54] In this situation the justifications identified by the

47. *But see* McGee v. International Life Ins. Co., 355 U.S. 220, 224 (1957).

48. *See* Sands v. Lefcourt Realty Corp., 117 A.2d 365 (Del. 1955).

49. *See* Leathers, *supra* note 42, at 11.

50. 433 U.S. at 207 n.23.

51. *Id.* at 204, 207, 209.

52. *Id.* at 210.

53. In this respect the holding in *Shaffer* increases the expense of collecting on a judgment, "[a]nd there can be no assurance that some debtors may not again remove their assets, making it difficult for creditors to rediscover them before other-state personal judgments can be secured." R. LEFLAR, AMERICAN CONFLICTS LAW § 24, at 43 (3d ed. 1977).

54. *See, e.g.*, Harnischfeger Sales Corp. v. Sternberg Dredging Co., 189

Supreme Court[55] for the assertion of judicial jurisdiction by the forum over property within its borders—that is, the interests in assuring the marketability of property and in providing a procedure for the peaceful resolution of disputes about possession—may mark the limits of the forum's adjudicatory authority.

Although *Shaffer* holds the mere presence of a defendant's property insufficient to support judicial jurisdiction over claims unrelated to that property, other relationships between the defendant and the forum may permit the adjudication of claims arising out of facts unrelated to the forum. For example, as noted in one commentary, "a defendant who is domiciled or who resides within the forum is likely to have an extensive network of contacts sufficient to support jurisdiction over *any* claim asserted against him."[56] In the case of a corporation, it would seem constitutionally permissible to subject a corporation to suit on any claim in a forum in which it either maintains its principal place of business or is engaged in systematic and continuous business activities. In addition, nothing in *Shaffer* would appear to proscribe the assertion of jurisdiction by a forum in which the defendant expressed a willingness to be sued, regardless of the relationship between the forum and the underlying claim.[57] On the other hand, since the mere presence of the defendant's property is insufficient to support jurisdiction, the mere presence of the defendant's person (and perhaps the mere incorporation within a state) would also seem insufficient to permit adjudication of claims unrelated to the defendant's activities within the forum.

Similarly, although *Shaffer* stressed the critical importance of the relationship among the defendant, the forum, and the litigation, the Court was not prepared to state that "the particularized rules governing adjudications of status"—which often depend on the plaintiff's relationship to the forum—"are inconsis-

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Miss. 73, 191 So. 94 (1939). *Shaffer* does not expressly preclude actions related to intangible property located within the forum, but it offers no guidance on locating intangibles consistent with due process. *See The Supreme Court, 1976 Term*, *supra* note 25, at 160.

55. 433 U.S. at 208. The Court made clear, however, that this list of the interests of the state in which property is located is not necessarily complete. *Id.* at 208 n.28.

56. *The Supreme Court, 1976 Term*, *supra* note 25, at 160 (emphasis in original).

57. *Id.*

tent with the standard of fairness."[58] The most obvious example is jurisdiction over divorce, which may be granted by a state that is the domicile of the plaintiff alone.[59] It seems likely that this jurisdictional rule will survive *Shaffer* and at least one court has so held.[60] As Justice Traynor argued:

> [A] court could reason that even a defendant who had no contacts whatever with the forum state would not be gravely affected by a decree enabling the plaintiff to remarry, since there would be no way of compelling the plaintiff to cohabit with defendant and no effective way of preventing the plaintiff from cohabiting with anyone else. Moreover, divorce proceedings are not for the most part adversary except in name. In any event, a defendant's purposeless interest in barricading the plaintiff's avenue to freedom is overwhelmingly outweighed by the plaintiff's purposeful interest in securing freedom. Finally, the dubious interest of defendant's state in perpetuating a broken marriage in limbo is overwhelmingly outweighed by the forum state's major interest in the orderly resolution of a plaintiff domiciliary's marital status.[61]

The unique factors of divorce litigation stressed by Justice Traynor suggest that recognition of the authority of the state of a plaintiff's domicile to grant a divorce is unlikely to have an immediate or significant impact on other types of litigation, which generally express a jurisdictional bias in favor of the defendant. It is not too early, however, to begin thinking seriously about the contemporary legitimacy of this traditional jurisdictional bias.[62]

A different kind of question concerning judicial jurisdiction was raised in the Tennessee Supreme Court during the survey period, although whether the court's opinion was directed to that question is somewhat unclear. In *Donaldson v. Donaldson*[63] a husband brought a damage action against his nonresident wife for an

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58. 433 U.S. at 208 n.30.

59. *See* Williams v. North Carolina, 317 U.S. 287 (1942).

60. *In re* Marriage of Rinderknecht, 367 N.E.2d 1128 (Ind. Ct. App. 1977).

61. Traynor, *Is This Conflict Really Necessary?*, 37 TEX. L. REV. 657, 661 (1959).

62. *See generally* Seidelson, *Jurisdiction over Nonresident Defendants: Beyond "Minimum Contacts" and the Long-Arm Statutes*, 6 DUQ. L. REV. 221 (1970); von Mehren & Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1127-28, 1167-73 (1966).

63. 557 S.W.2d 60 (Tenn. 1977).

alleged "abuse of court process."[64] Plaintiff alleged that he suffered injury as a result of "the malicious, willful, and intentional"[65] institution against him of two actions, both in Arizona and both "providing for the identical remedy of 'imprisonment that is criminal [in] nature.' "[66] One action was brought under the Uniform Reciprocal Enforcement of Support Act, and the other sought to have plaintiff held in contempt, apparently because plaintiff failed to make support payments as previously ordered by an Arizona court. Defendant appeared specially to contest her amenability to suit under that portion of the Tennessee long-arm statute subjecting nonresidents to suit on any claim for relief arising from "any tortious act or omission within this state . . . ."[67] Defendant also sought dismissal on the ground that the complaint failed to state a claim for relief. The trial court dismissed for want of judicial jurisdiction, and the supreme court affirmed.

The court began its opinion by citing *Hanvy v. Crosman Arms Co.*[68] for the proposition that the long-arm statute "has been held to confer jurisdiction over nonresident tortfeasors in situations where the alleged tortious conduct took place outside the state but the resulting injury occurred within the state."[69] The court, however, disagreed with plaintiff's contention that the complaint adequately stated a claim for relief. Only two actions are available for misuse of the legal process: abuse of process and malicious prosecution. Abuse of process lies only if the legal process is utilized for a wrongful purpose, and plaintiff's complaint contained no allegation "or even intimation . . . that the [defendant] employed legal process to obtain an end that the process was not intended to effect."[70] This assertion of the court seems debatable in view of plaintiff's allegation of malice, a matter that may be pleaded generally.[71] Malicious prosecution, on the other hand, requires proof that the legal proceedings terminated in favor of the plaintiff, and again the court found plaintiff's

64. *Id.* at 61.
65. *Id.*
66. *Id.* (quoting from plaintiff's complaint).
67. TENN. CODE ANN. § 20-235 (Cum. Supp. 1978).
68. 225 Tenn. 262, 466 S.W.2d 214 (1971), *cited in* Donaldson v. Donaldson, 557 S.W.2d at 61.
69. 557 S.W.2d at 61.
70. *Id.* at 62.
71. *See* TENN. R. CIV. P. 9.02.

complaint fatally defective because it contained no allegation that either of the two Arizona suits were resolved in plaintiff's favor.[72] Finding "no duty on the part of the court to create a claim the pleader does not spell out in his complaint,"[73] and citing two federal cases concerning a trial court's authority to dismiss a pleading on its own motion for failure to state a claim upon which relief can be granted,[74] the Tennessee Supreme Court affirmed the trial court's dismissal.

Donaldson may have decided nothing more than that plaintiff failed to allege either directly or inferentially every material element of either abuse of process or malicious prosecution. It seems odd, however, to pass on the sufficiency of a plaintiff's complaint prior to a determination of whether the defendant is amenable to suit. Alternatively, *Donaldson* may have held that because plaintiff failed to allege a claim for relief, defendant had not committed any tortious act or omission within Tennessee upon which to predicate the assertion of personal jurisdiction. The effect of such a holding is to equate the circumstances permitting the assertion of personal jurisdiction under the long-arm statute with the substantive validity of plaintiff's claim for relief. Such an equation of the merits and the scope of jurisdiction has been wisely rejected by other courts,[75] since, as Justice Traynor noted, it might encourage "a defendant [to] take a default judgment and resist subsequent enforcement in his own state by collateral attack for lack of jurisdiction, thus compelling plaintiff to litigate the merits there."[76]

Perhaps the court in *Donaldson* failed to see any practical difference between affirming a dismissal because a defendant was not amenable to suit and affirming a dismissal because a plaintiff failed to state a claim for relief. The res judicata consequences of these bases for dismissal are not necessarily identical, however. A dismissal for want of personal jurisdiction is not an adjudication on the merits and therefore does not preclude a subsequent

72. 557 S.W.2d at 62.

73. *Id.*

74. Dodd v. Spokane County, 393 F.2d 330 (9th Cir. 1968); Clinton Community Hosp. Corp. v. Southern Md. Medical Center, 374 F. Supp. 450 (D. Mo. 1974), *aff'd*, 510 F.2d 1037 (4th Cir.), *cert. denied*, 422 U.S. 1048 (1975).

75. *E.g.*, Nelson v. Miller, 11 Ill. 2d 378, 143 N.E.2d 673, 680-82 (1957).

76. Traynor, *supra* note 61, at 659.

action,[77] while a dismissal for failure to state a claim for relief, although the matter is not entirely free from doubt, may well bar a subsequent action.[78] Despite the seeming oddity of such a holding, it may be best to construe *Donaldson* as simply a determination that plaintiff failed to state a claim for relief, leaving wholly unresolved the further question whether plaintiff might amend his complaint to cure the defects detailed by the court.[79]

The only other development in the area of Tennessee judicial jurisdiction was an amendment to the Tennessee Code permitting any person to appoint any other person as trustee of a personal or corporate trust regardless of the residence of the proposed trustee.[80] The amendment also provides that

> all such trustees . . . who are not residents of the state of Tennessee shall be subject to the jurisdiction of the courts of this state as to any action or claim for relief arising from any trust within this state for which such nonresident person is acting as trustee in the manner described in [Tennessee Code Annotated sections] 20-235—20-240. Any nonresident who becomes a trustee or fiduciary for a Tennessee resident shall appoint the secretary of state as an agent for service of process.[81]

While the provision for in-state service on the secretary of state is a nod toward the now moribund jurisdictional theory of *Pennoyer v. Neff*,[82] nothing in *Shaffer v. Heitner*[83] would seem to cause the constitutionality of this amendment to be called into question since nonresident trustees are amenable to suit only on claims arising from trusts within this state.

B. Jurisdiction over the Subject Matter

In addition to jurisdiction over the person of the defendant or his interest in property, an action may be adjudicated in a particular court only if that court has jurisdiction over the type of case involved and is a proper venue for the action, and if no

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77. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 48.1 (Tent. Draft No. 1, 1973).

78. *Id.* § 48, Comment d.

79. *See generally* Phillips, *Civil Procedure and Evidence—Tennessee Survey 1970*, 38 TENN. L. REV. 127, 141-43 (1971).

80. TENN. CODE ANN. § 35-610 (Cum. Supp. 1978).

81. *Id.*

82. 95 U.S. 714 (1877).

83. 433 U.S. 186 (1977); *see* text accompanying notes 4-62 *supra*.

statute or doctrine exists under which the court, otherwise qualified to proceed, may or must dismiss the action. Each of these areas will be discussed successively.

During the survey period the developments in the area of subject-matter jurisdiction were entirely statutory and, with one or two exceptions, relatively insignificant. Most notably, the circuit and chancery courts of Davidson County have been given "original jurisdiction to enter judgments against the state founded upon any express or implied contract or breach thereof with the state."[84] Such actions, previously brought before the Tennessee Board of Claims, are to be tried before the court without a jury,[85] and "no action [may] be maintained based on any contract or any act of any state officer which the officer is not authorized to make or do by the laws of this state."[86]

Juvenile courts in counties with a population of 600,000 or more may now exercise jurisdiction concurrent with circuit courts in actions under the Uniform Reciprocal Enforcement of Support Act.[87] The jurisdiction of justices of the peace and courts of general sessions has been increased from $3,000 to $5,000 in all civil cases except in equity causes, in which the jurisdictional competence was raised from $250 to $1,500.[88] Finally, chancery courts may now transfer to circuit court or, alternatively, hear and determine "upon the principles of a court of law" actions "for unliquidated damages for injuries to person or character, and . . . for unliquidated damages for injuries to property not resulting from a breach of oral or written contract."[89]

C. *Venue*

The importance of distinguishing the concepts of jurisdiction over the subject matter and jurisdiction over the person of the defendant from the concept of venue in determining the validity of a prior adjudication is reflected in the opinion of the Tennessee Supreme Court in *Kane v. Kane*.[90] The case involved the all-too-common problem of senselessly repetitive child custody litigation

84. TENN. CODE ANN. § 23-3601 (Cum. Supp. 1978).
85. *Id.*
86. *Id.*
87. *Id.* § 36-902(4).
88. *Id.* § 19-301.
89. *Id.* § 16-602.
90. 547 S.W.2d 559 (Tenn. 1977).

by a divorced couple. The parties had been divorced in 1964 in Robertson County, even though at that time they were residents of Davidson County and had separated there. The divorcing court originally awarded custody of the couple's daughter to the mother, but seven years later it modified the decree and awarded custody to the father. To regain custody the mother brought an action raising in the divorcing court the same issues that had been litigated in the modification action. Dissatisfied with the divorcing court's decree in her action to regain custody, the mother brought yet another action, this time in Davidson County. The Davidson County court declined plaintiff's invitation to second-guess the Robertson County court, and the state supreme court affirmed.

Apparently plaintiff recognized the well-established rule in Tennessee that the divorcing court possesses exclusive jurisdiction over custody matters until a child reaches majority.[91] However, plaintiff sought to avoid application of this rule by relying on that portion of the Tennessee Code specifying "the county where the parties reside at the time of their separation, or in which the defendant resides, if a resident of the state"[92] as the proper venue for a divorce action. Because the parties did not reside in Robertson County at the time of their separation or divorce, plaintiff argued that the Robertson County court never acquired jurisdiction and that its decrees were therefore void and open to collateral attack.

The supreme court rejected plaintiff's argument for two reasons. First, the venue provision relied upon by plaintiff provides that "[a]ny divorce granted prior to May 4, 1967 will not be deemed void solely on the ground that the parties to the divorce action were residents of a county or counties other than the county in which said divorce decree was entered."[93] Thus, even if plaintiff were correct in her argument that the Robertson County court was without jurisdiction, the statute precluded a collateral attack on its decree.[94] Moreover, the supreme court also rejected plaintiff's argument that jurisdiction and venue are synonymous. "Venue," the court stated, "is the personal privilege of a defendant to be sued in particular counties; it may be waived and is

91. *See, e.g.*, Sutton v. Sutton, 220 Tenn. 410, 417 S.W.2d 786 (1967).
92. TENN. CODE ANN. § 36-804 (1977).
93. *Id.*
94. 547 S.W.2d at 560.

waived by a defendant who defends upon the merits without first interposing an objection to improper venue."[95] Jurisdiction, on the other hand, is of two types: jurisdiction over the subject matter, which is conferred by the constitution and statutes, and jurisdiction over the person, which "is acquired by service of process."[96] The statute relied upon by plaintiff, the court continued, "merely deals with venue of divorce actions . . . [and] nothing in this record . . . indicate[s] that the defendant in the original divorce suit objected to the bringing of the action in Robertson County; thus, the right of venue was waived."[97] Also, there was no "suggestion that the defendant was not served with process, hence no lack of jurisdiction of the person is shown."[98] Since the Robertson County court that granted the divorce was statutorily empowered to entertain suits for divorce and award custody, subject-matter jurisdiction was also present.[99] The decrees of the Robertson County court were therefore valid, and "the jurisdiction of that court over the custody of the child of these parents continues to be exclusive, under the circumstances shown in this case."[100]

The court's holding that a judgment is valid even if rendered by a court without proper venue for the action is consistent with the prevailing rule that a judgment is valid if rendered by a court with subject-matter jurisdiction and jurisdiction over the person of the defendant (or his property), as long as the defendant is given reasonable notice of the action and a reasonable opportunity to be heard.[101] The court's treatment of jurisdiction over the person as being the equivalent of service of process, however, confuses two distinct concepts. Service of process is a method by which a defendant is notified of the pendency of an action. "If the defendant is not notified of the proceedings, he has no opportunity to defend himself, and he is deprived of his property or liberty without due process."[102] Jurisdiction over the person of the

95. *Id.*
96. *Id.*
97. *Id.*
98. *Id.*
99. *Id.*
100. *Id.*
101. *See* 1 RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 92 (1971); RESTATEMENT (SECOND) OF JUDGMENTS § 4 (Tent. Draft No. 5, 1978).
102. R. CRAMPTON, D. CURRIE & H. KAY, CONFLICT OF LAWS: CASES—COMMENTS—QUESTIONS 511 (2d ed. 1975).

defendant, on the other hand, refers to the due process problem of locating the place of trial and the reach of a jurisdiction's long-arm statute. As *Shaffer v. Heitner*[103] makes clear, notice to the defendant cannot by itself confer jurisdiction over the person. There, defendants clearly had notice of the derivative action brought against them in Delaware, even though the Court held that the assertion of jurisdiction by Delaware violated the due process clause.[104] Amenability of the defendant to suit instead depends upon the minimum contacts standard of *International Shoe* and the applicable long-arm statute.

As my colleague Professor Cohen points out in his recent survey of Tennessee family law,[105] the court's holding in *Kane* can be criticized for freezing the place of trial at what may prove to be an inconvenient forum. Although the court's attempt to curtail needlessly repetitive litigation is understandable, this objective might be as effectively realized by application of normal res judicata principles as long as the legal and factual circumstances remain constant.[106]

A different sort of venue problem was involved in *Romines v. K & S Engineering & Contracting Co.*,[107] which arose out of an automobile accident in Rutherford County. Plaintiffs commenced a damage action in Knox County against three corporate defendants. One of the defendants was a Delaware corporation that maintained an agent for service of process in Knox County, and the other two defendants were apparently domestic corporations with places of business outside Knox County. Service of process was effected on the Delaware corporation in Knox County with counterpart process being served on the two domestic corporations at their places of business in Wilson and Lawrence Counties. At some point before trial, a motion for summary judgment filed by the foreign corporation was granted. Motions to dismiss filed by the other two defendants were then granted on the ground of improper venue. The issue, as defined by the state supreme court, was: "When properly attacked by motion, can

103. 433 U.S. 186 (1977).

104. *See* text accompanying notes 4-34 *supra*.

105. Cohen, *A Critical Survey of Developments in Tennessee Family Law, 1976-77*, 45 TENN. L. REV. 427, 455 (1978).

106. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 41, Comment c (Tent. Draft No. 1, 1973).

107. 556 S.W.2d 85 (Tenn. 1977).

counterpart service of process be sustained where the only resident defendant was dismissed by the trial judge in ruling on motions filed preliminary to trial?"[108] The court held that it cannot.

By statute the proper venue for transitory civil actions is the county in which the cause of action arose or in which the defendant resides or is found.[109] In actions involving multiple defendants residing in different counties, "original" process is served on the defendants residing or found in the county where the action is commenced, and "counterpart" process, which "may be sent to another county as in local action[s],"[110] is served on the other defendants residing outside the county in which the action is pending.

In an apparent effort to thwart evasion of the statutory restrictions on venue, the Tennessee Supreme Court has held on numerous occasions prior to *Romines* that venue cannot be fixed in an otherwise improper forum by serving a fictitious or immaterial defendant with counterpart process issuing against the defendants who are the persons against whom the plaintiff's claim for relief in fact lies.[111] The supreme court followed this well-established law in *Romines* though in language that blurs the line drawn in *Kane* between venue and jurisdiction.

> Where a transitory action is filed in a county other than the one where the cause of action arose, if service of original process is on a party that is not a real and material defendant, venue does not lie in the county where the action was commenced and the trial court is not able to acquire jurisdiction over the person of defendants summoned by counterpart process, in the face of a motion to dismiss the action for lack of venue.[112]

Thus the crucial question was whether the Delaware corporate defendant was "a real and material defendant so as to locate venue and legitimate the service of counterpart process on the other defendants."[113]

Plaintiff argued that because the action was filed with the

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108. *Id.* at 85-86.

109. TENN. CODE ANN. § 20-401 (Cum. Supp. 1978).

110. *Id. See generally* Comment, *Venue Alternatives in Transitory Actions: Legislative Amendment*, 39 TENN. L. REV. 118 (1971).

111. *See, e.g.*, Achy v. Holland, 76 Tenn. 510 (1881).

112. 556 S.W.2d at 86.

113. *Id.*

good faith belief that "plaintiff had a cause of action against [the Delaware corporation] . . . and not with the fraudulent intention of depriving the nonresident defendants of their right to be sued in their own county or in the county where the cause of action arose,"[114] it followed that the Delaware corporate defendant was a real and material defendant. The supreme court disagreed. "[I]rrespective of the motive of a plaintiff in bringing an action against a resident defendant," the court held, "if the action cannot survive motions made preliminary to trial, the resident defendant is not a real and material defendant for the purpose of locating venue or the acquisition of jurisdiction over nonresident defendants by counterpart process."[115]

The court's rejection of plaintiff's proffered test for determining whether a party is a real and material defendant seems sound since that test would entail a difficult and uncertain factual inquiry into a matter in which certainty and ease of application of the law to be applied are of paramount importance. On the other hand, some uncertainty lingers after *Romines* since the opinion does not specify precisely when a defendant must move to dismiss for lack of venue. By virtue of rule 12 of the Tennessee Rules of Civil Procedure, a defendant generally must object to improper venue either in a pre-answer motion or in his answer itself. If he does not, an objection to venue is considered waived.[116] However, at the time of service of the plaintiff's complaint and prior to dismissal of the resident defendant, a nonresident defendant cannot ascertain whether venue is improper. It seems unlikely, therefore, that he would object to venue either prior to answering or in his answer. As a consequence, it may be only fair to permit a nonresident defendant to move to dismiss for improper venue within a specified time after the resident defendant is dismissed from the action, even if he has previously moved under rule 12 or answered without interposing an objection to venue. This result is consistent with the spirit of rule 12.07, which permits a defendant to include in his answer rule 12 defenses and objections not previously available, even though they were not raised in a pre-answer rule 12 motion. Yet, to eliminate the expense and inconvenience of requiring a plaintiff to recommence his action, it would seem most desirable in the context of cases

114. *Id.*
115. *Id.*
116. TENN. R. CIV. P. 12.07-.08.

like *Romines* to deny a defendant's motion to dismiss and, instead, to transfer the action to an appropriate venue.

D. Refusal to Take Jurisdiction

Although discretionary refusals to take jurisdiction have become increasingly important as the scope of jurisdiction over the defendant has expanded, they remain relatively rare. One situation in which courts have refused to exercise their authority to adjudicate involves suits that fall under the heading of "internal affairs" of foreign corporations.[117] If the discussion of the federal district court in *McLouth Steel Corp. v. Jewell Coal & Coke Co.*[118] is an accurate reflection of Tennessee law, the internal affairs doctrine is simply an aspect of the broader doctrine of forum non conveniens and is of dwindling importance.

McLouth was a diversity action by a minority shareholder, a Michigan corporation, to compel the payment of dividends. Defendants were two Virginia corporations and their directors, who were citizens of Tennessee. The corporate defendants were engaged in manufacturing and mining operations primarily in Virginia, but their executive and sales offices were in Tennessee. The refusal to declare dividends occurred at meetings of the board of directors of defendant corporations in Tennessee. Defendants sought discretionary dismissal on the ground that the action involved the internal affairs of a foreign corporation. The United States District Court for the Eastern District of Tennessee refused to dismiss the action.

The district court recognized that there is authority for the proposition that federal courts are not required by the *Erie* doctrine[119] to follow state decisions concerning forum non conveniens.[120] Nevertheless, the federal district court perceived little difference between Tennessee law[121] and the approach of the United States Supreme Court in the classic case of *Koster v. (American) Lumbermen's Mutual Casualty Co.*[122] In that case the Supreme Court treated the internal affairs doctrine not as an invariably

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117. *See* R. LEFLAR, *supra* note 53, § 255.

118. 432 F. Supp. 10 (E.D. Tenn. 1976).

119. *See* Erie R.R. v. Tompkins, 304 U.S. 64 (1938).

120. *See* 1A MOORE'S FEDERAL PRACTICE ¶ 0.317[2] (2d ed. 1978).

121. The district court relied upon the unpublished opinion in Brown v. Greer, No. 146-Knox (Tenn. Sup. Ct. Feb. 19, 1974).

122. 330 U.S. 518 (1947).

applicable rule of law but rather as an aspect of the flexible and discretionary doctrine of forum non conveniens.

> There is no rule of law, moreover, which requires dismissal of a suitor from the forum on a mere showing that the trial will involve issues which relate to the internal affairs of a foreign corporation. That is one, but only one, factor which may show convenience of parties or witnesses, the appropriateness of trial in a forum familiar with the law of the corporation's domicile, and the enforceability of the remedy if one be granted. But the ultimate inquiry is where trial will best serve the convenience of the parties and the ends of justice. Under modern conditions corporations often obtain their charters from states where they no more than maintain an agent to comply with local requirements, while every other activity is conducted far from the chartering state. Place of corporate domicile in such circumstances might be entitled to little consideration under the doctrine of *forum non conveniens*, which resists formalization and looks to the realities that make for doing justice.[123]

The district court stated dismissal under *Koster* is appropriate only "on a showing of 'much harassment' by a defendant and [a showing that] the forum chosen 'would not ordinarily be thought a suitable one to decide the controversy' "[124] and concluded that "under the facts and circumstances of this case . . . the Eastern District of Tennessee is [not] so unsuitable as a forum to warrant invocation of this rather extreme doctrine."[125] Although the district court did not delineate the factors making it a convenient forum, the presence of the directors and other evidence in Tennessee certainly support the court's refusal to dismiss. Moreover, the soundness of the court's approach to the internal affairs doctrine should commend itself to the Tennessee courts.

E. Giving Notice of the Action

In order to satisfy the dictates of procedural due process, the applicable statute or rule of court must establish a reasonable method of notifying the defendant of the institution of an action against him, and he must be given a reasonable opportunity to be heard.[126] It is also generally held that the described method of

123. *Id.* at 527-28.
124. 432 F. Supp. at 15 (quoting 330 U.S. at 532).
125. *Id.*
126. *See, e.g.*, Mullane v. Central Hanover Bank & Trust Co., 339 U.S.

notification must be followed even though the method of notification actually utilized comports with procedural due process.[127] Only one of the cases decided during the survey period purported to involve procedural due process; the remaining cases involved disparate problems regarding the prescribed method of notification.

Solida v. Ledford,[128] the one due process case, was a diversity action in which plaintiff sought recovery for personal injuries allegedly suffered as a result of a vehicular collision. One of the defendants, the operator of a vehicle involved in the collision, appeared specially and moved to quash service or, alternatively, to dismiss on the ground of insufficiency of service of process. The initial summons had been returned "Not to be Found." Thereafter plaintiff filed an amended complaint, and an alias summons was issued for service on the Tennessee secretary of state pursuant to the nonresident motorist provisions of the Tennessee Code.[129] Those provisions require the secretary of state to forward a certified copy of the summons to the defendant by registered return-receipt mail.[130] The Code also requires "the return-receipt signed by, or duly in behalf of, the defendant"[131] to be sent to the clerk of the court in which the action was brought. The return-receipt filed in *Solida* bore the notation "Addressee Unknown." Defendant argued that, because there was no return-receipt signed by him, service was constitutionally infirm as well as defective under the Tennessee Code. Plaintiffs contended, on the other hand, that as long as service is made on the secretary of state who in turn mails a copy of the summons to the defendant, service is valid, and a return-receipt signed by the defendant is not required. The United States District Court for the Western District of Tennessee granted defendant's motion to quash service "because the Court believes due process requires, and the statutory scheme contemplates, evidence of service through notice by mail upon a defendant or his agent as a minimum."[132]

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306 (1950); 1 RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 25, 57, 69 (1971); RESTATEMENT (SECOND) OF JUDGMENTS § 5 (Tent. Draft No. 5, 1978).

127. *See, e.g.*, Wuchter v. Pizzutti, 276 U.S. 13 (1928).

128. 75 F.R.D. 529 (W.D. Tenn. 1977).

129. TENN. CODE ANN. §§ 20-224 to 227 (1955 & Cum. Supp. 1978).

130. *Id.* § 20-226 (Cum. Supp. 1978).

131. *Id.* § 20-227 (1955).

132. 75 F.R.D. at 531.

The district court's holding that the nonresident motorist statute requires evidence of actual service on the defendant may have been correct though a recent amendment to another section of the Code[133] that was in effect when *Solida* was decided suggests otherwise. The court's further holding that due process was not satisfied, however, seems clearly wrong. In the first place, it is by no means certain that due process requires actual service. Professor Hazard has taken the position that it does not:

> Can a valid judgment for compensatory relief be granted [if a reasonable effort is made to deliver notice but notice is in fact not delivered to the defendant]? This depends on whether the condition of rendering a valid judgment under the Due Process Clause is defined as the giving of notice or the making a reasonable effort to give notice. If the former, then the plaintiff is helpless to obtain compensation . . . unless he can actually deliver notice to the defendant. The Supreme Court has never gone beyond holding that due process requires a reasonable opportunity to be heard and that reasonable effort to give notice of the hearing sufficiently affords that opportunity. But the Supreme Court has never passed on the precise question raised, although many lower courts have. The problem has arisen recurrently under the automobile "long-arm" statutes. Most courts have ducked the issue by reading—sometimes by straining to read—the local state statute to require actual notice. Those courts that have faced the issue all appear to have held that failure of actual delivery of notice does not preclude valid judgment, so long as a reasonable and technically punctilious effort has been made, *i.e.*, there has been compliance with a statutory procedure that is itself reasonable. And this seems a correct analysis of the due process requirement as established by the Supreme Court.[134]

Moreover, if due process requires actual notice, defendant's special appearance in *Solida* demonstrates that he apparently did in fact receive adequate and timely notice of the lawsuit pending against him.[135]

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133. TENN. CODE ANN. § 21-218 (Cum. Supp. 1978); *see* text accompanying notes 189-94 *infra*.

134. Hazard, *A General Theory of State-Court Jurisdiction*, 1965 SUP. CT. REV. 241, 286-87 (footnotes omitted); *see* 1 RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 25, Comment e (1971); RESTATEMENT (SECOND) OF JUDGMENTS § 5, Comment c (Tent. Draft No. 5, 1978).

135. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 5, Comment d (Tent. Draft No. 5, 1978).

The service requirements of the Tennessee long-arm statute[136] also received federal scrutiny in *Shires v. Magnavox Co.*[137] Individual defendants in an antitrust action moved to quash service of process on the ground that the person signing the return-receipts was not authorized to accept service on their behalf. A corporate defendant also moved to quash service on the same ground although service was made on an agent of a wholly-owned subsidiary. Plaintiffs offered no proof that the return-receipts were signed by or on behalf of the moving defendants.[138] Because plaintiffs had the burden of establishing the validity of service but did not do so, the United States District Court for the Eastern District of Tennessee granted defendants' motions to quash.

Shires did not present a due process problem because defendants were in fact given adequate and timely notice of the action against them[139] although there is some indication the district court thought due process was involved.[140] The only apparent practical effect of quashing service, therefore, is to ensure strict compliance with the prescribed method of giving notice, an advantage of questionable value when measured against the expense and inconvenience of requiring the plaintiffs to serve the defendants a second time.

Three decisions of the Tennessee Supreme Court dealt with more substantial problems concerning the prescribed method of notification. In *Saylors v. Riggsbee*[141] plaintiffs brought an action on March 13, 1970, for damages for wrongful death resulting from an automobile accident that occurred on March 14, 1969. At the time of the accident the nonresident motorist statute provided that "[t]he agency of the secretary of state to accept service of process shall continue for a period of one (1) year from the date of any accident or injury . . . ."[142] Prior to institution of the action in *Saylors*, however, the statute was amended to provide that "[t]he agency of the secretary of state to accept service of process for both personal injuries and property damages shall

136. *See* TENN. CODE ANN. §§ 20-235 to 240 (Cum. Supp. 1978).

137. 74 F.R.D. 373 (E.D. Tenn. 1977).

138. *See* TENN. CODE ANN. § 20-237 (Cum. Supp. 1978).

139. *See* text accompanying note 135 *supra*.

140. 74 F.R.D. at 376.

141. 544 S.W.2d 609 (Tenn. 1976).

142. 1949 Tenn. Pub. Acts ch. 47, § 2 (current version at TENN. CODE ANN. § 20-224 (Cum. Supp. 1978)).

continue for such period of time or so long as the cause of action is not barred by the statute of limitations of this state . . . ."[143] Plaintiffs voluntarily dismissed their action on June 22, 1972, and, pursuant to the saving statute,[144] reinstituted the action on June 22, 1973. Again, process was served on the secretary of state, who accepted service of the reinstituted action on June 28, 1973. Defendants argued that the amended statute increasing the duration of the secretary's fictitious agency could not be applied retroactively to accidents occurring prior to its enactment and that therefore, the action had not been reinstituted in timely fashion. The Tennessee Supreme Court held that the amended statute should and constitutionally could be given retroactive application, and accordingly reversed the trial court's quashing of process and abatement of the action.

"[P]rocedural statutes," the court noted, "apply retrospectively not only to causes of action arising before such acts become law, but to all suits pending when the legislation takes effect . . . , unless the legislature indicates a contrary intention or immediate application would produce an unjust result . . . ."[145] The test for determining whether a statute is procedural or substantive depends upon whether it deals with " 'the mode or proceeding by which a legal right is enforced,' " on the one hand, or whether it " 'gives or defines the right,' " on the other hand.[146] The process statute under consideration, the court stated, "created no rights and imposed no liabilities."[147] Accordingly, the amendment to the nonresident motorist statute was procedural and was given retroactive application.

The court acknowledged[148] that the holding in *Saylors* was

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143. TENN. CODE ANN. § 20-224 (Cum. Supp. 1978).

144. *Id.* § 28-106 (1955) provides:

> If the action is commenced within the time limited by a rule or statute of limitation, but the judgment or decree is rendered against the plaintiff upon any ground not concluding his right of action, or where the judgment or decree is rendered in favor of the plaintiff, and is arrested, or reversed on appeal, the plaintiff, or his representatives and privies, as the case may be, may, from time to time, commence a new action within one (1) year after the reversal or arrest.

145. 544 S.W.2d at 610.

146. *Id.* (quoting Jones v. Garrett, 192 Kan. 109, 114, 386 P.2d 194, 198 (1963)).

147. *Id.*

148. *Id.* at 611.

foreshadowed by the decision in *Speight v. Miller*.[149] In that case the court permitted retroactive application of an amendment to the nonresident motorist statute, which increased the secretary's fictitious agency from one to three years after the accident in actions for property damage.[150] The only decision that tended to block the court's path was *Henderson v. Ford*,[151] which refused to permit retroactive application of the same amendment to the nonresident motorist statute involved in *Saylors*. Although the court in *Saylors* did not expressly overrule *Henderson*, it quite rightly rejected the theoretical foundation upon which *Henderson* was built.[152] *Henderson*, it would therefore appear, lives on in name alone.

Herring v. Estate of Tollett,[153] the second decision of the Tennessee Supreme Court during the survey period concerning the appropriate method of notification, involved the proper procedure to be followed for filing notice in probate court of the pendency of a tort action in circuit court. Appellants commenced a damage action against decedent's administrator in the circuit court of Cumberland County for injuries and loss of services arising out of a vehicular accident. Appellants also filed a claim, with a copy of their previously filed complaint appended, in the county court of Cumberland County where deceased's estate was being administered. This claim was filed within six months after the statutorily mandated notice to creditors by the administrator.[154] The administrator excepted to appellants' claim principally on the ground that it was an unliquidated tort claim pending in circuit court. The county judge disallowed and dismissed the claim, reasoning that the claim " 'is one sounding in tort and the claimants cannot be deemed creditors until they obtain judg-

149. 223 Tenn. 259, 443 S.W.2d 657 (1969).

150. 1968 Tenn. Pub. Acts ch. 574, § 1 (current version at TENN. CODE ANN. § 20-224 (Cum. Supp. 1978)).

151. 488 S.W.2d 720 (Tenn. 1972), *noted in* 40 TENN. L. REV. 746 (1973).

152. 544 S.W.2d at 611. *Henderson* can be distinguished from *Saylors* on its facts since in *Henderson*, unlike *Saylors*, the statute extending the agency of the secretary of state was not in effect when the action was initially commenced. However, if, as the supreme court correctly noted in *Saylors*, the secretary of state's statutory " 'agency' exists only in theory and is a pure fiction," *id.*, then this difference is inconsequential.

153. 550 S.W.2d 660 (Tenn. 1977).

154. TENN. CODE ANN. § 30-509 (1977).

ments.' "[155] The state supreme court reversed.

The source of the problem confronting the court in *Herring* was the 1947 decision of the Tennessee Supreme Court in *Collins v. Ruffner*.[156] *Collins* arose when two automobiles collided, instantly killing both drivers. Plaintiff, as administratrix of the estate of one of the deceased drivers, brought a damage action in circuit court against the administrator of the estate of the other driver. The Tennessee statute then in effect dealing with the inventory and management of estates provided that "within twelve (12) months from the date of the notice to creditors . . . all persons . . . having claims against the estate of the decedent . . . shall file them . . . with the clerk of the Court in which the estate is being administered."[157] Another section of the Code provided: "Duplicate copies of the first pleading filed in original actions against a personal representative, shall be filed with the Clerk of the Court where the administration originated, to be noted by him in the record of claims as are other claims filed."[158] Defendants in *Collins* sought dismissal of plaintiff's circuit court damage action on the ground that plaintiff failed to file either a claim or copies of the pleadings in that action with the county court where defendant's decedent's estate was being administered. The supreme court held that plaintiff's action should not have been dismissed by the circuit court.

For present purposes it is sufficient to note only two of the reasons offered by the court for its holding in *Collins*. One was that the only persons required to file claims in probate are creditors of the deceased, and the holder of a cause of action in tort is not a creditor until his claim is reduced to judgment.[159] Another reason was far more practical: "No jurisdiction is conferred . . . on the county judge to try, adjudge, and render judgment in a negligence case. No machinery is set up in that court and no procedure prescribed."[160]

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155. 550 S.W.2d at 661 (quoting the judge of the county court of Cumberland County).

156. 185 Tenn. 290, 206 S.W.2d 298 (1947).

157. 1939 Tenn. Pub. Acts ch. 175, § 2 (current version at TENN. CODE ANN. § 30-510 (1977)).

158. 1939 Tenn. Pub. Acts ch. 175, § 6 (current version at TENN. CODE ANN. § 30-511 (1977)).

159. 185 Tenn. at 295-96, 206 S.W.2d at 300.

160. *Id.* at 296, 206 S.W.2d at 301.

These are not entirely satisfactory explanations for the result in *Collins*. In the first place, the statute being construed by the court did not speak of creditors but rather of "all persons . . . having claims against the estate of the decedent . . . ."[161] The holder of an unliquidated chose in action would seem to fall within the scope of this statutory language since ultimately he seeks recovery out of the assets constituting the decedent's estate. Second, requiring a copy of the first pleading in an unliquidated tort case to be filed with the court where decedent's estate is being administered does not necessarily mean, as the court apparently assumed, that the action has to be adjudicated there. The action could be adjudicated in another court of competent jurisdiction, while filing a copy of the first pleading would serve to notify the probate court to hold in abeyance final distribution of the estate pending the outcome of the tort action. On the other hand, nothing in the statute construed in *Collins* expressly authorized such bifurcated proceedings.[162] Moreover, since plaintiff commenced her action within the twelve-month limitation period prescribed by the statute, the administrator of decedent's estate had timely notice of plaintiff's inchoate claim. While the opinion in *Collins* is silent on the matter, it seems entirely probable that there had not yet been a final distribution of the estate. Thus the *Collins* court quite understandably may have perceived no good reason to dismiss plaintiff's action.

Regardless of their deficiencies, each of these reasons offered by the court for its holding in *Collins* took on new and independent life in subsequent decisions of the Tennessee Supreme Court. For example, in *McMahan v. Beach*,[163] a tort action for damages occasioned by a traffic accident was commenced against the administrator of decedent's estate less than six months after issuance of letters of administration. At that time the Code exempted an administrator from suit for a period of six months after issuance to him of letters of administration,[164] a provision apparently designed to afford the administrator time in which to decide

161. 1939 Tenn. Pub. Acts ch. 175, § 2 (current version at TENN. CODE ANN. § 30-510 (1977)); *see* text accompanying note 157 *supra*.

162. 1939 Tenn. Pub. Acts ch. 175, §§ 1-12 (current version at TENN. CODE ANN. §§ 30-501 to 527 (1977)).

163. 198 Tenn. 168, 278 S.W.2d 680 (1955).

164. 1939 Tenn. Pub. Acts ch. 175, § 6 (current version at TENN. CODE ANN. §§ 30-511, -1001 (1977)).

whether to pay claims against the estate. Nonetheless, relying on that portion of *Collins* in which the court noted that county courts are not empowered to adjudicate tort claims, the court in *McMahan* held that "the exemption of an administrator from suit for a period of six months after issuance of letters does not apply to tort actions."[165] So too, in *Darby v. Union Planters National Bank*[166] appellant filed a medical malpractice claim against the estate of a deceased doctor but apparently did not commence an independent action in a court empowered to adjudicate such a claim. The executor excepted to appellant's claim, and the probate court dismissed it. On appeal the supreme court affirmed, reasoning that "appellant is not a creditor until such time as a court of competent jurisdiction shall have determined whether or not the estate of deceased is liable for the alleged negligent wrong."[167]

Apparently the probate court in *Herring* construed the *Collins* line of cases as standing for the proposition that since a claimant asserting an unliquidated tort claim is not a creditor until his claim is reduced to judgment, a decedent's estate may be finally distributed even though the tort action has not yet been finally adjudicated, and even though the action was timely commenced in a court of competent jurisdiction, and a copy of the complaint was promptly filed in the probate court. Thus, while *Collins* permitted recovery against an estate despite seeming noncompliance with the statutory scheme, the probate court in *Herring* denied recovery even though plaintiff complied with every requirement of the current version of the Code.[168]

Fortunately the state supreme court reached the only sensible result in *Herring*. "Whenever the probate court is put on notice of the pendency of a tort action in another court by the filing of a copy of the complaint, or by any other good and sufficient means," the court held, "the probate court must hold in abeyance a final distribution of the . . . estate, pending the outcome of a tort action."[169] The court, however, did not overrule *Collins*. Only "[b]etter practice," not the Code itself, "demands that the court in which the estate is being administered be put

165. 198 Tenn. at 169, 278 S.W.2d at 681.
166. 222 Tenn. 417, 436 S.W.2d 439 (1969).
167. *Id.* at 421, 436 S.W.2d at 441.
168. *See* TENN. CODE ANN. §§ 30-510 to 511 (1977).
169. 550 S.W.2d at 662.

on notice of the pendency of a tort action in another court. Filing a copy of the complaint is sufficient to accomplish this."[170]

It seems likely that problems will continue to arise in this area of the law until the state supreme court is willing to view afresh the statutory language of the current version of the Code. As the court itself noted in *Herring*,[171] nothing in the Code exempts unliquidated tort claims from its filing provisions. Instead, the Code requires everyone seeking recovery out of the assets of a decedent's estate to file a claim against the estate within six months after the date of notice to creditors.[172] In the case of claims founded on causes of action beyond the jurisdictional competence of the probate court, the Code would seem to require that an action be instituted on such a cause of action within the six-month limitation period[173] and that a copy of the complaint be filed with the clerk of the court where the estate is being administered.[174] The Code specifically provides that in such circumstances

> the court wherein the administration is pending shall hold in abeyance any action on such claim until the final determination of said independent suit, whereupon, on the filing of a certified copy of such final judgment or decree with the clerk of the court wherein the administration is pending, such court is authorized to enter judgment accordingly.[175]

If an action is instituted within the six-month limitation period but a copy of the complaint is not filed with the probate court, the plaintiff runs the risk that the probate court may finally distribute the estate out of ignorance of his claim. If the plaintiff fails to file a copy of his complaint but the probate court is aware of the plaintiff's action against the decedent's administrator, then dictum in *Herring* appears to require the probate court to withhold final distribution of the estate,[176] although that sensible

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170. *Id.*

171. *Id.*

172. TENN. CODE ANN. § 30-510 (1977) requires "all persons . . . having claims against the estate of the decedent" to file them within six months from the date of notice to creditors.

173. TENN. CODE ANN. § 30-513.

174. *Id.* § 30-511.

175. *Id.* § 30-518.

176. The state supreme court stated that final distribution of the estate should be held in abeyance whenever the probate court has notice of a pending

result is hard to square with the literal language of the Code.[177] Moreover, in cases in which the plaintiff does not commence his action within six months from the date of notice to creditors, the Code appears to render the plaintiff's action untimely and "forever barred."[178] As long as the reasoning of *Collins* remains authoritatively unimpeached, however, a confident statement of the meaning of the Code can be offered only by one who walks right in "while the angels wait outside and tremble."[179]

Tennessee State Board of Education v. Cobb[180] was the third and final decision of the Tennessee Supreme Court during the survey period concerning the appropriate method of notification. Plaintiff in *Cobb* alleged that he had become tenured and had been improperly discharged from his position as assistant superintendent of the Tennessee School for the Blind in Davidson County. Plaintiff commenced his action in the chancery court for Davidson County under the judicial review provision[181] of the general teacher tenure statutes.[182] Under that provision a teacher may obtain judicial review by filing a petition in the chancery court of the county in which he was employed. Upon filing of the petition the clerk and master is directed to serve the named defendants by registered return-receipt mail. This method of obtaining judicial review had been made expressly applicable to those teachers under its jurisdiction by a rule of the Tennessee Department of Education.[183] Plaintiff complied with the statute in all respects, defendants being served with a copy of plaintiff's petition by registered mail. However, defendants were never served in accordance with the procedure set forth in the Tennessee Rules of Civil Procedure, which ordinarily require the clerk to issue a summons and to cause it, together with a copy of the complaint, to be delivered to a person authorized to serve process personally on the defendant.[184] The supreme court rejected defendants' contention that process and service were insufficient for

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tort action "by any . . . good and sufficient means . . . ." 550 S.W.2d at 662.

177. *See* TENN. CODE ANN. §§ 30-510 to 512 (1977).

178. *Id.* § 30-513.

179. The phrase is Professor Rosenberg's. Rosenberg, *The Adversary Proceeding in the Year 2000*, 1 PROSPECTUS 5, 6 (1968).

180. 557 S.W.2d 276 (Tenn. 1977).

181. TENN. CODE ANN. § 49-1417 (1977).

182. *Id.* §§ 49-1401 to 1425 (1977 & Cum. Supp. 1978).

183. 557 S.W.2d at 277.

184. TENN. R. CIV. P. 4.

failure to comply with the Tennessee rules.

Rule 4 itself, the court noted, recognizes "other methods of accomplishing service of process, in addition to personal service of a summons."[185] For example, rule 4.05 authorizes constructive service in the manner provided by statute as do those portions of rule 4.04 that deal with service on foreign corporations and nonresidents.[186] The court concluded:

> [W]e are of the opinion that whenever a special statute dealing with a particular type of judicial action, such as review of a Board of Education under the Teacher Tenure Law, contains specific provisions for process and service, that method, in lieu of the general provisions of Rule 4, is permissible and may be followed. We are particularly persuaded to this view in the present case since the State Board itself, by its regulations, expressly authorized judicial review under the provisions of [the Tennessee Code].[187]

The court's holding in *Cobb* engrafts on Tennessee rule 4 a provision comparable in some respects to Federal Rules of Civil Procedure 4(d)(7) and 4(e), which authorize service by use of federal statutes in certain specified circumstances.[188] Only one aspect of the court's opinion needs to be emphasized—namely, that while service may be made in accordance with a statute, nothing in *Cobb* expressly precludes service in accordance with the Tennessee Rules of Civil Procedure, even if a statute contains specific provisions for process and service.

The remaining development during the survey period in this area of the law is statutory. The Tennessee Code dispenses with personal service in certain circumstances if the defendant is a nonresident of this state.[189] In such cases, however, notice must be given by publication[190] and, under a 1977 amendment to the Code, a copy of the newspaper clipping containing the publication must be mailed to the nonresident's last known address by return-receipt certified or registered mail.[191] "The return of the

185. 557 S.W.2d at 277.

186. TENN. R. CIV. P. 4.04(5), (7).

187. 557 S.W.2d at 277.

188. *See generally* 4 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE §§ 1112-1118 (1969 & Supp. 1977).

189. TENN. CODE ANN. § 21-212 (1955).

190. *Id.* § 21-214.

191. *Id.* § 21-218 (Cum. Supp. 1978).

receipt signed by the defendant or his duly authorized agent, or its return marked refused, evidenced by appropriate notation of such fact by the postal authorities"[192] is evidence of personal notice. If such evidence is lacking, "the court may find through independent proof that the defendant had actual notice in compliance with notice requirements."[193] If the court fails to find that a defendant had actual notice, "it may order new publication on applicable grounds, or order such other and further action to be taken to give the defendant notice."[194]

The same amendment also adds a new provision to the Code for divorce actions "[i]n those counties where the divorce referee mails notice of the filing of the divorce and a copy of the complaint to a nonresident defendant by certified or registered mail return receipt requested . . . ."[195] In those counties it is not necessary for the clerk of the court to mail further notice; "[n]otice to the nonresident defendant from the . . . referee [is] sufficient."[196] The amended section also provides, although probably unnecessarily, that "[n]othing in this section shall be deemed to have changed or amended requirements of the law as to venue or jurisdiction."[197]

III. STANDING: AN ASPECT OF JUSTICIABILITY

Not all disputes properly brought before an appropriate forum are considered susceptible of judicial resolution. The reasons for declaring a dispute not justiciable vary, one of which is that the party presenting the dispute for adjudication lacks standing, that is, he "is not properly situated to be entitled to judicial determination of the dispute."[198] While the Tennessee Supreme Court was presented with two cases raising questions concerning standing, the court found it necessary to answer the standing question in only one of them.

In *Roberts v. State Board of Equalization*[199] a trustee of

192. *Id.*
193. *Id.*
194. *Id.*
195. *Id.*
196. *Id.*
197. *Id.*
198. 13 C. WRIGHT, A. MILLER & F. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3531, at 176 (1975).
199. 557 S.W.2d 502 (Tenn. 1977).

Roane County sought judicial review in the chancery court of Davidson County of the action of the State Board of Equalization concerning tax assessments on enriched uranium owned by ten Japanese utilities and located in that portion of the Oak Ridge complex situated in Roane County. The county itself, however, was not a party to the petition, and the chancellor ruled that it was an indispensable party.[200] The trustee was given an opportunity to have the county join his petition but the county, acting through its quarterly court, resolved not to join in the trustee's petition for review. Accordingly, the chancellor dismissed the petition, and the state supreme court affirmed.

The court stated that the issue before it was whether Roane County was an "indispensable party"[201] to a petition seeking review of the action of the State Board of Equalization or, put another way, "[c]an the county trustee, acting independently of the county court, petition for a review of the action of the State Board of Equalization?"[202] Noting the difficulty in determining whether review was being sought under the relatively new Uniform Administrative Procedures Act[203] or by way of common-law certiorari,[204] the court observed that under either procedure review may be sought only by someone "aggrieved" by the action sought to be reviewed.[205] While the duties of a county trustee include the obligations to make assessments and to collect taxes, his duty to collect taxes "is a ministerial function . . . ."[206] Moreover, the right to appeal to the State Board of Equalization from assessments of the county trustee is given by statute only to the state, the county, and the assessed party.[207] The county trustee, therefore, is merely a " 'fiscal agent of the county,' "[208] which acts through its quarterly court. Thus, the supreme court

200. *Id.* at 503-04; *see* TENN. R. CIV. P. 19.01-.02.

201. 557 S.W.2d at 503.

202. *Id.*

203. TENN. CODE ANN. §§ 4-507 to 527 (Cum. Supp. 1978).

204. *Id.* § 27-901 (1955).

205. TENN. CODE ANN. § 4-523 (Cum. Supp. 1978) permits "[a] person who is aggrieved by a final decision in a contested case" to seek judicial review, and TENN. CODE ANN. § 27-901 (1955) permits review by "[a]nyone who may be aggrieved by any final order or judgment of any board or commission . . . ."

206. 557 S.W.2d at 503.

207. TENN. CODE ANN. § 67-832 (1976).

208. 557 S.W.2d at 503 (quoting Dulaney v. Dunlap, 43 Tenn. (3 Cold.) 306, 312 (1866)).

held that "[t]he real party in interest, the party that stands to be affected by action of the State Board of Equalization, and the proper party to question the board's actions with respect to assessments on property in Roane County is Roane County acting through its governing body, the county court."[209]

Whatever else may be said of the opinion in *Roberts*, it provides a vivid illustration of the overlap among the concepts of standing to sue, indispensable parties, and the real party in interest. In the portions of the opinion quoted above, the court itself expressly refers to "indispensable part[ies]" and "the real party in interest," and its discussion of whether the trustee was an "aggrieved party" within the meaning of the Administrative Procedures Act or common-law certiorari refers implicitly to the notion of standing to sue, under which heading *Roberts* has been conveniently placed for purposes of this survey. Professors Wright and Miller have attempted to disentangle these three concepts, but they observe that "there are situations in which a Rule 17(a) objection [concerning the real party in interest] is enmeshed in a question whether a particular person who is not before the court should be considered indispensable under Rule 19."[210] Similarly, they note:

> To the extent that standing . . . is understood to mean that the litigant actually must be injured by the governmental action that he is assailing, then it closely resembles the notion of real party in interest under Rule 17(a), inasmuch as both terms are used to designate a plaintiff who has shown that he possesses a sufficient interest in the action to entitle him to be heard on the merits.[211]

It is, therefore, quite understandable why the court in *Roberts* failed to distinguish among the concepts of standing to sue, real parties in interest, and indispensable parties. The overlap of these concepts also suggests that only rarely should differing procedural consequences turn on distinguishing among them.

A question concerning standing was also raised, though left unanswered, in *Blair v. Watts*.[212] *Blair* involved a challenge to the

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209. *Id.* at 504.

210. 6 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1542, at 640 (1971).

211. *Id.* § 1542, at 641 (footnote omitted).

212. 555 S.W.2d 709 (Tenn. 1977).

procedure utilized in appointing the assistant chief of police of Columbia, Tennessee. After the incumbent to that office was promoted to another position, the city manager notified the Civil Service Board that a vacancy existed. Examinations were given to the seven applicants for the position and the Board certified to the city manager the three applicants obtaining the highest test scores. Before any further action was taken, one of the three applicants certified as eligible for the position advised the city manager that he did not wish to be considered for the position. The city manager notified the Board of this development and requested a third candidate. The Board certified two additional names because these applicants had obtained identical scores on the examination. One of these two was appointed assistant chief of police, and, as a result, a member of the police force of Columbia, who was eligible to take the examination but elected not to be an applicant, brought an action for mandamus directing the city manager to appoint one of the three applicants originally certified for consideration. After this action was brought, two of the original applicants certified by the Board, both of whom sought appointment to the position, moved for leave to join as parties plaintiff.[213] Their motion was granted and apparently no error was assigned concerning this action of the trial court. As a result, the state supreme court did not pass on whether the original plaintiff had standing. The court did state that both plaintiffs who joined the action had

> a special interest in this litigation and [were] subject to a special injury not common to the public generally. . . . Either of these plaintiffs, or both of them, clearly have standing to bring this action and the issues for adjudication are the same whether pursued by [all three], or only by [the joined plaintiffs].[214]

Accordingly, the supreme court pretermitted the issue of the original plaintiff's standing.

IV. PRETRIAL PROCEDURE

A. Pleading

Once an appropriate forum has been selected for the adjudication of a justiciable controversy, the parties must advise the

213. *See* TENN. R. CIV. P. 24.

214. 555 S.W.2d at 710-11 (citations omitted).

court as well as one another of their respective claims and defenses. The pleadings, the first of the formal pretrial devices, serve this notice-giving function. Historically, the pleadings have been called upon to serve other purposes as well, including to narrow and to define the issues for trial, to disclose the facts the parties believe exist, and to dispose of claims and defenses.[215] "To a large extent, of course, the formulation of a State's general pleading rules will depend upon its views regarding the relative importance to be attached to, and the efficacy of the pleadings as a means of pursuing, each of these objectives."[216]

In strict theory the Tennessee Rules of Civil Procedure deemphasize the importance of the pleadings as an issue-formulating or discovery mechanism and as a means of speedily disposing of claims and defenses. Other devices are provided to perform these functions. For example, the relevant facts can be unearthed by discovery,[217] and the issues can be narrowed and defined by partial summary adjudication[218] or by a pretrial conference.[219] Similarly, summary judgment serves the end of speedily and inexpensively disposing of claims in cases in which there is no genuine issue as to any material fact.[220] Yet, as cases like *Swallows v. Western Electric Co.*[221] and *Jose v. Equifax, Inc.*[222] demonstrate, there is still a generally held belief in the efficacy of the pleadings to dispose of at least certain kinds of claims.

1. The Complaint

a. Specificity and Substantive Legal Sufficiency

Plaintiff in *Swallows* sought recovery from his employer for outrageous conduct and invasion of privacy. Plaintiff alleged that two managerial level employees of Western Electric suspected him of mailing to each of them, in envelopes without return addresses, an ace of spades, which they construed as threats on their

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215. *See* 5 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1202, at 59-60 (1969).

216. M. ROSENBERG, J. WEINSTEIN, H. SMIT & H. KORN, ELEMENTS OF CIVIL PROCEDURE 568 (3d ed. 1976).

217. *See* TENN. R. CIV. P. 26-37.

218. *See id.* R. 56.

219. *See id.* R. 16.

220. *See id.* R. 56.03.

221. 543 S.W.2d 581 (Tenn. 1976).

222. 556 S.W.2d 82 (Tenn. 1977).

lives. Plaintiff further alleged that despite his denials and the absence of any proof whatever, these employees, while acting in the scope of their employment, " 'continued to harass and accuse him' "[223] and ultimately prevailed on their superiors at Western to have Pinkerton, a co-defendant in the action, investigate plaintiff's " 'background, his private life, and all other manner of things . . . in the most minute and personal detail.' "[224] Plaintiff also alleged that Western and Pinkerton " 'knew, or in the exercise of reasonable diligence and good judgment, should have known, that he had nothing to do with the mailing of the playing cards . . . [but they nonetheless] continued to harass and investigate him for a period of approximately six (6) months.' "[225] Furthermore, Western and Pinkerton had actual knowledge of mild emotional difficulties in plaintiff's past and should have known their conduct would have " 'a most deleterious effect upon [plaintiff's] emotional stability and well being' "[226] and in fact did cause plaintiff to suffer " 'the most grievous mental and emotional . . . suffering . . . .' "[227] On defendants' motion the trial court dismissed plaintiff's complaint for failure to state a claim for which relief could be granted, and the supreme court affirmed.

A recovery for the tort of outrageous conduct, the court stated, requires conduct so "beyond the pale of decency [as] to be regarded as atrocious and utterly intolerable in a civilized society,"[228] as well as resultant "serious mental injury."[229] Certain trivialities, such as " 'mere insults, indignities, threats, petty oppression [*sic*], or other trivialities' "[230] are inadequate bases of liability. Invasion of privacy, on the other hand, " 'exists only if the conduct is such that a defendant should have realized it would be offensive to persons of ordinary sensibilities; and . . . *it is only where the intrusion has gone beyond the limits of de-*

223. 543 S.W.2d at 582 (quoting amended complaint).

224. *Id.* (quoting amended complaint).

225. *Id.* (quoting amended complaint).

226. *Id.* (quoting amended complaint).

227. *Id.* (quoting amended complaint).

228. *Id.* (citing Medlin v. Allied Inv. Co., 217 Tenn. 469, 398 S.W.2d 270 (1966)).

229. *Id.* (citing Medlin v. Allied Inv. Co., 217 Tenn. 469, 398 S.W.2d 270 (1966)).

230. *Id.* at 582-83 (quoting Medlin v. Allied Inv. Co., 217 Tenn. 469, 479, 398 S.W.2d 270, 274 (1966), which quoted 1 RESTATEMENT (SECOND) OF TORTS § 46, Comment d at 73 (1965)).

cency that liability accrues . . . .' "[231]

The court held that under the Tennessee Rules of Civil Procedure, the plaintiff in a tort action has "the burden of averring facts sufficient to show the existence of a duty owed by the defendant, a breach of the duty, and damages resulting therefrom."[232] Nothing in the simplified pleading rules permits allegations "replete with conclusions,"[233] which fail to describe "the substance and severity"[234] of the allegedly outrageous conduct or invasion of privacy. " '[I]n an action of this kind' "[235] the rules require that the " 'actionable conduct' "[236] be " 'set out' "[237] so that the trial court can determine whether the defendant's conduct "may reasonably be regarded as so extreme and outrageous as to permit recovery or whether the conduct is such as to be classed as 'mere insults, indignities, threats, annoyances, petty oppression [*sic*], or other trivialities,' for which [defendants] would not be liable."[238] Since plaintiff's complaint lacked the requisite specificity it was properly dismissed.

In *Jose v. Equifax, Inc.*[239] plaintiff brought a workers' compensation action to recover for " 'a severe psychiatric illness' "[240] occasioned by " 'a tremendous amount of pressure and tension' "[241] placed upon him as claims director and field representative for his employer. Plaintiff alleged that these pressures ultimately lead to his habitual alcoholism. Plaintiff's complaint did not delineate the nature of his employment duties or the character of the psychiatric illness he suffered. No attempt was made to amend plaintiff's complaint either before or after his employer

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231. *Id.* at 583 (quoting Martin v. Senators, Inc., 220 Tenn. 465, 473, 418 S.W.2d 660, 664 (1967)) (emphasis added).

232. *Id.*

233. *Id.*

234. *Id.*

235. *Id.* (quoting Medlin v. Allied Inv. Co., 217 Tenn. 469, 480, 398 S.W.2d 270, 275 (1966)).

236. *Id.* (quoting Medlin v. Allied Inv. Co., 217 Tenn. 469, 480, 398 S.W.2d 270, 275 (1966)).

237. *Id.* (quoting Medlin v. Allied Inv. Co., 217 Tenn. 469, 480, 398 S.W.2d 270, 275 (1966)). The court's reliance on *Medlin*, which was decided prior to adoption of the Tennessee Rules of Civil Procedure, is questionable.

238. *Id.* (citing 1 RESTATEMENT (SECOND) OF TORTS § 46, Comment d (1965)).

239. 556 S.W.2d 82 (Tenn. 1977).

240. *Id.* at 83 (quoting complaint).

241. *Id.* (quoting complaint).

moved to dismiss for failure to state a claim. As a result, the supreme court affirmed the trial court's dismissal.

The court's opinion carefully defines the limits of its holding. After a partial survey of prior Tennessee cases, the court noted that mental and nervous illnesses are compensable in workers' compensation actions "when shown to be caused by an industrial, work-related accident."[242] Moreover, the court stated that it was "not inclined to limit recovery to cases involving physical, traumatic injury or to impose any other artificial limitation upon the coverage afforded by the compensation statutes."[243] Quite to the contrary, the court indicated its readiness in a proper case to permit recovery for mental or nervous disorder even if the cause is solely "a mental stimulus, such as fright, shock or even excessive, unexpected anxiety . . . ."[244] However, in order to fall within the scope of the workers' compensation statute, a plaintiff must prove he suffered an "injury . . . by accident,"[245] and this statutory requirement "still does not embrace every stress or strain of daily living or every undesirable experience encountered in carrying out the duties of a contract of employment. Workmen's compensation coverage is not as broad as general, comprehensive health and accident insurance."[246]

Giving plaintiff "the benefit of the most liberal interpretation of the compensation law,"[247] his "general and conclusory allegations"[248] attempted to set forth a claim "on the periphery of coverage provided by the statute."[249] When defendant challenged the sufficiency of plaintiff's complaint, "it was incumbent upon [plaintiff] to state with some specificity and clarity what sort of 'accidental injury' was being claimed."[250] Accordingly, the court held that the "conclusions and generalities"[251] set forth in plaintiff's complaint failed to state a claim for relief under the workers' compensation statute.

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242. *Id.* at 84.
243. *Id.*
244. *Id.*
245. TENN. CODE ANN. § 50-903 (1977).
246. 556 S.W.2d at 84.
247. *Id.*
248. *Id.* at 83.
249. *Id.* at 84.
250. *Id.*
251. *Id.*

The heart of the procedural question involved in both *Swallows* and *Jose* is the meaning to be ascribed to rule 8.01's requirement that the pleader set forth "a short and plain statement of the claim showing that the pleader is entitled to relief."[252] Nothing in the literal language of rule 8.01 requires the pleader to allege the "facts" constituting his "cause of action," which was typically required by the codes,[253] nor does the rule proscribe the use of "conclusions," which were typically considered forbidden by the courts construing the requirement of code pleading that the pleader allege the "facts constituting a cause of action."[254] Yet both *Swallows* and *Jose* condemn "conclusions," and *Swallows* requires the pleader to aver "facts" sufficient to show a cause of action. The mere use by the supreme court of obsolete nomenclature is not in itself harmful. "However," as Professors Wright and Miller point out with regard to the federal rules, "there always is the danger that the use of archaic terms . . . will tend to revive the very distinctions that the . . . rules repudiated."[255]

A partial explanation for the results in *Swallows* and *Jose* may lie in the fact that rule 8.01 does not simply require the pleader to set forth "a short and plain statement of the claim" but also requires that the statement show "the pleader is entitled to relief."[256] As Professor Millar observed in commenting on the identical language of federal rule 8(a)(2):

> If the provision had stopped with requiring "a short and plain statement of the claim," there would be little doubt that the [rule dispensed with any requirement that the pleader state all the essential elements of his claim]. But the addition of the participial clause "showing that the pleader is entitled to relief" is disturbing. A very fair argument could be made to the effect that the pleading would not show entitlement to relief if it omitted an essential element of what we have been accustomed to speak of as the cause of action, even though not necessary to conveying adequate notice of the claim, because in the absence of that element there could be no recovery.[257]

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252. TENN. R. CIV. P. 8.01.

253. *See* 5 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1218 (1969).

254. *See id.*

255. *Id.* § 1218, at 141.

256. TENN. R. CIV. P. 8.01; *see* text accompanying note 252 *supra*.

257. R. MILLAR, CIVIL PROCEDURE OF THE TRIAL COURT IN HISTORICAL PERSPECTIVE 192 (1952).

Based on their reading of a "host" of federal cases, Professors Wright and Miller state that:

> [The] cases [suggest] that the complaint, and other relief-claiming pleadings need not state with precision all elements that give rise to a legal basis of recovery as long as fair notice of the nature of the action is provided. However, the complaint must contain either direct allegations on every material point necessary to sustain a recovery on any legal theory, even though it may not be the theory suggested or intended by the pleader, or contain allegations from which an inference fairly may be drawn that evidence on these material points will be introduced at trial.[258]

A more convincing explanation of *Swallows* and *Jose* may lie in the types of claims being asserted. Although rule 8.01 on its face does not purport to establish special pleading requirements for certain kinds of cases, nonetheless the standard for successful pleading may be more stringent depending upon an unarticulated desire to discourage what is viewed as vexatious or simply unmeritorious litigation. Thus, in *Jose* the court stressed the fact that plaintiff's claim was "on the periphery of coverage provided by the statute."[259] In *Swallows* the court may have looked askance on the assertion of job-related claims for outrageous conduct and invasion of privacy, particularly by an emotionally disturbed employee.[260]

Whether it is appropriate to establish more stringent pleading requirements for certain kinds of claims is another matter. Nothing in rule 8.01 itself gives fair warning of special pleading requirements. Moreover, dismissal of a plaintiff's complaint followed by an appeal may only increase the duration and expense of litigation, and thereby frustrate the purpose of the rules, if plaintiff is permitted to amend after affirmance of the dismissal on appeal. On the other hand, if plaintiff is not permitted to

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258. 5 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1216, at 120-23 (1969) (footnotes omitted).

259. 556 S.W.2d at 84.

260. Donaldson v. Donaldson, 557 S.W.2d 60 (Tenn. 1977), which has already been discussed in another context and which at base involved a dispute over support, see text accompanying notes 63-79 *supra*, also admits of an explanation similar to that given for *Swallows*; that is, the court may have thought it desirable at least in the context presented to discourage claims for "abuse of court process." 557 S.W.2d at 64.

amend after appeal, in short, if granting a rule 12.02(6) motion to dismiss in effect means plaintiff has no claim as opposed to meaning simply that the claim has not been adequately stated in the complaint, then at least in some circumstances "there is the possibility that plaintiff may not realize that more than his formal statement of the claim is being contested on a given Rule [12.02(6)] motion [to dismiss] and may not prepare . . . to defend the substantive merits of his claim."[261] If it is desirable to test the merits of plaintiff's claim in a preliminary motion, the proper procedural device is a motion under rule 56 for summary judgment. And if it is also desirable in a particular case to secure immediate appellate review of the trial court's ruling on the summary judgment motion, an appeal not otherwise available should be sought under the interlocutory appeals statute.[262]

In any event, the approach of the court to the pleading question in *Swallows* and *Jose* contrasts markedly with the approach of the court to the same basic question in *Ladd v. Roane Hosiery, Inc.*[263] and *Adams v. Carter County Memorial Hospital.*[264] In *Ladd* plaintiff brought an action against her employer and one of her supervisors, contending that the latter induced her employer to breach or to terminate her employment contract. On appeal plaintiff effectively abandoned her claims against her employer. With regard to plaintiff's claim against her supervisor, the state supreme court held that the trial court improperly granted defendant's motion for judgment on the pleadings.

When passing upon a motion predicated on the ground that the plaintiff had failed to state a claim upon which relief could have been granted, the court stated, "the facts pleaded and the allegations made must be viewed in the light most favorable to the plaintiff, with every doubt resolved in his behalf."[265] Quoting from the classic United States Supreme Court case of *Conley v. Gibson*,[266] the Tennessee Supreme Court also stated that a "complaint should be dismissed only if it 'appears beyond doubt that the plaintiff can prove no set of facts in support of his claim

261. 5 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1357, at 615 (1969).

262. TENN. CODE ANN. § 27-305 (Cum. Supp. 1978).

263. 556 S.W.2d 758 (Tenn. 1977).

264. 548 S.W.2d 307 (Tenn. 1977).

265. 556 S.W.2d at 759.

266. 355 U.S. 41 (1957).

which would entitle him to relief.' "[267] In *Ladd* plaintiff alleged that her supervisor " 'induced the corporation to terminate or breach the contract of employment between [her] and the corporation;' "[268] and that her supervisor " 'had neither reason, nor excuse [for doing so], and was actuated only through a spirit of vindictiveness and malice . . . .' "[269] These allegations, the court held, "are sufficient to set forth [an actionable] claim that [her supervisor] unlawfully and without justification procured the discharge of the plaintiff by [her employer]."[270] Furthermore, it was irrelevant that this theory may not have been the precise theory plaintiff intended to set forth in her complaint.

> [W]here, as here, the facts are sufficient to set forth a valid claim for relief under some theory of recovery, it is immaterial that this theory is not the one originally envisaged by the plaintiff. The complaint is still sufficient to withstand a motion to dismiss for failure to state a claim upon which relief can be granted.[271]

Finally, the court rejected defendant's arguments that plaintiff was not entitled to recover because her employment was terminable at will and because defendant was her supervisor. "While her employment . . . may have been terminable at the will of [her employer] this does not absolve defendant . . . from liability if he wrongfully induced that termination."[272] While defendant may not be liable if he acted within the scope of his employment,

> at no point in her pleadings does the plaintiff admit that [her supervisor's] acts were within the scope of his duties, and the mere possibility that such a defense may be established at some point does not justify the dismissal of the plaintiff's claim at this stage of the proceedings.[273]

Thus, "in light of the liberal construction that must be given a complaint tested by a motion for judgment on the pleadings under [Tennessee Rule of Civil Procedure] 12.03,"[274] the su-

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267. 556 S.W.2d at 760 (quoting Conley v. Gibson, 355 U.S. 41, 45-46 (1957) (footnote omitted)).

268. *Id.* (quoting complaint).

269. *Id.* (quoting complaint).

270. *Id.*

271. *Id.*

272. *Id.*

273. *Id.*

274. *Id.*

preme court reversed the trial court's dismissal of plaintiff's action against her supervisor.

In *Adams v. Carter County Memorial Hospital*[275] a widow brought a damage action for the wrongful death of her husband, who committed suicide while a patient at defendant hospital and while under the care and supervision of defendant physician. The fatal injuries were sustained when plaintiff's husband plunged down a staircase at the hospital. The trial court's dismissal of plaintiff's complaint for failure to state a claim upon which relief can be granted was summarily reversed by the supreme court. Rule 8 of the Tennessee Rules requires only a short and plain statement of the claim showing the pleader is entitled to relief along with a demand for relief. "The complaint," the court observed, "contained detailed averments of malpractice against each defendant and alleged that these breaches of duty proximately caused the death of their patient, the plaintiff's husband. It thus stated a cause of action under well settled rules of liability in such cases."[276] It was not necessary for plaintiff to refer expressly to the wrongful death statute because "[p]laintiff does not rely upon the violation of any statute as the basis of her cause of action; hence, Rule 8.05(1) . . . does not apply."[277] Noting that "neither the order of dismissal nor the motions to dismiss point out any alleged particular deficiency of the complaint,"[278] the court reiterated its conclusion that the allegations were sufficient.

Whatever the reason, the court seems to have been far more willing to construe the complaint in plaintiff's favor in *Ladd* and *Adams* than it was in *Swallows* and *Jose*. It would not have been difficult, for example, to label as mere "conclusions" plaintiff's assertions in *Ladd* that her supervisor " 'induced the corporation to terminate or breach the contract of employment between [her] and the corporation,' "[279] and that her supervisor " 'had neither reason, nor excuse [for doing so], and was actuated only

275. 548 S.W.2d 307 (Tenn. 1977).

276. *Id.* at 308.

277. *Id.* at 309. TENN. R. CIV. P. 8.05(1) provides: "The substance of any ordinance or regulation relied upon for claim or defense shall be stated in a separate count or paragraph and the ordinance or regulation shall be clearly identified." The rule also requires "[t]he manner in which violation of any statute, ordinance or regulation is claimed" to be set forth. *Id.*

278. 548 S.W.2d at 309.

279. 556 S.W.2d at 760 (quoting Ladd's complaint).

through a spirit of vindictiveness and malice . . . .' "[280] The point being made here is not that the court should engage in the fruitless enterprise of attempting to distinguish between "facts" and "conclusions," but that in truth the detail required in the plaintiff's complaint does appear to vary from case to case.

b. Timeliness

Adams v. Carter County Memorial Hospital[281] also involved a question concerning the timeliness of plaintiff's action. The injuries from which plaintiff's husband died occurred on February 11, 1973, and plaintiff's complaint was filed on February 8, 1974. Process was served on defendant hospital the same day the action was commenced, but defendant physician was not served until August 14, 1974. He moved to quash and dismiss the action against him, arguing the action was not properly commenced because plaintiff did not "prosecute and continue the action"[282] as required by law; that, as a result, service was wholly ineffective; and that in the meantime the one-year statute of limitation[283] had run. The trial court granted the physician's motion, and the supreme court affirmed except with regard to the trial court's ruling that the action was barred by the statute of limitation.

Under rule 4.03 of the Tennessee Rules, the court noted, "the efficacy of this summons terminated upon the expiration of thirty days next following its issuance . . . ."[284] Though the Tennessee Rules contain no express provision dealing with the situation presented in which process is neither served nor returned within the thirty-day period,

> plaintiff cannot sit idly by when confronted with such a situation. We hold that when the summons is not returned at the end of thirty days following its issuance, the plaintiff must apply for and obtain issuance of new process within six months, or recommence the action within one year, of the end of said thirty days period in order to preserve the original commencement of the action as a bar to the running of a statute of limitations.[285]

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280. *Id.* (quoting Ladd's complaint).

281. 548 S.W.2d 307 (Tenn. 1977).

282. *Id.* at 308 (quoting a defendant's motion to quash the summons and to dismiss the action).

283. *See* TENN. CODE ANN. § 28-304 (Cum. Supp. 1978).

284. 548 S.W.2d at 309 (citing TENN. R. CIV. P. 4.03).

285. *Id.* (footnote omitted).

It followed that plaintiff could have applied for and obtained issuance of a new summons until September 10, 1974; but, since this was not done, the action was properly dismissed by the trial court.[286] However, it was error for the trial court to hold plaintiff's action barred by the one-year statute of limitation because, under the saving statute,[287] "[p]laintiff may timely recommence the action against defendant [physician] by filing a new complaint any time within one year of the entry of judgment of this Court affirming the order of dismissal of the trial court."[288]

The court's resolution in *Adams* of the problem of unserved and unreturned process is substantially in accord with the ill-fated 1975 proposed amendments to the Tennessee Rules of Civil Procedure.[289] The proposed amendment to rule 3 provides:

> [I]f the process is not served or not returned within 30 days from issuance, regardless of the reason, plaintiff, if he wishes to rely upon the original commencement as a bar to the running of a statute of limitations, must either prosecute and continue the action by applying for and obtaining issuance of new process from time to time, each new process to be obtained within six months from issuance of the previous one, or plaintiff must recommence the action within one year from issuance of the initial process not served or not returned within 30 days from issuance.

Similarly, rule 4.03 as amended would permit plaintiff to obtain a new summons not only, as provided by current rule 4.03, when any prior summons has been returned unserved but also "in the event that such prior summons has not been returned within 30 days after its issuance."[290] Presumably the holding in *Adams* effectively authorizes plaintiff to obtain a new summons as contemplated by the proposed amendment to rule 4.03. However, *Adams* differs from the proposed amendments to the Tennessee Rules in that the time for recommencing the action or obtaining new process is measured not, as under the proposed rule, from issuance of the original process, but thirty days following its issuance.[291] In addition, *Adams* goes beyond the proposed amend-

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286. *Id.* at 309-10.
287. TENN. CODE ANN. § 28-106 (1955); *see* note 144 *supra.*
288. 548 S.W.2d at 310.
289. *See* text accompanying note 456 *infra.*
290. PROPOSED TENN. R. CIV. P. 4.03.
291. *See* text accompanying note 285 *supra.*

ments insofar as the court indicated that plaintiff there could recommence her action by filing a new complaint "any time within one year of the entry of judgment of *this Court* affirming the order of dismissal of the trial court."[292]

The court's tidying-up of this area of procedural law is welcomed, although it would seem even more convenient to permit plaintiff to obtain issuance of new process any time within one year from issuance of the initial process (or within one year following thirty days after issuance of initial process), thereby eliminating any need to recommence the action.[293] Moreover, if actual notice is not a precondition to rendition of a valid judgment,[294] then there would be no constitutional impediment to eliminating the current requirement of repetitious attempts to serve defendant as long as there were satisfactory evidence that there had been compliance with a procedure that is itself reasonably designed to afford notice. The requirements of *Adams* and the proposed amendments to the rules, therefore, may exceed the requirements of due process.

Finally, at least passing attention should be given to the question whether plaintiff in *Adams* would have been permitted to recommence her action against defendant physician if she had not appealed and if the only basis of dismissal involved the propriety and timeliness of the chosen method of initiating the action. Traditionally a judgment for the defendant bars another action only if judgment is rendered "on the merits."[295] In the hypothetical situation the trial court would not have passed on the substantive sufficiency of plaintiff's claim, but only upon the propriety and timeliness of the chosen method of initiating the action. Therefore, under traditional notions of res judicata, plaintiff would be free to recommence her action, at least in a jurisdiction with a limitation period that had not expired. However, the current version of the proposed Restatement (Second) of Judgments eliminates any requirement that a judgment in favor of the defendant be on the merits.[296] Subject to certain exceptions not

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292. 548 S.W.2d at 310 (emphasis added).

293. Apparently, however, some members of the bench and bar consider the current six-month provision of rule 3 as being too long a period for obtaining issuance of new process. *See* TENN. R. CIV. P. 3, Committee comment.

294. *See* text accompanying note 134 *supra*.

295. *See* RESTATEMENT OF JUDGMENTS §§ 45(b), 48 (1942).

296. RESTATEMENT (SECOND) OF JUDGMENTS §§ 45(b), 48 (Tent. Draft No. 1, 1973).

here relevant,[297] any "valid and final personal judgment rendered in favor of the defendant bars another action by the plaintiff on the same claim."[298] Rule 41.02(3) of the Tennessee Rules is substantially similar. It provides that, "[u]nless the court in its order for dismissal otherwise specifies," an involuntary dismissal "and any dismissal not provided for in this Rule 41, other than a dismissal for lack of jurisdiction or for improper venue or for lack of an indispensable party, operates as an adjudication upon the merits."[299] Unless the state supreme court is willing to construe the language of rule 41.02(3) concerning dismissals for lack of jurisdiction expansively or is willing to hold the rule is subservient to the saving statute (a holding that would be difficult to square with the statute under which the Tennessee Rules were drawn),[300] it would seem to follow that rule 41.02(3), literally applied, would bar plaintiff from recommencing her action. The desirability of such a result is certainly debatable, but until rule 41.02(3) is authoritatively construed to mean otherwise, an appeal in cases like that hypothesized seeking entry of a judgment without prejudice seems the only prudent path to follow.

A novel question concerning the Tennessee saving statute was resolved by the Court of Appeals for the Sixth Circuit in *Lee v. Crenshaw*.[301] Plaintiff originally filed a complaint on January 31, 1975, alleging medical malpractice on February 1, 1974, by a physician, a clinic, and a hospital. The action was commenced in state circuit court, and on the day the complaint was filed plaintiff's attorney informed personnel in the clerk's office that a voluntary dismissal[302] would be taken immediately. An affidavit submitted by a deputy clerk indicated that plaintiff's attorney also gave instructions not to issue a summons because of plaintiff's intent to take an immediate nonsuit. An affidavit submitted by plaintiff's attorney denied the giving of any such instructions. No summons was ever issued by the clerk, and plaintiff's attorney, who obtained an order of nonsuit without prejudice from a judge of the circuit court the same day the complaint was filed, was well aware that no summons had issued. When plaintiff recommenced

297. *Id.* § 48.1.
298. *Id.* § 48.
299. TENN. R. CIV. P. 41.02(3).
300. *See* TENN. CODE ANN. § 16-116 (Cum. Supp. 1978).
301. 562 F.2d 380 (6th Cir. 1977).
302. *See* TENN. R. CIV. P. 41.01.

his action in federal district court on January 28, 1976, defendants moved for summary judgment, arguing that the one-year statute of limitation governing personal injury actions[303] had run. The district court rejected plaintiff's contention that the action was still alive by virtue of the saving statute[304] and granted summary judgment in defendants' favor. The Sixth Circuit reversed.

The federal court of appeals reasoned that rule 3 of the Tennessee Rules clearly provides that an action is commenced for purposes of the statute of limitation when the complaint is filed[305] and does not require as a necessary component of commencement of the action that process be issued.[306] Accordingly, the court concluded that "failure to issue process [does] not by itself preclude the commencement of [plaintiff's] cause of action under Rule 3 of the Tennessee Rules of Civil Procedure."[307] However, that conclusion did not dispose of the matter because plaintiff did not rely on rule 3, but rather on the saving statute, which "predates Rule 3 and . . . was not repealed or modified by the promulgation of the Tennessee Rules of Civil Procedure."[308] Turning to cases decided under the saving statute,[309] the court concluded that "notice to the defendant and diligence by plaintiff's counsel are pertinent to the applicability of the saving statute."[310] The reason justifying the statute " 'is that the bringing of a suit, whether prosecuted to final judgment or not, gives the defendant notice that the plaintiff has a demand which he proposes to assert.' "[311] If the failure to issue process stemmed from no fault or lack of diligence by plaintiff's counsel, then the saving statute would apply.[312] But if plaintiff's counsel instructed that process

303. TENN. CODE ANN. § 28-304 (Cum. Supp. 1978).

304. *Id.* § 28-106 (1955); *see* note 144 *supra*.

305. TENN. R. CIV. P. 3 provides in part: "An action is commenced within the meaning of any statute of limitations upon . . . filing of a complaint, whether process be returned served or unserved . . . ."

306. *Id.* R. 4.01 provides in part: "Upon the filing of the complaint the clerk of the court wherein the complaint is filed shall forthwith issue the required summons and cause it, with necessary copies of the complaint and summons, to be delivered for service to any person authorized to serve process."

307. 562 F.2d at 382.

308. *Id.*

309. The Sixth Circuit relied principally upon Burns v. Peoples Tel. & Tel. Co., 161 Tenn. 382, 33 S.W.2d 76 (1930).

310. 562 F.2d at 382.

311. *Id.* (quoting Burns v. Peoples Tel. & Tel. Co., 161 Tenn. 382, 387, 33 S.W.2d 76, 78 (1930)).

312. 562 F.2d at 383.

not issue "in order to avoid giving notice to defendants of the cause of action, there would be no justification for invoking the saving statute."[313] Since there was a factual dispute regarding why the summons did not issue when plaintiff's complaint was originally filed, it followed that summary judgment was improperly granted and the case should be remanded for resolution of the factual dispute.

The court in *Lee* did not consider whether the tolling provision of rule 3 would have dictated the same result, since plaintiff did not raise the issue in the district court.[314] The saving statute differs from rule 3 in that the statute simply provides that if an action is timely "commenced" a plaintiff may recommence his action if the judgment is rendered on "any ground not concluding his right of action . . . ."[315] The tolling provision of rule 3, on the other hand, assumes that process will issue and service will be attempted as provided in rule 4.01.[316] This distinction seems more apparent than real, however, since the saving statute uses the word "commenced" as it was defined under prior statutory law. Under that law, "the suing out of a summons is the commencement of an action . . . ."[317] Thus, it would appear both the saving statute and the rule require that process be issued, although there is eminent good sense in the holding of *Lee* that the parties should not be penalized because of the inadvertent actions of the clerk of the trial court over whom the parties have no control.[318]

Moreover, it would be quite sensible to view the saving statute, as the Sixth Circuit apparently did in *Lee*, not as a tolling provision but as a statute of limitation designed to require prompt reassertion of claims by a plaintiff who, as contemplated by rule 41.02(1), diligently prosecuted his initial action but had judgment entered against him after expiration of the limitation period "upon any ground not concluding his right of action"[319]—language that can be construed as incorporating by

313. *Id.*

314. *Id.* at 382 n.2.

315. TENN. CODE ANN. § 28-106 (1955); *see* note 144 *supra.*

316. *See* notes 305-06 *supra.*

317. Code of 1858, § 2754 (repealed by 1972 Tenn. Pub. Acts ch. 565, § 1).

318. *See* General Elec. Supply Co. v. Arlen Realty & Dev. Corp., 546 S.W.2d 210, 214 (Tenn. 1977).

319. TENN. CODE ANN. § 28-106 (1955); *see* note 144 *supra.*

reference the provisions of the Tennessee Rules.[320] So viewed, the saving statute would not be available in cases like *Lee* or in any other instance in which the plaintiff did not diligently prosecute his initial action but utilized the saving statute as a tolling provision to extend the time otherwise available under the applicable statute of limitation for commencing his action.

Because the Sixth Circuit decided *Lee* under the saving statute and not under rule 3, the opinion does not discuss the significance of the trial court's dismissal of plaintiff's action without prejudice. Since rule 41.01 provides that voluntary nonsuits are generally without prejudice,[321] the trial court's dismissal was consistent with the rule. However, it is at least arguable that unless an action is properly commenced the provisions of rule 41.01 are inapplicable. If so, the outcome of cases like *Lee* would be wholly unaffected by the trial court's dismissal without prejudice. In any event, *Lee* makes clear that an attorney who directs the clerk not to issue process does so at his peril.

c. Verification

The more limited purpose served by the pleadings under the Tennessee Rules—a matter touched upon previously[322]—is reflected in rule 11, which eliminates the former equity requirement that the pleadings be verified.[323] The pleadings must still be verified, however, "when otherwise specifically provided by rule or statute."[324] In *Blair v. Watts*[325] defendants contended that plaintiff's action was fatally defective because the complaint was not supported by affidavit as required by statute.[326] The state supreme court noted that the term "affidavit" at the time the Code

320. *See* TENN R. CIV. P. 41.

321. Tennessee rule 41.01 carves out exceptions for class actions and actions wherein a receiver has been appointed. *See id.* R. 23.05, 66. Rule 41.01(2) also provides that "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 including the same claim."

322. *See* text accompanying notes 217-20 *supra*.

323. Under TENN. R. CIV. P. 11 pleadings are signed by an attorney of record or, if a party is not represented by an attorney, by the party.

324. *Id.*

325. 555 S.W.2d 709 (Tenn. 1977).

326. The statutory provision involved was TENN. CODE ANN. § 23-2001 (1955), which provides that mandamus may issue upon a petition or bill "supported by affidavit."

section was enacted was synonymous with "sworn petition."[327] The intent of the provision "is simply that the facts alleged . . . be supported by oath or affidavit."[328] Since both the original and amended complaint were sworn to by plaintiff, the court quite properly overruled defendants' assignment of error.

2. Responsive Pleading

The defendant's correct procedural response for raising a res judicata defense to the complaint was discussed in *Usrey v. Lewis*.[329] Defendants raised their res judicata objection in *Usrey* by way of a motion to dismiss, and plaintiffs responded with a motion to " 'strike, quash and dismiss' "[330] defendants' motion. The Tennessee Court of Appeals held:

> [R]es judicata in an *affirmative defense* which must be *plead* specially . . . . [T]he proper method to present the defense of res judicata is by a *pleading* (answer), and not by a motion. If, from affidavits or other evidence, the facts supporting the defense are made to appear uncontroverted, then a motion for summary judgment would be in order.[331]

The court then treated defendants' motion as an answer presenting the defense of res judicata and as a motion for summary judgment.[332] The court also stated that plaintiffs' motion to strike was an appropriate method under rule 12.06 to raise a question concerning the legal sufficiency of defendants' defense.[333]

The opinion in *Usrey* reflects a commendable willingness to consider the substance of defendants' res judicata defense despite noncompliance with what the court perceived to be the appropriate method for raising that defense. Moreover, the court's construction of the rules as requiring that a res judicata defense be pleaded in defendant's answer is certainly credible and parallels that given to Federal Rule of Civil Procedure 8(c) by several federal courts.[334] However, a number of other federal courts per-

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327. 555 S.W.2d at 711.
328. *Id.*
329. 553 S.W.2d 612 (Tenn. Ct. App.), *cert. denied, id.* (Tenn. 1977).
330. *Id.* at 613.
331. *Id.* at 614.
332. *Id.*
333. *Id.*
334. *See* 5 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1277 (1969).

mit all affirmative defenses to be raised by motion, often by converting a motion to dismiss or for judgment on the pleadings into a motion for summary judgment.[335] The results reached in these federal cases seem sound since they avoid the wastefulness inherent in requiring defendant to prepare an answer to a case that admits of a summary disposition.[336] It would, therefore, seem best not to construe *Usrey* as an impediment to a similar development in the Tennessee case law.

Also, the court in *Usrey* was quite correct in stating that a motion to strike is an appropriate mechanism to dispose of an insufficient defense.[337] Only rarely, however, will a defense be so obviously without merit as to permit the court to grant the motion without consideration of matters outside the pleadings. Typically, therefore, the appropriate mechanism to test the sufficiency of a defense is by way of a motion for partial summary adjudication, which can be granted only if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.[338] "However," Professors Wright and Miller contend, "it is questionable whether this procedure will be worth the effort in many cases. As one [federal] court noted, the partial summary judgment will narrow, but not terminate the controversy between the parties, and thus smacks of 'polishing' the pleadings."[339]

3. Amendments

A peculiarly informative indication of the significance a given procedural system attaches to the pleadings is reflected in its attitude toward amendments. "At common law a litigant had very little freedom to amend his written pleadings other than to correct formal defects and remedy errors of oversight."[340] *Adams v. Carter County Memorial Hospital*[341] and, more graphically,

335. *Id.*

336. *Id.* § 1277, at 337.

337. TENN. R. CIV. P. 12.06 permits the trial court to "order stricken from any pleading any insufficient defense . . . ."

338. *See* TENN. R. CIV. P. 56.

339. 5 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1381, at 804 (1969).

340. 6 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1471, at 355 (1971).

341. 548 S.W.2d 307 (Tenn. 1977).

Farrar v. Farrar,[342] on the other hand, are illustrations of the increased freedom to amend sanctioned by the Tennessee Rules.

In *Adams* the state supreme court construed Tennessee rule 15.01 to mean exactly what it says: "[A] party may amend his pleadings once as a matter of course at any time before a responsive pleading is served." Accordingly, the court found error in the trial court's denial of plaintiff's motion to amend his complaint since defendants had filed and served only motions to dismiss and under the rules "[a] motion is not . . . a responsive pleading."[343]

By contrast, *Farrar v. Farrar*[344] involved the distinguishable problem that arises if there is a variance between the pleadings and the proof. In *Farrar* both plaintiff-husband and defendant-wife sought a divorce, the former an absolute divorce and the latter a divorce from bed and board, on the ground of cruel and inhuman treatment. After repeated motions for a more definite statement,[345] defendant amended her counterclaim three times to set forth the details of an open and continuous relationship between plaintiff and a named woman. The amended pleadings, however, contained no specific charges of adultery. The supreme court's review of the testimony, particularly plaintiff's, convinced it that plaintiff engaged in a "persistent pattern of adulterous conduct."[346] The court then held that "proof of adultery is admissible in a divorce action charging cruel and inhuman treatment and may form the basis for a decree resting upon cruel and inhuman treatment."[347] While adultery was not specifically alleged, the court took note of legislation[348] attempting "to de-scandalize divorce proceedings"[349] and construed defendant's detailed allegations as impliedly charging adultery.[350] "Moreover, this was the major issue tried by the parties. Under these circumstances Rule

342. 553 S.W.2d 741 (Tenn. 1977).

343. 548 S.W.2d at 309; *see* TENN. R. CIV. P. 7.01. It is somewhat anomalous that if defendant chooses to incorporate a rule 12 defense in his answer, he no longer may amend as a matter of course more than 15 days after service of his answer. However, the admonition of rule 15.01 that leave to amend be freely given renders this anomaly without significant practical effect.

344. 553 S.W.2d 741 (Tenn. 1977).

345. *See* TENN. R. CIV. P. 12.05.

346. 553 S.W.2d at 744.

347. *Id.*

348. TENN. CODE ANN. § 36-805 (1977).

349. 553 S.W.2d at 744.

350. *Id.*

15.02 . . . comes into play and we may treat this issue as being 'tried by express or implied consent of the parties . . . as if they [*sic*] had been raised in the pleadings.' "[351] Perhaps it would have been "better practice"[352] for defendant to have moved to amend her counterclaim yet another time, but the court held that "the failure to do so does not preclude this Court from deciding the issues the parties tried in the Court below."[353] Having noted that the parties were "fully apprised in advance of the nature of the proof,"[354] the court concluded its discussion of the pleading issue by agreeing with the dissenting judge in the court of appeals that "[n]o useful purpose can be served by dismissing this case and requiring the [wife] to institute a new suit, alleging adultery and desertion and relitigating the issues anew."[355]

At first blush it is somewhat startling that the court of appeals reversed the trial court's award of a divorce to the wife, but "[u]nlike most legal contests a suit for divorce is not regarded as wholly in the hands of the two parties. The parties cannot consent to a divorce. It is not surprising then that [a] court examines with great care the process of proof."[356] This consideration, however, was not deemed to be significant by the supreme court because it could not find "the slightest suggestion"[357] that the evidence of adultery was the result of collusion or coercion. Moreover, the recent addition of irreconcilable differences as a ground for divorce in Tennessee[358] is reflective of changing societal attitudes concerning the circumstances in which divorce should be permitted and adds further support to the court's decision in *Farrar*.

B. Joinder of Claims and Parties

"In its simplest form, the paradigm of a lawsuit has a single plaintiff asserting a single cause of action against a single defen-

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351. *Id.* (quoting TENN. R. CIV. P. 15.02).

352. *Id.*

353. *Id.*

354. *Id.*

355. *Id.* (quoting Drowota, J., dissenting in the court of appeals in an unreported opinion).

356. J. COUND, J. FRIEDENTHAL & A. MILLER, TEACHERS MANUAL FOR CIVIL PROCEDURE: CASES AND MATERIALS 92 (1970).

357. 553 S.W.2d at 744.

358. TENN. CODE ANN. § 36-801 (Cum. Supp. 1978).

dant."[359] As the complexity of society has increased and as more intricate disputes have been generated, however, procedural devices have emerged by which the scope of civil litigation has expanded by permitting the joinder of claims and parties.[360] This expansion in turn has given rise to novel procedural issues, one of which involves the question whether a plaintiff, by instituting his action, thereby waives a statute of limitation defense to a counterclaim asserted by a defendant after the limitation period on the counterclaim has run.

1. Counterclaims—Timeliness

In *Brown v. Hipshire*[361] plaintiffs commenced an action on July 28, 1976, for an alleged tort that occurred on August 27, 1975. Defendant was served with process on August 3, 1976, and answered, denying liability, on September 7, 1976. Thereafter on November 10, 1976, defendant moved to amend in order to assert an omitted counterclaim. This motion was granted, and defendant filed his counterclaim on December 10, 1976, alleging assault and battery. Plaintiffs asserted that the applicable one-year statute of limitation[362] barred defendant's counterclaim and the trial court sustained plaintiffs' plea. On an interlocutory appeal the state supreme court affirmed.

In its 1969 decision in *Lovejoy v. Ahearn*,[363] the Tennessee Supreme Court held that counterclaims sounding in tort must be asserted within the applicable limitation period. Defendant in *Brown* conceded that under *Lovejoy* his counterclaim was untimely, but sought to have the court overrule that decision. The court refused to do so, reasoning that "[t]he policy undergirding limitation of actions is legislative policy, not judicial policy."[364] Based upon this reasoning, the court further stated: "[I]t is not the prerogative of the courts to create an exception by grafting upon the statute a waiver or a tolling provision for the benefit of counterclaimants in tort actions."[365] The court recognized that in

359. J. COUND, J. FRIEDENTHAL & A. MILLER, CIVIL PROCEDURE: CASES AND MATERIALS 502 (2d ed. 1974).

360. *E.g.*, TENN. R. CIV. P. 13-14, 18-20, 22-24.

361. 553 S.W.2d 570 (Tenn. 1977).

362. TENN. CODE ANN. § 28-304 (Cum. Supp. 1978).

363. 223 Tenn. 562, 448 S.W.2d 420 (1969).

364. 553 S.W.2d at 571.

365. *Id.* at 572.

another line of cases it has held that the statute of limitation does not bar a defendant's plea of set-off[366] and that,

> while originally a purely defensive plea [set-off] has been expanded, so that, admittedly, there are some cases where a defendant in a contract action asserts as a set-off a claim that could also be the subject of an independent action. But, in our opinion, it does not follow that this occasional similarity between a set-off in a contract action and a counterclaim in a tort action requires tolling of the limitation period for a tort counterclaim that is in no circumstances a defensive plea. The courts, in allowing all defensive pleas available to defendants, are not grafting exceptions upon statutes of limitation governing the commencement of independent actions.[367]

Finally, the court noted that at the time defendant was served with process the limitation period had not run on his counterclaim, and that he did not even seek leave to file his omitted counterclaim until over two months after he answered and without any factual assertion that his failure to include the counterclaim in his answer was the product of oversight, inadvertence or excusable neglect "as required by [Tennessee Rule of Civil Procedure] 13.06."[368] Accordingly, the court thought it doubtful "that any jurisdiction would extend the lifeline to [a defendant], who has so negligently responded to the stimulus of the statute of limitations."[369]

The holding of the earlier case of *Lovejoy v. Ahearn*[370] adhered to in *Brown* has been more extensively criticized in an earlier article.[371] The essential point made there is that none of the purposes served by statutes of limitation are frustrated by permitting adjudication of counterclaims that arise out of the transaction or occurrence sued upon by plaintiff.

> Generally speaking, statutes of limitation seek to provide repose by establishing a specified time beyond which an individual may not be sued for his past misdeeds, and to prevent the assertion of claims which may be stale in terms of availability

366. *Id.*
367. *Id.*
368. *Id.*
369. *Id.* at 573.
370. 223 Tenn. 562, 448 S.W.2d 420 (1969).
371. *See* Sobieski, *Counterclaims and Statutes of Limitations: A Critical Commentary on Present Tennessee Law*, 42 TENN. L. REV. 291 (1975).

> of witnesses and other relevant evidence. By bringing his action, however, plaintiff has made it abundantly clear that he does not desire to lay to rest the transaction or occurrence upon which his claim is founded. Adjudication of a claim of defendant based upon the same transaction or occurrence would not entail inquiry into wholly unrelated matters which plaintiff justifiably believed were beyond reawakening. Similarly, if a transaction or occurrence is not so stale in terms of the availability of evidence as to prevent litigation of plaintiff's claim, it would seem to follow that the evidence would be equally available for purposes of adjudicating defendant's claim arising out of the same transaction or occurrence.[372]

Whether for these reasons or others, the holding in *Lovejoy*, confirmed in *Brown*, was recently set aside by legislation.[373]

Still, it seems appropriate to express some dissatisfaction with the court's approach to the resolution of the question presented in *Brown*. To say, as the court did, that the policy underlying statutes of limitation is legislative and not judicial provides no answer to the question whether a defendant should be permitted to assert a counterclaim after the limitation period has expired. That question can be answered only by considering the policies that statutes of limitation seek to further. Until that is done it is hardly convincing to contend, as the *Brown* court did, that "it is not the prerogative of the courts to create an exception . . . [to] the statute"[374] or that "it is doubtful that any jurisdiction would extend the lifeline to [a defendant], who has so negligently responded to the stimulus of the statute of limitations."[375] Similarly, the court's reference to Tennessee rule 13.06 is somewhat mystifying since that provision is not designed to breathe new life into a time-barred claim, but instead to provide an escape route from the barring effect of the failure to assert a compulsory counterclaim.[376] Moreover, tort claims are expressly exempted from the compulsory counterclaim rule,[377] thus rendering

372. *Id.* at 293-94.

373. 1978 Tenn. Pub. Acts ch. 758, §§ 1-2.

374. 553 S.W.2d at 572.

375. *Id.* at 573.

376. TENN. R. CIV. P. 13.06 provides: "When a pleader fails to set up a counterclaim through oversight, inadvertence or excusable neglect, or when justice requires, he may by leave of court set up the counterclaim by amendment."

377. TENN. R. CIV. P. 13.01.

rule 13.06 largely irrelevant. All of which simply says that the fundamental weakness of *Brown* was its failure to ask why.

2. Impleader

Another procedural mechanism, besides counterclaims, with which a defending party can expand the scope of civil litigation is impleader, which permits a defending party, as a third-party plaintiff, to "cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to him for all or a part of the plaintiff's claim against him."[378] In *Velsicol Chemical Corp. v. Rowe*[379] the Tennessee Supreme Court considered the availability of rule 14 on impleader in a nuisance action seeking damages. The original plaintiffs in *Velsicol*, residents and homeowners in the Alton Park area of Chattanooga, brought their damage action against Velsicol Chemical Corporation, alleging that Velsicol's chemical manufacturing plant in Alton Park emitted pollutants that contaminated the air and water, and constituted both a nuisance and a trespass by depositing identifiable pollutants on plaintiffs' properties. Plaintiffs also alleged Velsicol acted in intentional disregard of the law and previously-issued injunctions, entitling plaintiffs to punitive damages. Velsicol answered, denying liability, and filed third-party complaints against five additional defendants, contending that each of these defendants operated plants in Alton Park that emitted pollutants, thus rendering them liable for "whatever amount of recovery is made by said plaintiffs."[380] The trial court granted the third-party defendants' motions to dismiss on the ground that the third-party complaint failed to state a claim for relief since the original defendant and third-party defendants were not joint tortfeasors, and thus the original defendant was not entitled either to contribution or indemnity. On an appeal from the order of dismissal, the state supreme court reversed.

Most of the opinion of the court is devoted to the substantive question whether Velsicol was entitled to either indemnity or contribution.[381] In language reminiscent of *Swallows* and *Jose*[382] the court concluded that "the third-party plaintiff has not alleged

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378. *Id.* R. 14.01.
379. 543 S.W.2d 337 (Tenn. 1976).
380. *Id.* at 338.
381. *Id.* at 338-43.
382. *See* text accompanying notes 221-51 *supra*.

facts sufficient to give rise to a possible right of indemnity against the third-party defendants."[383] Contribution, however, was another matter. After an extensive discussion of the law of Tennessee and elsewhere, the court held that parties can be jointly and severally liable "when an indivisible injury has been caused by the concurrent, but independent, wrongful acts or omissions of two or more wrongdoers, whether the case be one of negligence or nuisance."[384] This rule is subject to the statutory exception that "one who intentionally causes or contributes to an injury has no right of contribution."[385]

Having settled upon the governing substantive law, the procedural issues involved in *Velsicol* presented little difficulty. Rule 14, the court stated, authorizes "a third-party complaint based upon a claim of one tortfeasor for indemnity or contribution from other alleged 'joint tortfeasors.' "[386] Moreover, the "may be liable" language of rule 14[387] means that the "allegations of the third-party complaint need not show that recovery is a certainty; the complaint should be allowed to stand if, under some reasonable construction of the facts which might be advanced at trial, recovery would be possible."[388] Nor was the third-party complaint premature. As noted by Professor Moore, whom the court quoted approvingly:[389]

> The fact that contribution may not actually be obtained until the original defendant has been cast in judgment and has paid does not prevent impleader; the impleader judgment may be so fashioned as to protect the rights of the other tort-feasors, so that defendant's judgment over against them may not be enforced until the defendant has paid plaintiff's judgment or more than his proportionate share, whichever the law may require.[390]

Accordingly, the supreme court reversed the trial court's judgment dismissing the third-party action and remanded for further proceedings.

The opinion in *Velsicol* does not expressly indicate whether

383. 543 S.W.2d at 339.
384. *Id.* at 343.
385. *Id.* at 343 n.4; *see* TENN. CODE ANN. § 23-3102(c) (Cum. Supp. 1978).
386. 543 S.W.2d at 338.
387. *See* text accompanying note 378 *supra*.
388. 543 S.W.2d at 343.
389. *Id.* at 343-44.
390. 3 MOORE'S FEDERAL PRACTICE ¶ 14.11, at 322-23 (2d ed. 1974).

intent within the meaning of the contribution statute is synonymous with the intent required to support an award of punitive damages. Nor is the opinion entirely clear as to whether damages are to be apportioned pro rata as provided by statute[391] or according to the extent to which each defendant caused the harm for which plaintiffs seek compensation.[392] For present purposes, however, it is sufficient to note that the impleader issue involved in *Velsicol* probably would be unaffected, regardless of how these matters are resolved, since, at the time the third-party complaint is filed, recovery is reasonably possible.[393]

3. Need to Make the Attorney General a Party

Generally speaking, the joinder of parties is permissive, not mandatory.[394] *Paty v. McDaniel*,[395] however, is a reminder of the attorney general's right to be heard in certain types of litigation. *Paty*, which ultimately reached the United States Supreme Court,[396] involved the question of whether the Tennessee constitutional provision rendering ministers of the gospel and priests of all denominations ineligible for a seat in the General Assembly[397] violates the Federal Constitution. A candidate for the 1977 constitutional convention brought an action to have a Baptist minister declared ineligible to run for and serve as a delegate to the constitutional convention, the qualifications to serve as a delegate to the constitutional convention being the same as those for membership in the House of Representatives.[398] In his answer, defendant alleged that the Tennessee constitutional prohibition on his service as a delegate violated the United State Constitution. Under the Tennessee Code, the attorney general in a declaratory judgment action is entitled to be served and to be heard if a

391. *See* TENN. CODE ANN. §§ 23-3102(b), -3103 (Cum. Supp. 1978).

392. At one point in its opinion the court refers to Landers v. East Texas Salt Water Disposal Co., 151 Tex. 251, 248 S.W.2d 731 (1952), which, the court stated, permits a defendant to "reduce his liability by showing the amount of damage caused by his acts only, or the amount that was caused by other defendants." 543 S.W.2d at 342. Later, the supreme court stated that it "adopt[s] the rule of *Landers*." *Id.* at 343.

393. *See* text accompanying note 388 *supra*.

394. *See, e.g.*, TENN. R. CIV. P. 20. *But see id.* R. 19.

395. 547 S.W.2d 897 (Tenn. 1977).

396. McDaniel v. Paty, 435 U.S. 618 (1978).

397. TENN. CONST. art. 9, § 1.

398. 1976 Tenn. Pub. Acts ch. 848, § 4.

statute, ordinance, or franchise of statewide effect is alleged to be unconstitutional[399] as defendant alleged in *Paty*. A similar but even more expansive provision is contained in the Tennessee Rules of Civil Procedure.[400] Accordingly, on the first appeal to the state supreme court, the case was remanded to the trial court to permit the attorney general to be made a party.

C. *Disposition Without a Full Trial*

Lawsuits are often disposed of without a full trial. The essential purpose of a trial is to present evidence on contested issues of fact. Issues of law, on the other hand, can be resolved without a trial; all that is needed is a means of bringing the legal contentions to the court's attention. One such mechanism is a motion for summary judgment, which may be granted, in the language of Tennessee rule 56.03, only if "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law."

The availability of summary judgment in medical malpractice actions was the central focus of the state supreme court's attention in *Bowman v. Henard*.[401] In response to plaintiff's allegations of professional negligence in the death of her husband, defendants moved for summary judgment. Their motions were supported by their own affidavits as well as the affidavits of other practitioners of medicine and surgery and other radiologists. All of the affidavits asserted essentially that defendants acted in conformity with the standard of care required by law. Plaintiff responded with an affidavit of one of her attorneys who stated that based on his experience "a case of negligence can be made out . . . [and that] based upon the facts . . . a jury will likely conclude the defendants were guilty of negligence."[402] The trial court granted defendants' motions for summary judgment; the court of appeals affirmed, and on certiorari the supreme court also affirmed.

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399. TENN. CODE ANN. § 23-1107 (1955).

400. TENN. R. CIV. P. 24.04 provides:

When the validity of a statute of this state or an administrative rule or regulation of this state is drawn in question in any action to which the state or an officer or agency is not a party, the court shall require that notice be given the attorney general, specifying the pertinent statute, rule or regulation.

401. 547 S.W.2d 527 (Tenn. 1977).

402. *Id.* at 529.

The purpose of summary judgment, the court reasoned, is " 'to provide a quick, inexpensive means of concluding cases, in whole or in part, upon issues as to which there is no dispute regarding the material facts.' "[403] On the other hand, summary judgment is not designed to resolve disputed questions of fact or "to force a party to try his case on affidavits with no opportunity to cross-examine witnesses."[404] As a general rule, therefore, summary judgment is not appropriate in negligence actions because, as noted by two distinguished commentators cited by the court, "[j]udge and jury each have a specialized function in negligence actions and particular deference has been accorded the jury in this class of cases in light of its supposedly unique competence in applying the reasonable man standard to a given fact situation."[405] Moreover, summary judgment is particularly inappropriate in medical malpractice actions because of "the natural tendency of [defendants' professional] colleagues to be good Samaritans and come to their rescue in a time of distress."[406] In addition, the court conceded that it is also generally true that, " '[b]ecause opinion testimony always is subject to evaluation by the fact finder,' "[407] expert opinion testimony is " 'not an appropriate basis for summary judgment.' "[408]

None of these considerations, however, rendered summary judgment inappropriate in *Bowman*. Unlike most negligence actions, a medical malpractice action requires expert testimony unless the alleged malpractice is within the common knowledge of a layman.[409] Because the deceased died of " 'cardio-renal failure,' following 'an exploratory operation' revealing 'a mass in the pelvis, probably a ruptured Mechel's Diverticulum,' "[410] the court concluded, quite safely it seems, that these are not matters within the common knowledge of laymen but require expert testimony.[411] Accordingly, this case fell within an exception to the

403. *Id.* (quoting Evco Corp. v. Ross, 528 S.W.2d 20, 24-25 (Tenn. 1975)).

404. *Id.* at 530.

405. 10 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2729, at 560 (1973), *cited in* 547 S.W.2d at 530.

406. 547 S.W.2d at 530.

407. *Id.* (quoting 10 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2738, at 690-92 (1973)).

408. *Id.* (quoting 10 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2738, at 690-92 (1973)).

409. *Id.* at 530-31.

410. *Id.* at 531.

411. *Id.*

rule disallowing summary judgment in most negligence actions: " '[I]f the only issue is one of the kind on which expert testimony must be presented, and nothing is presented to challenge the affidavit of the expert, summary judgment may be proper.' "[412] Here, the only affidavit submitted by plaintiff was from one of her attorneys, who simply was not a qualified expert on matters of medical malpractice.[413] Plaintiff, therefore, failed to comply with Tennessee rule 56.05, which provides that

> [w]hen a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.[414]

Based on these considerations, the court held:

> [I]n those malpractice actions wherein expert medical testimony is required to establish negligence and proximate cause, affidavits by medical doctors which clearly and completely refute plaintiff's contention afford a proper basis for dismissal of the action on summary judgment, in the absence of proper responsive proof by affidavit or otherwise. In those cases wherein the acts are [*sic*] complained of are within the ken of the common layman, the affidavit [*sic*] of medical experts may be considered along with all other proof, but are not conclusive.[415]

The scope of the holding in *Bowman* is obviously intended to be quite narrow, and the court's opinion as well as rule 56 itself seem to support the following generalizations. In malpractice actions in which expert testimony is not required, summary judgment is rarely appropriate since usually there will be disputed questions of fact or disputes concerning application of the governing legal standard to a given fact situation. In malpractice actions in which expert testimony is required and expert evidence is presented by the plaintiff in support of his position, summary judgment is appropriate only if the defendant has an ironclad defense.

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412. *Id.* at 530 (quoting 10 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2738, at 692-94 (1973)).

413. *Id.* at 531.

414. TENN. R. CIV. P. 56.05; *see* 547 S.W.2d at 531.

415. 547 S.W.2d at 531.

Even if the plaintiff offers no contrary expert proof, summary judgment may be denied on the ground that the plaintiff should be given additional time to obtain the necessary evidence.[416] Only if the plaintiff offers no expert proof as required and is not deserving of additional time to obtain it, is summary judgment appropriate, at least if the defendant's motion is supported by expert proof of persons not parties to the litigation.

The appealability of a denial of summary judgment was the dispositive issue, or at least the supreme court so held, in *Williamson County Broadcasting Co. v. Williamson County Board of Education*.[417] The underlying dispute involved the applicability of the Tennessee Open-Meeting Act[418] to the Williamson County Board of Education, defendant board and its members asserting that the meetings involved were informal assemblages not covered by the Act. Plaintiffs, insisting that the meetings were covered, moved for summary judgment, supported by depositions. After a hearing on the motion, the chancellor held that there were no genuine issues of material fact but decided the questions of law adversely to plaintiffs. The motion for summary judgment was therefore denied. The chancellor also concluded his findings of fact and conclusions of law with the statement: " 'If plaintiffs elect to *stand upon their motion* for summary judgment, as indicated by plaintiffs' counsel in the course of argument, the complaint in this case will be dismissed at plaintiffs' cost.' "[419] Shortly thereafter defendants moved for summary judgment and plaintiffs moved to amend the findings. The chancellor never expressly acted on defendants' summary judgment motion but, after overruling plaintiffs' motion to amend, entered a decree dismissing the action. The court of appeals considered an ensuing appeal on the merits, but the Tennessee Supreme Court held that the case "is simply not ripe for appellate review."[420]

Had the chancellor sustained defendants' motion for summary judgment, there would have been a final judgment.[421] However, the chancellor only denied plaintiffs' motion for summary

416. *See* TENN. R. CIV. P. 56.06.

417. 549 S.W.2d 371 (Tenn. 1977).

418. TENN. CODE ANN. §§ 8-4401 to 4406 (Cum. Supp. 1978).

419. 549 S.W.2d at 372 (quoting the chancellor's findings of fact and conclusions of law) (emphasis added by the supreme court).

420. *Id.*

421. *Id.*

judgment. "When a plaintiff's motion for summary judgment has been overruled, he has simply lost a preliminary skirmish and must proceed to trial."[422] If the plaintiff " 'stands' on his unsuccessful motion for summary judgment, the proper procedure is for the trial judge to dismiss for want of prosecution."[423] Since appeals generally lie only from final judgments and since overruling a motion for summary judgment is an interlocutory ruling, an appeal as of right did not lie.[424] The supreme court recognized that denial of summary judgment might be appealable by permission under the interlocutory appeals statute,[425] but, on the facts presented, that statute "was neither pursued nor pursuable . . . ."[426] Accordingly, the court reversed and remanded with instructions that the chancellor rule on defendants' summary judgment motion or direct plaintiffs to prosecute their action. The court then concluded its opinion with a perplexing statement:

> In the event, this action is fully and finally terminated on defendants' motion for a summary judgment, the additional record thus made may be certified to the Court of Appeals for such action as it may deem appropriate, and that Court may then forward the record to us for consideration on the merits. If terminated after a trial on the merits the usual procedure on appellate review shall govern.[427]

Nothing in Tennessee rule 56 specifically discusses the power of the trial court to grant summary judgment in favor of the nonmoving party. Federal rule 56 is equally silent:

> A few [federal] courts, expressing a reluctance to enter a judgment in the absence of a motion requesting the court to do so, have refrained from disposing of the original motion in order to allow a cross-motion to be made. However, the weight of authority is that summary judgment may be rendered in favor of the opposing party even though he has made no formal cross-motion under Rule 56.[428]

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422. *Id.*
423. *Id.* at 373.
424. *Id.*
425. TENN. CODE ANN. § 27-305 (Cum. Supp. 1978).
426. 549 S.W.2d at 373.
427. *Id.*
428. 10 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2720, at 467-68 (1973).

Professors Wright and Miller contend:

> The practice of allowing summary judgment to be entered for the nonmoving party in the absence of a formal cross-motion is appropriate. It is in keeping with the objective of Rule 56 to expedite the disposition of cases and, somewhat more remotely, with the mandate of Rule 54(c) requiring the court to grant the relief to which a party is entitled "even if the party has not demanded such relief in his pleadings." Indeed, in 1955 the Advisory Committee proposed an amendment to Rule 56(c), which was not adopted, codifying the power of the court to grant summary judgment without waiting for a cross-motion and some states have provisions to that effect in their summary judgment rules.[429]

If the state supreme court was unwilling to recognize the power of a trial court to enter summary judgment in favor of the nonmoving party—an unwillingness that might be justifiable, at least in some circumstances[430]—it would have been helpful if the court had explained why the trial court's decree dismissing the action was not construed as a grant of defendants' summary judgment motion. Certainly the chancellor's admonition in his findings and conclusions put plaintiffs on notice that judgment would be entered against them unless they demonstrated there were genuine issues of fact and that defendants were not entitled to judgment as a matter of law. Perhaps the key to the decision in *Williamson County* lies in the court's observation, tucked away in its rendition of the facts, that plaintiffs' motion to amend "shows conclusively that there were unresolved and genuine issues of material facts."[431] If so, reversal was appropriate not because the case was unappealable but because the standard for granting summary judgment was not met. Moreover, reversal on the ground that summary judgment is inappropriate avoids the wastefulness that otherwise ensues if the chancellor subsequently, but erroneously, grants defendants' summary judgment motion.

Reference has already been made to the perplexing last paragraph of the court's opinion in which the court stated that if defendants' motion for summary judgment is granted, the additional record may be certified to the court of appeals for whatever

429. *Id.* § 2720, at 470 (footnotes omitted).

430. *Id.* § 2720, at 471.

431. 549 S.W.2d at 372.

action it deems appropriate, "and that Court may then forward the record to us for consideration on the merits. If terminated after a trial on the merits the usual procedure on appellate review shall govern."[432] The paragraph is perplexing because, while the law in other jurisdictions authorizes the highest court to review cases decided or pending in the intermediate appellate court upon certification of that court or on the highest court's own motion,[433] no comparable procedure is expressly authorized in Tennessee. Instead, existing law places the initiative for seeking review by the supreme court in the hands of the parties.[434] To be sure, cases appealed to the wrong appellate court may be transferred to the proper court,[435] but, as the supreme court itself noted in *Bowman v. Henard*,[436] "where a motion for summary judgment is supported by 'evidentiary matters, such as depositions, affidavits, or exhibits,' the appeal is to the Court of Appeals."[437] According to the supreme court's statement of the facts in *Williamson County*, defendants' summary judgment motion was supported by depositions,[438] thus rendering the court of appeals, under the law then in effect, the proper court to which to appeal.[439] Perhaps the supreme court simply wanted to ensure compliance with its disposition of the case and desired to relieve the parties of the burden of preparing further petitions for certiorari and briefs in case of noncompliance on remand. Perhaps it had some other good reason in mind for employing the procedure outlined in its concluding statement, but for now that statement remains somewhat of a mystery.

Only two published opinions of the court of appeals involved summary judgment. One of them, *Small World, Inc. v. Industrial Development Board*,[440] does not meaningfully elaborate upon the procedural law of summary judgment and will not therefore be

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432. *Id.* at 373. *See also* 16 C. WRIGHT, A. MILLER, F. COOPER & E. GRESSMAN, FEDERAL PRACTICE AND PROCEDURE § 3937 (1977).

433. *E.g.*, COLO. APP. R. 50(b); MASS. APP. R. 11(a); N.M. STAT. ANN. § 16-7-14(c) (1953); N.C. R. APP. P. 15.

434. *See* TENN. CODE ANN. §§ 16-452, 27-819 (Cum. Supp. 1978).

435. *See id.* §§ 16-409, -450.

436. 547 S.W.2d 527 (Tenn. 1977).

437. *Id.* at 528 n.1 (quoting Allstate Ins. Co. v. Hartford Accident & Indem. Co., 483 S.W.2d 719, 720 (Tenn. 1977)) (emphasis omitted).

438. 549 S.W.2d at 372.

439. *But see* text accompanying notes 598-600 *infra*.

440. 553 S.W.2d 596 (Tenn. Ct. App. 1976), *cert. denied, id.* (Tenn. 1977).

discussed. *Union Livestock Yards, Inc. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*,[441] however, is deserving of discussion.

Merrill Lynch obtained a judgment in federal district court against Lambert and, in order to satisfy its judgment, had garnishments served on Cas and Virginia Walker to reach any property in the possession of the Walkers belonging to Lambert. About a year before entry of the federal judgment, the Walkers and Lambert had entered a written agreement, the terms of which required the Walkers to pay Lambert royalties for the use of a rock quarry. As a result of the garnishment the Walkers paid the royalties due Lambert to Merrill Lynch.

The crux of the substantive law issue raised in *Union Livestock* stemmed from the fact that prior to levy of the garnishment Merrill Lynch had knowledge that Lambert assigned his royalties to Union Livestock Yards, though the assignment had not been recorded. The Walkers, on the other hand, "had no notice or knowledge of the assignment of these royalties by Lambert to [Union Livestock Yards]."[442] Union Livestock commenced an action against Merrill Lynch and the Walkers alleging that as a result of the assignment it had priority over Merrill Lynch. The chancellor granted defendants' motions for summary judgment and the court of appeals affirmed.

As one of its grounds for reversal, Union Livestock contended that the chancellor erred "in accepting and considering on the day of the hearing of motions for summary judgment [Merrill Lynch's] sole affidavit in support of their motions, as the affidavit was not filed together with the motions for thirty (30) days before time for a hearing."[443] The motion for summary judgment itself had been filed more than thirty days prior to the hearing on the motion, but the affidavit in support of the motion was filed the day of the hearing. In support of its argument Union Livestock relied on that portion of Tennessee rule 6.04(2) requiring affidavits to be served with the motion,[444] and on the decision of the Tennessee Supreme Court in *Craven v. Lawson*.[445]

In *Craven* plaintiff settled his case against one of two defen-

441. 552 S.W.2d 392 (Tenn. Ct. App. 1976), *cert. denied, id.* (Tenn. 1977).

442. *Id.* at 393.

443. *Id.*

444. TENN. R. CIV. P. 6.04(2) provides in part: "When a motion is supported by affidavit, the affidavit shall be served with the motion . . . ."

445. 534 S.W.2d 653 (Tenn. 1976).

dants a few days before trial was to begin. On the day of trial the other defendant moved to amend his answer and for summary judgment on the ground that the release extinguished his derivative or vicarious liability. Plaintiff in turn moved to amend his complaint to allege other independent acts of negligence, and also moved to vacate summary judgment that had been granted the same day defendant's motion was filed and presented to the trial court. Vacation was urged on the ground that the motion itself was not filed thirty days prior to the hearing on the motion as required by Tennessee rule 56.03.[446] The supreme court held that the thirty-day period prescribed by rule 56.03 "is mandatory and not discretionary,"[447] but went on to state:

> In this case the facts as pleaded bearing on the issue made on defendant's summary judgment motion are undisputed and the question presented is one of law only. In the interest of the orderly and expeditious disposition of litigation and to serve the manifest interest of the parties in this case we must finally decide that legal issue on this appeal, the effect of which is to render harmless the error of the trial judge. However, it should be apparent that where there is the slightest possibility that the party opposing the motion for summary judgment has been denied the opportunity to file affidavits, take discovery depositions or amend, by the disposition of a motion for summary judgment without a thirty (30) day interval following the filing of the motion, it will be necessary to remand the case to cure such error.[448]

Relying on this portion of the opinion in *Craven*, the court of appeals in *Union Livestock* held that, while the party moving for summary judgment is required to file supporting affidavits with the motion, on the facts presented this error was harmless.

> The purpose of the affidavit filed on the date of the hearing was to affirm that the Walkers had no knowledge or notice of the assignment of these royalties from Lambert to [Union Livestock] prior to the service of the garnishment on the Walkers. [Union Livestock] makes no claim it has been prejudiced by this late affidavit or has been denied in any way an opportunity

446. TENN. R. CIV. P. 56.03 provides in part: "The motion [for summary judgment] shall be served at least thirty (30) days before the time fixed for the hearing."

447. 534 S.W.2d at 655.

448. *Id.*

> to counter same. To reverse on this assignment would serve the interest of neither party and in fact impede the disposition of the litigation for no purpose.[449]

On the merits of the substantive law question the court held that Merrill Lynch had gained priority by serving its garnishment prior to the time Union Livestock perfected its assignment by notifying the Walkers.[450] The court concluded its opinion by rejecting Union Livestock's argument that a question of fact existed as to whether the assignment by Lambert was intended as a security instrument. That question would be relevant only if the assignment were governed by the Commercial Code, but the Code, the court held, is inapplicable to the kind of payments involved in *Union Livestock*.[451] Accordingly, the judgment of the trial court was affirmed.

The thirty-day period prescribed in rule 56.03 for serving a motion for summary judgment, along with the requirement of rule 6.04(2) that affidavits be served with the motion, is designed to afford the party opposing the motion ample time to prepare himself to demonstrate that summary judgment should not be granted. The period is substantially longer than the five-day period prescribed in rule 6.04(1) for the service of other motions because of the drastic consequence to the opposing party of the grant of summary judgment and because of the difficulties often encountered in adequately opposing such a motion.[452] On the facts presented in *Union Livestock* plaintiff was given the full time required by the rules to ascertain the state of the law since the motion itself was filed thirty days prior to the hearing. On the other hand, filing the affidavit on the day of the hearing deprived plaintiff of a meaningful opportunity to inquire into the accuracy of its factual assertion that the Walkers had no knowledge or notice of the assignment by Lambert. In all probability, however, plaintiff could have readily come forth with the evidence if it had given notice to the Walkers of Lambert's assignment of his royalty payments. The court of appeals, therefore, was probably correct in holding the assigned error harmless; still, great caution needs to be exercised lest summary judgment become a mecha-

449. 552 S.W.2d at 394.

450. *Id.* at 397.

451. *Id.*

452. *See also* 10 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2719, at 449-52 (1973).

nism to deprive the nonmoving party of his right to a trial of disputed questions of fact.

D. Obtaining Information: Discovery

In most modern procedural systems, procedural rules are designed in a way to ensure that lawsuits will be disposed of on their merits.[453] "Obviously, for this to occur, the merits of the case must be made known to the court. Since pleadings are not required to do this and motions are not able to do it, the work of uncovering the merits of a claim or defense has to be done by other tools."[454] The mechanism used to serve this function is pretrial discovery.[455]

Somewhat paradoxically, the most notable development during the survey period concerning discovery may be what did not happen: the proposed amendments to the Tennessee discovery rules were not even submitted to the General Assembly for its approval. Given the fact that the Advisory Committee on Civil Rules has recommended further amendments to the federal discovery rules,[456] it may be some time before a set of proposed amendments to the Tennessee Rules is again submitted for legislative approval.

On the more positive side, there were two additions to the Tennessee Code related to discovery. One of the additions provides that nonresident motorists who are served with process pursuant to the nonresident motorist statute are required to appear in the county in which the action is pending to give pretrial discovery depositions.[457] No sanction is specified in the statute for noncompliance; presumably, the sanctions available are those specified in Tennessee Rule of Civil Procedure 37.[458]

The other addition to the Code involves the use of subpoenas

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453. *See, e.g.*, TENN. R. CIV. P. 1 ("These rules shall be construed to secure the just, speedy and inexpensive determination of every action."); *id.* R. 8.06 ("All pleadings shall be so construed as to do substantial justice.").

454. M. ROSENBERG, J. WEINSTEIN, H. SMIT & H. KORN, *supra* note 216, at 756.

455. *See* TENN. R. CIV. P. 26-37.

456. *See* COMMITTEE ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE 6-36 (Mar. 1978).

457. TENN. CODE ANN. § 20-224 (Cum. Supp. 1978).

458. *See* TENN. R. CIV. P. 37.02, .04.

duces tecum for hospital records,[459] whether the subpoena is issued for discovery, trial, or other purposes.[460] Under this addition to the Code, if a subpoena is served on the custodian of the records of any hospital "in an action or proceeding in which the hospital is neither a party nor the place where any cause of action is alleged to have arisen . . .,"[461] the custodian within five days after service may file, either in person or by certified or registered mail, a "true and correct" copy of all records described in the subpoena.[462] Parties utilizing this addition to the Code must "furnish the adverse party or his attorney a copy of the subpoena duces tecum not less than ten (10) days prior to the date set for trial of the matter for which the records may be introduced."[463] Further sections specify the procedure to be followed in sealing, identifying, and mailing the records[464] as well as the procedure for opening of the sealed envelopes.[465] The records must be accompanied by an affidavit of the custodian attesting to their authenticity and other matters rendering them admissible as an exception to the hearsay rule.[466] "The copy of the record shall be admissible in evidence to the same extent as though the original thereof were offered and the custodian had been present and testified to the matters stated in the affidavit."[467] Similarly, "[t]he affidavit shall be admissible in evidence and the matters stated therein shall be presumed true in the absence of a preponderance of evidence to the contrary."[468] Another section specifies how personal attendance of the custodian and production of the original records can be procured.[469] If the originals are produced and introduced into evidence, copies may be substituted "unless otherwise directed for good cause by the court, officer, body, or tribunal conducting the hearing."[470] Virtually all "hospital records" as de-

459. *See* TENN. CODE ANN. §§ 53-1501 to 1508 (Cum. Supp. 1978).
460. *Id.* § 53-1503.
461. *Id.* § 53-1502.
462. *Id.*
463. *Id.*
464. *Id.* § 53-1503.
465. *Id.* § 53-1504.
466. *Id.* § 53-1505.
467. *Id.* § 53-1506.
468. *Id.*
469. *Id.* § 53-1507.
470. *Id.* § 53-1508.

fined by the Medical Records Act of 1974[471] are covered by this addition to the Code.[472]

V. TRIAL PROCEDURE

A. Trial by Jury: Selection and Composition

Once discovery is complete and assuming the action has not otherwise been terminated, it is ready for trial. If the action is to be tried by a jury, one of the initial steps in the trial process is the selection of the jury from among those eligible for jury service.

Under rule 47.01 of the Tennessee Rules of Civil Procedure, the trial court determines the method and scope of the examination of prospective jurors. The rule authorizes the court to conduct the examination itself or to permit the parties or their attorneys to do so. The rule also provides that if the court examines the prospective jurors, "the court shall permit the parties or their attorneys to supplement the examination by such further inquiry as it deems proper or shall itself submit to the prospective jurors such additional questions of the parties or their attorneys as it deems proper."

By virtue of a new section added to the Tennessee Code, the parties or their attorneys in both civil and criminal cases are given "an absolute right to examine prospective jurors . . . notwithstanding any rule of procedure or practice of court to the contrary."[473] The extent to which this section affects the trial court's discretion under rule 47.01 is not free from doubt. Construed most narrowly, this section is merely a legislative affirmation of the right accorded the parties under rule 47.01 to supplement the court's examination of prospective jurors. Somewhat more broadly, this section might eliminate only that much of the trial court's discretion as empowers the court itself to submit to the jurors questions propounded by the parties or their attorneys. Even more broadly, this section might also affect the trial court's authority to limit the scope of the examination of prospective jurors. The last two interpretations might result in abuse by some counsel.[474] It seems likely, therefore, that the most narrow inter-

471. *Id.* § 53-1320(B) (1977).

472. *Id.* § 53-1501 (Cum. Supp. 1978).

473. *Id.* § 22-501.

474. *See, e.g.*, 4 J. WEINSTEIN, H. KORN & A. MILLER, NEW YORK CIVIL PRACTICE ¶¶ 4107.03-.06 (1977); Note, *Voir Dire—Prevention of Prejudicial*

pretation will commend itself to the courts.

The Tennessee Code was also amended to exempt all practicing certified public accountants and public accountants from jury service.[475] As the editors of a leading casebook on civil procedure have noted: "Needless to say, exemptions [from jury service] may be founded on little more than a particular lobby's effectiveness in the legislature."[476]

B. Withdrawing the Case from the Jury

After the jurors have been selected and sworn, and after the opening statements, the parties present their proof in support of their respective positions. While the jury acts as the trier of disputed questions of fact disclosed by the evidence, the trial court retains a significant amount of power to keep the jury in check. "Of the means of withdrawing a case from the jury's consideration the directed verdict is the most dramatic and emphatic."[477]

1. Directed Verdict

In only one case decided during the survey period did the procedural law of directed verdicts receive extensive and explicit attention. Although *State v. Thompson* was a criminal case, it afforded the Tennessee Supreme Court an opportunity to say a good deal, by way of dictum, about directed verdicts in civil actions.

Defendant in *Thompson* was indicted and convicted for counseling or procuring the burning of a building, a conviction the supreme court held should have been simply for arson.[478] At the conclusion of the state's largely circumstantial case, defendant moved for a directed verdict pursuant to the rather vague provisions of the Tennessee Code authorizing directed verdicts in criminal cases.[480] The trial court overruled this motion, finding

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Questioning, 50 MINN. L. REV. 1088, 1093 (1966).

475. TENN. CODE ANN. § 22-103 (Cum. Supp. 1978).

476. D. LOUISELL & G. HAZARD, CASES AND MATERIALS ON PLEADING AND PROCEDURE STATE AND FEDERAL 983 (3d ed. 1973).

477. M. ROSENBERG, J. WEINSTEIN, H. SMIT & H. KORN, *supra* note 216, at 1008.

478. 549 S.W.2d 943 (Tenn. 1977).

479. *Id.* at 944.

480. TENN. CODE ANN. § 40-2529 (1975) provides: "In a criminal prosecution the trial judge shall direct the jury to acquit the defendant if at the close

that there was sufficient evidence to take the case to the jury. Although defendant did not testify in her own behalf, she did offer other testimony in her defense. On cross-examination of defendant's witnesses, the state elicited testimony favorable to its position. At the conclusion of all the proof, defendant did not renew her directed verdict motion and the case was submitted to the jury, which found defendant guilty. On appeal, the court of criminal appeals reversed defendant's conviction on the ground the trial court erred in overruling defendant's directed verdict motion made at the close of the state's case-in-chief. The state supreme court reversed the intermediate appellate court and reinstated the judgment of the trial court, holding that defendant, by introducing evidence in her own behalf, waived her right to obtain appellate review of the trial court's denial of her directed verdict motion.[481]

In discussing the law of directed verdicts as it has evolved in civil actions, the court emphasized that the purpose of the motion, like its predecessor the demurrer to the evidence, is to test the legal sufficiency of the facts in evidence.[482] The court continued:

> [N]o party has an absolute right to have a directed verdict granted until the close of all of the evidence. If a motion made at the conclusion of the plaintiff's proof is overruled, the defendant must stand upon his motion, and rest his case without offering proof, in order to have the record at that point preserved for appellate review. If the motion is overruled and the defendant does not stand upon the motion, but rather proceeds to offer evidence, then it is necessary for the defendant to "renew" his motion—actually to make another motion—at the end of all of the evidence in order to have the same considered. Both the trial and appellate courts then review the entire record, not just the plaintiff's case-in-chief, in determining whether the defense motion should be granted.[483]

While admitting there were some differences between criminal and civil cases "which prevent complete adaptation of civil proce-

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of the evidence for the prosecution, or at the close of all the evidence, the court is of the opinion that the evidence is insufficient to warrant a conviction."

481. 549 S.W.2d at 945-46.

482. *Id.* at 945.

483. *Id.*

dure on directed verdicts into criminal trials,"[484] the court nonetheless concluded that the test for granting directed verdicts in criminal cases is generally similar to the test utilized in civil cases.[485] The test in criminal actions, as developed by the court of criminal appeals and expressly approved by the supreme court,

> requires the trial judge and the reviewing court on appeal to look at all of the evidence, to take the strongest legitimate view of it in favor of the opponent of the motion, and to allow all reasonable inferences from it in its favor; to discard all countervailing evidence, and if then, there is any dispute as to any material determinative evidence, or any doubt as to the conclusion to be drawn from the whole evidence, the motion must be denied.[486]

Moreover, the supreme court was of the further opinion that

> under the present statute the practice used in civil cases should be used in criminal cases with respect to the times when a motion for directed verdict may appropriately be made on behalf of a defendant in a criminal trial. The trial judge should not be placed in error for overruling a motion at the conclusion of the State's proof when the defendant has not then rested his case, but has gone forward with the evidence in his own behalf.[487]

Applying this law to the facts of *Thompson*, the court held that the action taken by the trial court on defendant's directed verdict motion was no longer open to review.[488] The court also held, based upon a review of all the evidence, that even if a timely motion for a directed verdict had been made at the conclusion of all the evidence, it would not have been proper for the trial court to grant such a motion and the judge was correct in submitting the case to the jury.[489] Accordingly, the supreme court found error in the "implicit conclusion" of the court of criminal appeals "that the verdict is contrary to the preponderance of the evidence . . . ."[490]

The court concluded its opinion with a comparison between the trial court's role in directing a verdict of acquittal and the

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484. *Id.*

485. *Id.* at 946.

486. *Id.* (quoting Jones v. State, 533 S.W.2d 326, 329 (Tenn. Crim. App.), *cert. denied*, *id.* (Tenn. 1975)). *See also* text accompanying notes 512-13 *infra*.

487. 549 S.W.2d at 946.

488. *Id.*

489. *Id.* at 946-48.

490. *Id.* at 948.

appellate court's function in reviewing the adequacy of the evidence to sustain a conviction. "The directing of a verdict . . .," the court stated, "is entirely different from reviewing the preponderance, particularly in criminal cases, where well-settled rules . . . govern the role and function of an appellate court."[491] A conviction will be set aside by an appellate court on the inadequacy of the evidence only if the evidence preponderates against the guilty verdict and in favor of the accused's innocence.[492] This limited scope of appellate review is based on recognition of the fact that:

> In this state, a trial judge has a unique function with respect to jury verdicts, in criminal cases as well as in civil cases. He is commonly referred to in the reported cases as a "thirteenth juror", and is required either to approve or disapprove the findings of the jury. If he fails to exercise this function, the case will be reversed and remanded for a new trial.
>
> Where, as in the present case, the trial judge has approved a jury verdict, an appellate court should be reluctant to overturn that verdict on the basis of a preponderance of the evidence. That it has the authority to do so, in criminal cases unlike jury verdicts in civil cases, however, is well settled, and this function is an entirely different one from that of directing a verdict of acquittal.[493]

The supreme court did not delineate precisely in what respect the function of the trial judge acting as the thirteenth juror differs from the appellate court reviewing the adequacy of the evidence. Nor did the court expressly indicate whether a similar difference exists in civil actions. The scope of review by the trial court of a jury verdict should be broader than that of the appellate court reviewing the same case. The trial court and jury are in a position to take note of a number of factors affecting the probative value of testimony that cannot be adequately conveyed in the record on appeal.[494] It is quite sensible, therefore, for an

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491. *Id.*

492. *Id. But see* PROPOSED TENN. R. APP. P. 13(e) & Advisory Comm'n comment. The text of this proposed rule and the Advisory Commission comment are set forth in *Proposed Tennessee Rules of Appellate Procedure*, 45 TENN. L. REV. 271, 300, 302 (1978).

493. 549 S.W.2d at 948 (citation omitted).

494. *See, e.g.*, ABA COMM'N ON STANDARDS OF JUDICIAL ADMINISTRATION, STANDARDS RELATING TO APPELLATE COURTS § 3.11, at 23 (1977) [hereinafter cited

appellate court in both civil and criminal actions to affirm a verdict approved by the trial court if there is a conflict in the testimony as long as there is evidence to support by the required degree of persuasion whatever matters must be proven to obtain the judgment entered below.[495] Similarly, as the test approvingly cited by the supreme court provides,[496] the trial court in passing upon a motion for a directed verdict of acquittal must take the strongest legitimate view of the evidence in favor of the nonmoving party, including all reasonable inferences that might be drawn from the evidence. This much of the test is equally applicable to civil actions.[497] If strictly adhered to, it would preclude the trial court from weighing the evidence or passing on the credibility of the witnesses.[498] Thus, both the appellate court in reviewing the adequacy of the evidence to support the judgment[499] and the trial court in determining whether the evidence is sufficient to create an issue of fact for the jury[500] should be viewed as deciding solely a common question of law. It is, therefore, somewhat unclear how appellate review of the evidence differs from the directing of a verdict of acquittal, and whether this differentiation is also to be observed in civil actions.

On the other hand, the holding in *Thompson* that defendant waived her right to appellate review of the trial court's denial of her directed verdict motion made at the close of the state's case-in-chief by introducing evidence in her own behalf is in accord with the equivalent holding made in the earlier civil case of *Sadler v. Draper*.[501] The practical effect of this holding is to encourage adjudications based on all the evidence and not merely

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as APPELLATE COURT STANDARDS]; R. TRAYNOR, THE RIDDLE OF HARMLESS ERROR 20-21 (1970).

495. *See* Sobieski, *The Theoretical Foundations of the Proposed Tennessee Rules of Appellate Procedure*, 45 TENN. L. REV. 161, 203-04 (1978).

496. *See* text accompanying note 486 *supra*.

497. *See* text accompanying notes 512-13 *infra*.

498. *See* text accompanying note 514 *infra*. *See also* 9 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2524 (1971).

499. *See* R. TRAYNOR, *supra* note 494, at 27.

500. *See* 9 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2524, at 541 (1971).

501. 46 Tenn. App. 1, 326 S.W.2d 148, *cert. denied, id.* (Tenn. 1959). The state supreme court in *Thompson* cited *Sadler* as "[a]n excellent discussion of the nature and use of the motion for directed verdict, particularly that made at the close of the plaintiff's evidence." 549 S.W.2d at 945.

a part of it since only rarely will a defendant forego an opportunity to introduce favorable evidence, particularly if, as seems likely, by standing on his motion defendant is precluded from urging successfully on appeal that he should be given a new trial to present evidence in his own behalf. Besides, by introducing evidence, defendant does not waive his right to renew his motion for a directed verdict at the close of all the evidence and, if unsuccessful, to renew his motion yet again under rule 50.02 after entry of judgment or discharge of the jury if a verdict was not returned.

2. Judgment Notwithstanding the Verdict

Typically a motion for judgment notwithstanding the verdict under rule 50.02[502] will be joined in the alternative with a motion for a new trial, since "[i]f the losing party thinks that there is insufficient evidence as a matter of law to support the verdict, he will, in most situations, also think that the verdict is against the weight of the evidence."[503] In *Holmes v. Wilson*[504] the Tennessee Supreme Court discussed the duty of the trial court if an alternative motion is made, as well as the complex problems of appellate review that arise when a party has moved in the alternative for judgment notwithstanding the verdict or for a new trial.

At the close of all the evidence, defendant in *Holmes* moved for a directed verdict on the ground the evidence was insufficient to establish his liability. The trial court overruled the motion and the jury returned a verdict for plaintiff. At this point defendant made an alternative motion for a judgment notwithstanding the verdict or a new trial. The trial court granted the judgment but did not rule upon the new trial motion. Pursuant to rule 50.03,

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502. Rule 50.02 does not speak of a motion for judgment notwithstanding the verdict, but rather a motion "to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with [the] motion for a directed verdict." TENN. R. CIV. P. 50.02. The motion for judgment notwithstanding the verdict that was a recognized part of Tennessee practice prior to adoption of the Tennessee Rules of Civil Procedure had a different purpose than that specified in rule 50.02. *See* CARUTHERS' HISTORY OF A LAWSUIT § 391 (8th ed. 1963). However, the state supreme court in *Holmes* referred to a motion under rule 50.02 as a motion for judgment notwithstanding the verdict, and the text of the present article also speaks of a rule 52.02 motion in those terms.

503. 9 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2539, at 608 (1971).

504. 551 S.W.2d 682 (Tenn. 1977).

which provides that the trial court must also rule on the new trial motion if he grants a judgment notwithstanding the verdict, the court of appeals remanded the case to the trial court with directions that he review the verdict in his role as the thirteenth juror[505] and specify the grounds for granting or denying the new trial motion.[506] On remand the trial court conditionally granted the new trial because he disagreed with the jury's verdict. On plaintiff's second appeal to the court of appeals, that court reversed both the judgment and the conditional grant of a new trial and reinstated the verdict of the jury.

The state supreme court began its review of the second appeal by emphasizing the trial judge's duty to rule on an alternative motion for a new trial and to specify his grounds for granting or denying the motion, even if he grants a judgment notwithstanding the verdict.[507] The grant of the new trial is conditional and becomes effective only if the judgment is thereafter vacated or reversed.[508] In addition, the grant of the new trial motion does not affect the finality of the judgment for the purpose of seeking immediate appellate review.[509] Because of the conditional nature of the grant of the new trial motion, the case is at an end if the appellate court affirms the judgment.[510] If, however, the judgment is reversed, "the grant of the motion for a new trial springs to life, and the case is remanded for a new trial, 'unless the appellate court has otherwise ordered.' "[511]

In passing upon the court of appeals' reversal of the judgment, the supreme court noted that a judgment notwithstanding the verdict is governed by the same standard as that utilized for directing a verdict.[512] That standard requires

> the trial judge, and the appellate courts, [to] take the strongest legitimate view of the evidence in favor of the opponent of the motion, allow all reasonable inferences in his or her favor, discard all countervailing evidence, and deny the motion where

505. *See* text accompanying notes 543-62 *infra*.

506. The requirement that the trial court specify the gounds for granting or denying a new trial is also contained in TENN. R. CIV. P. 50.03.

507. 551 S.W.2d at 684.

508. *Id.*; *see* TENN. R. CIV. P. 50.03.

509. 551 S.W.2d at 684; *see* TENN. R. CIV. P. 50.03.

510. 551 S.W.2d at 684.

511. *Id.* (quoting TENN. R. CIV. P. 50.03).

512. *Id.* at 685.

> there is any doubt as to the conclusions to be drawn from the whole evidence. A verdict should not be directed during, or after, trial except where a reasonable mind could draw but one conclusion.[513]

Without elaboration, the court concluded the judgment notwithstanding the verdict was erroneously granted, particularly since "[n]either the trial judge nor the reviewing court is privileged to weigh the preponderance of the evidence when passing upon a motion for a directed verdict or for a judgment [notwithstanding the verdict]."[514]

Having determined the judgment notwithstanding the verdict should not have been granted, the supreme court was required to pass on the lower courts' rulings with respect to the alternative motion for a new trial. Different standards govern granting a judgment notwithstanding the verdict and granting a new trial.

> On motion for judgment [notwithstanding the verdict], the sole concern of the trial judge is the existence of material evidence in accordance with the [standard previously set out] whereas on motion for a new trial he has a substantially wider, though not unbridled, latitude and may set the verdict aside when it is against the weight of the evidence or when the interests of justice would be served thereby. Thus the trial judge consistently may overrule a motion for directed verdict or judgment [notwithstanding the verdict] and grant or deny a new trial. If he or she should sustain the motion for a directed verdict, consistency demands that there be a conditional award of a new trial.[515]

If the appellate court holds that the judgment notwithstanding the verdict was erroneously granted, it has the option of either remanding for a new trial or reinstating the jury's verdict.[516] Generally speaking, the case should be remanded,[517] and such will always be true if the trial court acting as the thirteenth juror expresses his dissatisfaction with the verdict because "his action in awarding a new trial is not reviewable . . . ."[518] However,

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513. *Id.*
514. *Id.*
515. *Id.*
516. *Id.*
517. *Id.*
518. *Id.* at 684.

"[a]ppellate courts . . . may exercise a sound judicial discretion in the matter and may, under exceptional circumstances and in the interest of justice, reinstate the verdict of the jury where the trial judge erred in ruling on a controlling conclusion of law and has approved the verdict of the jury."[519] Finding no exceptional circumstances justifying departure from the general rule,[520] the supreme court affirmed the court of appeals' reversal of the grant of the judgment notwithstanding the verdict but reversed its reinstatement of the jury verdict and remanded for a new trial.

The opinion in *Holmes*, which is consistent with the interpretation given to federal rule 50 by the federal courts,[521] is a useful reminder of the wholly distinct standards that govern allowance of a motion for judgment notwithstanding the verdict and a motion for a new trial. In passing on a motion for judgment notwithstanding the verdict, as well as the equivalent motion for a directed verdict, both the trial and appellate court consider only the purely legal question of whether the evidence is sufficient to make out a jury question. A new trial motion, by contrast, may be granted by the trial court more freely and, as *Holmes* makes clear, the exercise of the trial court's discretion will seldom be set aside on appeal when it is based on the trial court's evaluation of the weight of the evidence.

Holmes and cases like *Sadler v. Draper*[522] illustrate some of the procedural intricacies that must be observed in order to secure a directed verdict or judgment notwithstanding the verdict. They also illustrate the difficulty that arises in obtaining subsequent appellate review of rulings on those motions and a new trial motion joined in the alternative with a motion for judgment notwithstanding the verdict. Much, though not all, of the complexity of this area of procedural law is attributable to matters of historical significance alone.[523] The law in this area, therefore, would only profit from simplification, but until then a thorough knowledge of the complexities is indispensable.

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519. *Id.* at 687.

520. *Id.*

521. *See* 9 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE §§ 2537-2540 (1971).

522. 46 Tenn. App. 1, 326 S.W.2d 148, *cert. denied, id.* (Tenn. 1959).

523. *See* 9 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2522 (1971).

C. *Putting the Case to the Jury: Instructions*

If the evidence is sufficient to make out a jury question, the trial court must instruct the jury on the law.[524] In *Haddock v. Lummus Cotton Gin Co.*,[525] plaintiff sought damages for personal injuries sustained when his head and arm were caught in a bale press manufactured and sold by defendant. Although plaintiff's complaint contained allegations based on negligence and breach of warranty, the case was tried exclusively on a theory of strict liability. After the trial court completed its charge, plaintiff noted that the charge contained instructions that related to a claim based on negligence. Plaintiff at that time did not object to the instructions as given but instead moved that the pleadings be amended to conform to the court's instructions. The court of appeals noted that if plaintiff had made no comment on the instructions, under rule 51.02 he could assign error to any portion of the given instructions.

> However, since the Plaintiff took affirmative action by asking for permission to amend his theory of the case to conform to the charge of the Court and approved the charge, we hold that Plaintiff's assignment of error in this Court is not authorized by [Tennessee Rule of Civil Procedure] 51.02.[526]

VI. Motions After Trial

A. *Nunc Pro Tunc*

After the jury has returned its verdict or the trial court has heard the evidence, judgment should be entered. Under rule 58.02, "[t]he filing with the clerk of a judgment, signed by the judge, constitutes the entry of such judgment, and, unless the court otherwise directs, no judgment shall be effective for any

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524. *See* Tenn. R. Civ. P. 51.

525. 552 S.W.2d 390 (Tenn. Ct. App.), *cert. denied, id.* (Tenn. 1976).

526. *Id.* at 392. After *Haddock* and beyond the period covered in this survey, the state supreme court in Rule v. Empire Gas Corp., 563 S.W.2d 551 (Tenn. 1978), held:

> Rule 51.02 of the Tennessee Rules of Civil Procedure has not abolished or altered the rule . . . that in order to predicate error upon an alleged omission in the instructions given to the jury by the trial judge [the litigant assigning error] must have pointed out such omission to the trial judge at trial by an appropriate request for instruction.

Id. at 554.

purpose until the entry of same." Occasionally a judgment will not be entered as required by rule 58.02, and important interests may be adversely affected as a result. Entry of judgment *nunc pro tunc* serves the purpose of alleviating the harsh consequences that might otherwise ensue by permitting entry of a judgment now that is effective from some earlier date. *Gillis v. Eggelston*[527] is a good example of the valuable purpose served by entry of judgment *nunc pro tunc.*

Gillis grew out of the administration of the estate of Georgia Gillis, who died intestate. In 1925, Georgia and her husband filed a petition seeking to adopt their nephew, Andrew Gillis, one of the claimants to decedent's estate. The adoption was contested, and a decree entered paroling Andrew to his aunt and uncle for a three-month period. The decree also retained the adoption petition for further action and granted petitioners the opportunity to apply for adoption again at the expiration of the three-month period. In his petition to the probate court of Shelby County for entry of a decree of adoption *nunc pro tunc*, Andrew alleged that after this three-month period his aunt and uncle successfully petitioned for his adoption but that, due to inadvertence or oversight on the part of their attorney or the clerk of the court, the decree was not signed by the judge or entered on the court's minutes. The other claimants to the decedent's estate sought dismissal of Andrew's petition, contending that no official record demonstrated the trial court ever signed an adoption decree. The state supreme court reversed the probate court's dismissal of the *nunc pro tunc* petition. The supreme court relied upon its earlier decision in *Rush v. Rush*[528] in which the court stated:

> It is equally clear that a party whose rights are injuriously affected by a clerical omission to extend upon the record a judgment of the court regularly pronounced may present the matter to the court, and upon a proper showing have the judgment entered nunc pro tunc.
>
> All courts have the right, and it is their duty, to make their records speak the truth, and a court, therefore, in a proper case, of its own motion, may order a nunc pro tunc entry to be made; and no sound reason can be suggested why they should not exercise this right and discharge this duty upon the suggestion of one whose rights are impaired by the failure of the record to

527. 543 S.W.2d 846 (Tenn. 1976).
528. 97 Tenn. 279, 37 S.W. 13 (1896).

> state the truth. . . . And the lapse of time between the announcement of judgment and the making of this motion is of no importance; *that which is important is, that the proof be clear and convincing that the judgment which it is sought to have entered is the one pronounced in the cause.*[529]

The supreme court held that Andrew's allegations, that the court permitted his adoption and that the failure to have the decree signed and entered on the minutes was due to the inadvertence or oversight of the attorney or clerk, "if proven by clear and convincing evidence, would justify the entry of the decree of adoption nunc pro tunc."[530] Since Andrew had stated a claim for relief, the supreme court concluded that the trial court erred in dismissing Andrew's petition without affording him an opportunity to introduce evidence in support of his claim.[531]

There are limits to the notion that a judgment may be entered *nunc pro tunc*, however, as *Zeitlin v. Zeitlin*[532] demonstrates. In that case, the trial court entered a final decree of divorce in September 1973, that approved a separation agreement requiring defendant to pay $200 per week in alimony and child support. The very next month plaintiff filed a petition seeking to have defendant held in contempt for failure to make the agreed-upon payments. Defendant sought to have his payments reduced. Apparently no action was taken by the court with regard to either the contempt petition or defendant's petition for reduction of his payments. Plaintiff filed a second petition for contempt approximately one year after her first petition, and defendant again sought reduction. Plaintiff also sought a judgment for the delinquent payments. Although the statement of the facts is confusing, it appears that defendant alleged that the parties entered into an agreed order after plaintiff's first contempt petition and that through inadvertence this order was never entered. Defendant sought to have the agreed order entered *nunc pro tunc* to take effect from October 1973. The trial court refused *nunc pro tunc* entry of the agreed order and, although "in sympathy with his situation insofar as the Order not having been filed as it, of course, should have been . . . ,"[533] the court also entered judg-

529. *Id.* at 281-82, 37 S.W. at 14 (citation omitted) (emphasis added).
530. 543 S.W.2d at 848.
531. *Id.*
532. 544 S.W.2d 103 (Tenn. Ct. App. 1976).
533. *Id.* at 105.

ment against defendant for an amount in excess of $14,000. That judgment, apparently based on the payments specified in the original divorce decree, was "to be held in abeyance, at least until the financial activity of [defendant] increases to a reasonable extent where [*sic*] this arrearage could be paid."[534] The court of appeals affirmed in an opinion affording defendant reason to believe that he might yet obtain the relief he sought.

The intermediate appellate court rejected defendant's reliance on various subsections of rule 60.02 as authority for entry of the agreed order *nunc pro tunc*.[535] Essentially the court reasoned that rule 60.02 is available only to afford relief from judgments that have previously been entered and not to permit entry of a judgment not previously entered.[536] Although the parties may have intended that the agreed order be entered, there was no evidence that the trial judge ever intended that the order be entered,[537] a fact that distinguishes *Zeitlin* from *Gillis*. For substantially the same reason, the court of appeals also held relief was unavailable under rule 58.02,[538] which defines precisely when a judgment is entered, or rule 60.01,[539] which permits relief from clerical mistakes. Having rejected defendant's arguments in support of entry of judgment *nunc pro tunc*, the court stated that it too was not without sympathy for defendant's plight.[540] Noting that the judgment for the delinquent payments was not immediately enforceable, the court concluded its opinion by intimating the trial court could still "retroactively forgive or modify delinquent installments of alimony or support."[541]

The concluding point made by the appellate court in *Zeitlin* is fundamental both in the sense of its obvious importance and in the sense that it should not be overlooked. Orders for the support of a spouse or a child are apparently modifiable retroactively in Tennessee.[542] If the trial court had kept this fact in mind, it

534. *Id.*
535. *Id.* at 106-07.
536. *Id.* at 106.
537. *Id.*
538. *Id.* at 108.
539. *Id.*
540. *Id.*
541. *Id.* at 109.
542. *See, e.g.*, Morton v. Morton, 223 Tenn. 491, 448 S.W.2d 69 (1969); Mayer v. Mayer, 532 S.W.2d 54 (Tenn. Ct. App.), *cert. denied, id.* (Tenn. 1975);

seems unlikely that it would have felt compelled to enter judgment for the past due installments, which it appears it thought was for a fixed, unmodifiable amount. While it might have been preferable for the appellate court to reverse with directions that the trial court determine whether the payments should be modified retroactively, it seems highly likely that the trial court's sympathy for defendant's plight will cause it to do so.

B. New Trial

In addition to the power of a trial court to direct a verdict or enter judgment notwithstanding the verdict, "[t]he power of the trial judge to grant a new trial is one of his most effective devices to control the jury."[543] As *James E. Strates Shows, Inc. v. Jakobik*[544] and *Sherlin v. Roberson*[545] make clear, the power to grant a new trial is more than an effective power—it is a power that must be exercised if the trial court is not satisfied with the jury's verdict.

Jakobik was a personal injury action in which the trial court granted plaintiff's motion for a new trial. Thereafter, in response to defendants' motion to reconsider, the trial court reinstated the jury verdict in defendants' favor. In its initial order granting a new trial, the trial court, acting as the thirteenth juror, expressed its dissatisfaction with the jury's verdict. In its order reinstating the jury's verdict, the court stated it was "of the opinion that there was evidence to support the verdict of the jury in its finding for the defendants and . . . [could not] say that the verdict was unreasonable in light of the evidence presented by both sides in this case."[546]

In affirming the court of appeals' reversal, the state supreme court emphasized that "[w]here the motion for a new trial asserts that the verdict was contrary to the weight of the evidence it is the duty of the trial judge to weigh the evidence and determine whether it preponderates against the verdict, and if so, to

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Daugherty v. Dixon, 41 Tenn. App. 623, 297 S.W.2d 944 (1956), *cert. denied, id.* (Tenn. 1957).

543. M. ROSENBERG, J. WEINSTEIN, H. SMIT & H. KORN, *supra* note 216, at 976.

544. 554 S.W.2d 613 (Tenn. 1977).

545. 551 S.W.2d 700 (Tenn. Ct. App. 1976), *cert. denied, id.* (Tenn. 1977).

546. 554 S.W.2d at 615.

grant a new trial."[547] In acting as the thirteenth juror when passing upon the verdict, the trial court is not required to state the reasons for its action, "[b]ut . . . if it appears from reasons assigned or statements made, that the trial judge was not satisfied with the verdict, it is the duty of the appellate courts to grant a new trial."[548] Here, the court's initial unequivocal expression of dissatisfaction with the verdict "was an implicit adjudication that the evidence preponderated against the verdict."[549] The court's later reinstatement of the verdict was not based on a weighing of evidence to "determine whether it preponderated in favor of the plaintiff or defendants or was equally balanced, but merely determined that there was some evidence to support the verdict."[550] It is improper to sustain a verdict, however, merely because there is some evidence to support it,[551] and accordingly the case was remanded for a new trial.

The opinion in *Jakobik* placed extensive reliance on *Sherlin v. Roberson*.[552] There, the trial court in overruling the plaintiffs' motion for a new trial stated that it could not say whether the jury verdict was right or wrong. The court also stated that before it would set aside the verdict "it would have had to have been a verdict that I couldn't have lived with . . .,"[553] but here the case was so close "I can't say I can't agree with what the jury did."[554] The court of appeals reversed.

The intermediate appellate court in *Sherlin* reasoned that the trial court's inability to say the jury verdict was right "was a clear disavowal of approval."[555] Taking all the trial court's statements together, "they would indicate that the judge had no opinion either way."[556] Accordingly, the appellate court concluded that the trial court "was deferring to the verdict of the jury and disclaiming any opinion of his own. When he stated he could not say the verdict was right he failed to do precisely what he must

547. *Id.*
548. *Id.*
549. *Id.* at 616.
550. *Id.*
551. *Id.* at 615-16.
552. 551 S.W.2d 700 (Tenn. Ct. App. 1976), *cert. denied*, *id.* (Tenn. 1977).
553. *Id.*
554. *Id.* at 701.
555. *Id.*
556. *Id.*

do before rendering judgment on the verdict."[557] The court continued:

> The . . . remarks of the judge make it appear he disassociated himself from the deliberative process which is the peculiar and exclusive province of the jury of which the presiding judge is as much a member as jurors sitting in the jury box. Indeed, it must be said that, by reason of his training as a lawyer and his experience in weighing testimony, he is the most important member of the jury.
>
> To say, as the trial judge did in this case, that before the trial judge, acting as the thirteenth juror, should set aside a verdict it would have to be a verdict that he could not live with would be to adopt a standard relieving the judge of the duty to take an unbiased and dispassionate view of the evidence, weigh it and determine whether the evidence preponderates in favor of the plaintiff or defendant or is equally balanced.
>
> If the trial judge abdicates this important duty justice could often miscarry. On appeal the evidence cannot be weighed as in the trial court. As has been said so often, a verdict in a civil case approved by the trial judge cannot be overturned if there is any credible material evidence to support it. In view of the finality of his determination of the weight of the evidence as the thirteenth juror, it will not do to weaken the rule by implying [*sic*] approval by the trial judge from countervailing and irreconcilable remarks. To do so would be to strike at the very foundation of our judicial system as it pertains to jury trials.[558]

In order to shore up the foundation of the judicial system, the action was remanded for a new trial.

Certainly the court of appeals in *Sherlin* could have taken a more sympathetic view of the trial court's ruling on the new trial motion. In light of the trial court's statement that the case "could have gone either way,"[559] it seems more realistic to say that the trial court concluded the evidence was evenly balanced rather than to conclude, as the appellate court did, that he "disclaim[ed] any opinion of his own"[560] and "disassociated himself from the deliberative process"[561] thereby "abdicat[ing]"[562] his

557. *Id.*
558. *Id.*
559. *Id.*
560. *Id.*
561. *Id.*
562. *Id.*

duty to weigh the evidence. Taken together, however, *Jakobik* and *Sherlin* leave little doubt as to the importance the appellate courts place on the trial judge's role as thirteenth juror.

An entirely different sort of problem, one related to the right to trial by jury itself, was involved when the trial court passed on plaintiff's new trial motion in *Welch v. T.F.C. Marketing Service, Inc.*[563] *Welch* involved an action for breach of contract in which the jury returned a verdict for damages in defendant's favor on its counterclaim. In ruling on plaintiff's new trial motion, the trial court granted a new trial and at the same time entered judgment for defendant but in an amount less than that awarded by the jury. Both parties appealed, defendant contending that the trial judge should have ordered a new trial before a new jury and plaintiff contending that the trial judge properly decided the case himself but should not have awarded defendant damages. The court of appeals held that at no time did defendant waive his right to a jury trial[564] and that, while the trial judge acting as the thirteenth juror may grant a new trial before a new jury, he cannot enter judgment based on his opinion as to who should prevail on the facts.[565] The appellate court also noted in passing that the fact that plaintiff, not defendant, initially demanded the jury was quite irrelevant[566] since under trial rule 38.05 a party may not withdraw his demand for a jury "without the consent of all parties as to whom issues have been joined."

C. *Relief from Judgment*

Even after judgment has finally been entered either on a jury verdict or otherwise, the trial court retains the power for some time to relieve a party from the judgment.[567] In *Brown v. Brown*[568] the state supreme court held that relief from a judgment under rule 60.02 is available to amend a final judgment after the expiration of thirty days from its entry. The court's opinion is so clearly correct that the only regrettable aspect of the case is that the

563. 554 S.W.2d 643 (Tenn. Ct. App.), *cert. denied, id.* (Tenn. 1977).
564. *Id.* at 646.
565. *Id.*
566. *Id.*
567. *See* TENN. R. CIV. P. 60.
568. 548 S.W.2d 660 (Tenn. 1977).

appellant had to appeal all the way to the state supreme court after the intermediate appellate court failed to vindicate his right to attempt to secure relief from the judgment.

In *Campbell v. Archer*[569] the state supreme court emphasized that rule 60.02 is designed to afford relief only from final judgments and that a rule 59 motion for a new trial is the appropriate vehicle for remedying errors affecting a judgment not yet final. The difficulty involved in *Campbell* arose because the case had to be reset for trial on three separate occasions. When the case was set for trial the third time, the clerk sent notice of the new trial date to defendants' attorney approximately one month before the scheduled trial date. Four days before trial, defendants employed new counsel and their original attorney agreed to withdraw. Defendants' original attorney denied that he was aware of the new trial date until trial had actually begun, and neither defendants nor their new counsel had notice or knowledge the case was set for trial until the day of the trial itself. After learning on the day of trial that defendants' original counsel had withdrawn and would not appear, the trial court nonetheless determined to proceed with the trial. The court also refused to sign an order brought to its attention in the midst of the trial permitting defendants' original counsel to withdraw. Upon learning from defendants' first attorney on the day of trial that the trial was proceeding, defendants' new counsel and defendants themselves went to court and requested permission to approach the bench but permission was denied. Plaintiffs completed presenting their proof, and after the jury retired, one of the defendants and his new counsel explained to the trial court what had happened. The jury returned verdicts for substantial damages against defendants for wrongfully diverting surface waters. After judgments were entered on the verdicts, defendants moved for a new trial alleging, among other matters,[570] that they had a meritorious defense and no notice or actual knowledge of the trial date. Defendants further alleged that their failure to appear amounted, at most, to excusable neglect. The trial court denied the new trial motions, and the court of appeals affirmed.

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569. 555 S.W.2d 110 (Tenn. 1977).

570. Defendants also argued that the judgments entered against them were default judgments within the meaning of rule 55.01, and invalid because five-days notice of application for the entry of judgment had not been served upon them. The supreme court pretermitted this question. *Id.* at 112.

Before the state supreme court, defendants relied on the portion of rule 60.02 that permits the court to relieve a party from a final judgment on the grounds of mistake, inadvertence, surprise or excusable neglect. However, the supreme court held that "[t]he function of this Rule is to give relief from *final* judgments; Rule 59, providing for motion for new trial, is the appropriate remedy for asserting alleged errors affecting a judgment which has not yet become final."[571] On the merits of the new trial motions, the court further held that a new trial may be granted for the mistake, inadvertence, surprise or excusable neglect of a party's attorney.[572] Here it was clear the parties themselves were not at fault either in the initial choice of counsel or otherwise and that the fault rested primarily with defendants' original counsel in not taking note of the notice of the trial date forwarded to him by the clerk.[573] The court also determined that other than the additional expenses incident to a retrial, plaintiffs would not suffer any prejudice if a new trial were awarded.[574] Accordingly, the supreme court remanded for a new trial on condition that defendants tender into court all court costs accrued to date and reasonable attorney's fees for plaintiffs' representation at the trial.[575] It seems likely defendants would willingly pay these incidental expenses in order to make out a meritorious defense.

VII. Appellate Review of the Disposition

If relief cannot be obtained in the trial court, redress may be sought in an appellate court. As the numerous decisions handed down in this area demonstrate, the paths of the parties in obtaining a decision on the merits are strewn with a number of obstacles. The proposed Tennessee Rules of Appellate Procedure, which seek to simplify existing law and which are discussed more fully elsewhere,[576] were not submitted for legislative approval in 1978 but will be submitted to the 1979 session of the General

571. 555 S.W.2d at 112 (emphasis in original).
572. *Id.*
573. *Id.* at 112-13.
574. *Id.* at 113.
575. *Id.*
576. *See* Sobieski, *The Procedural Details of the Proposed Tennessee Rules of Appellate Procedure*, 46 TENN. L. REV. 1 (1978); Sobieski, *supra* note 495.

Assembly. Until they take effect, the requirements of existing practice remain a vital area of concern.

A. The Timing of Appellate Review

An appeal as of right lies only upon entry of a final judgment.[577] In *Frayser Assembly Christian School v. Putnam*[578] and *Highland Construction Co. v. K.I.T. Coal Co.*[579] the state supreme court dealt with the problem of the meaning of finality in the context of civil actions involving multiple claims or multiple parties.

Putnam was a workers' compensation action in which plaintiff sought recovery for medical expenses and temporary and permanent disability. The trial court entered a decree that awarded plaintiff accrued medical expenses and benefits for temporary disability. The decree expressly reserved for a future hearing any claim for further medical expenses and permanent disability. After an appeal was taken by defendant from this decree to the supreme court and after the assignments of error and briefs were filed, but prior to oral argument, plaintiff moved to have the appeal remanded to the trial court for its consideration whether an appeal by permission should be allowed pursuant to the interlocutory appeal statute.[580] Defendant also moved for a remand but for the purpose of entry of a final decree adjudicating all issues and claims for relief. The state supreme court reiterated its earlier[581] holding that

> a decree in a workmen's compensation case which, like this one, adjudicates compensability and awards benefits for temporary total disability but reserves to a future date the determination of the employee's claim of permanent disability [is] not a final decree and, therefore, [is] not appealable to this court in the absence of a statute conferring jurisdiction of such an interlocutory decree or judgment.[582]

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577. *See, e.g.*, Cockrill v. People's Sav. Bank, 155 Tenn. 342, 347, 293 S.W. 996, 997-98 (1927) (writ of error); Carrol v. Caldwell, 8 Tenn. (1 Mart. & Yer.) 78, 79 (1827) (appeal in the nature of a writ of error); Moore v. Churchwell, 27 Tenn. App. 443, 446, 181 S.W.2d 959, 961, *cert. denied*, *id.* (Tenn. 1942) (appeal).

578. 552 S.W.2d 746 (Tenn. 1977).

579. 557 S.W.2d 67 (Tenn. 1977).

580. TENN. CODE ANN. § 27-305 (Cum. Supp. 1978).

581. Aetna Cas. & Sur. Co. v. Miller, 491 S.W.2d 85 (Tenn. 1973).

582. 552 S.W.2d at 747 (citing Aetna Cas. & Sur. Co. v. Miller, 491 S.W.2d 85 (Tenn. 1973)).

Without expressing an opinion, the supreme court noted that an interlocutory appeal might be permitted under the interlocutory appeal statute.[583] However, such an appeal requires strict compliance with the certification requirements prescribed in that statute. "A compliance with such requirements is an absolute prerequisite to an appeal under this statute."[584] Since a proper certification "is essential to confer jurisdiction upon the appellate court"[585] and since no such certification was in the record, the supreme court dismissed the appeal and remanded the case to the trial court for such further action as deemed appropriate on the parties' suggested courses of proceeding.

Highland Construction Co. v. K.I.T. Coal Co. was disposed of in a cryptic opinion in which the state supreme court noted that the action among the multiple parties involved multiple claims, all of which apparently had not been adjudicated. The action was therefore remanded to the trial court since there had been no compliance with the certification requirements of the interlocutory appeal statute. Interestingly, the court went on to suggest certain issues that should be addressed upon remand, and offered the further opinion that another issue probably could not be determined from the face of the complaint.[586] These gratuitous suggestions were probably prompted by an understandable desire to avoid a later reversal, and they also intimate that, contrary to the holding reiterated in *Putnam*, certification is not as essential to confer jurisdiction as might otherwise be supposed. In any event, *Putnam* and *Highland Construction Co.* reaffirm the principle that if multiple parties or multiple claims for relief are involved in an action, any order that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties is not appealable of right before entry of a final judgment adjudicating all the claims, rights, and liabilities of all parties.[587]

B. The Availability of Appellate Review by Way of Writ of Error

The intricacies of existing appellate practice have been remedied to some extent by the writ of error, which serves as a salutary device permitting review otherwise unavailable because of non-

583. *Id.*
584. *Id.*
585. *Id.*
586. 557 S.W.2d at 67.
587. *See* TENN. CODE ANN. § 27-305 (Cum. Supp. 1978).

compliance with the technical requirements of review by way of appeal or appeal in error.[588] There are limits, however, on the extent to which the writ of error can be so used, as *Hamby v. Millsaps*[589] illustrates.

At the conclusion of an action awarding death benefits under the workers' compensation law,[590] defendant prayed for and was granted an appeal in the nature of a writ of error to the supreme court. Defendant timely filed an appeal bond and bill of exceptions, but did not file assignments of error and brief within the time specified in rule 14 of the supreme court rules.[591] On plaintiff's motion defendant's appeal was dismissed for failure to comply with rule 14. Defendant then sought review by writ of error and the supreme court held that review was unavailable.

The Tennessee Code provides that review by writ of error is available "in all cases where an appeal in the nature of a writ of error would have lain."[592] This language, the supreme court noted, "implies that the remedy of an appeal in the nature of a writ of error, although available, has not been perfected or utilized."[593] Thus, the court stated in a summary of previous decisions, the writ of error is available if the appealing party has not perfected an appeal in the nature of a writ of error by failing to file in timely fashion an appeal bond or oath in forma pauperis or a transcript of the record.[594] However,

> if the appeal in the nature of writ of error is fully perfected by timely filing of appeal bond or pauper's oath *and* transcript of the record, the remedy of writ of error is no longer available. This is true even though a review of the merits of the appeal is not obtained, whether due to voluntary abandonment of the appeal by the appellant . . . or to the dismissal of the appeal by the appellate court because the appellant fails to file assign-

588. *See, e.g.*, Ward v. North Am. Rayon Corp., 211 Tenn. 535, 366 S.W.2d 134 (1963); Burcham v. Carbide & Carbon Chem. Corp., 188 Tenn. 592, 221 S.W.2d 888 (1949).

589. 544 S.W.2d 360 (Tenn. 1976).

590. TENN. CODE ANN. §§ 50-901 to 919, -1001 to 1029, -1101 to 1109, -1201 to 1211 (1977 & Cum. Supp. 1978).

591. Under supreme court rule 14 a party has 25 days after the date of the filing of the transcript of the record to file his assignment of errors and supporting brief.

592. TENN. CODE ANN. § 27-601 (1955).

593. 544 S.W.2d at 361.

594. *Id.*

> ments of error and brief within the time required by law or rules of the court or for other good cause.[595]

Since defendant had perfected his appeal in the nature of a writ of error by timely filing of the appeal bond and transcript of the record,

> he has had the benefit of the remedy of appeal in the nature of a writ of error, even though he lost the right to a review of the merits of his appeal by reason of the dismissal thereof because of his failure to file assignments of error and brief within the time required . . . . He, therefore, is not entitled to review now by writ of error.[596]

There is something odd about saying that defendant had the benefit of an appeal in error even though he lost the right to a review of the merits. It seems equally as odd to deny access to the writ of error to litigants more diligent than those to whom the writ is available. An appellate court should finally dismiss an appeal if appellant fails to prosecute his appeal diligently, but it seems somewhat mechanical to refuse a writ of error to a litigant merely because he timely filed his appeal bond and transcript but failed to file his assignments of error and brief in timely fashion. If, as may have been the case,[597] appellant's dereliction were egregious and inexcusable, refusal to afford review on the merits would be understandable, but nothing in the court's opinion indicates the outcome would have been any different if appellant's assignments and brief had been filed only a day or two late and for an unavoidable reason. *Hamby*, therefore, sounds a warning that cannot safely be ignored.

C. Choosing the Correct Appellate Court

If an appeal is taken at the appropriate time and in the correct fashion, problems still may arise in determining the court to which to appeal. Unlike the allocation of subject-matter jurisdiction in criminal appeals, the allocation of subject-matter jurisdiction between the supreme court and court of appeals is a

595. *Id.* (citations omitted) (emphasis in original).

596. *Id.* at 361-62.

597. The transcript of the record on the first appeal in error was filed on December 3, 1975. The opinion in *Hamby* was handed down December 6, 1976. These dates, separated by over a year, suggest appellant may have delayed seeking a writ of error for a considerable time.

hodgepodge.[598] One of the most troublesome provisions of the Code allocating subject-matter jurisdiction in civil appeals has been that which permits direct review by the supreme court of cases "which have been finally determined in the lower court on demurrer or other method not involving a review or determination of the facts, or in which all the facts have been stipulated."[599] The legislature eliminated this provision during the survey period and all such cases are now appealable to the court of appeals.[600] The legislature also significantly lessened the burden that otherwise would have been placed on the supreme court by amending the Uniform Administrative Procedures Act to provide for appellate review in the court of appeals[601] and not in the supreme court as that Act originally provided.[602]

Finally, in *Ezell v. Buhler*[603] the state supreme court held that the circuit court did not err in holding it had no jurisdiction over an appeal from a county court judgment overruling exceptions to a claim filed against an estate being probated in the county court. After the county judge dismissed the exceptions of the executrix and awarded judgment against the estate, the executrix appealed from county court to circuit court, which dismissed the appeal on the ground that jurisdiction was exclusively in either the court of appeals or the supreme court. The supreme court affirmed. In so doing, it reiterated a prior holding[604] that the relevant statute provided for review of judgments of a county or probate court concerning exceptions to a claim against an estate only in the court of appeals or supreme court.[605] Whether review is to one or the other appellate court depends on the statutes allocating subject-matter jurisdiction between them.[606] The supreme court also held it was not in a position to review the merits of the county court judgment because "no appeal from that court was prayed and granted to this Court; only the judgment of the Circuit Court was appealed to this Court."[607]

598. *See* Sobieski, *supra* note 495, at 182 n.114.
599. 1925 Tenn. Pub. Acts ch. 100, § 10.
600. *See* TENN. CODE ANN. § 16-408 (Cum. Supp. 1978).
601. *Id.* § 4-524.
602. 1974 Tenn. Pub. Acts ch. 725, § 18.
603. 557 S.W.2d 62 (Tenn. 1977).
604. Rowan v. Inman, 207 Tenn. 144, 338 S.W.2d 578 (1960).
605. TENN. CODE ANN. § 30-518 (1977).
606. 557 S.W.2d at 63; *see* TENN. CODE ANN. § 16-408 (Cum. Supp. 1978).
607. 557 S.W.2d at 63.

Since the purpose of praying for and granting an appeal is to provide a record of the intent to appeal,[608] it seems overly technical to deny appellate review altogether because the executrix appealed to the wrong court. In cases appealed to the supreme court that should have been appealed to the court of appeals, and vice versa, the case is simply transferred to the appropriate appellate court, not dismissed.[609] The same procedure would seem equally appropriate in cases like *Ezell*.

D. Who May Appeal

The standing of a party, who has otherwise properly taken an appeal, to seek review before the appropriate appellate tribunal seldom raises problems since typically a party has no incentive to appeal unless he is disappointed with the trial court's judgment in some way, and generally any aggrieved party may appeal. *Cole v. Arnold*[610] and *Carey v. Jones*,[611] both of which dealt with the identical question of who may appeal, are therefore somewhat unusual. In those cases the supreme court and the court of appeals independently arrived at the conclusion that a defendant with the right of contribution is an aggrieved party who may appeal a judgment in favor of his codefendant.

Plaintiffs in *Cole* brought an action for damages to their building sustained as a result of a collision between defendants' vehicles. Neither defendant offered evidence at the trial of the action in general sessions court and a judgment was entered in favor of one of the defendants and against the other. Defendant against whom judgment was entered appealed to circuit court both the judgment against him and the judgment in favor of his codefendant. The circuit court held defendant had no right to appeal the judgment exonerating his codefendant from liability, but the supreme court disagreed.

The supreme court conceded that prior to enactment of the Uniform Contribution Among Tortfeasors Act[612] a defendant could not appeal the dismissal of his codefendant because he was not aggrieved nor was his liability affected, since the substantive

608. *See* Wicker, *A Comparison of Appellate Procedure in Tennessee and in the Federal Courts*, 17 TENN. L. REV. 668, 674 (1943).

609. *See* TENN. CODE ANN. §§ 16-408, -450 (Cum. Supp. 1978).

610. 545 S.W.2d 95 (Tenn. 1977).

611. 546 S.W.2d 814 (Tenn. Ct. App. 1976), *cert. denied, id.* (Tenn. 1977).

612. TENN. CODE ANN. §§ 23-3101 to 3106 (Cum. Supp. 1978).

law did not recognize a right of contribution.[613] However, under the Act a defendant has a right of contribution from a co-defendant whose negligence contributed to a plaintiff's injury,[614] and therefore a defendant's liability is affected by a judgment in favor of his codefendant.[615] Accordingly, the defendant in such circumstances is an aggrieved party having the right to appeal the judgment exonerating his codefendant.[616] The issue presented in *Carey* was the same as in *Cole* and the court of appeals, in an opinion initially handed down before *Cole*, reached the same result.[617]

The opinion in *Carey* does not indicate whether defendants cross-claimed against each other, but it seems reasonably clear from the opinion in *Cole* that no claims had been asserted between defendants there.[618] Presumably the rule of law announced in these two cases is therefore applicable even in the absence of claims for contribution being asserted by the defendants against one another. The availability of appellate review also seems to leave little doubt that issues actually and essentially litigated between the defendants are precluded from relitigation,[619] assuming the rules of collateral estoppel are otherwise fully satisfied. The question after *Cole* and *Carey*, therefore, is not whether a defendant may appeal a judgment in favor of her codefendant but whether she can afford not to.

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613. *See, e.g.*, Yellow Cab Co. v. Pewitt, 44 Tenn. App. 572, 316 S.W.2d 17 (1958).

614. *See* TENN. CODE ANN. §§ 23-3102(b), -3103 (Cum. Supp. 1978).

615. 545 S.W.2d at 97.

616. *Id.*

617. 546 S.W.2d at 817.

618. After plaintiffs commenced their general sessions court action and during the time that that action was appealed to circuit court, one of the defendants instituted an independent action against the other. 545 S.W.2d at 97. It seems unlikely that this second action would have been brought if defendants had asserted claims against one another in the first action.

619. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 68.1(a) (Tent. Draft No. 1, 1973), which provides in part:

> Although an issue is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, relitigation of the issue in a subsequent action between the parties is not precluded in the following circumstances:
>
> (a) The party against whom preclusion is sought could not, as a matter of law, have obtained review of the judgment by an appellate court in the initial action . . . .

The belatedly reported opinion in *Gouger v. American Mutual Insurance Co.*,[620] an opinion rendered by the state supreme court in 1974, involved a distinguishable but equally vital question concerning who may appeal. *Gouger* was a workers' compensation case in which the successful plaintiff accepted payment of the judgment—voluntarily and not under protest, according to the appellees—at some point prior to rendition of the supreme court's opinion. The supreme court denied appellees' motion to dismiss the appeal, holding that an appellant could accept payment under a judgment he deems inadequate and still obtain appellate review. Appellant took the chance that on appeal he might end up with a less favorable judgment and therefore might be required to make restitution, but such was his right.[621] The court in *Gouger* did not indicate whether a defendant against whom judgment is entered may pay the judgment in full and still appeal, and there is authority that he may not.[622] It seems somewhat artificial to distinguish between these two situations, but the matter deserves more careful attention than can be given here.

E. Security on Appeal

Perhaps the occasional arbitrariness of the current law of appellate procedure in Tennessee is nowhere better illustrated than by the bonding requirement on appeal of a money decree. In *Ligon v. Ligon*[623] the circuit court entered a divorce decree that awarded $600,000 in lump-sum alimony and a $60,000 attorney fee. On an appeal by the husband, the wife moved to dismiss the appeal on the ground that the $250 cost bond filed by the husband was insufficient. The wife argued that under the Code decrees for a specific sum of money require a bond for the amount of the decree, damages, and costs, and not just costs alone.[624] The intermediate appellate court did not deny that the wife's argument would have been well founded if the action had been tried in chancery court, but the court held the statute was inapplicable

620. 548 S.W.2d 296 (Tenn. 1974) (reported in advance sheet but withdrawn from publication at the request of the Tennessee Supreme Court).

621. *Id.* at 297.

622. Metropolitan Dev. & Hous. Agency v. Hill, 518 S.W.2d 754 (Tenn. Ct. App. 1974), *cert. denied, id.* (Tenn. 1975).

623. 556 S.W.2d 763 (Tenn. Ct. App.), *cert. denied, id.* (Tenn. 1977).

624. *See* TENN. CODE ANN. § 27-313 (1955).

to actions tried to a circuit court.[625] The historical distinction between actions tried at law and actions tried in equity thus remains, even though there is no sensible contemporary reason in this area to distinguish between the two.

F. Informing the Appellate Court of the Proceedings Below

The impact of history on the current law of appellate procedure is also strikingly evident with regard to preparation of the appellate record. For example, the bill of exceptions can be traced back to the Statute of Westminster of 1285.[626] Given this ancient lineage, it is not surprising that highly technical questions concerning preparation of the bill of exceptions continue to beset the participants in the appellate process. Of all the areas of appellate procedure that received explicit consideration in the reported opinions during the survey period, that pertaining to the bill of exceptions generated the greatest number of opinions.

1. Preparation of the Bill of Exceptions

The most significant opinion concerning preparation of the bill of exceptions was the state supreme court's opinion in *Arnold v. Carter*.[627] The opinion in that case disposed of two separate appeals that presented the same basic question of appellate procedure. In *Arnold* itself, the bill of exceptions, which consisted of a transcript of the evidence and exhibits and which had previously been approved and signed by counsel for all parties, was taken directly to the chancellor instead of being filed with the clerk as specified in the relevant statute.[628] The chancellor examined the bill and signed, approved, and dated each of the exhibits, but he inadvertently did not sign the transcript itself. The bill was filed in that condition only four days after entry of the judgment appealed from, well within the time for filing the bill.[629] The chancellor's missing signature was not detected by the parties, and the appeal was duly docketed and briefed in the court of appeals. That court noted the omission and called the matter to the attention of counsel for appellant, who obtained an affidavit

625. 556 S.W.2d at 765-66.
626. 13 Edw. 1, c. 31; *see* Sobieski, *supra* note 495, at 242-43.
627. 555 S.W.2d 721 (Tenn. 1977).
628. TENN. CODE ANN. § 27-110 (Cum. Supp. 1978).
629. *See id.* § 27-111.

from the chancellor in which he stated he had examined and approved the bill but inadvertently had failed to sign the transcript. The court of appeals, however, held that the bill had to be signed within ninety days of judgment and, since the bill had not been signed within that time, it could not consider the bill but only the technical record.[630] The court of appeals, therefore, did not consider those assignments of error directed to the evidence contained in the transcript.

In *Flynn v. Jenkins*, the other appeal decided in the same opinion, the bill, as in *Arnold*, had been approved by counsel for the parties and timely filed with the clerk. Unlike *Arnold*.the bill was signed by the trial judge, but, again as in *Arnold*, more than ninety days after judgment. This bill too was held fatally defective by the intermediate appellate court.

Reversing and remanding both cases, the state supreme court held that nothing in the current version of the Code requires the trial court to sign the bill of exceptions within thirty days or, if an extension has been timely sought and granted, within ninety days after entry of the judgment being appealed.[631] The Code simply requires that the bill be filed within the designated time,[632] and the bill may be filed by the clerk when it is lodged with him bearing the "certificate of approval of the parties or the certificate of the court stenographer . . . ."[633] If, however, the bill has not been approved by all the parties, then the filing party must also certify that notice of the filing has been given to all other interested parties.[634] Notice need not be given if all the parties have previously approved the bill because, in the indisputably sensible opinion of the supreme court, "it would be redundant indeed to require that notice be given to the other parties of the filing of the bill of exceptions, in order that they might make objections, when they have already previously approved its contents."[635] The Code also provides that if notice must be given to the other parties, they have ten days from filing of the bill (not, it needs to be emphasized, ten days from receipt of notice of the

630. For a discussion of the distinction between the bill of exceptions and the technical record, see Sobieski, *supra* note 495, at 242-43.

631. 555 S.W.2d at 723.

632. *Id.*; *see* TENN. CODE ANN. § 27-111 (Cum. Supp. 1978).

633. TENN. CODE ANN. § 27-110 (Cum. Supp. 1978).

634. 555 S.W.2d at 723.

635. *Id.*

filing) to file written objections with the clerk.[636] Once the record has been timely filed, the Code directs the trial court to affix his certificate of approval to the bill "as soon as practicable after the filing"[637] or as soon as practicable after the ten-day notice period.[638] The action of the trial court in affixing his certificate of approval to the bill of exceptions comprises the requisite authentication.[639]

These provisions, which were initially incorporated into the Code in 1972,[640] simplify prior law, but as *State v. Williams*[641] illustrates, the bill of exceptions must still be timely filed and signed by the trial court. The importance of these requirements is highlighted by the fact that the supreme court left little doubt that it wanted very much to decide the issue presented. "The time is opportune,"[642] the court stated, to decide the question whether a non-lawyer juvenile judge may constitutionally incarcerate a juvenile or deprive him of his liberty, a question the court characterized as "of far-reaching significance"[643] and "of vital public importance."[644] But the court concluded that it could not reach the merits because the bills in the consolidated cases were fatally defective.[645] This was so for two reasons. First, the trial judge never signed the bills.[646] Second, the bills were not filed within thirty days after judgment and no motion for an extension was made until after expiration of the thirty-day period.[647] Limiting itself to a review of the technical record, the court also found it insufficient since the record did not indicate whether the juvenile judge was or was not a lawyer.[648] Accordingly, the supreme court reversed the court of appeals, which held due process was not satisfied by nonlawyer juvenile judges,[649] and affirmed the trial court's judgment.

636. TENN. CODE ANN. § 27-110 (Cum. Supp. 1978).
637. *Id.*
638. *Id.*
639. *Id.*
640. 1972 Tenn. Pub. Acts ch. 497, §§ 2-3.
641. 547 S.W.2d 895 (Tenn. 1976).
642. *Id.* at 896.
643. *Id.*
644. *Id.*
645. *Id.*
646. *Id.*
647. *Id.* at 896-97.
648. *Id.* at 897.
649. *Id.* at 895-96.

Williams was decided before *Arnold* and the court in *Arnold* did not overrule *Williams*.[650] Nevertheless, the continued precedential value of *Williams* is certainly open to some doubt. In criminal cases the Code empowers the appellate courts for good cause to order at any time the late filing of the bill of exceptions.[651] The appeal in *Williams* was taken to the court of appeals,[652] and the statute authorizing the late filing of the bill of exceptions does not expressly include the court of appeals.[653] It is somewhat more than simply discomforting to think, however, that a juvenile's interest in obtaining review of his conviction is valued less dearly than that of an adult similarly situated. It seems only fair, therefore, to permit the late filing of a bill of exceptions in a juvenile appeal like that in *Williams*. If this difficulty can be surmounted, then the remaining defect with the bill in *Williams*—the absence of the trial court's signature—can also be remedied pursuant to the rationale of *Arnold* by remanding the appeal to the juvenile judge for the affixing of his certificate of approval on the bill of exceptions.

Gouger v. American Mutual Insurance,[654] which was previously discussed in connection with the parties entitled to appeal,[655] also involved a question concerning the timeliness of the filing of the bill of exceptions. The decree from which the appeal was taken was entered on December 12, 1972. A few days earlier appellant filed a motion in which he excepted to the decree prepared by appellees because it did not contain a provision granting an appeal. On December 27, 1972, the court entered an order allowing appellant ninety days within which to perfect his appeal, and the bill of exceptions was filed within ninety days of the order. The supreme court held that appellant's motion that resulted in the order of December 27, 1972, suspended the effective date of the decree until the motion was ruled on,[656] and since the

650. *See* 555 S.W.2d at 723-24.

651. TENN. CODE ANN. § 27-111 (Cum. Supp. 1978).

652. *See* 547 S.W.2d at 895.

653. TENN. CODE ANN. § 27-111 (Cum. Supp. 1978) provides in part: "[I]n criminal cases the Court of Criminal Appeals or the Supreme Court . . . shall be empowered at any time to order the filing of the bill of exceptions . . . so as to give the appellate court jurisdiction to consider the same . . . ."

654. 548 S.W.2d 296 (Tenn. 1974) (reported in advance sheet but withdrawn from publication at the request of the Tennessee Supreme Court).

655. *See* text accompanying notes 620-22 *supra*.

656. *See* TENN. CODE ANN. § 27-111 (Cum. Supp. 1978), which provides

bill was filed within ninety days from the order, the court denied appellees' motion to dismiss the appeal.[657]

Appellee's motion to dismiss was equally unavailing in *Zeitlin v. Zeitlin*,[658] which also has been discussed previously.[659] Appellee in *Zeitlin* sought dismissal of the appeal on the ground that appellant failed to give him notice of the filing of the bill of exceptions, a requirement discussed in connection with *Arnold*.[660] However, appellee admitted to the court of appeals that, after learning that the bill had been filed, he filed no objections and made no other effort to reform the bill of exceptions. While authentication of the bill by the trial court prior to expiration of the notice period is generally invalid, the court held that under the circumstances it would consider the bill.[661] The fact that the court found no reversible error "from an informal examination"[662] of the bill of exceptions was offered as an additional reason for the court's decision to deny appellee's motions to strike the bill and to dismiss the appeal.

2. Incomplete Bill of Exceptions

Even if the bill of exceptions is timely filed and properly authenticated, difficulties arise if the bill does not contain "the mandatory recitation that 'this was all the evidence heard in this case', or words of like import."[663] In *State v. Williams*[664] the supreme court held that this "historic requirement"[665] and "matter of universal knowledge"[666] does not preclude consideration of the bill of exceptions if it is signed by counsel for all the parties and the trial judge.

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in part: "The period of pendency of any motion or other matter, having the effect of suspending . . . final judgment or action, shall be excluded in the computation of the period [for filing the bill of exceptions] . . . ."

657. 548 S.W.2d at 297 (reported in advance sheet but withdrawn from publication at the request of the Tennessee Supreme Court).

658. 544 S.W.2d 103 (Tenn. Ct. App.), *cert. denied*, *id.* (Tenn. 1976).

659. *See* text accompanying notes 532-41 *supra*.

660. *See* text accompanying note 634 *supra*.

661. 544 S.W.2d at 106.

662. *Id.*

663. State v. Williams, 547 S.W.2d 895, 896 (Tenn. 1976).

664. 547 S.W.2d 895 (Tenn. 1976).

665. *Id.* at 896.

666. *Id.*

Similarly, in *Yett v. Smoky Mountain Aviation, Inc.*,[667] the court of appeals held that appellate review is not precluded simply because a partial bill of exceptions is filed. All the evidence bearing on the purely legal issue presented for review appeared in the partial bill; a transcript of all the evidence, in the court's opinion, would have been superfluous.[668] Finding the procedure employed by appellant "commendable,"[669] the court denied appellee's motion to dismiss the appeal and to affirm the judgment below.

Failure to include all the evidence in the bill of exceptions proved surprisingly beneficial in *Fischer v. Cromwell Co.*[670] Plaintiff prevailed in general sessions court and moved to dismiss defendant's appeal to circuit court on the ground that defendant had not timely filed the appeal bond under the provision of the Code allowing ten days to appeal a judgment of a sessions court.[671] In a written response to this motion, defendant contended the sessions court judgment was entered *nunc pro tunc* on a date later than that appearing in the record and that the appeal bond was filed within ten days from the date of actual entry of the sessions court judgment. In a hearing pursuant to rule 43.05 of the Tennessee Rules of Civil Procedure, a circuit court judge overruled the motion, his order reciting that he had considered defendant's response to the motion. The bill of exceptions also disclosed that when the case came on for trial before a special judge of the circuit court, plaintiff's motion to dismiss was renewed orally and again denied. The court of appeals reversed, and in a rather cryptic and uninformative opinion, the supreme court affirmed the court of appeals' reversal. The basis for the supreme court's holding was that the appeal to circuit court from sessions court was untimely and that the appropriate remedy for an untimely appeal is by certiorari.[672]

In a persuasive dissent, Justice Harbison joined by Justice Brock noted that matters outside the appellate record were considered by at least one of the circuit court judges and possibly by

667. 555 S.W.2d 867 (Tenn. Ct. App.), *cert. denied*, *id.* (Tenn. 1977).

668. *Id.* at 868.

669. *Id.*

670. 556 S.W.2d 749 (Tenn. 1977). The facts set forth in the text are taken from the dissenting opinion. *Id.* at 749-50 (Harbison, J., dissenting).

671. TENN. CODE ANN. § 27-509 (Cum. Supp. 1978).

672. 556 S.W.2d at 749.

both. This evidence, however, was not included in the record by plaintiff who sought reversal of the circuit judge's findings that the appeal to circuit court was timely. Absent a complete bill of exceptions, the dissent argued, the supreme court "should presume that there was sufficient evidence before them to sustain their respective findings that the appeal bond was in fact timely filed."[673] This presumption applied even though defendant took the appeal to the court of appeals. Plaintiff was the party attacking these particular findings, and "it was incumbent upon plaintiff, not upon the defendant, to preserve a proper bill of exceptions, including all matters considered by the trial judges, and this simply has not been done."[674] The dissent, therefore, was of the opinion the case should have been remanded to the court of appeals for consideration of the merits of defendant's assignment of errors that were properly supported by a transcript of the evidence heard at the trial.[675]

3. Wayside Bill of Exceptions

In addition to the ordinary bill of exceptions, Tennessee law, unlike the common law,[676] recognizes a wayside bill of exceptions, the unique purpose of which was discussed in *Overturf v. State*.[677] Although *Overturf* was a criminal appeal, the law set forth therein is equally applicable to civil appeals.[678]

Defendant Overturf was indicted with a codefendant for larceny of an automobile and joyriding. He offered no evidence on his own behalf and moved for a directed verdict both at the close of the state's case-in-chief and at the close of his codefendant's case. His motions were denied, and he was convicted and sentenced to not less than three nor more than five years in the penitentiary. The trial court, however, granted Overturf a new trial on the ground the evidence was insufficient to sustain the conviction. A timely filed and duly authenticated wayside bill of exceptions was made of these proceedings. Defendant was convicted at his retrial, and his motion for a directed verdict or, in the alterna-

673. *Id.* at 750 (Harbison, J., dissenting).
674. *Id.* (Harbison, J., dissenting).
675. *Id.* (Harbison, J., dissenting).
676. *See* Sunderland, *A Simplified System of Appellate Procedure*, 17 TENN. L. REV. 651, 659 (1943).
677. 547 S.W.2d 912 (Tenn. 1977).
678. *Id.* at 914.

tive, for a new trial made at the conclusion of the second trial was overruled. On his appeal to the court of criminal appeals, defendant assigned as error the failure to direct a verdict in his favor at the first trial. The intermediate appellate court held that issue was not properly before it because the issue had not been included in defendant's new trial motion made after the second trial. The state supreme court reversed.

The form and content of the wayside bill of exceptions, the court noted, are virtually the same as those of an ordinary bill of exceptions, the distinction being that the wayside bill refers to an earlier stage of the proceedings or a former trial.[679] "Essentially, the purpose of a wayside bill of exceptions is to preserve a record of the first trial proceedings, in the event that a party is unsuccessful after a subsequent trial and desires to seek appellate review with respect to specific action taken by the trial court in the previous trial."[680] By utilizing a wayside bill, errors in the first trial can be assigned as error upon an appeal after the second trial, including errors such as the failure to direct a verdict or the granting of a new trial.[681] If a wayside bill of exceptions is properly before the appellate court, the wayside bill and the assigned errors relating to it must be considered prior to consideration of errors relating to the subsequent bill of exceptions.[682] If the trial court committed no error in granting a new trial, the appellate court will then consider the bill of exceptions concerning the second trial.[683] If, however, the trial court erred in granting a new trial, the appellate court will enter judgment on the results of the original trial and will not consider the succeeding trial.[684]

Applying these principles to the facts of *Overturf*, the supreme court held the court of criminal appeals was incorrect in concluding defendant could not obtain appellate review of errors that occurred at his first trial.

> By filing a wayside bill of exceptions with respect to the first trial, [defendant] preserved and made a part of the proceedings in this case on appeal his assignments of error relevant to that previous trial. His original motion for new trial relating to

679. *Id.*
680. *Id.*
681. *Id.* at 915.
682. *Id.*
683. *Id.*
684. *Id.*

> the wayside bill of exceptions remains just as viable on the present appeal as his subsequent motion for new trial relating to the bill of exceptions of his second trial.[685]

Since the question of whether the trial court erred in not directing a verdict after the first trial was open to appellate review but undecided by the court of criminal appeals, the supreme court remanded the case to that court for its consideration of the question.

4. Matters Includable in the Technical Record

The only remaining reported opinion concerning the appellate record concerned the matters includable in the technical record. In *Farrar v. Farrar*,[686] a divorce action discussed earlier in regard to amendments to the pleadings,[687] the husband assigned as error before the court of appeals the trial court's decree dated May 24, 1976, awarding his wife's attorneys a $5,000 fee for their representation of her on appeal to be paid by him. The technical record had been filed in the court of appeals on May 18, and on May 24 a judge of that court remanded the case to the trial court so that it could set an award of counsel fees for the appeal. It was in response to the appellate court's order that the trial court ordered the disputed attorneys' fees. That order was entered on June 1, though dated and signed earlier, and was filed with the court of appeals the next day. The supreme court held that the decree awarding fees was properly before the court of appeals "notwithstanding the fact that no appeal therefrom was prayed. The sole purpose of the remand was for the fixing of attorneys' fees. Certainly the amount so fixed, and certified, is a legitimate issue on appeal."[688]

G. Discretionary Review by the State Supreme Court of Judgments of the Intermediate Appellate Courts

1. Assignment of Errors and Supporting Brief

As cases like *Farrar* and others discussed in this survey illustrate, the state supreme court hears not only cases appealed di-

685. *Id.* at 916.
686. 553 S.W.2d 741 (Tenn. 1977).
687. *See* text accompanying notes 344-58 *supra*.
688. 553 S.W.2d at 745.

rectly to it from the trial court but also cases that have been considered by the intermediate appellate courts.[689] Review of final determinations of the intermediate appellate courts is sought by petitioning for certiorari.[690] The supreme court during the survey period modified its rules governing the procedure for so petitioning. Supreme court rules 11 and 12 were amended, first, to make clear that they govern petitions for certiorari (or certiorari and supersedeas) to review judgments of both intermediate appellate courts and not just those of the court of appeals.[691] In addition, rule 11 as amended eliminates the five-days notice of the intent to file the petition for certiorari that previously had to be given opposing counsel.[692] The most extensive changes, however, were in supreme court rule 12. Verification by affidavit of the petition is no longer necessary.[693] Also, while rule 12 still permits use of briefs filed in the intermediate appellate court, the rule now requires that the assignment of errors be redrafted to indicate specifically in what respects the opinion of the intermediate appellate court is in error.[694] The brief in support of the assignments must also be redrafted along similar lines.[695]

> It is not . . . acceptable . . . to attach a copy of the brief filed in the intermediate court to a skeleton petition for the writ of certiorari, making a single reference to said brief, as a substitute for assignment of errors and brief in support thereof, which must be directed to alleged error by the intermediate court, rather than the trial court.[696]

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689. *See* TENN. CODE ANN. §§ 16-452, 27-819 (Cum. Supp. 1978).

690. *Id.*

691. This was accomplished by deleting reference to the "court of appeals," Tenn. Sup. Ct. R. 11, 12, 218 Tenn. 811-12 (1967), and substituting the phrase "intermediate court[s]." TENN. SUP. CT. R. 11, 12.

692. Tenn. Sup. Ct. R. 11, 218 Tenn. 811-12 (1967), provided in part for "five days' notice of the filing of the petition being first given opposite counsel . . . ."

693. *Compare* Tenn. Sup. Ct. R. 12, 218 Tenn. 812 (1967), *with* TENN. SUP. CT. R. 12 (as amended, effective Jan. 1, 1977).

694. TENN. SUP. CT. R. 12 provides in part: "[A]ssignments of error in this Court must be redrafted expressly directed to error in the judgment or decree of the intermediate court, showing specifically wherein the opinion of that court is erroneous."

695. TENN. SUP. CT. R. 12 provides in part: "Each section of a brief in support of the assignment of errors . . . must also be redrafted . . . ."

696. TENN. SUP. CT. R. 12.

Reply briefs must respond to each section of petitioner's assignment of errors and supporting brief, and are subject to the same requirements as those governing petitioner's assignment and brief.[697]

2. Effect of Denial of Review

Many petitions for certiorari are not granted, and in *Adams v. State*[698] the state supreme court reaffirmed its previously expressed view that the mere denial of certiorari " 'does not commit us to all the views expressed in a particular opinion. *We are primarily concerned on such application with the result reached.*' "[699] The effect of denial of certiorari accompanied by an opinion, however, proved to be a far more difficult question for the state supreme court to resolve.

Pairamore v. Pairamore[700] was a divorce action in which the supreme court denied a first petition for certiorari in 1974. The court accompanied its denial of certiorari with a memorandum opinion suggesting that the wife's claim for homestead be given consideration on remand. Though the wife had not expressly asked for homestead in her complaint, she had asked that her husband's interest in the family residence be vested in her. The supreme court in an earlier unrelated case held that request to be a sufficient prayer for relief to support an award of homestead.[701] Neither the trial nor intermediate appellate court considered the wife's homestead claim. The decree of the court of appeals simply awarded nominal periodic alimony and remanded the case for enforcement of its decree and retention of the case in the trial court for any modification required by changed circumstances.

On remand after the denial of certiorari, the general sessions court determined that it did not have jurisdiction to order the sale of the family residence in order to award homestead, and the court of appeals affirmed, reasoning that the supreme court's memorandum opinion denying certiorari had no force or effect whatever on its earlier decree. The supreme court granted a second petition for certiorari and affirmed.

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697. *Id.*

698. 547 S.W.2d 553 (Tenn. 1977).

699. *Id.* at 556 (quoting Bryan v. Aetna Life Ins. Co., 174 Tenn. 602, 611, 130 S.W.2d 85, 88 (1939)) (emphasis added by *Adams* court).

700. 547 S.W.2d 545 (Tenn. 1977).

701. Trimble v. Trimble, 224 Tenn. 571, 458 S.W.2d 794 (1970).

Three separate opinions were voiced by the state supreme court. In one, Justice Fones, speaking for himself and Justice Harbison, noted that there are two inconsistent lines of cases, one suggesting the court acquires jurisdiction upon timely filing of a petition for certiorari and another suggesting jurisdiction attaches only if certiorari is granted.[702] Justices Fones and Harbison concluded jurisdiction exists when the petition for certiorari is filed.[703] The denial of certiorari accompanied by a published opinion means the supreme court agrees only with the result but not the disposition of the issues by the intermediate appellate court.[704] Any principles of law enunciated in a published opinion of the supreme court upon the denial of certiorari are entitled to stare decisis effect.[705]

In a second opinion Justice Brock, with the concurrence of Justice Cooper, distinguished between the lawful authority of the supreme court to grant or to deny a petition for certiorari and its authority to pass on the merits.[706] In their opinion, authority to pass on the merits is acquired only if certiorari is granted.[707] An opinion filed on the denial of certiorari "should be limited to a statement of reasons for refusal to take jurisdiction of the merits of the case; anything more is dictum and amounts to an advisory opinion which we are not authorized to give."[708]

Finally, in a third opinion Justice Henry argued that upon the filing of a petition for certiorari, the court acquires jurisdiction to determine whether certiorari should be granted.[709] However, Justice Henry was also of the view that the denial of certiorari accompanied by an opinion "becomes the law of the case and is conclusive in subsequent proceedings."[710] Justice Henry also appears to agree that any principles of law enunciated in an opinion accompanying the denial of certiorari are entitled to stare decisis effect.[711]

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702. 547 S.W.2d at 546-47.

703. *Id.* at 547.

704. *Id.* at 548.

705. *Id.*

706. *Id.* at 549 (Brock, J., concurring).

707. *Id.* (Brock, J., concurring).

708. *Id.* at 550 (Brock, J., concurring).

709. *Id.* (Henry, J., now C.J., concurring in part & dissenting in part).

710. *Id.* at 551 (Henry, J., now C.J., concurring in part & dissenting in part).

711. If the supreme court denies certiorari but accompanies the denial

Two conclusions seem justified by the views expressed by the respective justices in *Pairamore*. First, the denial of certiorari leaves the judgment of the intermediate appellate court unimpaired; only Justice Henry thought otherwise. Second, opinions issued on the denial of certiorari are entitled to stare decisis effect although Justices Brock and Cooper disagree. The desirability of giving these opinions such an effect would certainly be open to question if the proposed Tennessee Rules of Appellate Procedure were adopted by the General Assembly. Under those rules, appellant's request for supreme court review will be just that, a request and demonstration to the supreme court that the case is of such extraordinary importance that it is an appropriate one for granting review.[712] Such a request will typically give only incidental consideration to the correctness of the intermediate appellate court's opinion since the supreme court cannot realistically be expected to correct every error made by the intermediate appellate courts.[713] If the proposed appellate rules are adopted, the most desirable approach to the question raised in *Pairamore*, therefore, would appear to be that of Justices Brock and Cooper.

H. The Scope of Appellate Review

1. Administrative Proceedings

If the parties have successfully avoided the obstacles strewn along their path to a review on the merits, they must next concern themselves with the appropriate scope of appellate review. In

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with an opinion, "[t]his means," in Justice Henry's view, "that the Court has elected to decide the controversy, *or clarify the law*, or considers it desirable to outline procedure on remand *or that it has used this means of advising the trial court and counsel of the Court's views on a controlling principle of law . . . .*" *Id.* at 550-51 (Henry, J., now C.J., concurring in part & dissenting in part) (emphasis added). Later in his opinion Justice Henry speaks of "the right to hand down a binding opinion on certiorari denials." *Id.* at 552 (Henry, J., now C.J., concurring in part & dissenting in part). While Justice Henry's views on the matter are not unambiguously clear, he does appear to agree with Justices Fones and Harbison that principles of law enunciated in an opinion accompanying the denial of certiorari are entitled to stare decisis effect.

712. *See* PROPOSED TENN. R. APP. P. 11(b).

713. *See* Sobieski, *supra* note 576, at 19-20; Sobieski, *supra* note 495, at 231-35. The supreme court and the litigants are also deprived of oral argument if questions of law are decided upon the denial of certiorari. *See* Pairamore v. Pairamore, 547 S.W.2d 545, 551 (Tenn. 1977) (Henry, J., now C.J., concurring in part & dissenting in part).

Metropolitian Government of Nashville v. Shacklett[714] the Tennessee Supreme Court clarified the law concerning the scope of appellate review of the action of administrative agencies subject to the Uniform Administrative Procedures Act.[715]

Shacklett arose as the result of a municipal ordinance adopted by the Metropolitan Government of Nashville and Davidson County that restricted the location of retail liquor stores to a specified area of the Urban Services District. The Metropolitan Government refused to issue certificates of good moral character and retail liquor licenses to certain applicants solely because their proposed outlets were outside the specified area. Based on an evidentiary record made before it, the Tennessee Alcoholic Beverage Commission on review held the municipal ordinance to be arbitrary and unreasonable and granted the applications of twelve of the nineteen applicants who had been denied licenses by the Metropolitan Government. On review before the chancery court of Davidson County the chancellor also held the ordinance arbitrary and unreasonable but reversed the denial of the seven applications on the ground that the Commission established no satisfactory criteria or standard for the granting of some of the applications and the denial of others.

The state supreme court initially held that judicial review of orders of the Alcoholic Beverage Commission was properly sought in chancery court by way of a petition for review under the Uniform Administrative Procedures Act.[716] The court also thought it "clear from the language of the statute that the review provided in the chancery court is in no sense a broad, or de novo, review."[717] Instead, review is limited to the record made before the agency unless, as provided by statute, there are "alleged irregularities in procedure before the agency not shown in the record . . . ."[718] Moreover, review is confined to the purely legal issues of

> whether the agency acted within the scope of its statutory authority, and in conformity generally with statutory and constitutional provisions, whether it followed proper procedures, whether its decisions were arbitrary, capricious or in abuse of

714. 554 S.W.2d 601 (Tenn. 1977).
715. TENN. CODE ANN. §§ 4-507 to 527 (Cum. Supp. 1978).
716. 554 S.W.2d at 602-04.
717. *Id.* at 604.
718. *Id.*; *see* TENN. CODE ANN. § 4-523(g) (Cum. Supp. 1978).

discretion, and whether its conclusions are supported by material and substantial evidence in the record.[719]

It is against this background that the court then discussed the appropriate scope of appellate review. The Uniform Administrative Procedures Act itself provides for appellate review "as in chancery cases."[720] "This language," the court stated, "is not without difficulty."[721] The difficulty arises because review of chancery cases on appeal is ordinarily governed by a statutory standard that entitles the appealing party in an equity case to "a reexamination . . . of the whole matter of law and fact appearing in the record."[722] In nonjury cases the Code specifies that such a reexamination "of any issue of fact or of law in the appellate court shall be de novo upon the record of the trial court, accompanied by a presumption of the correctness of the judgment or decree of the trial court, unless the preponderance of the evidence is otherwise."[723]

The court quite sensibly held that the Uniform Administrative Procedures Act was not intended to permit broad or de novo appellate review of the chancellor's decision "when his action, initially, is confined to a narrow and statutorily prescribed review of the record made before the administrative agency."[724] It would not be practicable, the court stated, "to afford any broader or more comprehensive review to cases arising under the Act than is afforded to them by the trial court in the first instance . . . ."[725] Therefore, the court construed the language in the Act providing for appellate review "as in chancery cases" as referring only to the general procedures to be followed in taking a case from chancery court to the appellate court if that procedure is not otherwise specified in the Act itself.[726]

The appropriate scope of review by the chancellor of administrative action was also considered in two later decisions of the state supreme court, *United Inter-Mountain Telephone Co. v.*

719. 554 S.W.2d at 604 (citing TENN. CODE ANN. § 4-523(h) (1977)).
720. TENN. CODE ANN. § 4-524 (Cum. Supp. 1978).
721. 554 S.W.2d at 604.
722. *Id.*; *see* TENN. CODE ANN. § 27-301 (1955).
723. TENN. CODE ANN. § 27-303 (Cum. Supp. 1978).
724. 554 S.W.2d at 604.
725. *Id.*
726. *Id.*

Public Service Commission[727] and *Public Service Commission v. General Telephone Co.*[728] Both were telephone rate cases. In *United Inter-Mountain*, review of the rate fixed by the Public Service Commission was sought in chancery court by way of a complaint and petition for certiorari. The record made before the Commission was certified to the chancery court, which received substantial additional evidence and affirmed the action of the Commission. On appeal the state supreme court held that the Uniform Administrative Procedures Act applied to the Commission and that the only available method of judicial review of a contested case is by way of a petition for review.[729] In addition, the court emphasized, as it had in *Shacklett*,[730] that judicial review is limited to the record made before the agency unless there are alleged irregularities before the agency and that factual determinations may be set aside only if unsupported by material and substantial evidence.[731] It was error, therefore, for the chancellor to receive additional evidence. While normally it would be appropriate to decide the appeal on the basis of the record before the Commission, the supreme court concluded that in the interest of justice the case should be remanded to the Commission since both counsel and the chancellor had proceeded under the old, superseded statutes.[732]

In the *General Telephone Co.* case, the company argued that if a constitutional issue of confiscation is presented in a rate case, the appropriate scope of review is that established by the United States Supreme Court in *Ohio Valley Water Co. v. Ben Avon Borough*.[733] In that case the Supreme Court stated that in rate cases "if the owner claims a confiscation of his property will result, the state must provide a fair opportunity for submitting that issue to a judicial tribunal for determination upon its own independent judgment as to both law and facts; otherwise the order is void because in conflict with the due process clause, Fourteenth Amendment . . . ."[734] The authors of one leading administrative

727. 555 S.W.2d 389 (Tenn. 1977).
728. 555 S.W.2d 395 (Tenn. 1977).
729. 555 S.W.2d at 391-92.
730. *See* text accompanying note 718 *supra*.
731. 555 S.W.2d at 391-92.
732. *Id.* at 392.
733. 253 U.S. 287 (1920).
734. *Id.* at 289 (citations omitted).

law casebook state that "[p]robably no administrative law decision ever gave rise to more instant, voluminous, or steadily critical comment by legal writers."[735] Moreover, the Tennesee Supreme Court's review of subsequent decisions of the United States Supreme Court as well as the decisions of the courts of other states led it to the conclusion that *Ben Avon*'s independent judgment rule was no longer good law and that the substantial evidence rule satisfied federal constitutional law.[736] "We reject the independent judgment rule as controlling Tennessee constitutional law and hold that the scope of review articulated in [the Uniform Administrative Procedures Act] provides adequate standards within constitutional limits, for judicial determination of the issue of confiscation in rate cases."[737] Most significantly, the state supreme court also stated that if the rates prescribed by the Public Service Commission are confiscatory, its order can be set aside because it would be "in violation of constitutional provisions, and arbitrary, capricious and an abuse of discretion."[738] In short, the state supreme court seems to have arrived at the proper conclusion that determinations of fact by the Public Service Commission will not be set aside if supported by substantial evidence. The further question, however, of whether the rate fixed on those facts is confiscatory raises a question of constitutional law that is subject to plenary review in the courts.

2. County Court to Circuit Court

In administrative review cases like those just discussed, the trial court functions like an appellate court, initially reviewing the action of the administrative agency pursuant to the limited review provisions of the Uniform Administrative Procedures Act. There are other cases, however, appealed to the trial court from inferior tribunals in which the trial court exercises plenary powers of review. *Delffs v. Delffs*[739] is a case in point.

The dispute in *Delffs* was between an intestate's widow and his eldest son over the right to administer decedent's estate. The county court issued letters of administration to the son, and intes-

735. W. GELLHORN & C. BYSE, ADMINISTRATIVE LAW: CASES AND COMMENTS 409 (6th ed. 1974).

736. 555 S.W.2d at 399-402.

737. *Id.* at 402.

738. *Id.*

739. 545 S.W.2d 739 (Tenn. 1977).

tate's widow sought revocation of the letters on the ground that as decedent's widow she had a superior statutory right to administer the estate.[740] The county court denied the petition, and she appealed the order of denial to the circuit court. Decedent's son sought dismissal of the appeal on the grounds that the record did not show an appeal was prayed and granted, that the transcript was not timely filed, and that no bill of exceptions of the county court hearing was made and filed in circuit court. The circuit court overruled the motion to dismiss and heard the case, without receiving additional proof, on the technical record. That court concluded that the letters had been issued without notice to the widow and remanded the case with directions that the widow be appointed administratrix unless an evidentiary hearing, on notice to all parties, demonstrated she was unfit to serve in that capacity. On appeal to the court of appeals, decedent's son renewed his arguments that the appeal to circuit court should have been dismissed. The court of appeals reversed on the ground that a bill of exceptions was essential to review but had not been made or filed. Accordingly, the intermediate appellate court held the circuit court did not have authority to entertain the appeal and ordered that the widow's petition be dismissed. The state supreme court reversed.

The supreme court initially distinguished the earlier court of appeals decision in *Griffitts v. Rockford Utility District*.[741] In that case the intermediate appellate court held that an appeal in the nature of a writ of error, and not an appeal, was the proper method of review to circuit court from a county court order establishing a utility district. In those kinds of proceedings, the supreme court in *Delffs* reasoned, the county judge acts as an administrative agency, and therefore the narrower review of appeal in error, rather than the de novo review of an appeal, is appropriate.[742] There was dictum in *Griffitts* that all appeals from county court to circuit court should be reviewed as appeals in error,[743] except in jury and chancery cases. The supreme court denied certiorari in *Griffitts*, but that denial of certorari "must not be considered as approval of the dictum . . . but only as approval

740. *See* TENN. CODE ANN. § 30-109 (1977).
741. 41 Tenn. App. 653, 298 S.W.2d 33, *cert. denied, id.* (Tenn. 1956).
742. 545 S.W.2d at 741.
743. 41 Tenn. App. at 655-58, 298 S.W.2d at 34-35.

of the narrow holding . . . ."[744] The court then construed the statute that authorized an "appeal" from county court to circuit court of orders appointing executors and administrators[745] as being intended to permit a de novo hearing. "[U]pon review by an appeal of an order of the county court appointing an administrator or executor, the case is to be heard *de novo* in the circuit court."[746] Since the hearing in circuit court is de novo, no bill of exceptions is required, and the court of appeals decision to the contrary was in error.[747] Besides, the court stated, a bill of exceptions is never required if the error complained of appears in the technical record, and the error raised by the widow in circuit court—failure of the county court to give notice to her of its initial hearing—was an error found in the technical record.[748] The court concluded its opinion by noting that all other requirements for an appeal from county court to circuit court had been met.[749]

3. Interlocutory Review

As many of the previous cases demonstrate, the proper scope of appellate review is a multifaceted concept. No single, all-inclusive rule exists to guide an appellate court in its review of proceedings below. Rather, the scope of review depends on the kind of legal controversy and the particular lower-court (or agency) function upon which the appellate court must pass.[750] In *Cumberland Capital Corp. v. Patty*,[751] the Tennessee Supreme Court indicated that the scope of review also depends, at least to some extent, on whether the appeal is being taken from an interlocutory order.

Patty is best known for its holding concerning the permissible rate of interest that may be charged on the loan of money. However, in its petition to rehear, Cumberland Capital sought to have the state supreme court rule on matters not within the scope of the issues certified by the trial court for interlocutory review.[752]

744. 545 S.W.2d at 741; *see* text accompanying notes 698-99 *supra*.
745. *See* TENN. CODE ANN. § 30-110 (1977).
746. 545 S.W.2d at 742.
747. *Id.*
748. *Id.*
749. *Id.* at 742-43.
750. *See* APPELLATE COURT STANDARDS, *supra* note 494, § 3.11, at 19.
751. 556 S.W.2d 516 (Tenn. 1977).
752. *See* TENN. CODE ANN. § 27-305 (Cum. Supp. 1978).

The supreme court refused to consider the merits of a due process and commerce clause argument made by Cumberland Capital in its rehearing petition because "the nature of the appeal and the established principles of appellate review have combined to produce a narrow consideration of limited issues . . . ."[753] Without any explanation for the difference, however, the court proceeded to consider whether its holding should be given retroactive effect, even though that issue also was not expressly certified for interlocutory review.[754]

In dissent, Justice Harbison noted that Cumberland Capital and the other lending institutions as amici curiae emphasized in their principal briefs that the only issues open for review were those certified by the trial court.[755] These issues were fully and completely addressed in the court's principal opinion.[756] Moreover, in Justice Harbison's opinion, the earlier case of *Tennessee Department of Mental Health and Mental Retardation v. Hughes*[757] established that "in dealing with interlocutory appeals the Court requires the exact and precise questions to be reviewed to be stated in the order granting the appeal, and limits its decision to those specific questions."[758] Accordingly, he thought it was inappropriate to consider any additional questions pertaining to the court's opinion in light of the incomplete and undeveloped record before the court. "Interlocutory appeals, no doubt, serve a useful purpose, but parties utilizing this special appellate procedure, occurring, as it were, in the midst of the handling of the case in the trial court, should not expect the Court to respond to any issues except those certified here."[759]

The proper scope of appellate review on an interlocutory appeal presents a difficult question.[760] Whatever the appropriate scope of review, an appellate court, as Justice Harbison correctly noted, should not pass upon an issue that raises questions of fact upon which the parties have not been heard. Consideration of

753. 556 S.W.2d at 538.

754. *Id.* at 538-42.

755. *Id.* at 543 (Harbison, J., concurring in part & dissenting in part).

756. *Id.*

757. 531 S.W.2d 299, 300 (Tenn. 1975).

758. 556 S.W.2d at 543.

759. *Id.*

760. *See* Sobieski, *supra* note 495, at 192-94. *See also* 16 C. WRIGHT, A. MILLER, F. COOPER & E. GRESSMAN, FEDERAL PRACTICE AND PROCEDURE § 3937 (1977).

such an issue raises a serious due process problem. Besides, the purpose of a petition to rehear is to point out errors in the opinion of the appellate court, not to raise for the first time a question of law not raised on the first argument, especially when the question has not been raised in the trial court and turns on disputable matters of fact.[761]

4. Assignment of Errors

On the other hand, an appellate court may appropriately rest its decision concerning an issue raised by the parties on any available grounds.[762] For example, in *State ex rel. Polin v. Hill*,[763] four realtors brought a mandamus action to compel the issuance to them of licenses pursuant to the Business Tax Act.[764] The realtors filed a motion for judgment on the pleadings,[765] but the motion was overruled. No specific assignment of error was directed toward the failure to grant judgment on the pleadings. However, the state supreme court sensibly reversed the judgment of the trial court on the ground that the motion should have been granted. The assignments of error that were made, the court observed, "adequately invoke the same legal principles upon which said motion should have been decided in favor of realtors."[766]

I. Relief; Waiver

Not all errors occurring at a trial justify relief on appeal. "[A]n appellant who has failed to take whatever action is available to him to nullify any harmful effect runs the risk that his passivity may be deemed a waiver of the error."[767] The doctrine of waiver, however, cannot be mechanically applied. For example, in *Tennessee State Board of Education v. Cobb*,[768] the Board contended that plaintiff had not complied with the appropriate method of notification in his suit challenging his discharge. The

761. *See* Louisell & Degnan, *Rehearing in American Appellate Courts*, 44 CALIF. L. REV. 627, 635 (1956).

762. *See* Vestal, *Sua Sponte Consideration in Appellate Review*, 27 FORDHAM L. REV. 477, 479-81 (1959).

763. 547 S.W.2d 916 (Tenn. 1977).

764. TENN. CODE ANN. §§ 67-5801 to 5829 (1976 & Cum. Supp. 1978).

765. *See* TENN. R. CIV. P. 12.03.

766. 547 S.W.2d at 917.

767. R. TRAYNOR, *supra* note 494, at 76.

768. 557 S.W.2d 276 (Tenn. 1977).

state supreme court held, as noted previously,[769] that the Board's position was without merit. However, the court also held that there was no waiver of the issue by the Board,[770] which had raised its objection to the method of service utilized by a motion to dismiss and a later prayer for an interlocutory appeal. Apparently the trial court and court of appeals suggested that the Board waived its right to appellate review by filing an answer and participating in the trial. "From a practical standpoint," the supreme court stated, "a defendant who has properly raised the question of the sufficiency of process and its service has no alternative, after being overruled, except to answer and defend or suffer judgment by default."[771] Although the court did not expressly say so, it apparently thought requiring defendant to suffer a default in order to obtain appellate review was unreasonable.

On the other hand, it has previously been noted that as long as a defendant has timely and complete notice of the action against him, no due process problem is presented,[772] and it is certainly questionable whether the results of an otherwise error-free trial should be set aside to ensure strict compliance with the prescribed method of giving notice. Any error, though open to review under the rationale of *Cobb*, would therefore appear to be harmless.

J. Frivolous Appeals

Perceived abuses of the appellate process can be remedied in a number of ways. All too often the remedy employed is to penalize the offender, rather than to modify the system that encourages such abuse.[773] Whatever the proper remedy in the long run, *Davis*

769. *See* text accompanying notes 180-87 *supra*.

770. 557 S.W.2d at 277.

771. *Id.* at 278. The doctrine of waiver, however, was invoked against defendant in State v. Thompson, 549 S.W.2d 943 (Tenn. 1977). *See* text accompanying notes 478-500 *supra*. Based on the reasoning of *Cobb*, it could be argued defendant in *Thompson* had no practical alternative other than to defend or forfeit her right to present evidence in her own behalf. The different results in these two cases may be justifiable, but it is difficult to distinguish the cases on the basis of the reasoning utilized in *Cobb*.

772. *See* text accompanying note 134 *supra*.

773. "The way to insure prompt and proper disposition of appellate work is not to penalize abuse of an unworkable system but to insure efficiency and dispatch in the system itself." Louisell & Degnan, *supra* note 761 at 642 (quoting Roscoe Pound).

v. Gulf Insurance Group[774] sounds a clear warning that, for the present, certain kinds of abuse will be penalized.

Davis, a tractor-trailer driver, brought a workers' compensation action, alleging that he injured his back on May 14, 1973. He further alleged that on suffering the injury he visited his family physician and that on the day following his injury he was forced by the pain to stop driving and leave his truck. Davis continued hauling for his employer, however, making three long distance trips in the next four weeks. In mid-June he was fired and, on June 19, 1973, he notified his employer of the alleged injury. The notification was beyond the thirty-day period for notification specified in the Workers' Compensation Act.[775] In a deposition, Davis claimed he had been unable to work since the accident, although at trial he admitted working full time for two different employers since the accident. He also admitted at trial that he told one employer he had never filed a workers' compensation claim or suffered a back injury. The chancellor dismissed the action on the ground Davis had not carried the burden of proof, finding " 'plaintiff's explanation of the events surrounding the alleged occurrence [of the injury] not entirely plausible' and his testimony 'impeached on the record.' "[776]

On appeal the state supreme court affirmed. "This court has repeatedly pointed out that on factual issues in workmen's compensation appeals it is concerned solely with whether any material evidence supports the findings below."[777] In light of this well-settled law, the court found Davis' arguments on appeal—which went to the sufficiency of the evidence—"obviously without merit."[778] Moreover, "a careful examination of the record"[779] convinced the court that no other error could legitimately have been raised on appeal. The court then went on to observe:

> [T]his case goes beyond mere meritlessness, however. It has no reasonable chance for success, for reversal of the decision would require revolutionary changes in fundamental standards of appellate review . . . . There is no basis for believing such revolu-

774. 546 S.W.2d 583 (Tenn. 1977).

775. TENN. CODE ANN. § 50-1001 (1977).

776. 546 S.W.2d at 585 (quoting chancery court opinion) (brackets in original).

777. *Id.*

778. *Id.*

779. *Id.* at 586.

> tionary changes might take place . . . .
>
> . . . [T]his appeal is recognizable on its face as devoid of merit. It presents no justiciable questions—neither debatable questions of law nor findings of fact not clearly supported. It is difficult to believe that such an appeal could serve any purpose other than harassment. It is equally difficult to believe that counsel could honestly believe in its merits . . . .[780]

On its own motion, the court ordered that expenses incurred in defending the appeal, including court costs and reasonable attorneys' fees, be assessed as damages against appellant.[781]

The reach of *Davis* is probably quite narrow. The supreme court itself correctly noted that too strict an interpretation of the statute permitting the awarding of damages for frivolous appeals might discourage legitimate appeals.[782] The court also noted that workers' compensation suits are particularly susceptible to the abuse of frivolous appeals.[783] These considerations, along with the difficulty of formulating a satisfactory definition of a frivolous appeal, suggest that damages will be awarded only in the clearest of cases.

K. Publication of Opinions

Perhaps one of the most controversial and difficult questions concerning appellate practice that has generated a significant amount of recent legal writing is the question of which opinions of an appellate court should be published. These difficulties have been explored in an earlier article on certain aspects of the proposed Tennessee Rules of Appellate Procedure[784] and will not be reexamined here. However, some attention needs to be given two developments that occurred during the survey period. First, the state supreme court modified its rule 31 on the publication of opinions to provide that no opinion designated not for publication "shall be cited in any court unless a copy thereof shall be furnished to the court and to adversary counsel." Second, the General Assembly, apparently dissatisfied with the court's rule on the publication of opinions, enacted a statute that requires all opinions of the supreme court to be published, as well as the opinions

780. *Id.*
781. *Id.*; *see* TENN. CODE ANN. § 27-124 (Cum. Supp. 1978).
782. 546 S.W.2d at 586.
783. *Id.*
784. Sobieski, *supra* note 495, at 265-68.

of the court of appeals if certiorari has been denied by the supreme court.[785] The statute exempts from its mandatory publication requirement

> appeals from any state boards or commissions, including public service commission, appeals involving revenue matters and/or taxes, and appeals where the only grounds for a new trial were that there was no evidence to support the verdict and/or that the verdict of the jury was contrary to the weight and preponderance of the evidence.[786]

Nothing in this addition to the Code speaks to publication of the opinions of the court of criminal appeals.

The statute differs from the supreme court's rule in several respects. Most notably, the court's own rule does not require publication of all its opinions but only those that establish a new rule of law or alter or modify an existing rule, involve a legal issue of continuing public interest, criticize existing law, resolve an apparent conflict of authority, or update, clarify, or distinguish a principle of law.[787] Also, the court's rule does not permit publication of the opinions of the intermediate appellate courts in which the supreme court grants or denies certiorari but concurs in the result only.[788] Presumably, the statute supersedes the court's rule to the extent the two are inconsistent, unless the statute invades the court's inherent rulemaking power.

VIII. The Binding Effect of Adjudications

After an action has been finally adjudicated, the law of res judicata steps in with its command that one judicial contest of a claim or issue is generally enough.[789] Traditionally res judicata is broken down into three categories. "Merger" arises when a judgment is rendered in favor of the plaintiff. The plaintiff's cause of action is deemed to merge in the judgment and is extinguished, being replaced by the plaintiff's right to sue on his judgment.[790] "Bar" refers to the situation in which a judgment is rendered in

785. Tenn. Code Ann. § 8-612(b)-(c) (Cum. Supp. 1978).
786. *Id.* § 8-612(b).
787. Tenn. Sup. Ct. R. 31(2).
788. *Id.* R. 31(4).
789. *See* Restatement (Second) of Judgments § 45 (Tent. Draft No. 1, 1973).
790. *Id.* §§ 45(a), 47.

defendant's favor, the judgment operating as a bar to a subsequent action on the same cause of action.[791] Under modern terminology, the merger and bar effect of a prior adjudication are collectively referred to as claim preclusion. "Collateral estoppel," or issue preclusion, prescribes that issues actually litigated and determined in one action are precluded from relitigation in subsequent litigation on a different cause of action if their determination was essential to the first judgment.[792] Both claim preclusion (merger and bar) and issue preclusion (collateral estoppel) also require some identity of parties, as both *Grundy County v. Dyer*[793] and *Usrey v. Lewis*[794] illustrate.

A. Persons Affected

Dyer was arrested for public drunkenness by two deputy sheriffs of Grundy County, who, in route to the county jail, allegedly beat him without justification. As a result of this incident, Dyer instituted suit in federal district court against the deputies, the county sheriff, and the county. That court dismissed the action against the county, apparently on the ground the county could not be sued in federal court.[795] A judgment for damages was awarded against the deputies but not against the sheriff. Dyer then filed suit in state court against the county seeking recovery of the balance of the federal court judgment that remained unsatisfied. Apparently the trial court in the state action entered judgment against the county based on the earlier federal judgment. The state supreme court held that in so doing the trial court erred.

The county argued that entry of judgment against it based on the earlier adjudication to which it was not a party deprived it of its day in court. The state supreme court quite correctly

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791. *Id.* §§ 45(b), 48.

792. *Id.* §§ 45(c), 68.

793. 546 S.W.2d 577 (Tenn. 1977). The court in *Dyer* also overruled Dyer's motion to dismiss because the motion for a new trial and appeal bond were filed prematurely. "It would be manifestly unjust, absent prejudice to the complaining party, to dismiss this appeal and penalize a lawyer and his client for promptness." *Id.* at 579.

794. 553 S.W.2d 612 (Tenn. Ct. App.), *cert. denied, id.* (Tenn. 1977).

795. *See* Moor v. County of Alameda, 411 U.S. 693 (1973). *But see* Monell v. Department of Social Serv., 98 S. Ct. 2018 (1978) (a city is a person under 42 U.S.C. § 1983 (1970), but is not vicariously liable for the torts of its employees).

agreed. Noting that an action like Dyer's could be brought directly against the county, the court nonetheless stated it "cannot conceive of the county being held liable on a judgment rendered in a case in which it did not participate fully and as an adversary."[796] Accordingly, the supreme court remanded the case so that the county "may litigate liability and damages to the same manner and to the same extent as if the Federal Court judgment had not been awarded."[797]

This last-quoted statement must be construed in light of the facts before the state supreme court. Because the county was not a party to the earlier litigation, the judgment could not fairly be used against it. However, Dyer was a party to the previous litigation, and it would be appropriate to limit him to no more than the amount of damages he recovered in the first action unless the measure of damages in the two actions differs.[798] Similarly, if Dyer had not prevailed in the first action, he might well be prevented from bringing an action against the county if the county's liability depends solely on the wrongdoing of its deputies.[799]

The extent to which a party, who would be precluded from relitigating an issue with an opposing party, should also be precluded from relitigating that issue with another person not a party to the first action raises a difficult and controversial question.[800] But, even though a nonparty to the first action may be able to take advantage of the judgment in the previous litigation against a party to that litigation, *Dyer* demonstrates that the result of the first action cannot be used against someone not a party (or in privity with a party) to the previous litigation. *Usrey v. Lewis*[801] is another example.

The litigation in *Usrey* arose out of a two-car automobile accident, in which all the occupants of the automobiles were either killed or injured. Apparently eight separate actions were instituted, six of which were tried together. In each of those six

796. 546 S.W.2d at 581.

797. *Id.* at 582.

798. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 99(2) (Tent. Draft No. 4, 1977).

799. *See id.* § 99(3).

800. *Compare, e.g., id.* § 88 (Tent. Draft No. 2, 1975), *with, e.g.*, Overton, *The Restatement of Judgments, Collateral Estoppel, and Conflict of Laws*, 44 TENN. L. REV. 927 (1977).

801. 553 S.W.2d 612 (Tenn. Ct. App.), *cert. denied, id.* (Tenn. 1977).

actions, Barbara Usrey, the driver of one of the vehicles, had judgments entered against her. The other driver, Phyllis Lewis, had judgments entered in her favor in those actions to which she was a party, including a judgment in her favor against Barbara Usrey. The two actions before the court of appeals in *Usrey* involved plaintiffs who were not parties (or in privity with any of the parties) to the previously tried actions. The defendants in the untried actions included Barbara Usrey and Phyllis Lewis, who moved to have plaintiffs' actions dismissed on a plea of res judicata. The court of appeals quite properly held that the trial court erred in dismissing plaintiffs' actions.

The intermediate appellate court reasoned that while the issue of liability was the same, the parties were different and "[i]dentity of parties is required."[802] This statement by the court of appeals appears to be referring to the mutuality requirement under which one who invokes the conclusive effect of a prior judgment must have been bound if the judgment had gone the other way.[803] Many courts have relaxed the requirement of strict mutuality[804] but, as noted previously, not to the extent of completely depriving a litigant of his day in court. The court of appeals also rejected the argument that because plaintiffs did not participate in the consolidated trial of the other actions, they were bound by the results of that trial. Such a result, the court reasoned, would defeat one of the purposes of granting a severance or separate trial, which is to try an action "unhindered by other cases."[805] Finally, the court conceded that the verdicts in the action yet to be tried may turn out to be inconsistent with the verdicts previously rendered, "but no known legal principle prohibits a plaintiff from seeking his remedy because another plaintiff has been unsuccessful before a previous jury upon the same or similar evidence."[806]

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802. *Id.* at 615.

803. *See Developments in the Law—Res Judicata*, 65 HARV. L. REV. 818, 862 (1952).

804. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 88, Reporter's Note, at 98-99 (Tent. Draft No. 2, 1975).

805. 553 S.W.2d at 616.

806. *Id.* The court of appeals also held defendant's reliance on the presumption of correctness that arises if there is no bill of exceptions was misplaced. "Such presumption relates only to findings of fact and not to conclusions of law." *Id.*

B. *Issue Preclusion*

Issue preclusion may also be denied for reasons other than those going to the identity of the parties. Generally speaking, an issue is conclusive in a subsequent action only if that issue was actually litigated and determined in the prior adjudication.[807] If several issues are litigated in an action, it sometimes cannot be ascertained which issue was determinative in the prior action. *Cole v. Arnold*[808] illustrates that in such a situation none of the issues are precluded from being relitigated.

Plaintiffs in *Cole*, it will be recalled,[809] sought to recover for damages to their building sustained as a result of an accident between Cole and Medic Ambulance Service. After plaintiffs' suit had been appealed from general sessions court to circuit court, Cole brought an action in circuit court for personal injuries and property damage against Medic. That action resulted in a general verdict for defendant. The trial court held in plaintiffs' action against Cole and Medic that the effect of the circuit court verdict was to establish Cole's negligence, and accordingly the trial court awarded plaintiffs a judgment against him. The state supreme court quite rightly held this to be error. Essentially the state supreme court reasoned:

> [T]he general verdict in favor of Medic in the tort action brought by [Cole] was not necessarily predicated upon a finding of negligence on the part of [Cole]. It is just as likely to have been predicated upon a finding that [Cole], as plaintiff in the circuit court action, failed to carry the burden of proof, which would not make [Cole] liable to [plaintiffs] in the sessions court case.[810]

Since it could not be ascertained whether the jury found Medic not negligent or whether it found Cole contributorily negligent, no issue preclusion effect was given the jury's general verdict.[811]

C. *Law of the Case*

Thus far this discussion has been concerned with the effect

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807. *See* RESTATEMENT (SECOND) OF JUDGMENTS §§ 45(c), 68 (Tent. Draft No. 1, 1973).

808. 545 S.W.2d 95 (Tenn. 1977).

809. *See* text accompanying notes 610-17 *supra*.

810. 545 S.W.2d at 97.

811. *Id.*

that an adjudication in one case has on a subsequent case. "Issues previously decided recur, however, not only in successive suits but in successive stages of a single suit, and the principles that underlie the rules of res judicata are not without force in the latter situation."[812] *Rogers v. Ware*[813] provides a good example.

Various heirs of decedent brought an action to have a deed declared void and to have the land conveyed by the deed resold and the proceeds distributed among the heirs. Named as defendants were the purchasers, the successor trustee who sold the land at a public auction, a life tenant, and other heirs. At the first trial the chancellor held the successor trustee was properly appointed and that plaintiffs were estopped to attack the deed. On a first appeal, the court of appeals disagreed with the first holding but agreed that plaintiffs were estopped to deny the validity of the deed. However, the appellate court also concluded that not all the persons with an interest in the litigation were parties and remanded to permit them to be brought into the action, and to permit the rights of the life tenant to be settled. A petition for certiorari was not sought from the state supreme court. On remand, the trial court held that all persons with an interest were before the court, ratified the deed subject to the life estate, and ordered the proceeds from the sale distributed to the heirs. On a second appeal, the court of appeals affirmed.

The assigned errors, the court observed, appeared directed primarily to errors in the first trial, especially the holding that plaintiffs were estopped from challenging the validity of the deed.[814] That assigned error, however, had been decided on the first appeal. "Our previous holding has become final and is now the law of the case and may not be reargued and relitigated."[815] Moreover, no error was assigned on the second appeal that the trial court erred in holding that all parties were before the court.[816] Finally, since plaintiffs were estopped to deny the validity of the

812. J. COUND, J. FRIEDENTHAL & A. MILLER, *supra* note 359, at 1153.

813. 555 S.W.2d 409 (Tenn. Ct. App.), *cert. denied*, *id.* (Tenn. 1977).

814. *Id.* at 410. The court of appeals found it difficult to determine exactly what plaintiffs thought was error since the assignments of error did not refer to the pages of the record where the alleged errors appeared. *Id.*; *see* TENN. CT. APP. R. 12(2).

815. 555 S.W.2d at 410.

816. *Id.*

deed, the court also did not consider an assigned error relating to the life estate.[817]

IX. MISCELLANEOUS

By way of a conclusion to this survey only two other miscellaneous matters need to be mentioned. First, the Code was amended to provide that "any person who is required to deposit a bond for any reason by this state or any political subdivision of this state may deposit an amount of cash or a certified or cashier's check equal to the amount of the required bond in lieu of such bond."[818] This provision is inapplicable to appearance bonds in criminal cases.[819] Second, the Uniform Enforcement of Foreign Judgments Act[820] was amended to correct a drafting error.[821]

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817. *Id.*

818. TENN. CODE ANN. § 8-1958 (Cum. Supp. 1978).

819. *Id.* The statutes governing release in criminal cases are TENN. CODE ANN. §§ 40-1201 to 1247 (Cum. Supp. 1978), -3405 (1975), -3406, -3407 (Cum. Supp. 1978), -3408 (1975).

820. *See* TENN. CODE ANN. §§ 26-801 to 807 (Cum. Supp. 1978).

821. *Id.* § 26-803(c). The word "creditor" was substituted for the word "debtor." *See* 1977 Tenn. Pub. Acts ch. 50, § 1.

THE BURGER COURT, THE REGULATION OF INTERSTATE TRANSPORTATION, AND THE CONCEPT OF LOCAL CONCERN: THE JURISPRUDENCE OF CATEGORIES

EARL M. MALTZ*

I. INTRODUCTION 406
II. THE PRE-BURGER COURT APPROACH 406
III. THE BURGER COURT APPROACH 415
IV. CONCLUSION 423

I. INTRODUCTION

The extent to which the commerce clause in the absence of congressional legislation restricts the power of the states to regulate the facilities for the interstate transportation of goods is a problem of constitutional federalism that the Supreme Court has faced repeatedly. The Court's perception of whether the matter being regulated is of primarily local or national concern is a critical factor linking the cases in this area; however, the significance of "localness" or "nationalness" has changed considerably during the history of commerce clause litigation. This article will examine the current status of the concept of local concern as it affects the Court's view of state regulation of the avenues of commerce.[1]

II. THE PRE-BURGER COURT APPROACH[2]

The concept of local concern being critical to the constitu-

* B.A., Northwestern University; J.D., Harvard. Assistant Professor of Law, University of Arkansas-Little Rock. The author gratefully acknowledges the assistance and helpful suggestions of Bill McNichols and Dan Gibbens.

1. This inquiry does not cover the entire range of problems faced by the Court in developing its commerce clause jurisprudence. For example, no mention is made herein of state regulations that, rather than affecting transportation facilities generally, interfere with the interstate movement of specific products. *See, e.g.*, Exxon Corp. v. Governor of Maryland, 98 S. Ct. 2207 (1978); Milk Control Bd. v. Eisenberg Farm Prods., 306 U.S. 346 (1939). Nor is there any attempt to delve into the complexities engendered by state regulations having either the purpose or effect of discriminating against out-of-state interests. *Compare* Exxon Corp. v. Governor of Maryland, 98 S. Ct. 2207 (1978), *with* Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333 (1977).

2. For the classic study in this area, see Dowling, *Interstate Commerce*

tionality of state regulation made an early appearance in 1851 in *Cooley v. Board of Wardens*.[3] Pennsylvania law required ships entering or leaving the port of Philadelphia to engage local pilots to guide them through the harbor. Prior to the passage of this law, Congress had enacted a statute providing that

> all pilots in the bays, inlets, rivers, harbors, and ports of the United States shall continue to be regulated in conformity with the existing laws of the States, respectively, wherein such pilots may be, or with such laws as the States may respectively hereafter enact for the purpose, until further legislative provision shall be made by congress.[4]

The Court noted that if the commerce clause of the Constitution had divested the states of authority to regulate pilotage, Congress could not regrant such authority by statute.[5] At issue was whether a constitutional provision that gave Congress plenary power over interstate commerce—a power that concededly embraced the regulation of pilotage—was inconsistent with the states' concurrent power to regulate pilotage in a manner consistent with congressional action.

The Court reasoned that some subjects of the commerce power "are in their nature national, or admit only of one uniform system [or] plan or regulation."[6] The Court viewed the congressional action as indicative of legislative intent that pilotage did not demand uniform regulation but rather "is local and not national [and] that it is likely to be the best provided for, not by one system, or plan of regulations, but by as many as the legislative discretion of the several States should deem applicable to the local peculiarities of the ports within their limits."[7] The Court held that in such a situation the terms of the commerce clause did not require invalidation of the challenged statute.

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and State Power, 27 VA. L. REV. 1 (1940). *See also* Powell, *The Still Small Voice of the Commerce Clause*, in 3 SELECTED ESSAYS ON CONSTITUTIONAL LAW 931 (1938).

3. 53 U.S. 143, 12 How. 299 (1852).

4. *Id.* at 151, 12 How. at 317 (citing Act of 1789, 1 Stat. 54 (1789)).

5. *Id.*, 12 How. at 318. The Court noted that the situation would have been different if Congress had explicitly approved the challenged Pennsylvania law subsequent to its passage. In such a case, the state law would have had the same constitutional effect as an act of Congress. *Id.*, 12 How. at 318.

6. *Id.* at 152, 12 How. at 319.

7. *Id.* at 153, 12 How. at 319.

Although expressly limited to cases in which Congress has defined an activity as local in nature,[8] *Cooley* is widely regarded as enunciating principles applicable to cases in which Congress has not spoken at all.[9] Thus, *Cooley* is a classic example of what might be called the jurisprudence of categories since the label placed on an activity determines the constitutionality of its regulation. If the activity were "national," the commerce clause by its terms prohibited local control of the activity; if the activity were "local," the states were free to regulate, at least in the absence of a congressional mandate to the contrary.

While at times the Court employed other lines of analysis,[10] the *Cooley* approach had a profound impact on the modern pre-Burger Court cases dealing with the permissibility of state regulation of interstate transportation. This impact is most apparent in *South Carolina State Highway Department v. Barnwell Brothers, Inc.*[11] and *Huron Portland Cement Co. v. City of Detroit.*[12] In *Barnwell* the Court considered a South Carolina law that prohibited the use on state highways of any trucks with a width in excess of ninety inches or weight in excess of 20,000 pounds.[13] The trial court found that eighty-five to ninety percent of trucks involved in interstate commerce exceeded both limitations and that all other states permitted trucks with a ninety-six inch width.[14] Thus, the South Carolina regulations would seriously impede traffic passing through the state and increase transportation costs. The lower court found that the roads were capable of supporting heavier trucks without injury and that no reasonable relationship existed between the challenged statute and highway safety.[15] For these reasons the lower court held the regu-

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8. *Id.*, 12 How. at 320.

9. *See* J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 248 (1978); L. TRIBE, AMERICAN CONSTITUTIONAL LAW 324 (1978); Dowling, *supra* note 2, at 4-5.

10. *Compare, e.g.*, Di Santo v. Pennsylvania, 273 U.S. 34 (1927) (direct burden on commerce unconstitutional), *with, e.g.*, Bradley v. Public Util. Comm'n, 289 U.S. 92 (1933) (burden on commerce acceptable if only incidental to main purpose of state enactment).

11. 303 U.S. 177 (1938).

12. 362 U.S. 440 (1960).

13. 303 U.S. at 180.

14. *Id.* at 182.

15. *Id.* at 183-84.

lation to be an unconstitutional burden on interstate commerce.[16] Although acnowledging that the South Carolina law burdened interstate commerce,[17] the Supreme Court upheld the regulation because highway safety was "peculiarly of local concern."[18] The Court rejected any notion of balancing the burden on interstate commerce with the local interests advanced by the state in support of the regulations, holding that:

> Congress, in the exercise of its plenary power to regulate interstate commerce, may determine whether the burdens imposed on it by state regulation, otherwise permissible, are too great, and may, by legislation designed to secure uniformity or in other respects to protect the national interest in the commerce, curtail to some extent the state's regulatory power. But that is a legislative, not a judicial function, to be performed in the light of the Congressional judgment of what is appropriate regulation of interstate commerce, and the extent to which, in that field, state power and local interests should be required to yield to the national authority and interest. In the absence of such legislation the judicial function, under the commerce clause as well as the Fourteenth Amendment, stops with the inquiry whether the state legislature in adopting regulations such as the present has acted within its province, and whether the means of regulation chosen are reasonably adapted to the end sought.[19]

Since the regulations were rationally related to the local purposes of safety and preservation of the highways the commerce clause attack was rejected.[20]

A similar approach was taken in *Huron Portland Cement Co. v. City of Detroit*,[21] which dealt with the constitutionality of the application of a city smoke ordinance to ships operating in interstate commerce on the Great Lakes. To comply with this ordinance, the shipowner would have had to alter his ships structurally. Plaintiff claimed that the ordinance was an unconstitutional burden on interstate commerce. The Court quickly dispensed

16. *Id.* at 181-82 (citing Daniel v. John P. Nutt Co., 180 S.C. 19, 185 S.E. 25 (1935)).

17. *Id.* at 189.

18. *Id.* at 187.

19. *Id.* at 189-90 (citations omitted).

20. *Id.* at 196.

21. 362 U.S. 440 (1960).

with this contention, holding that "[s]tate regulation, based on the police power, which does not discriminate against interstate commerce or operate to disrupt its required uniformity, may constitutionally stand."[22] As in *Barnwell,* the extent to which the law burdened interstate commerce was apparently of no significance.

Barnwell and *Huron Cement* reflect strict application of the *Cooley* approach of result-determinative categorization. In both cases, scrutiny under the commerce clause basically ceased once the regulated activity was defined as "peculiarly local" or, in the case of *Huron Cement,* not of the type that requires national uniformity of regulation. Even cases that have elements of other approaches reflect the *Cooley* influence, however. *Southern Pacific Co. v. Arizona*[23] may be regarded as employing a pure balancing approach to state regulations of interstate transportation. The validity of an Arizona law that limited the length of trains to fourteen passenger cars or seventy freight cars was challenged under the commerce clause. The Court stated that the issue was

> whether the relative weights of the state and national interests involved are such as to make inapplicable the rule, generally observed, that the free flow of interstate commerce and its freedom from local restraints in matters requiring uniformity of regulation are interests safeguarded by the commerce clause from state interference.[24]

In attempting to ascertain the extent of the state's interest in limiting train length, the Court examined a mass of contradictory evidence[25] on the effect of this limitation on the safety of trains running through the state, particularly on the number of accidents caused by so-called "slack action." Rather than deferring to the state legislature's position on safety, as in *Barnwell,* the Court accepted the trial court's independent evaluation that the Arizona law provided "at most [a] slight and dubious advantage" in promoting train safety.[26] Finding that any state interest in train safety was outweighed by the additional expense and

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22. *Id.* at 448. The Court also noted that "[t]he record contains nothing to suggest the existence of any . . . competing or conflicting local [air pollution] regulations." *Id. Compare id. with* Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520 (1959), *discussed in* text accompanying notes 28-35 & 40-43 *infra.*

23. 325 U.S. 761 (1945).

24. *Id.* at 770-71.

25. *See id.* at 787-89 (Black, J., dissenting).

26. *Id.* at 779.

inconvenience engendered by the train length restrictions,[27] the Court struck down the length limitations.

Bibb v. Navajo Freight Lines, Inc.,[28] another case that contained some elements of a balancing approach, involved an Illinois requirement that trucks using state highways be equipped with contour rather than straight mudflaps. Use of straight mudflaps was legal in forty-five states, and in at least one of those states the use of the contour flaps was illegal.[29] The district court had found that the contour flaps possessed no safety advantages over the straight flaps.[30] The Supreme Court struck down the Illinois mudflap law as violative of the commerce clause, noting that the burden of delay and expense would be placed on truckers forced to change mudflaps at state lines and that the practice of "interlining" freight would be seriously impeded.[31]

The *Bibb* court clearly applied a standard of review that although somewhat less stringent than the *Southern Pacific* standard, was more demanding than that in *Barnwell*. The appropriate question was seen as whether " 'the total effect of the law as a safety measure in reducing accidents and casualties is so slight or problematical as not to outweigh the national interest in keeping interstate commerce free from interferences which seriously impede it.' "[32] Although the state in *Bibb* apparently introduced evidence indicating that the requirement of contour mudflaps had a valid relationship to safety,[33] the Supreme Court relied on the trial court's independent determination that the contour mudflaps had no safety advantages and invalidated the Illinois law as being unduly restrictive.[34] Thus, the Court apparently re-

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27. *Id.*

28. 359 U.S. 520 (1959).

29. *Id.* at 523.

30. *See id.* at 525 (citing Navajo Freight Lines, Inc. v. Bibb, 159 F. Supp. 385 (S.D. Ill. 1958)).

31. *Id.* at 527. Interlining is the interchanging of trailers from an originating carrier to another carrier when the latter serves an area not served by the former. *See id.*

32. *Id.* at 524 (quoting Southern Pac. Co. v. Arizona, 325 U.S. 761, 775-76 (1945)).

33. *See id.* at 525.

34. The Court cited Morgan v. Virginia, 328 U.S. 373 (1946), as the most authoritative case that supported the Court's conclusion in *Bibb*. *See* 359 U.S. at 526-27. *Morgan*, a case decided prior to the court's rejection of the "separate but equal" doctrine of Plessy v. Ferguson, 163 U.S. 537 (1896), in Brown v.

jected the applicability of the *Barnwell* admonition that in commerce clause cases "a court is not called upon, as are state legislatures, to determine what, in its judgment, is the most suitable restriction to be applied of those that are possible, or to choose that one which in its opinion is best adapted to all the diverse interests affected."[35]

Despite the balancing language in *Southern Pacific* and *Bibb*, the Court in each case indicated that certain elements of the *Cooley* categorization approach were to be unaffected. In its formulation of the balancing test, the *Southern Pacific* Court explicitly noted that the subject required uniformity of regulation,[36] thus echoing the *Cooley* Court's statement that states are generally forbidden from regulating those matters that "admit only of one uniform system [or] plan of regulation."[37] The *Southern Pacific* Court further recognized that the states have "wide scope for the regulation of matters of local state concern, even though it in some measure affects the commerce"[38] and distinguished *Barnwell* on the ground that it involved a matter "peculiarly of local concern."[39] Thus, although *Southern Pacific* employed a balancing test, the Supreme Court apparently thought the test to be appropriate only because the regulated subject was outside the scope of matters of peculiarly local concern.

Board of Educ., 347 U.S. 483 (1954), dealt with a commerce clause challenge to a Virginia statute that required the separation of white and nonwhite passengers on intrastate and interstate motor carriers. Focusing on other states' prohibitions against racial segregation on motor carriers and the varying definitions of a nonwhite person, the *Morgan* Court struck down the statute as unduly burdening interstate commerce, reasoning that enforcement of requirements of reseating might be "disturbing" to interstate passengers. 328 U.S. at 381.

Although *Bibb* and *Morgan* both turned on the diversity among state regulations, the cases differ in one critical aspect. *Morgan* was based partially on the Court's conclusion that seating arrangements on interstate motor carriers require a "single uniform rule." *Id.* at 386. Under *Southern Pacific*, therefore, the application of a balancing test was appropriate. By contrast, the *Bibb* Court conceded that the subject matter concerned was of a "peculiarly local nature." 359 U.S. at 523. Under *Cooley* and *Barnwell*, a balancing test generally would be seen as inappropriate.

35. 303 U.S. 177, 190 (1938).
36. 325 U.S. 761, 771 (1945).
37. 53 U.S. 143, 152, 12 How. 299, 319 (1851).
38. 325 U.S. at 770.
39. *Id* at 783.

Similarly, while the *Bibb* Court disavowed any language in *Barnwell* that "would suggest that no showing of burden on interstate commerce is sufficient to invalidate local safety regulations in absence of some element of discrimination,"[40] the Court also noted the "strong presumption of validity" attaching to highway safety regulations.[41] The Court indicated that the case would have been controlled by *Barnwell* except for the irreconcilable conflict between the challenged mudflap regulation and those of other states.[42] Indicating its approval of the *Cooley* analysis, the majority opinion suggested that the conflict in mudflap laws indicated that the regulation of mudflaps is not a matter " 'admitting of diversity of treatment, according to the special requirements of location conditions.' "[43]

Further evidence that the *Cooley* approach at least partially survived *Southern Pacific* and *Bibb* was provided by *Brotherhood of Locomotive Firemen & Enginemen v. Chicago, Rock Island & Pacific Railroad.*[44] This case concerned the constitutionality of the Arkansas "full crew" laws, which specified that a minimum number of employees must serve as part of a train crew under certain circumstances. A commerce clause challenge to the same law had been rejected prior to *Southern Pacific* on the ground that railroad safety was an appropriate matter of local concern and that any law passed to further this objective was valid unless entirely arbitrary.[45] In *Chicago, Rock Island & Pacific*, the district court found that technological changes had rendered any safety justification obsolete[46] and that the law should be invalidated under *Southern Pacific* and *Bibb*.[47]

The Supreme Court unanimously rejected this argument, although, as in *Southern Pacific*, there was conflicting evidence of the value of full crew laws as a safety measure.[48] The *Chicago,*

40. 359 U.S. 520, 528-29 (1959).

41. *Id.* at 524.

42. *Id.* at 526.

43. *Id.* at 529 (quoting Sproles v. Binford, 286 U.S. 374, 390 (1932)). *See also id.* at 523 (regulation of highway safety "peculiarly local" in nature).

44. 393 U.S. 129 (1968).

45. *See* Chicago, Rock Island & Pac. Ry. v. Arkansas, 219 U.S. 453 (1911). *See also* Missouri Pac. R.R. v. Norwood, 283 U.S. 249 (1931); Saint Louis, Iron Mountain, & S. Ry. v. Arkansas, 240 U.S. 518 (1916).

46. Chicago, Rock Island & Pac. R.R. v. Hardin, 274 F. Supp. 294, 300-02 (W.D. Ark. 1967) (three-judge court).

47. *Id.* at 300-04.

48. *See* 393 U.S. at 134-36. *See also* text accompanying notes 33-34 *supra*.

Rock Island & Pacific Court took a different view of the court's role in such a situation, holding that "[t]he District Court's responsibility for making 'findings of fact' certainly does not authorize it to resolve conflicts in the evidence against the legislature's conclusion . . . ."[49] Although the burden on commerce was characterized as insignificant,[50] the Court also apparently rejected the idea of applying a balancing test, asserting that the courts should not "place a value on the additional safety in terms of dollars and cents, in order to see whether this value, as calculated by the court, exceeded the financial cost to the railroads."[51] Finding *Bibb* applicable only to situations of irreconcilable conflicts between the regulations of two states,[52] the Court concluded that "[i]n the absence of congressional action . . . we cannot invoke the judicial power to invalidate this judgment of the people of Arkansas and their elected representatives as to the price society should pay to promote safety in the railroad industry."[53]

A modified *Cooley* approach to the analysis of state regulation of the modes of interstate transportation of goods emerged from the line of cases from *Barnwell* to *Chicago, Rock Island & Pacific*. One class of regulations, which dealt with matters local in nature, was essentially immune from judicial scrutiny under the commerce clause. When considering those regulations not dealing with matters of local concern, however, the Court would make an independent assessment of the facts and determine whether the burden placed on commerce was justified by the state interest in regulating the matter.

This approach is subject to criticism because the concept of a "local" concern, which is determinative of the scope of review, remained largely amorphous. This problem is particularly well illustrated by the contrast between *Southern Pacific* and *Chicago, Rock Island & Pacific*, both of which dealt with regulations of railroad safety. In the former, the law was invalidated as a result of the Court's independent assessment of the law's burdens and benefits; in the latter, the Court deferred to the legislative judgment, appearing to reject any balancing approach.

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49. *Id.* at 138-39.
50. *Id.* at 139.
51. *Id.* (footnote omitted).
52. *Id.* at 140 n.13.
53. *Id.* at 144.

III. THE BURGER COURT APPROACH

In *Raymond Motor Transportation, Inc. v. Rice*[54] the Burger Court significantly changed the theoretical framework for the analysis of *Cooley*-type problems. *Rice* involved Wisconsin regulations dealing with the specifications of trailer trucks that could be operated on the state's highways. The maximum permissible length of any vehicle pulling one trailer was fifty-five feet, and a special permit was required for any vehicle pulling two or more trailers (a "trailer train").[55] While the statute authorized the state highway commission to issue permits for tractor-trailers with a maximum length of 100 feet, the commission's regulations restricted such permits to " 'the operation of vehicles used for the transporting of municipal refuse or waste, or for the interstate or intra-state [*sic*] operation without load of vehicles in transit from manufacturer or dealer to purchaser or dealer, or for the purpose of repair.' "[56]

These regulations were challenged by two interstate trucking companies that operated two types of trucks on the Wisconsin highways. One type, called a "single," consisted of a tractor that pulled a single trailer. Since the overall length of each single was fifty-five feet, these vehicles were permitted on Wisconsin roads. Both companies also operated another type of truck, called a "double," that was made up of a tractor that pulled two trailers. The overall length of the connected units was sixty-five feet. Since doubles are thought to have advantages over singles in general commodity shipping, plaintiffs preferred to use them between Chicago, Detroit, and points east and between Minneapolis and points west.[57] The most direct route for all of this traffic is over interstate highways 90 and 94, which cross Wisconsin, Illinois, and Minnesota. All states west from Illinois to Washington through which interstates 90 and 94 run, except Wisconsin, allowed the use of doubles on interstate highways and access

54. 434 U.S. 429 (1978).

55. *Id.* at 432-33 & nn.3-4 (citing WIS. STAT. § 348.07(1) (1975)).

56. *Id.* at 434 (quoting Wis. Admin. Code § Hy 30.14(3)(a) (July 1975)).

57. *See id.* at 432. A double often can carry a greater volume of cargo than a single without exceeding legal gross vehicle weight limits. Since fewer doubles than singles are needed to carry a given amount of cargo, consequent savings in fuel and drivers' time result. Since the trailers of a double can be routed separately, cargo can be picked up from various shippers, dispatched, and delivered to different destinations more quickly by the use of doubles. *Id.* at 432 n.2.

roads.[58] *Rice* was based on the theory that the failure by Wisconsin to grant a permit for the use of doubles on interstate highways 90 and 94 and on the four-lane divided highways connecting the interstate highways to Wisconsin cities unconstitutionally burdened and discriminated against interstate commerce.

Reversing a three-judge district court decision denying plaintiffs relief,[59] the Supreme Court declared that the refusal to grant the requested permits was an unconstitutional burden on commerce.[60] The Court noted that Wisconsin's sole asserted justification for the ban on doubles was to improve highway safety.[61] Plaintiffs presented evidence showing that sixty-five foot doubles were as safe or safer than fifty-five foot singles on the highways in question[62] and that plaintiffs were burdened on routes passing through or into Wisconsin. On routes terminating in Milwaukee or Madison, doubles were compelled to stop at the Wisconsin state line and have each trailer pulled by a separate tractor to its final destination. While routes between Chicago and Minneapolis required the use of fifty-five foot singles, fifty-five foot doubles could be used on routes from Chicago or Detroit to Seattle, but these carriers had to be diverted through Missouri.[63] These problems contributed to an increase in the cost and time involved in the interstate movement of goods. The regulations also prevented plaintiffs "from accepting interline transfers of sixty-five foot doubles for movement through Wisconsin" to other states.[64]

By contrast, Wisconsin produced no evidence supporting its claim that the regulation furthered its interest in highway safety. The chairman of the state highway commission stated that he was unprepared to comment on the safety of these vehicles[65] and that the commission's adoption of restrictive regulations was based upon its belief that the people of Wisconsin simply did not want more vehicles over fifty-five feet long on the state's high-

58. *Id.* at 432.

59. Raymond Motor Transp., Inc. v. Rice, 417 F. Supp. 1352 (W.D. Wis. 1976) (per curiam) (three-judge court), *rev'd*, 434 U.S. 429 (1978).

60. 434 U.S. at 447. The Court declined to reach the discrimination claim. *See id.* at 446 n.24.

61. *Id.* at 436.

62. *Id.*

63. *Id.* at 438. Diversion as far south as Missouri was necessary because Iowa also bans sixty-five foot doubles from its roads. *Id.* at 438 n.13.

64. *Id.* at 445.

65. *Id.* at 437.

ways.[66] On this showing, the Court might have ordered the issuance of the permits even under the *Barnwell* standard, concluding that the evidence presented demonstrated that the exclusion of plaintiffs' vehicles had no rational relationship to the state-asserted goal of highway safety.[67] Rather than following this course, however, the Court[68] treated *Bibb* as having rejected the *Barnwell* "rational relationship" test, replacing it with a generally applicable balancing test for highway safety regulations.[69] The Court rejected the state's argument that the level of scrutiny applied in *Bibb* was based upon the fact that the challenged mudguard requirement conflicted with regulations in other states[70] in spite of this argument's apparent support in the explicit language of both *Bibb*[71] and *Chicago, Rock Island & Pacific*.[72] The *Rice* Court concluded that *Bibb* established the proposition that decisions in all highway safety cases should be based upon "a sensitive consideration of the weight and nature of the state regulatory concern in light of the extent of the burden imposed on the course of interstate commerce."[73] Applying this

66. *Id.*

67. The invalidation of the Wisconsin regulation under the rational basis test would not have been inevitable because some equal protection cases indicate that a law fails the rational basis test only if no conceivable legislative justification would support the challenged regulation. *See* Williams v. Lee Optical, 348 U.S. 483, 489 (1955) (by implication); *cf.* Raymond Motor Transp., Inc. v. Rice, 434 U.S. 429, 447-48 n.25 (1978) (courts entitled to look to lawyers to present relevant facts). In *Rice* the challenged limitations could have received support from the district court's finding that drivers of vehicles passing longer trucks are subject to greater visual impairment by virtue of extra length of vehicles being passed. Raymond Motor Transp., Inc. v. Rice, 417 F. Supp. 1352, 1359 (W.D. Wis. 1976) (per curiam) (three-judge court), *rev'd*, 434 U.S. 429 (1978).

68. All participating Justices joined in Justice Powell's opinion. Justice Stevens did not participate in the decision, and Justice Blackmun, joined by Chief Justice Burger and Justices Brennan and Rehnquist, filed a concurring opinion that stressed the narrow scope of the Court's decision.

69. 434 U.S. at 443.

70. *Id.* at 446 n.23.

71. *See* note 42 *supra* and accompanying text.

72. *See* note 52 *supra* and accompanying text.

73. 434 U.S. at 441. In drawing this conclusion the Court also relied heavily on Pike v. Bruce Church, Inc., 397 U.S. 137 (1970), *cited at* 434 U.S. at 441. *Pike* did not involve a facially neutral regulation of interstate transportation facilities but instead concerned a challenge to an Arizona law that effectively required Arizona cantaloupe producers to pack their cantaloupes only in that

test in *Rice*, the Court struck down the challenged regulations "because they place a substantial burden on interstate commerce and they cannot be said to make more than the most speculative contribution to highway safety."[74]

Despite its methodology and result, *Rice* did not signal the end of the consideration of "localness" as an important element in commerce clause jurisprudence. Whether the Court perceives a given subject of regulation as "local" or "national" is still important within the confines of the balancing test. Although the rubric that highways are a matter of local concern no longer automatically validates such regulations, several factors weigh heavily in favor of the Court's acceptance of such enactments: states retain "primary responsibility" for the construction, maintenance, and policing of highways; highway conditions vary from state to state; and the burden of nondiscriminatory local highway regulations generally fall equally on local and out-of-state economic interests, thus ensuring an internal political check on such regulations.[75] Thus, the *Rice* Court reaffirmed the " 'strong presumption of . . . validity' " attaching to these enactments[76] and narrowly circumscribed its holding to situations in which "the evidence produced on the safety issue [is] so overwhelmingly one-sided as in this case."[77] Justice Blackmun's concurring opinion, in which four of the eight participating justices joined, more strongly states that "if safety justifications are not illusory, the Court will not second-guess legislative judgment about their importance in comparison with related burdens on interstate com-

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state. *See* 397 U.S. at 138 (quoting ARIZ. REV. STAT. § 3-503(c) (Supp. 1969)). Although a balancing test was seen as being generally appropriate, *id.* at 142, discrimination between in-state and out-of-state operations was of pivotal importance. The Court stated that

> [t]he nature of that burden is, constitutionally, more significant than its extent. For the Court has viewed with particular suspicion state statutes requiring business operations to be performed in the home State that could more efficiently be performed elsewhere. Even where the State is pursuing a clearly legitimate local interest, this particular burden on commerce has been declared to be virtually *per se* illegal.

Id. at 145.

74. 434 U.S. at 447.

75. *See* 434 U.S. at 443-44 & n.18.

76. *Id.* at 444 (quoting Bibb v. Navajo Freight Lines, 359 U.S. 520, 524 (1959)).

77. *Id.* at 447 (footnote omitted).

merce."[78] Justice Blackmun noted that he joined Justice Powell's opinion only because "the Court does not enagage in a balance of policies; it does not make a legislative choice. Instead . . . it concludes that the safety interests have not been shown to exist as a matter of law."[79]

Ray v. Atlantic Richfield Co.[80] reflects both the continued influence of the *Cooley* principles and the degree to which the Burger Court has deviated from a pure *Cooley* approach. *Ray* involved a challenge to the Washington tanker law, which regulated the design, size, and movement of oil tankers in Puget Sound.[81] Although large portions of the law were found to be preempted by federal tanker regulations,[82] the Court rejected both preemption and direct commerce clause attacks on Washington's requirement that vessels not satisfying certain design requirements be escorted by tugboats in Puget Sound. Echoing *Cooley*, the Court initially noted that this requirement "is not the type of regulation that demands a uniform national rule."[83] Under a pure *Cooley* approach, analysis of the issue would have stopped

78. *Id.* at 449 (Blackmun, J., concurring).

79. *Id.* at 450 (Blackmun, J., concurring). *See also* Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520, 530 (1959) (Harlan, J., concurring). This focus on the lack of evidence in *Rice* could possibly produce seemingly anomalous results. Sixteen other states and the District of Columbia did not allow sixty-five foot doubles on their highways at the time of the *Rice* decision. 434 U.S. at 437 n.9. If the laws of one of these jurisdictions were challenged and the state introduced evidence of the prohibition's efficacy as a safety standard, *see generally* Raymond Motor Transp., Inc. v. Rice, 417 F. Supp. 1352, 1359 (W.D. Wis. 1976) (per curiam) (three-judge court), *rev'd*, 434 U.S. 429 (1978) (suggesting possible safety justifications), the restriction might be upheld under the formulations of either Justice Powell or Justice Blackmun. Thus, the Constitution could prohibit one state's regulation of the highways while permitting the same law in the neighboring jurisdiction. *See generally* 434 U.S. at 447-48 n.25 (courts entitled to depend on lawyers for presentation of relevant facts).

80. 435 U.S. 151 (1978).

81. The challenged law essentially required every tanker of 50,000 deadweight tons (DWT) or larger to employ a state-licensed pilot while navigating Puget Sound, required every oil tanker of from 40,000 to 125,000 DWT either to possess certain safety features or to utilize tug escorts while operating in the Sound, and barred tankers in excess of 125,000 DWT from the Sound entirely. *Id.* at 180-81 (Marshall, J., concurring in part & dissenting in part) (citing WASH. REV. CODE §§ 88.16.180, 88.16.190(1) (Supp. 1975)).

82. *See* 435 U.S. at 155-78.

83. *Id.* at 179 (citing Cooley v. Board of Wardens, 53 U.S. 143, 12 How. 299 (1852)).

at that point; however, the Court apparently applied a balancing test when it considered the extent to which the requirement interfered with the "free and efficient flow of interstate . . . commerce."[84] Finding the additional costs imposed by the tug requirement to be insignificant, the Court upheld the Washington regulation.

After *Rice* and *Ray* state regulations of interstate transportation will be subjected to a significant level of judicial scrutiny under the commerce clause unless Congress, in the exercise of its plenary power over interstate commerce, immunizes the particular regulations from review. The intensity of that review, the placement of the burden of proof, and the degree of deference that will be given to state legislatures' findings of fact apparently still depends upon the Court's perception of the "localness" of the regulated subject matter. The method of determining "localness," therefore, is still of considerable importance.

A number of interrelated factors apparently influence this determination. Since the Constitution grants Congress plenary authority over interstate commerce and Congress can override any court's decision on the permissibility of any particular state regulation under the commerce clause, indication of congressional attitude toward the regulated activity is of primary importance. Accordingly, even when Congress has neither preempted nor expressly sanctioned the particular regulation at issue, a court's determination of the proper deference to give a state legislature's decisions should include consideration of the congressional attitude toward state regulation of the general area. Such a consideration was clearly a critical factor in *Cooley* in which the Court, in upholding the challenged state law, relied heavily on a federal statute that indicated congressional intent that pilotage was a matter of local concern.[85] One noted commentator has suggested that similar considerations were also critical to the Court's approach in *Huron Cement.*[86] In *Huron Cement* a federal law declared the policy of Congress to be "to preserve and protect the primary responsibilities and rights of the States and local govern-

84. *Id.* at 179-80.

85. *See* Cooley v. Board of Wardens, 53 U.S. 143, 152-53, 12 How. 299, 319-20 (1852).

86. G. GUNTHER, CONSTITUTIONAL LAW CASES AND MATERIALS 318 (9th ed. 1975); *see* notes 21-22 *supra* and accompanying text.

ments in controlling air pollution."[87] A Senate committee report accompanying the bill further stated that "[t]he Committee recognizes that it is the primary responsibility of State and local governments to prevent air pollution."[88] This evidence of the congressional attitude possibly influenced the Court's deferential approach to the local smoke ordinance whose "sole aim . . . [was] the elimination of air pollution to protect the health and enhance the cleanliness of the local community."[89]

The degree to which the effects of the challenged regulations are localized so as not to affect transportation in other states is another important factor. The idea of deference to the legislature is built upon the concept of state sovereignty—local authorities generally should be free to control conduct within their respective jurisdictions. Although the legislature of state *A* is properly concerned with the appropriate measures necessary to ensure an acceptable level of highway or railway safety within that state, appropriate safety measures for neighboring state *B* are not within the proper purview of the state *A*'s government.[90] Thus, when state *A*'s regulation has the effect of imposing its will on state *B*, a more active role of intervention may be appropriate for the federal judiciary.

In *Bibb* the degree to which the challenged regulation affected transportation in other states was preeminent because changing mudflaps at Illinois' border was, for all practical purposes, impossible.[91] If trucks were to operate between Arkansas and Illinois, the Court, a presumably neutral arbiter, had to decide which state should be permitted to impose its will on the other.

The *Southern Pacific* Court partly relied on related considerations in distinguishing the early full-crew cases.[92] The Court noted that the realities of railroad operation caused the Arizona limitation at times to control the length of trains as far west as Los Angeles, California, and as far east as El Paso, Texas, even

87. 42 U.S.C. § 1857 (1955) (current version at 42 U.S.C. § 7401 (1977)); *see* 362 U.S. at 445-46.

88. S. REP. No. 389, 84th Cong., 1st Sess. 3 (1955); *see* 362 U.S. at 446.

89. 362 U.S. at 445.

90. *Cf.* Morgan v. Virginia, 328 U.S. 373, 386 (1946) (statute requiring racial segregation on motor carriers disrupts required uniformity because states are powerless to affect conflicting rules of other states).

91. *See* 359 U.S. at 527.

92. *See* cases cited note 45 *supra*.

though longer trains were legal in those states.[93] By contrast, the Court noted that the full-crew laws "had no effects outside the state beyond those of picking up and setting down the extra employees at the state boundaries."[94] This difference was apparently one factor that led the Court to reject the applicability of the full-crew rationale to *Southern Pacific*.

The type of extraterritorial impact present in *Southern Pacific* presented a far less compelling case for judicial intervention than did the type of impact in *Bibb*. The Court was not forced to choose between two or more states' fundamentally irreconcilable policy judgments because operating trains that met the Arizona standards in affected states was apparently not illegal. Thus, the possibility of conflict between the states in *Southern Pacific* was not as significant as in *Bibb*, and the Court's need to intervene was correspondingly lessened.

A third important element in determining the appropriate deference to grant legislative judgment is the degree to which that judgment is based upon uniquely local conditions rather than on factors common throughout the country. When unique conditions exist, special local knowledge in dealing with the problem may be critical in framing the appropriate solution. Deference to a state legislature is appropriate in this situation because the legislature presumably possesses special expertise. When a problem is caused by conditions that are nationwide in scope, however, a state legislature has no presumed special expertise, and its decisions are due less deference.

This factor provides a second possible distinction between *Bibb* and *Barnwell*. *Barnwell* was concerned with the condition of the entire system of roads maintained by South Carolina. Since state highway conditions vary widely[95] and special knowledge of these conditions contribute to the formulation of appropriate safety and maintenance measures, the Court noted that local judgment was entitled to great respect. By contrast, the efficacy of various types of mudflaps probably is not related to local conditions; therefore, judgments of the type involved in *Bibb* are not based on any special local expertise and may be accorded less deference by the courts.

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93. 325 U.S. at 774-75.
94. *Id.* at 782.
95. *See* 303 U.S. at 195.

Similar considerations also apparently influenced the *Cooley* Court. While giving controlling weight to the declaration of congressional intent, the Court also observed that "the nature of [pilotage regulations] is such as to leave no doubt of the superior fitness and propriety, not to say the absolute necessity, of different systems of regulation, drawn from local knowledge and experience, and conformed to local wants."[96] This language strongly suggests that as early as 1851 the Court viewed the question of local expertise as important in determining whether an activity was "local" or "national" for purposes of commerce clause analysis.

Finally, the regulation of highways has been viewed by the Court as a matter of especially strong local concern, with particular deference being paid to state regulations. Unlike most other modes of transportation, most roads exist only because the state chose to build and to maintain them. Since the Constitution does not require a state to build and to maintain highways, whenever a state builds a road, interstate commerce is facilitated in a manner that effectively exceeds any constitutional mandate. To strike down a state highway safety regulation because it unconstitutionally hinders commerce, in effect means that although a state may choose not to aid interstate commerce by building highways, if it exceeds its constitutional duties by constructing such highways, the state may be ordered by the Court to facilitate commerce even further by abandoning nondiscriminatory regulations that the state deems appropriate for the attainment of legitimate state goals. The obvious incongruity of this situation provides a strong basis for limiting the Court's commerce clause scrutiny of state highway regulations.

IV. CONCLUSION

If one accepts the basic premise that the terms of the commerce clause invalidate some nondiscriminatory state regulations of interstate transportation facilities,[97] then a determination of which regulations are unconstitutional necessitates a delicate balancing of the interests of state sovereignty against the national

96. 53 U.S. at 153, 12 How. at 320.

97. This proposition has not been without its notable detractors. *See* Southern Pac. Co. v. Arizona, 325 U.S. 761, 795-96 (1945) (Douglas, J., dissenting); *id.* at 784-95 (Black, J., dissenting).

interest in the free flow of goods. The Burger Court approach provides an appropriate framework for this weighing of interests. *Ray* and *Rice* acknowledge that various factors may influence the determination of the appropriateness of local judgments. These cases hold that the interference with the free movement of commerce may be of sufficient importance that a substantial local justification is necessary to sustain a state regulation even when an extremely local interest is involved. The Court's analysis thus retained the flexibility necessary to resolve the difficult problems of federalism inherent in commerce clause analysis.

RECENT DEVELOPMENTS

Constitutional Law—Due Process—Fundamental Right to Bodily Integrity—Protective Services for Elderly Persons

Defendant, a seventy-two-year-old woman, suffered from a gangrenous infection of both feet. Because of a 90 to 95% probability that the infection, if untreated, would lead to death, doctors recommended that both feet be amputated. Although the operation would arrest the infection, there was only a 50% chance that defendant would survive the surgery, and severe psychological complications were almost certain to result if she did survive. Defendant withheld her consent to the operation. The Department of Human Services for the State of Tennessee sought authorization under a Tennessee statute providing protective services for elderly persons[1] to proceed with the treatment necessary

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1. Tennessee Code Annotated section 14-2306(a) (Cum. Supp. 1978) provides:

> If the department [of human services] determines that an elderly person who is in need of protective services is in imminent danger of death if he does not receive protective services and lacks capacity to consent to protective services, then the department may file a complaint with the chancery court for an order authorizing the provision of protective services necessary to prevent imminent death. The chancellor shall hear the complaint ahead of any other business then pending in court or in chambers. This order, may include the designation of an individual or organization to be responsible for the personal welfare of the elderly person and for consenting to protective services in his behalf. The complaint must allege specific facts sufficient to show that the elderly person is in imminent danger of death if he does not receive protective services and lacks capacity to consent to protective services.
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> The chancellor, prior to entering the order, must find that the elderly person is in imminent danger of death if he does not receive protective services and lacks capacity to consent to protective services.
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> . . . .
>
> Protective services necessary to prevent imminent death authorized by order pursuant to this section may include taking the elderly person into physical custody in the home or in a medical or nursing care facility, provided that the court finds that such custody is for the pur-

to preserve defendant's life. The Department alleged that defendant, although otherwise sane, suffered from a delusion about the condition of her feet and, therefore, could not competently decide whether to undergo the operation. The chancery court issued an order authorizing the Department of Human Services to take custody of defendant and to consent on her behalf to any necessary medical treatment. On appeal[2] to the Court of Appeals of Tennessee, Middle Section, *held*, affirmed.[3] Upon a finding that a person over the age of sixty is in imminent danger of death and lacks capacity to consent to necessary medical treatment, a competent court, pursuant to Section 14-2306(a) of the Tennessee Code Annotated, may appoint a guardian to consent on behalf of the elderly person to such necessary medical treatment. *State v. Northern*, 563 S.W.2d 197 (Tenn. Ct. App.), *cert. denied, id.* (Tenn. 1978), *appeal dismissed as moot*, 436 U.S. 923 (1978).

In this case, the court was confronted with the issue of the

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pose of medical examination and treatment necessary to prevent imminent death or protection from physical mistreatment necessary to prevent imminent death . . . .

Tennessee Code Annotated section 14-2302(a) defines "elderly person" as "any person aged sixty (60) or over residing in the state of Tennessee." The statute applies only to "elderly persons" in need of protective services. *See* TENN. CODE ANN. §§ 14-2301 to -2306 (Cum. Supp. 1978).

2. The urgency with which this case was decided is evidenced by the fact that only four days elapsed between the time the original suit was filed in the chancery court and the final order was issued by the court of appeals. Procedural irregularities in this expedited action are not addressed in this Note.

3. Although the court of appeals affirmed the issuance of an order, it was modified in two important respects. First, the Commissioner of the Department of Human Services rather than the Department itself was appointed to act on behalf of defendant in consenting to surgery. Second, consent could not be given until two doctors jointly signed a certificate stating that immediate amputation was necessary to save defendant's life. State v. Northern, 563 S.W.2d 197, 205-06 (Tenn. Ct. App.), *cert. denied, id.* (Tenn. 1978), *appeal dismissed as moot*, 436 U.S. 923 (1978).

The guardian ad litem for defendant applied to the United States Supreme Court for a stay of the order issued by the Tennessee Court of Appeals. In a special conference, the application was denied with Mr. Chief Justice Burger and Mr. Justice Blackmun dissenting. *In re* Northern, 434 U.S. 1090 (1978). Motion to expedite was denied on April 3, 1978. Northern v. Department of Human Services, 435 U.S. 950 (1978). Mrs. Northern died on May 1, 1978. Knoxville News-Sentinel, May 2, 1978, at 12, col. 1. Subsequently, the United States Supreme Court dismissed the case as moot. Northern v. Department of Human Services, 436 U.S. 923 (1978).

legality of authorizing the administration of potentially life-saving treatment to patients who themselves withhold consent to such treatment. Specifically, the court had to determine the constitutionality of a recently enacted statute empowering the courts to authorize such treatment for persons over sixty years of age who lacked capacity to consent. Similar questions have long perplexed both the legal and medical communities. Resolution of this issue requires a careful balancing of the state's interests in preserving the life of the individual against that individual's right to privacy that includes rights to self-determination and bodily integrity.

In resolving nonconsensual medical treatment issues, the underlying principle that must be focused upon is that every individual has a fundamental right of self-determination and bodily integrity, a right with which the state can interfere only upon a showing of a compelling state interest.[4] Although these rights are not expressly granted in the Constitution of the United States, they were recognized by the United States Supreme Court as early as 1891.[5] Similarly, in 1928, Justice Brandeis, dissenting, stated that the Constitution conferred the "right to be let alone"[6] and declared that its framers intended that right to be among the most valued of civilized man. The Court has subsequently recog-

4. *See generally* Byrn, *Compulsory Lifesaving Treatment for the Competent Adult*, 44 FORDHAM L. REV. 1 (1975); Cantor, *A Patient's Decision to Decline Life-saving Medical Treatment: Bodily Integrity Versus the Preservation of Life*, 26 RUTGERS L. REV. 228 (1973).

5. Disallowing a compulsory pretrial medical examination of plaintiff seeking damages for personal injuries, the Court stated that "[n]o right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law." Union Pac. Ry. v. Botsford, 141 U.S. 250, 251 (1891).

6. Dissenting from a decision that upheld the admissibility of evidence obtained through wiretapping, Mr. Justice Brandeis stated that "[t]he makers of our Constitution . . . sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred as against the government, *the right to be let alone*—the most comprehensive of rights and the right most valued by civilized man." Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting) (emphasis added). For application of this concept in a medical context, see People v. Privitera, 74 Cal. App. 3d 936, 141 Cal. Rptr. 764 (1977) (patient has right to obtain medical treatment of his choice).

nized a right to privacy in various contexts[7] and has held it to be implicitly guaranteed and protected within the "penumbra" of the Bill of Rights.[8]

Recently, in *Roe v. Wade*,[9] the Court broadly interpreted this fundamental right to privacy in striking down a state criminal abortion statute[10] that, by effectively forcing women to continue their pregnancy to its natural termination, violated the bodily integrity of expectant mothers.[11] The Court reviewed the statute under a standard of strict judicial scrutiny,[12] which is required in

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7. *See, e.g.*, Loving v. Virginia, 388 U.S. 1 (1967) (freedom to marry is a vital personal right); Skinner v. Oklahoma, 316 U.S. 535 (1942) (fundamental right to procreate). *But cf.* Schmerber v. California, 384 U.S. 757 (1966) (right of privacy not violated, under the circumstances, by taking of blood without consent); Henderson v. United States, 390 F.2d 805 (9th Cir. 1967) (examination of bodily cavity to obtain evidence, although not permissible in this case, was said to be permissible if there was a clear indication of possession of narcotics or a plain suggestion of smuggling).

8. Griswold v. Connecticut, 381 U.S. 479, 484 (1965).

9. 410 U.S. 113 (1973).

10. The statute precluded pregnant women from determining the course of their pregnancy by proscribing all abortions except those deemed necessary to preserve the expectant mother's life. *See id.* at 117-18.

11. *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 924 (1978). Although the Court in Roe v. Wade did not specifically mention the right of inviolability of bodily integrity, the suggestion is lent support in Doe v. Bolton, 410 U.S. 179 (1973), the companion case to Roe v. Wade, by Mr. Justice Douglas, who enumerated some of the implicit rights protected by the ninth amendment:

> First is the autonomous control over the development and expression of one's intellect, interests, tastes, and personality.
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> . . . .
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> Second is freedom of choice in the basic decisions of one's life respecting marriage, divorce, procreation, contraception, and the education and upbringing of children.
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> . . . .
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> Third is the freedom to care for one's health and person, freedom from bodily restraint or compulsion, freedom to walk, stroll or loaf.

410 U.S. 179 at 211-13 (Douglas, J., concurring) (emphasis omitted). The Court in Roe v. Wade indicated that whether the right to privacy was included in the ninth amendment or in the fourteenth amendment, it is "broad enough to encompass a woman's decision whether or not to terminate her pregnancy." 410 U.S. 113 at 153. Then, the Court held that the statute was "violative of the Due Process Clause of the Fourteenth Amendment." *Id.* at 164.

12. The Court applied this form of review stating that "[w]here certain 'fundamental rights' are involved, the Court has held that regulation limiting these rights may be justified only by a 'compelling state interest' . . . and that legislative enactments must be narrowly drawn to express only the legitimate

an analysis of statutes that affect fundamental rights of individuals.[13] Under this form of review, the state must show that the encroachment upon the fundamental right is necessitated by a "compelling state interest"[14] and, further, that it represents the "least restrictive alternative"[15] through which the state's compelling interest may be realized. Applying this standard, the Court concluded that the state's "important and legitimate"[16] interest in protecting potential life did not reach "the compelling point" until the fetus became viable;[17] therefore, the state could not interfere with the expectant mother's right to privacy until such time. Thus, by holding that a woman's right to privacy under certain conditions[18] outweighed the state's avowed interest in potential life, the Court ascribed relative weight to a state interest in a manner least restrictive to the individual's rights of privacy and bodily integrity.[19]

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state interests at stake." 410 U.S. 113 at 155. *Accord,* Maher v. Roe, 432 U.S. 464 (1977); Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307 (1976); San Antonio School Dist. v. Rodriguez, 411 U.S. 1 (1973); Griswold v. Connecticut, 381 U.S. 479 (1965); Skinner v. Oklahoma, 316 U.S. 535 (1942). *See generally* L. TRIBE, *supra* note 11, at 1000-25.

13. "[E]qual protection analysis requires strict scrutiny of a legislative classification . . . when the classification impermissibly interferes with the exercise of a fundamental right . . . ." Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 312 (1976) (footnote omitted).

14. 410 U.S. at 155.

15. The doctrine of least restrictive alternative developed primarily in the context of free exercise of religion cases. *See* L. TRIBE, *supra* note 11, at 846. These cases are analogous to right of privacy cases that involve the freedom of individuals to exercise their choice. Indeed, in many instances the choice to decline treatment has been based upon religious convictions. The Court in Roe v. Wade did not expressly consider the least restrictive alternative doctrine, but there appeared to be an implicit application of it in the Court's searching for the point at which the state may assert a compelling interest.

16. *Id.* at 162.

17. *Id.* at 163.

18. The Court ruled that the state had no interest sufficient to affect the expectant mother's decision during approximately the first trimester. Subsequent to this period, however, the state may regulate the abortion procedure in the interest of promoting maternal health. Subsequent to viability, the state may proscribe abortion except when necessary to preserve the life or health of the mother. 410 U.S. at 164-65.

19. The extensive protection afforded these implicit rights in Roe v. Wade clearly establishes them as worthy of all the safeguards, including strict judicial scrutiny, afforded explicit constitutional guarantees.

In *In re* Quinlan, 70 N.J. 10, 355 A.2d 647 (1976), in which a father sought

In other situations, courts have had difficulty defining and ascribing relative weight to compelling interests. One of the interests that has been advanced is the state's role as parens patriae.[20] "The rationale of parens patriae is that the State must intervene in order to protect an individual who is not able to make decisions in his own best interest."[21] Under a broad interpretation of this doctrine, courts have upheld the state's interest in protecting third persons from the consequences of self-determined courses of action by mentally competent individuals.[22] Parens patriae inter-

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authorization to discontinue administration of life-sustaining procedures to his comatose daughter, the court, citing Roe v. Wade, observed that the right of privacy "[p]resumably . . . is broad enough to encompass a patient's decision to decline medical treatment under certain circumstances, in much the same way as it is broad enough to encompass a woman's decision to terminate pregnancy under certain conditions." *Id.* at 40, 335 A.2d at 663.

Another manifestation of this right is the development of the doctrine of informed consent "[t]he primary purpose of . . . [which] . . . is the protection of the patient's right of self-determination." King, *The Standard of Care and Informed Consent Under the Tennessee Medical Malpractice Act*, 44 TENN. L. REV. 225, 284 (1977).

After tracing the line of United States Supreme Court decisions dealing with the right of privacy, one commentator observed that "the result is clear: it is no longer necessary to eke out privacy in small pieces as aspects of other constitutional rights; there is now a Constitutional Right of Privacy." Henkin, *Privacy and Autonomy*, 74 COLUM. L. REV. 1410, 1423 (1974).

20. In *Northern*, the court appears to rely only on the doctrine of parens patriae as the state interest. There are other established, as well as emerging, interests that are often asserted. One such assertion is the state's interest in preserving human lives. By indicating that appellant could choose to forego surgery if she were mentally competent, the *Northern* court does not seem to rely on this interest in preserving life. The Tennessee Supreme Court has, however, asserted such an interest. *See* Swann v. Pack, 527 S.W.2d 99 (Tenn. 1975).

Another emerging interest is that of the state in protecting the ethical integrity of the medical profession. Thus, when a patient voluntarily submits to treatment by a physician, there arises an ethical obligation in the treating physician to preserve the patient's life. Indeed, this ethical obligation coupled with the desire to avoid liability for either not treating a patient or treating without consent may be factors in the decision to apply for authorization to administer treatment. The medical profession is caught in somewhat of a dilemma. *See* United States v. George, 239 F. Supp. 752, 754 (D. Conn. 1965). *See generally* Byrn, *supra* note 4; Note, *Compulsory Medical Treatment: The State's Interest Reevaluated*, 51 MINN. L. REV. 293 (1966).

21. *In re* Weberlist, 79 Misc. 2d 753, 360 N.Y.S.2d 783, 786 (Sup. Ct. 1974).

22. *See* Jacobson v. Massachusetts, 197 U.S. 11 (1905) (compulsory vaccination of youth despite parental objection); Raleigh Fitkin-Paul Morgan Memo-

ests have been successfully asserted in protecting minor children from their parents' decisions to withhold medical treatment from their children.[23] It also appears that a state may assert an interest within the scope of parens patriae in administering nonconsensual treatment to mentally incompetent patients in state mental hospitals in an effort to "cure" patients, thereby rendering them less dangerous to society and liberating "scarce space" for new patients.[24] Ironically, despite the many liberal applications

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rial Hosp. v. Anderson, 42 N.J. 421, 201 A.2d 537, *cert. denied*, 377 U.S. 985 (1964) (compulsory treatment of expectant mother ordered to protect fetus that was beyond thirty-second week of development). *See also* Application of the President & Directors of Georgetown College, Inc., 331 F.2d 1000 (D.C. Cir. 1964) (compulsory treatment of incompetent mother to protect seven-month-old child).

23. *See* Wallace v. Labrenz, 411 Ill. 618, 104 N.E.2d 769, *cert. denied*, 344 U.S. 82 (1952); State v. Perricone, 37 N.J. 463, 181 A.2d 751, *cert. denied*, 371 U.S. 890 (1962); *In re* Vasco, 238 App. Div. 128, 263 N.Y.S. 552 (1933).

24. *See* Winters v. Miller, 306 F. Supp. 1158, 1168 (E.D.N.Y. 1969), *rev'd*, 446 F.2d 65 (2d Cir. 1971). In reversing, the Court of Appeals made the following statement that is pertinent to the present discussion:

> While it may be true that the state could validly undertake to treat [the patient] if it did stand in a *parens patriae* relationship to her and such a relationship may be created if and when a person is found *legally* incompetent, there was never any effort on the part of [the hospital] to secure such a judicial determination of incompetency before proceeding to treat [the patient] in the way they thought would be "best" for her.

446 F.2d at 71 (emphasis in original). This statement appears to acknowledge that the state may administer nonconsensual treatment, presumably on the theory suggested in the original case, provided the patient is first adjudged to be *legally* incompetent. *But cf.* New York City Health & Hosp. Corp. v. Stein, 70 Misc. 2d 944, 335 N.Y.S.2d 461 (Sup. Ct. 1972) (patient had right to refuse medical treatment even though there was a strong indication she would respond favorably) (discussed in note 64 *infra*).

The distinction between the state's authority acting under parens patriae as opposed to acting through its police power was not clearly defined by either court in *Winters*. In theory, parens patriae is invoked to protect the individual who cannot protect himself, whereas police power is generally invoked to protect society at large. However, maintaining a clear separation becomes difficult in application. For example, in *In re* Weberlist, 79 Misc. 2d 753, 360 N.Y.S.2d 783 (Sup. Ct. 1974), the court, after commenting on both doctrines, stated that "[t]he decision to exercise the power of parens patriae must reflect the welfare of society, as a whole, but mainly it must balance the individual's right [of privacy] against the individual's need for treatment . . . ." 360 N.Y.S.2d at 786. Similarly, the court in Application of President & Directors of Georgetown College, Inc., 331 F.2d 1000 (D.C. Cir. 1964), in applying parens patriae to

of the doctrine of parens patriae, when states have based the assertion of their interest solely upon the welfare of the incompetent individual, serious questions have arisen whether the prevailing interest should be the individual's right to resist the intrusion or the state's interest in prolonging the individual's life.[25]

Two of the leading cases, *Application of President & Directors of Georgetown College, Inc.*[26] and *In re Estate of Brooks*,[27] dealing with compulsory treatment of individuals determined to be incompetent to make a decision with regard to such treatment, have reached opposite results. In both cases court orders were sought[28] that would authorize life-saving blood transfusions to *in extremis*[29] patients who had made known their objections[30] to such transfusions prior to being rendered mentally incompetent[31]

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compel treatment stated that "[t]he patient had a responsibility to the community to care for her infant. Thus the people had an interest in preserving the life of this mother." *Id.* at 1008. These statements indicate that whether the state is acting under parens patriae or police power is not always readily discernible.

25. *See* Cantor, *supra* note 4, at 246.

26. 331 F.2d 1000 (D.C. Cir.), *cert. denied sub nom.* Jones v. President & Directors of Georgetown College, Inc., 377 U.S. 978 (1964).

27. 32 Ill. 2d 361, 205 N.E.2d 435 (1965).

28. In *Georgetown College*, petitioners sought an injunction and a declaratory judgment to determine the legal rights and liabilities between the hospital and the patient. 331 F.2d at 1002. In *Brooks*, although the physician had assured the patient he would not further attempt to persuade her to have a transfusion, he, along with the public guardian of the county, petitioned the court for appointment of the public guardian as conservator to consent to a transfusion for the patient. 32 Ill. 2d at 363, 205 N.E.2d at 437.

29. 331 F.2d at 1008. In *Brooks*, the term *in extremis* was not used to describe patient, but she was in a similar condition to patient in *Georgetown College*.

30. Both patients were members of the Jehovah's Witness religious sect, which considers blood transfusions a violation of the law of God. In *Brooks*, the patient had advised her physician that she was unwilling to accept a transfusion. In *Georgetown College*, the patient, although incompetent, voiced her objection. Her husband confirmed the objection. Although the reason for rejecting treatment in these cases may be different than in *Northern*, the right of an individual to withhold consent to an intrusion upon his bodily integrity is the same in each instance. The factor to be determined in each case is the extent of the limitations the state may impose upon the free exercise of that right.

31. Commenting on *Georgetown*, one observer noted "that courts will go quite far in such cases to find mental incompetence, and it appears that many judges feel that the very decision to accept death rather than medical treatment

by their physical afflictions.[32] Sharing the same objections to such treatment, the spouses in each case also refused to consent to the transfusions. The only significant factual distinction between the two cases was that the patient in *Georgetown College* had a seven-month-old child whereas the patient in *Brooks* had no minor children.[33]

In *Georgetown College* the court discussed a series of cases that protected sick children by invoking the doctrine of parens patriae as a sufficient state interest to override parental decisions.[34] After stating that the cases were analogous to *Georgetown College* insofar as the decision of the adult would affect the welfare of the child, the court applied the rationale of the sick-child cases on two levels. First, the patient was similar to a child in that she was incompetent; therefore, the court could assume guardianship of her to protect her from her husband's decision that would lead to her death.[35] Second, the voluntary death of the mother would constitute the "most ultimate of voluntary abandonments"[36] in which the state, acting as parens patriae to the seven-month-old child, could intercede to prevent. Based upon these conclusions, compulsory administration of the blood transfusions was authorized.[37]

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is convincing evidence of medical incompetence." N. CHAYET, LEGAL IMPLICATIONS OF EMERGENCY CARE 107 (1969).

32. Each of the patients was suffering from bleeding ulcers. In *Georgetown College*, Judge Wright observed, "the woman was not in a mental condition to make a decision." 331 F.2d at 1007. In *Brooks*, approaching death had so weakened the mental and physical faculties of a theretofore competent adult "that she [could] properly be said to be incompetent." 32 Ill. 2d at 365, 205 N.E.2d at 438.

33. Patient in *Brooks* had two adult children. 32 Ill. 2d at 362, 205 N.E.2d at 436.

34. 331 F.2d at 1008.

35. *Id.*

36. *Id.*

37. Before reaching its conclusion, the court discussed the state's interest in preventing suicide and the responsibility of the doctors. Then Judge Wright made a revealing comment on the dilemma the judiciary is confronted with in nonconsensual treatment cases:

> [A] life hung in the balance. There was no time for research and reflection. Death could have mooted the cause in a matter of minutes, if action were not taken to preserve the status quo. To refuse to act, only to find later that the law required action, was a risk I was unwilling to accept. I determined to act on the side of life.

Id. at 1009-10.

Addressing the *Georgetown College* case, the court in *Brooks* conceded that the state's interest might be sufficiently strong to override the individual's decision when the exercise of that decision might result in children becoming wards of the state.[38] The *Brooks* court then drew the distinction between the absolute right of an individual to freedom of his religious belief and the conditional right to the exercise thereof.[39] In the latter instance, the conduct may be proscribed upon a showing that it will endanger the "public health, welfare or morals."[40] Absent such a danger, however, the court emphasized that a person's right to be let alone in his decisions, notwithstanding their appearance of unreasonableness, extends to an individual's decision to choose death rather than to accept life-saving treatment. The state cannot impose upon the individual its belief that a reasonable person would choose to accept treatment.[41] Finding no overriding state interests[42] and no valid reason to invoke parens patriae,[43] the court held that the patient had a right to refuse life-saving medical treatment as manifested by her objections before becoming physically weakened and mentally incompetent.

Georgetown College and *Brooks* employed a similar reasoning process that provides a useful preliminary guideline for resolving compulsory treatment issues. First, the expressed wishes of the patient must be afforded utmost regard. This guideline is equally applicable to incompetent individuals whose objections to treatment were made known while they were competent. Second, the state's interests must be identified. Then, the competing interests of the state and the individual must be weighed against each other. Only those state interests directed toward the protection of its citizens individually and the public in general should be regarded as sufficient to authorize state intervention.[44] Indeed,

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38. *See* 32 Ill. 2d at 368-69, 205 N.E.2d at 439-40.

39. *Id.* at 369-72, 205 N.E.2d at 440-41.

40. *Id.* at 372, 205 N.E.2d at 441.

41. *See id.* at 373, 205 N.E.2d at 442.

42. "Even though we may consider appellant's beliefs unwise, foolish or ridiculous, in the absence of an overriding danger to society we may not permit interference therewith . . . for the sole purpose of compelling [the patient] to accept medical treatment . . . previously refused by her with full knowledge of the probable consequences." *Id.*, 205 N.E.2d at 442.

43. There being "[n]o minor children . . . involved," *id.* at 372-73, 205 N.E.2d at 442, the reasoning of *Georgetown College* was inapplicable here.

44. Protection of an incompetent adult whose decision against treatment

such an interest must be a compelling one.[45] Using this basic approach these two cases afforded protection to both the asserted state interests and the rights of the individual until one could be adjudged paramount to the other through a careful balancing process. Unfortunately, not every situation affords the court with knowledge of how the individual felt about the recommended medical treatment prior to his incompetency.[46] In such cases, the power of the state to act in the best interests of the incompetent is generally recognized;[47] however, determining what the best interests are is often difficult.[48]

In a recent Massachusetts decision, *Superintendent of Belchertown State School v. Saikewicz*,[49] a sophisticated balancing technique was employed in an attempt to approximate the decision-making process the individual might have gone through had he been competent to decide. Here, the court was called upon to authorize life-prolonging[50] treatment that had only a 30 to 50%

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was made while competent should not be regarded as sufficient to permit compulsory treatment. *See* note 42 *supra*. *But cf. In re* Quackenbush, 156 N.J. Super. 282, 383 A.2d 785 (Morris County Ct. 1978) (After adjudging an alleged incompetent to be capable of making an "informed choice" on facts very similar to those in *Northern*, the court stated that "there is a suggestion of a need for a combination of significant bodily invasion *and* a dim prognosis before the individual's right of privacy overcomes the State's interest in preservation of life.") (emphasis in original).

45. *See* notes 12-19 *supra* and accompanying text.

46. Indeed, the individual may have suffered from a mental disability from birth or from the time he attained his majority.

47. *See* Byrn, *supra* note 4, at 24.

48. In one case, Long Island Jewish-Hillside Med. Center v. Levitt, 73 Misc. 2d 395, 342 N.Y.S.2d 356 (Sup. Ct. 1973), the court determined that the value of human life was a sufficient interest, for both the patient and the state, to justify the issuance of an order for the amputation of the gangrenous leg of an 84-year-old male who was not competent to consent to the surgery. Although the court went to great lengths to obtain the consent of the patient's niece, they at one point stated "the concern that is shown for the maintaining of an individual human life affect [*sic*] not only us as individuals now, but also the very structure of our future society." *Id.* at 397, 342 N.Y.S.2d at 358. In the context this statement was made, it could have been a compliment to the hospital for being concerned rather than a policy argument for nonconsensual medical treatment. *See also* J.F.K. Memorial Hosp. v. Heston, 58 N.J. 576, 279 A.2d 670 (1971).

49. 77 Mass. Adv. Sh. 2461, 370 N.E.2d 417 (1977).

50. Saikewicz was suffering from acute myeloblastic monocytic leukemia for which chemotherapy was the only known treatment. Remission, the goal of

probability of succeeding and that would result in serious adverse side effects. The patient was mentally retarded and had lived in state institutions for fifty-three years. In reaching its decision, the court first asserted that all persons, whether mentally competent or incompetent, possess the same right to be free from the nonconsensual invasion of their bodily integrity.[51] The court further determined that the state is not bound by an "unvarying responsibility"[52] to order necessary medical treatment for an incompetent individual in every situation in which that person is faced with "an immediate and severe danger to life"[53] but that the doctrine of substituted judgment[54] is the appropriate method of determining whether necessary medical treatment should be ordered. Adopting this approach, the court objectively weighed the identifiable factors[55] that ordinarily enter into such a decision from the patient's viewpoint. The court decided, with due regard for the "actual interests and preferences"[56] of the patient, that withholding treatment was justified: "[f]inding no State interests sufficient to counterbalance a patient's decision to decline life-prolonging medical treatment in the circumstances of this case . . . the patient's right to privacy and self-determination is entitled to enforcement."[57]

This approach is generally consistent with *Georgetown College* and *Brooks*.[58] The primary distinguishing feature is the

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the treatment, was defined as a temporary return to normal as measured by clinical and laboratory means. *Id.* at 420.

51. "The recognition of that right must extend to the case of an incompetent, as well as a competent, patient because the value of human dignity extends to both." *Id.* at 427.

52. *Id.*

53. *Id.* at 427-28.

54. The goal of substituted judgment "is to determine with as much accuracy as possible the wants and needs of the individual involved." *Id.* at 430. *See generally* 44 TENN. L. REV. 879 (1977).

55. 370 N.E.2d at 431-32.

56. *Id.* at 431. *Compare In re* Guardianship of Pescinski, 67 Wis. 2d 4, 226 N.W.2d 180 (1975) *with* Strunk v. Strunk, 445 S.W.2d 145 (Ky. 1969).

57. 370 N.E.2d at 435.

58. Indeed, it also conforms analytically to the court's approach in *In re* Quackenbush, 156 N.J. Super. 282, 383 A.2d 785 (Morris County Ct. 1978), *see* note 44 *supra*. Although in *Quackenbush* there appeared to be a presumption of a paramount state interest in the preservation of life, this presumption could be rebutted by a sufficient showing of significant bodily invasion. Thus, the court ultimately balanced the individual's right to bodily integrity against the state's interests.

method employed to determine whether the patient would object to the proposed treatment. If the substituted judgment determination is that the patient would object, the competing state interest must be identified and weighed. Thus, the *Saikewicz* decision represents a rational approach in dealing with the issue of whether to authorize necessary medical treatment for incompetent individuals. Rather than automatically authorizing treatment in each case, it recognizes that the incompetent individual's right to bodily integrity is subordinate only to a compelling state interest.[59] Indeed, such recognition and subsequent balancing may constitute the least-restrictive-alternative method of resolving these issues.[60]

There has been very little legislation attempting to identify the appropriate state interests in the area of compulsory medical treatment. While most states have legislation authorizing treatment of patients in state mental hospitals,[61] such statutes require the consent of either the patient or someone acting in his behalf before surgery may be performed[62] or before a severe form of treatment may be administered.[63] The state interest asserted for less severe treatment is expedition of the treatment and resulting improvement of the patient's health to the benefit of taxpayers and society in general.[64]

In addition, the *Quackenbush* court provides a further indication of the moral conflict presented by such cases when it states that "[n]o decision of this nature is easily made. Always present is the predominant interest in the preservation of life. But constitutional and decisional law invest Quackenbush with the rights that overcome that interest." 383 A.2d at 790. *See* note 37 *supra*.

59. Although *Saikewicz* dealt with life-prolonging rather than life-saving treatment, the reasoning applied therein might prove beneficial where the purported life-saving treatment carries with it severe adverse side effects and no more than a 50% probability of success as was the situation in *Northern*.

60. *See* notes 14-19 *supra* and accompanying text.

61. *See, e.g.*, N.Y. MENTAL HYG. LAW § 33.03 (McKinney 1978); TENN. CODE ANN. § 33-307 (Cum. Supp. 1978).

62. *See* N.Y. MENTAL HYG. LAW § 33.03 (McKinney 1978).

63. *Id.*

64. In New York City Health and Hosp. Corp. v. Stein, 70 Misc. 2d 944, 335 N.Y.S.2d 461 (Sup. Ct. 1972), the court upheld the patient's refusal to consent to electro-shock therapy although (1) two prior nonconsensual treatments had been effective in improving the patient's mental condition, (2) there were directly conflicting psychiatric reports, and (3) the court itself had determined that the patient was "sufficiently mentally ill to require further retention." Ruling within the spirit of a proposed statute, N.Y. MENTAL HYG. LAW §

Effective legislation in this area requires a careful determination of compelling state interests to be weighed against an individual's right of privacy.[65] Since an equal protection analysis of any statutory classification authorizing nonconsensual medical treatment would employ a standard of strict judicial scrutiny,[66] it would be incumbent upon the legislature to assert specific compelling interests for each class of individuals affected. In view of this standard, a broad classification might include those persons deemed mentally incompetent and in need of life-saving medical treatment.[67] Further classification to include mentally competent individuals in need of medical treatment would depend upon the state interest being asserted in each instance.[68] Classifications based solely on age may not be permissible.[69] In addition to determining these compelling interests, the legislature must ensure that there are no less-restrictive means[70] by which the state interests may be realized; otherwise, there is a risk that the statute may be invalidated.[71]

15.03 (McKinney 1972) (current version at N.Y. MENTAL HYG. LAW § 33.03 (McKinney 1978)), this court applied a very restrictive standard of interpretation in favor of the patient to ensure against an unwarranted infringement upon her rights.

65. *See* notes 12-57 *supra* and accompanying text.

66. This conclusion follows from the premise that the inviolability of one's bodily integrity is a fundamental right. *See* notes 4-15 *supra* and accompanying text.

67. Such classification would encompass all mentally incompetent persons regardless of their age. Thus, the state would be asserting an interest in all incompetent individuals that would be balanced against the individual's wishes as determined through a substituted judgment process.

68. Under this type of statute, persons whose decisions to maintain their bodily integrity at the risk of dying affected third persons in whom the state had an interest to protect could be subjected to proceedings to determine fairly if those statutorily enumerated state interests sufficiently outweigh those individuals' rights to permit the court to compel life-saving medical treatment.

69. In Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307 (1976), the Court held that a statute that mandated retirement of uniformed state police officers at age 50 was not per se unconstitutional. The rational basis standard of review was applied because of the determination that the statutory classification neither interfered with a fundamental right nor operated to the "peculiar disadvantage of a suspect class." *Id.* at 312. The dissent indicated that if the operation of the statute had affected a fundamental right, it would have been subjected to the strict scrutiny standard of review and would probably have been invalidated. *Id.* at 319 (Marshall, J., dissenting). *See* note 110 *infra*.

70. *See* notes 14-19 *supra* and accompanying text.

71. Invalidation could occur if the courts analyzed the nonconsensual

Insight into what interests Tennessee might deem compelling is provided by a recent decision by the Tennessee Supreme Court that addressed issues analogous to those presented by compulsory medical treatment. In *Swann v. Pack*[72] the court enjoined members of a religious sect[73] from handling poisonous snakes and imbibing strychnine, activities that were included in their church services. The court balanced those individuals' right to exercise freely their religious beliefs against the state's interests.[74] The court barred snake-handling because of the very real danger it posed to third persons.[75] The poison consumption issue was more difficult. Nonetheless, the court asserted that "having a strong, healthy, robust, taxpaying citizenry capable of self-support and of bearing arms and adding to the resources and reserves of manpower"[76] was a "substantial and compelling interest"[77] sufficient to permit the state to proscribe consumption of strychnine as well as the handling of poisonous snakes. This generally stated interest leaves open the question whether it applies only to those per-

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medical treatment statutes on a least-restrictive-means basis after determining that a valid compelling state interest had been asserted. *See* text accompanying notes 16-19 *supra*. Such invalidation would not preclude the state from enacting modified statutes. Indeed, in Roe v. Wade, the Court, after holding the Texas abortion statute unconstitutional, carefully defined the contours of legislation within which abortions could be proscribed, realizing state interests to the maximum extent possible with minimum intrusion upon the expectant mother's bodily integrity. Although the Court did not suggest this on a least-restrictive-means basis, it did implicitly provide guidelines for the Texas legislature to reconstruct their statute. *See* note 19 *supra*.

72. 527 S.W.2d 99 (Tenn. 1975).

73. The Holiness Church of God in Jesus Name. *Id.* at 102.

74. *See* notes 39-41 *supra* and accompanying text.

75. 527 S.W.2d at 113. The court, although not explicitly labeling their effort an attempt to ascertain the least restrictive alternative, indicated:

> After long and careful analysis of alternatives and lengthy deliberations on all aspects of this problem we reached the conclusion that paramount considerations of public policy precluded less stringent solutions. . . . We could find no rational basis for limiting or restricting the practice, and could conceive of no alternative plan or procedure which would be palatable to the membership or permissible from a standpoint of compelling state interest.

Id. at 114.

76. *Id.* at 113. Indeed, the court ascribed the status of "right" to this interest concluding that "the state has a *right to protect a person from himself* and to demand that he protect his own life." *Id.* (emphasis added).

77. *Id.*

sons who can fulfill those needs set forth. Because different values cannot justifiably be placed on different human lives, this criterion must be interpreted to include an interest in the preservation of all human lives. This interpretation could result in the state authorizing necessary treatment for competent, as well as incompetent, adults.[78]

In the instant case, *State v. Northern*,[79] the court examined a statute[80] that was recently enacted with the explicit "[l]egislative intent and purpose . . . to develop and to encourage the provision of protective services for elderly persons residing in the state in need of such services."[81] Apparently cognizant of the problems encountered in nonconsensual medical treatment,[82] the legislature limited the exercise of authority to order such treatment to those cases in which there was a finding of an imminent danger of death and a lack of capacity to consent[83] to the necessary treatment. Although the individual in this case was found "to be lucid and apparently of sound mind generally," the court determined that she suffered from a delusion[84] that rendered her unable to comprehend the gravity of her condition that required amputation of her feet to save her life. This partial insanity[85] rendered defendant incapable of fully understanding the extent to which her life was imperiled; therefore, she was ad-

78. The court in *Northern* did not share this view. Incompetency was the primary fact upon which the case turned. Also, Judge Drowota specifically disagreed with this state interest asserted in *Swann*. *See* State v. Northern, 563 S.W.2d at 214 (Drowota, J., concurring).

79. 563 S.W.2d 197 (Tenn. Ct. App.), *cert. denied, id.* (Tenn. 1978), *appeal dismissed as moot*, 436 U.S. 923 (1978).

80. TENN. CODE ANN. § 14-2306 (Cum. Supp. 1978).

81. *Id.* § 14-2301 (Cum. Supp. 1978).

82. The word "apparently" is used here because there was no indication of extensive floor debate in either the Senate or the House when the statute was enacted. Its legislative history is quite routine with the only offered amendments pertaining to procedural terminology. Either the legislators were not aware of the far-reaching implications of the statute or they were not aware of the raging battle between state interests and individual rights. The former is more plausible. *See* 1974 Tenn. Pub. Acts ch. 730, House Bill No. 1658; 1 House Journal 2840 (1974); 2 Senate Journal 3108 (1974).

83. TENN. CODE ANN. § 14-2306 (Cum. Supp. 1978).

84. 563 S.W.2d at 209-10. Although this finding was determinative of the case to a large extent, it was a factual issue and is therefore not questioned in this Note. *See* note 32 *supra*.

85. 563 S.W.2d at 209.

judged legally incompetent to consent to the operation. Based upon this finding the court ruled that it was vested with the power to authorize necessary medical treatment. In so ruling, the court determined that the statute was enacted within the power of the state, that its application to that class of incompetent persons over the age of sixty years[86] was not per se unconstitutional, and that the terminology was not unconstitutionally vague.

Though a state does have an interest in protecting its incompetent citizens, legislation providing such protection is not exempt from judicial review.[87] In *Northern* the constitutionality of the statute was challenged,[88] and the court, apparently relying on parens patriae,[89] ruled that the statute was a "valid exercise of legislative authority of the . . . State . . . in providing protection for its incompetent citizens."[90] Unlike the *Georgetown—Brooks* approach,[91] *Northern* did not balance the individual's rights against those interests the state asserted through enactment of the statute. It appears that the Tennessee court would proceed to compel treatment in both cases upon a finding of incompetence without analyzing the patient's interests. While this reflex approach[92] may be efficient, it encroaches upon the individual's fundamental right of privacy.[93] The fact that this rule may render a desirable result from the state's viewpoint is not indicative of its constitutionality.

Another approach should be considered to determine when a court has the authority to exercise this statutory power. Fundamental to this approach is the premise that the court will require a strong showing of incompetency before adjudging an individual

86. *See* note 1 *supra*.

87. Indeed, when a question arises about a statute's constitutionality, an exhaustive review must be undertaken. *See* U.S. CONST. art. VI; notes 12 & 13 *supra* and accompanying text.

88. 563 S.W.2d at 206.

89. *Id.*

90. *Id.*

91. *See* notes 26-45 *supra* and accompanying text.

92. "[A]n automatic or strongly habitual and predictable way of thinking." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1908 (1971).

93. It is in this "free exercise of fundamental rights" context, of which the free exercise of religious beliefs is an example, that the least-restrictive-alternative inquiry would be appropriate. *See* notes 15-19 *supra* and accompanying text.

to be mentally incompetent.[94] Upon a finding of incompetence, there should not be a corresponding assumption of state responsibility to authorize medical treatment. Rather, the court should endeavor to ascertain and to assess all relevant factors, as was done in *Saikewicz*, from the viewpoint of the individual.[95] If, in the court's judgment, the individual would desire treatment, it would then be authorized.[96] On the other hand, if the court determines that treatment would not be desired, it would proceed to weigh the interests of the individual against those of the state. In this manner, both competent and incompetent individuals would be given the same considerations in the overall balancing process, and, moreover, the state could not automatically intercede without due regard for the rights of the incompetent. This approach would have been particularly appropriate in the *Northern* case. With a fifty percent chance that the treatment itself would have caused death or, in the event of survival, severe adverse side effects, *Northern* was not a clear-cut matter of life or death. However, in view of the decision in *Swann v. Pack*,[97] it is conceivable that a compelling state interest in preserving life may be asserted regardless of the outcome of substituted judgment. This assertion would, of course, result in the state prevailing in all cases whether the individual was competent or not.

In reply to defendant's contention that the statute[98] was unconstitutional because of vagueness in the use of "imminent dan-

94. *See, e.g., In re* Quackenbush, 156 N.J. Super. 282, 383 A.2d 785 (Morris County Ct. 1978). There was somewhat conflicting testimony whether the patient was mentally competent. One psychiatrist concluded that "Quackenbush's mental condition was not sufficient to make an informed decision concerning the operation." 383 A.2d at 788. Another psychiatrist was of the opinion that although Quackenbush exhibited "some fluctuations in mental lucidity" he had the mental capacity to appreciate the extent of the operation or the risks involved if he did not consent. This opinion was "based upon reasonable medical certainty." *Id.* The judge also visited Quackenbush and concluded that, despite the fact that the patient's "conversation did wander occasionally," he possessed the requisite capacity to consent. *Id.* at 788. *See also* note 64 *supra*.

95. *See* notes 49-60 *supra* and accompanying text.

96. Although this may appear to allow for a wide margin of judicial discretion, with proper legislative guidance and competent medical testimony the pertinent factors could be ascertained and objectively weighed from the standpoint of the patient.

97. *See* notes 72-78 *supra* and accompanying text.

98. TENN. CODE ANN. § 14-2306 (Cum. Supp. 1978).

ger of death"[99] and "capacity to consent,"[100] the court defined and explained the phrases.[101] To ensure that the phrase "imminent danger of death"[102] was interpreted to effect the purpose of the statute, the court stated that "[f]or an authorization to mildly encroach upon the freedom of the individual, a relatively mild imminence or danger of death may suffice. On the other hand, the authorization of a drastic encroachment upon personal freedom and bodily integrity would require a correspondingly severe imminence of death."[103] Such an encroachment test may appear superficially to afford some consideration for a person's bodily integrity by assigning the degree of encroachment a relative value.[104] This test should only be employed, however, if the threshold question whether there can be *any* encroachment upon personal freedom and bodily integrity has been answered in the affirmative. To proceed upon the supposition that the statute authorized an encroachment and that the only task for the court is to apply this encroachment test to those lacking capacity to consent, completely disregards the rights of mentally incompetent individuals.[105] Before any encroachment may be authorized, there must be a balancing of the state's interest in encroaching upon the individual's bodily integrity against that individual's right to resist such an encroachment. This balancing procedure retains the same significance whether the state wishes to pluck a hair, to administer a vaccination, or to sever a limb.

Defendant also challenged the constitutionality of the statute's classification scheme.[106] Citing *Massachusetts Board of Re-*

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99. 563 S.W.2d at 209.

100. *Id.*

101. *Id.*

102. *Id. See* TENN. CODE ANN. § 14-2306(a) (Cum. Supp. 1978).

103. 563 S.W.2d at 209.

104. This test appears to be more flexible than the one applied in *Quackenbush*, which would not allow a severe encroachment unless survival probability was high. For this reason, *Quackenbush* seems to provide a better, although not adequate, constitutional safeguard in that it recognizes a point of nonconsensual intrusion beyond which the state cannot proceed. Neither test, however, is acceptable under strict scrutiny analysis.

105. Hypothetically, this approach would allow the court to order the severance of one digit of an incompetent individual's hand if an infection in that hand gave rise to a 10% probability of death to that individual. Perhaps no court would entertain such a notion, but the limits of all rules must be first ascertained and then assessed.

106. 563 S.W.2d at 206.

tirement v. Murgia,[107] the court simply stated that "[t]he application of the statute only to persons over 60 years of age is not per se an unconstitutional discrimination."[108] While the court in *Northern* correctly states the holding in *Murgia*, it is not at all clear why that case is controlling on this issue. Examination of the reasoning in *Murgia*[109] indicates that the Court's view that a right to governmental employment is not per se a fundamental right had a significant bearing on the ultimate disposition of the case[110] by exempting the statute from a strict scrutiny review. In *Northern*, although the statute was enacted to protect elderly persons, its application resulted in state interference with a fundamental right of the individual.[111] Thus, the standard of strict judicial scrutiny would be applied in an equal protection analysis of the statute. It is doubtful that Tennesee Code Annotated section 14-2306 could successfully withstand this strict form of review.[112]

Criticizing a decision to preserve a human life is morally difficult. Nonetheless, while the court in *Northern* may have reached the right decision, a more penetrating analysis and resolution of the underlying issues would have placed the present statute in its proper perspective, aided in drafting much needed legislation in the nonconsensual treatment area, and provided guidance to the legal and medical communities. The chancery court's finding of incompetence should not have triggered the automatic response of authorizing compulsory treatment. Rather, this finding should have initiated a balancing process weighing

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107. 427 U.S. 307 (1976). This was one of two cases cited in the majority opinion.

108. 563 S.W.2d at 206.

109. *See* note 69 *supra*.

110. One detects a hint of this in the majority opinion, but Mr. Justice Marshall openly observes that "[i]f a statute is subject to strict scrutiny, the statute always, or nearly always . . . is struck down." 427 U.S. at 319 (Marshall, J., dissenting).

111. *See* notes 4-19 *supra* and accompanying text.

112. Under the doctrine of parens patriae, the state may have a compelling interest in protecting incompetent individuals. There is no basis, however, for asserting this interest as paramount to the rights only of those persons over a certain age. Although the passage of the statute was undoubtedly motivated by the legislators' altruism, the statute nonetheless affects only the rights of a class of incompetent persons based upon age and, therefore, should not withstand constitutional challenge. *See generally* notes 67 & 68 *supra*.

the individual's right to bodily integrity against compelling state interests. Only upon a determination that the state does have compelling interests should the scale be tipped in favor of authorizing compulsory treatment. The court's analysis in *Northern* should alert the legislature to the need for comprehensive legislation that fully articulates compelling state interests and provides adequate protection for the bodily integrity of all individuals.

RONALD W. JENKINS

Constitutional Law—Fourth Amendment—Warrant Requirement for OSHA Inspections

A Department of Labor inspector requested admittance to the nonpublic working areas of plaintiff's electrical and plumbing installation business to conduct an inspection pursuant to the Occupational Safety and Health Act of 1970.[1] When the inspector acknowledged he had no warrant authorizing the inspection, the general manager refused to grant admittance.[2] The Secretary of Labor subsequently obtained a federal district court order requiring entry.[3] Claiming that warrantless inspections by the Occupa-

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1. 29 U.S.C. §§ 651-678 (1976) [hereinafter referred to as the Act]. The relevant portions of the Act provide:

654 (a) Each employer—

(1) shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees;

(2) shall comply with occupational safety and health standards promulgated under this chapter.

(b) Each employee shall comply with occupational safety and health standards and all rules, regulations, and orders issued pursuant to this chapter which are applicable to his own actions and conduct.

. . . .

657(a) In order to carry out the purposes of this chapter, the Secretary, upon presenting appropriate credentials to the owner, operator, or agent in charge, is authorized—

(1) to enter without delay and at reasonable times any factory, plant, establishment, construction site, or other area, workplace or environment where work is performed by an employee of an employer; and

(2) to inspect and investigate during regular working hours and at other reasonable times, and within reasonable limits and in a reasonable manner, any such place of employment and all pertinent conditions, structures, machines, apparatus, devices, equipment, and materials therein, and to question privately any such employer, owner, operator, agent or employee.

2. *See* Marshall v. Barlow's, Inc., 436 U.S. 307, 310 (1978) (inspector also informed employer that a complaint had not prompted inspection).

3. *Id.* at 310 & 325 n.23 (issue of whether this order for inspection was the functional equivalent of a warrant was not addressed by the Court and not raised by the Secretary).

tional Safety and Health Administration (OSHA) violated the fourth amendment[4] to the United States Constitution, plaintiff refused to comply and filed a petition for injunctive relief. A three-judge federal district court granted the injunction.[5] On direct appeal[6] to the United States Supreme Court, *held*, affirmed. To the extent that it authorizes warrantless OSHA inspections, section 657(a) of the Occupational Safety and Health Act of 1970 is unconstitutional. Probable cause justifying the issuance of a warrant for an OSHA inspection may be based on evidence of an existing violation or an administrative plan that reasonably relies on employee concentration in various industries to determine the frequency of inspections required for effective enforcement. *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978).

Section 657(a), authorizing the Secretary to enter business premises for inspection purposes "without delay," contains no express requirement that a search warrant be acquired prior to entry.[7] Constitutional challenges of warrantless OSHA inspections have focused on this omission, and some federal district courts have construed the section to require a warrant when the employer objects to the inspection.[8] Other district courts have concluded that the section constitutionally authorizes warrantless inspections.[9] To resolve this conflict the Supreme Court in

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4. "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.

5. Barlow's, Inc. v. Usery, 424 F. Supp. 437 (D. Idaho 1976), *aff'd sub nom.* Marshall v. Barlow's, Inc., 436 U.S. 307 (1978).

6. 28 U.S.C. § 1252 (1976) provides:

Any party may appeal to the Supreme Court from . . . [a] final judgment, decree or order of any court of the United States, holding an Act of Congress unconstitutional in any civil action, suit, or proceeding to which the United States or any of its agencies, or any officer or employee thereof . . . is a party . . . .

7. *See* note 1 *supra*.

8. *See* Lockport Non Ferrous Casting, Inc. v. Marshall, 441 F. Supp. 333 (W.D.N.Y. 1977); Morris v. United States Dep't of Labor, 439 F. Supp. 1014 (S.D. Ill. 1977); Empire Steel Mfg. Co. v. Marshall, 437 F. Supp. 873 (D. Mont. 1977); Dunlop v. Hertzler Enterprises, Inc., 418 F. Supp. 627 (D.N.M. 1976); Brennan v. Gibson's Prods., Inc., 407 F. Supp. 154 (E.D. Tex. 1976).

9. *See* Dunlop v. Able Contractors, Inc., [1975] 4 OSHC (BNA) 1110 (D.

Barlow's addressed the question whether an OSHA inspection without a warrant was an unconstitutional invasion of the right of commercial privacy.[10] A warrant requirement would necessitate the establishment of criteria for probable cause sufficient to justify the issuance of a warrant.

Prior to 1967 the Supreme Court held administrative inspections without a warrant constitutional.[11] The Court in these pre-1967 cases separated the search and seizure clause[12] of the fourth amendment from the warrant clause.[13] To determine whether an administrative inspection complied with the fourth amendment, the Court considered only the search and seizure clause and decided whether the search was reasonable in light of the interest

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Mont. Dec. 15, 1975); Brennan v. Buckeye Indus., Inc., 374 F. Supp. 1350 (S.D. Ga. 1974).

10. *See* See v. City of Seattle, 387 U.S. 541 (1967). The right of commercial privacy will hereinafter be used to designate the privacy interests held by commercial establishments, as opposed to personal residences, and, in particular, those interests connected with the nonpublic areas of the business.

11. The case of District of Columbia v. Little, 339 U.S. 1 (1950), was the initial case questioning whether there was a constitutional requirement for a warrant authorizing an administrative inspection. Defendant in that case refused entry to her home to a public health official investigating a complaint of unsanitary conditions in her home. Claiming that it was her constitutional right to demand a warrant, defendant appealed her conviction under a public regulation prohibiting such interference with an inspection. The majority avoided the constitutional issue, holding merely that defendant's interference was not of the nature prohibited by the regulation. *But see id.* (Burton, J., dissenting); Annot., 13 A.L.R.2d 969 (1950).

Nine years after *Little* the Court did consider the issue under very similar circumstances in Frank v. Maryland, 359 U.S. 360 (1959). The Baltimore Health Department official in this case also was responding to a neighbor's complaint of unsanitary conditions. After discovering one-half ton of trash in defendant's yard, the official informed defendant of the need for a complete inspection. Defendant denied the request and subsequently was convicted and fined. On appeal, the Court held that the warrantless inspection procedure was reasonable under the fourth amendment. Justice Frankfurter, speaking for the majority, stated that the warrant clause of the fourth amendment was applicable primarily when the search threatened an individual's fifth amendment rights against self-incrimination. *Id.* at 365. "[G]iving the fullest scope to this constitutional right of privacy, its protection cannot here be invoked." *Id.* at 366. *See also* Eaton v. Price, 360 U.S. 246 (1959) (affirmed by an equally divided Court); J. LANDYNSKI, SEARCH AND SEIZURE AND THE SUPREME COURT 245-55 (1966).

12. "The right of the people to be secure . . . against unreasonable searches and seizures . . . ." U.S. CONST. amend. IV.

13. "[N]o warrants shall issue, but upon probable cause . . . ." *Id.*

in maintaining public health standards.[14] By confining its review to the search and seizure clause, the Court enabled agencies to comply with the fourth amendment without procuring a warrant as long as the search was reasonable.

Justice Frankfurter, speaking for the Court in *Frank v. Maryland*,[15] specified two protective rights emanating from the fourth amendment: the right to be secure from invasions of personal privacy and the right to resist unauthorized entry designed to obtain evidence for criminal prosecutions and for property forfeitures.[16] Justice Frankfurter considered the latter right to be the historical basis of the fourth amendment.[17] Because the primary concern of the Court in applying the warrant clause was to protect the individual from self-incrimination and not necessarily from an unwanted invasion of his personal privacy, the Court limited the protection afforded by the clause to searches planned to acquire evidence for criminal prosecution and property forfeiture.[18]

However, two 1967 cases, *Camara v. Municipal Court*[19] and *See v. City of Seattle*,[20] applied the warrant clause to ensure the right of privacy against warrantless administrative inspections. The inspection in *Camara* was a routine annual inspection of an apartment building in accordance with the San Francisco Housing Code. After learning from the manager of a possible infraction, the inspector requested admittance to the resident's apartment. The resident denied the request and was subsequently arrested for refusing to permit a lawful inspection. While awaiting trial, he filed a petition for a writ of prohibition in which he alleged that the lack of a warrant based upon probable cause violated his fourth amendment rights. The California court, determining that the inspection right was exercised under reasonable conditions and under a reasonably limited ordinance, denied the writ.[21] In its review of the decision, the Supreme Court held

14. *See* note 11 *supra*.
15. 359 U.S. 360 (1959).
16. *Id.* at 365.
17. *Id.*
18. *Id.* at 365-66.
19. 387 U.S. 523 (1967).
20. 387 U.S. 541 (1967).
21. Camara v. Municipal Ct., 237 Cal. App. 2d 128, 46 Cal. Rptr. 585 (1965), *vacated and remanded*, 387 U.S. 523 (1967). The municipal code provision construed in *Camara* did not expressly require a warrant:

"Authorized employees of the City departments or City agencies, so far

unconstitutional the Housing Code's authorization of inspections of private residences without a search warrant.

Camara departed from the *Frank* decision in two ways. First, the Court stated that "[t]he basic purpose of this [Fourth] Amendment . . . is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials."[22] In contrast to its earlier interpretations the Court stated that the right of privacy, not merely a person's fifth amendment rights,[23] was the crucial value protected by the fourth amendment. The Court, noting that "only by refusing entry and risking a criminal conviction can the occupant at present challenge the inspector's decision to search,"[24] held the *Camara* inspection to be an arbitrary invasion because the occupant had no way of knowing the lawful limits of the inspector's power to search, the Housing Code's requirement of an inspection, or the validity of the inspector's power to search.[25] The Court concluded that whether a legitimate governmental interest necessitates a breach of personal privacy is a question that deserves the consideration of a magistrate instead of a field inspector.[26] Second, *Camara* stated that the probable cause standard for administrative inspections differs from the standard for criminal investigations.[27] To show probable cause in the criminal context an official must present evidence supporting a reasonable belief that a criminal violation has been or is being committed and that the suspect is implicated in the crime.[28] In contrast, the concept of administrative probable cause

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as may be necessary for the performance of their duties, shall, upon presentation of proper credentials, have the right to enter, at reasonable times, any building, structure, or premises in the City to perform any duty imposed upon them by the Municipal Code."

387 U.S. at 526 (quoting San Francisco Housing Code).

22. 387 U.S. 523, 528 (1967).

23. "No person shall . . . be compelled in any criminal case to be a witness against himself . . . ." U.S. CONST. amend. V. The *Camara* Court was concerned that a resident forced to allow entry that results in discovery of criminal evidence, may be compelled to incriminate himself. *See* text accompanying note 15 *supra*; Frank v. Maryland, 359 U.S. 360, 365 (1959); Comment, *Search and Seizure in the Supreme Court: Shadows on the Fourth Amendment*, 28 U. CHI. L. REV. 664 (1961).

24. 387 U.S. 523, 532 (1967).

25. *Id.*

26. *Id.*

27. *Id.* at 534-39.

28. *See* Brinegar v. United States, 338 U.S. 160, 175-76 (1949); Carroll v.

is less stringent. Appellant in *Camara* urged the Court to require a showing of probable cause based upon a reasonable belief that a particular building was in violation of the Housing Code. *Camara* rejected the test[29] and instead required the magistrate to evaluate the reasonableness of the governmental intrusion by weighing such factors as the public interest served by the inspection, the scope of the search, the nature of the building, and the length of time since the last inspection. *Camara* created a more flexible concept of administrative probable cause aimed at protecting the individual's right of privacy without unduly restricting the enforcement procedures of the ordinances.[30]

In *See* the Court reviewed Seattle's fire code,[31] which authorized warrantless inspections of commercial premises, and held it unconstitutional because "[t]he businessman, like the occupant

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United States, 267 U.S. 132, 162 (1925). The inspectors in *Camara*, *Frank*, and *Little* could have shown sufficient evidence of probable cause, even in the restricted sense urged above. *See* Camara v. Municipal Ct., 387 U.S. 523 (1967) (building manager informed inspector that appellant was residing on the ground floor of an apartment building in violation of a housing regulation prohibiting such residence); Frank v. Maryland, 359 U.S. 360 (1959) (inspector responding to a neighbor's complaint of rat infestation discovered rodent feces and approximately one-half ton of garbage in appellant's yard); District of Columbia v. Little, 339 U.S. 1 (1950) (neighbor's complaint of unsanitary condition in appellant's home prompted inspection).

The Baltimore ordinance in *Frank* required that the inspector "have cause to suspect that a nuisance exists in any house, cellar, or enclosure" before he could demand entry without a warrant. However, in the cases of *Camara*, *Little*, and Eaton v. Price, 360 U.S. 246 (1959), there were no probable cause requirements in the codes.

29. At one point in the opinion the Court explicitly disagreed with appellant's claim that warrants should issue only when the inspector possesses probable cause to believe a particular dwelling to contain violations. *See* 387 U.S. at 534. At another point it says "[s]uch standards [for administrative probable cause] will not *necessarily* depend upon specific knowledge of the condition of the particular dwelling." *Id.* at 538 (emphasis added). A question remains whether the use of "necessarily" means that specific knowledge may be required in some but not all cases, or simply that specific knowledge will not be required at all.

30. *But see* See v. City of Seattle, 387 U.S. 541, 546-48 (1967) (Clark, J., dissenting) (stating that a new concept of probable cause will result only in a paper or rubber-stamp warrant providing no real protection). *Cf.* Davis v. Mississippi, 394 U.S. 721, 727-28 (1969) (dicta stating that probable cause in the traditional sense may not be required for a narrowly defined fingerprinting procedure).

31. 387 U.S. at 545.

of a residence, has a constitutional right to go about his business free from unreasonable official entries upon his private commercial property."[32] In several cases the Court had held that warrantless searches of commercial premises in connection with criminal investigations violated the fourth amendment.[33] However, *See* was the first case in which the Court extended the warrant requirement to administrative searches to protect the right of commercial privacy.[34]

In *Camara* the Court referred to "certain carefully defined classes of cases" in which a warrantless search would not be an unreasonable invasion of commercial privacy.[35] However, the Court did not elaborate on the distinctive characteristics of these classes until *Colonnade Catering Corp. v. United States*,[36] a case concerning a federal inspection of a retail liquor establishment.[37] After being refused entry into a storeroom, federal agents forcibly entered the room without a warrant. Although the Court held for the owner because the statute did not authorize forcible entry, it acknowledged the broad authority of Congress to fashion standards of reasonableness in the area of liquor regulation.[38] The Court did not precisely state why the warrantless inspection was reasonable, but it did refer to the historically close supervision of the liquor industry. This historical precedent differentiated

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32. *Id.* at 543.

33. *See* Lanza v. New York, 370 U.S. 139 (1962) (dictum); Go-Bart Importing Co. v. United States, 282 U.S. 344 (1931); Silverthorne Lumber Co. v. United States, 251 U.S. 387 (1920); Annot., 24 A.L.R. 1426 (1923).

34. The Court did limit the scope of *See* by reserving for later consideration warrantless searches pursuant to licensing programs for certain businesses. The Court did not determine whether warrants to inspect businesses may be issued only after access is refused. 387 U.S. at 545 n.6, 546. However, *Barlow's* authorized the use of an ex parte warrant by the Secretary to preserve the element of surprise and to avoid the requirement of a refusal before issuance. *See* Marshall v. Barlow's, Inc., 436 U.S. 307, 315-20 (1978).

35. 387 U.S. at 528-29.

36. 397 U.S. 72 (1970).

37. 26 U.S.C. § 5146(b) (1976) provides:

> The Secretary [of the Treasury] or his delegate may enter during business hours the premises (including places of storage) of any dealer for the purpose of inspecting or examining any records or other documents required to be kept by such dealer under this chapter or regulations issued pursuant thereto and any distilled spirits, wines, or beer kept or stored by such dealer on such premises.

38. 397 U.S. at 76-77.

Colonnade from *Camara*. The liquor dealer in *Colonnade*, unlike the occupant in *Camara*, presumably was aware of the historical supervision, and his awareness lessened the unreasonableness of the search.

Two years later in *United States v. Biswell*[39] the Court held that a warrantless search and seizure pursuant to the Gun Control Act of 1968[40] was constitutional. It was the second member of *Camara*'s "carefully defined classes of cases" that did not require a warrant for an administrative inspection. The *Biswell* Court extended the *Colonnade* reasoning by holding that a dealer in a pervasively regulated business impliedly consents to substantial intrusions upon his right of commercial privacy.[41] Because of the pervasive regulation, the dealer's reasonable expectation of privacy[42] was somewhat less than those in other industries. A warrantless inspection, therefore, was not a substantial intrusion in light of the other regulations.

The *Biswell* Court also established two requirements for warrantless inspections. First, the inspection must be based on a statutory scheme with proper restraints on the time, place, and scope of the search.[43] Second, the warrantless inspection must be

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39. 406 U.S. 311 (1972).

40. 18 U.S.C. § 923(g) (1970) authorizes official entry during business hours into "the premises (including places of storage) of any firearms or ammunition . . . dealer . . . for the purpose of inspecting or examining (1) any record or documents to be kept . . . and (2) any firearms or ammunition kept or stored by such . . . dealer . . . at such premises."

41. *See* 406 U.S. at 315-16. *See also* Hawley, *OSHA and Warrantless Searches—To Be or Not To Be*, 27 FED'N INS. COUNSEL Q. 369-78 (1977). Comment, *OSHA v. Fourth Amendment: Should Search Warrants Be Required for "Spot Check" Inspections?*, 29 BAYLOR L. REV. 283, 285-90, 297-301 (1977) (commentator distinguishes the theory of implied consent from the pervasive regulation test, but the *Biswell* Court seems to state that the theory is an intricate part of the test itself); Comment, *The Constitutionality of Warrantless OSHA Inspections*, 22 VILL. L. REV. 1214 (1977).

42. *See* Katz v. United States, 389 U.S. 347 (1967). The *Katz* Court upheld the dismissal of evidence acquired by eavesdropping upon a telephone conversation in a public booth. It held that the fourth amendment protects that amount of privacy that an individual can reasonably expect under the circumstances. *Id.* at 351-52. The *Colonnade* and *Biswell* Courts did not specifically mention *Katz*, but the underlying reasons for the decisions indicate that the liquor and gun dealers should not reasonably expect the privacy enjoyed by other industries because of the historical and pervasive regulation of their products.

43. *See* 406 U.S. 315 (1972).

a reasonable and effective means of enforcing the regulatory provisions.[44] The relevant question is whether the requirement of a warrant would substantially impair the statute's enforcement objectives.[45]

In *Colonnade* and *Biswell* the Court considered two statutes of relatively narrow scope regulating a particular industry or product. However, the scope and purpose of the Occupational Safety and Health Act of 1970 are significantly broader than those of the *Colonnade* and *Biswell* statutes. The purpose of the Act is "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources."[46] The Act's jurisdiction is no less expansive as it authorizes inspections of "any factory, plant, [or] establishment . . . where work is performed by an employee of an employer."[47] Because of its breadth OSHA presented a substantial threat to the right of commercial privacy.

The federal district courts have decided the principal cases concerning warrantless OSHA inspections pursuant to section 657(a), and they have reached two conclusions. The first significant construction of the statute occurred in a 1974 case, *Brennan v. Buckeye Industries, Inc.*[48] In this case the employer asked the OSHA inspector to delay the inspection[49] until the company at-

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44. *Id.* at 316.

45. *Id.*

46. 29 U.S.C. § 651(b) (1976).

47. *Id.* § 657(a)(1). The Act defines an employer as "a person engaged in a business affecting commerce who has employees." *Id.* § 652(5). One statistic reveals that the Act covers sixty-two million people or over eighty-two percent of the nation's work force. *See* Comment, *OSHA v. Fourth Amendment: Should Search Warrants Be Required for "Spot Check" Inspections?*, 29 BAYLOR L. REV. 283, 283 (1977). During the oral argument of *Barlow's* before the United States Supreme Court, Justice Powell noted that the Act covers approximately five million businesses. *See* 7 O.S.H. REP. (BNA) 1236 (Jan. 12, 1978).

48. 374 F. Supp. 1350 (S.D. Ga. 1974).

49. The *Buckeye* inspection was a random "spot check" inspection representing a general geographic area. *See* 374 F. Supp. at 1351. There are three other types of OSHA inspections: (1) inspections prompted by the written request of an employee or employee representative; (2) inspections of target industries classified by potential health hazards; and (3) investigations of catastrophies, fatalities, and emergencies in which a violation poses imminent threat of serious bodily harm to the employees. *See* Heath, *The Implementation of the Williams-Steiger Occupational Safety and Health Act of 1970*, 25 FLA. L. REV. 249, 254 (1973); Comment, *The Constitutionality of Warrantless OSHA Inspections*, 22 VILL. L. REV. 1214, 1216 (1977).

torney could drive two hundred miles to accompany the inspector. When the inspector refused to wait, the employer denied entry. The court granted the Secretary's request for a court order requiring Buckeye to submit to the inspection.

Pointing to the statutory restraints on the timing and scope of the inspection,[50] the compelling need for unannounced inspections,[51] and a general trend of post-*Camara* decisions not requiring administrative warrants,[52] the district court in *Buckeye* held that warrantless inspections authorized by section 657(a) were not unreasonable entries under the fourth amendment. The court determined that the *Camara* and *See* decisions were reactions to statutes giving field inspectors expansive grants of authority that allowed them to roam at will through any portion of the house or business.[53] In contrast, when the statutes imposed reasonable restraints, such as in *Colonnade* and *Biswell*, the warrantless inspections were reasonable. The *Buckeye* court held that *Colonnade*, *Biswell*, and other post-*Camara* cases[54] effectively narrowed *Camara* and *See* to cases in which statutes granted such broad authority to field inspectors. The *Buckeye* decision not to require a warrant ultimately became the minority position.[55]

The majority of courts[56] followed *Brennan v. Gibson's Prod-*

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50. 374 F. Supp. at 1354.

51. *Id.*

52. *Id.* at 1354-56.

53. *Id.* at 1356 (quoting Colonnade Catering Corp. v. United States, 410 F.2d 197, 201 (2d Cir. 1969)).

54. *See* Terraciano v. Montanye, 493 F.2d 682 (2d Cir. 1974) (warrantless inspection pursuant to New York narcotics statute declared constitutional); Youghiogheny and Ohio Coal Co. v. Morton, 364 F. Supp. 45 (S.D. Ohio 1973) (warrantless inspection of coal mine pursuant to federal statute upheld).

55. *See* Dunlop v. Able Contractors, Inc., [1975] 4 OSHC (BNA) 1110 (D. Mont. Dec. 15, 1975).

56. *See* Marshall v. Multicast Corp., [1978] 6 OSHC (BNA) 1486 (N.D. Ohio Jan. 10, 1978) (upholding the validity of warrant obtained by the Secretary and judicially construing section 657(a) as constitutionally requiring a warrant); Lockport Non Ferrous Casting, Inc. v. Marshall, 441 F. Supp. 333 (W.D. N.Y. 1977); Morris v. United States Dep't of Labor, 439 F. Supp. 1014 (S.D. Ill. 1977); Empire Steel Mfg. Co. v. Marshall, 437 F. Supp. 873 (D. Mont. 1977); Marshall v. Chromalloy Am. Corp., 433 F. Supp. 330 (E.D. Wis. 1977) (stating that words of section 657(a) authorizing entry without delay are not the unambiguous equivalent of entry without a warrant); Usery v. Centriff-Air Mach. Co., 424 F. Supp. 959 (N.D. Ga. 1977); Dunlop v. Hertzler Enterprises, Inc., 418 F. Supp. 627 (D.N.M. 1976).

ucts, Inc.,[57] which construed section 657(a) to comply with the general rule of *Camara* and *See*. Defendant, the owner of a retail establishment, refused entry to an OSHA inspector, and consequently the Secretary sought a court order requiring admittance. The owner counterclaimed to enjoin the inspection. In granting the injunction, the court held that nonconsensual OSHA inspections require a warrant based upon a showing of administrative probable cause as described by *Camara*. The magistrate was directed to determine the reasonableness of the inspection as evidenced, *inter alia*, by the public interest to be served, the length of time since the last inspection, and the scope of the search.

In *Camara* the Court said that probable cause exists

> if reasonable legislative or administrative standards for conducting an area inspection are satisfied with respect to a particular dwelling. Such standards, which will vary with the municipal program being enforced, may be based upon the passage of time, the nature of the building (e.g., a multi-family apartment house), or the condition of the entire area, but they will not necessarily depend upon specific knowledge of the condition of the particular dwelling.[58]

As a result of these vague guidelines, the district courts reached conflicting conclusions in cases dealing with OSHA inspections. For instance, in *Marshall v. Chromalloy American Corp.*[59] a federal district court in Wisconsin found that the Secretary had made a sufficient showing of probable cause to obtain a warrant to search a particular foundry by providing evidence of the high injury and illness rate in the metalworking and foundry industry. However, one month later in *Marshall v. Shellcast Corp.*[60] a federal district court in Louisiana held that a report showing the accident rate in the iron and steel foundry industry to be three times that of employers generally was an insufficient showing of probable cause. The court stated that when accident figures on the specific corporation are available, the Secretary should use these figures instead of national figures. In general, courts have found probable cause in an employee complaint,[61] but there is

57. 407 F. Supp. 154 (E.D. Tex. 1976).

58. 387 U.S. at 538.

59. 433 F. Supp. 330 (E.D. Wis. 1977).

60. 46 U.S.L.W. 2079 (N.D. La. 1977).

61. *See* Weyerhaeuser Co. v. Marshall, 452 F. Supp. 1375 (E.D. Wis. 1978); Marshall v. Reinhold Constr., Inc., 411 F. Supp. 658 (M.D. Fla. 1977);

some disagreement over whether the scope of the inspection should be limited to the hazard mentioned in such a complaint.[62]

The uncertainty in the area of probable cause and the conflict between the *Buckeye* and *Gibson's Products* cases led to the Supreme Court's consideration of *Marshall v. Barlow's, Inc.*,[63] the instant case. *Barlow's* represented the Court's initial evaluation of a federal inspection program possessing such a broad discretionary power of inspection. Unlike the relevant statutes in *Colonnade* and *Biswell*, the Act did not limit the inspection power to a particular industry. The Court expressed concern that "the degree of federal involvement in employee working circumstances has never been of the order of specificity and pervasiveness that OSHA mandates."[64] The Court declared section 657(a) unconstitutional insofar as it authorized warrantless OSHA inspections.[65]

The Court summarily rejected the Secretary's claim that businesses involved in interstate commerce possessed a history of pervasive regulation. The Court also rejected the assertion that businesses aware of OSHA's regulatory power impliedly consented to later searches by continuing their involvement in interstate commerce.[66] It concluded that the fourth amendment and the employer's reasonable expectation of privacy[67] demanded the protection of a warrant.

The Secretary had contended that a warrant requirement giving prior notice to the employer would seriously impair effective enforcement of the Act by allowing the employer to correct violations temporarily and escape deserved citations. Assuming that the majority of businessmen would consent to inspection without a warrant, the Court concluded that the surprise element was generally not crucial to enforce the Act effectively. In those instances in which the Secretary did consider the surprise element essential, he could resort to the ex parte warrant[68] and

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Empire Steel Mfg. Co. v. Marshall, 437 F. Supp. 873 (D. Mont. 1977).

62. *Compare In re* Inspection of Gilbert & Bennett Mfg. Co., [1977] 5 OSHC (BNA) 1375 (N.D. Ill. Apr. 12, 1977), *with* Whittaker Corp. v. OSHA, [1978] 6 OSHC (BNA) 1492 (M.D. Pa. Mar. 7, 1978).

63. 436 U.S. 307 (1978).

64. *Id.* at 314.

65. *Id.* at 325.

66. *Id.* at 314.

67. *See* Katz v. United States, 389 U.S. 347 (1967); note 42 *supra.*

68. "A judicial proceeding, order, injunction, etc., is said to be *ex parte*

thereby avoid notice to the employer.

As shown by the effect of *Camara* on the district court decisions, the significance of a fourth amendment decision lies not so much in the mere requirement of a warrant as in the probable cause standards established by the Court. In *Barlow's* the Court again rejected a standard requiring specific evidence of an existing violation with respect to a particular establishment. The Court made no substantial changes restricting the probable cause standard established by *Camara*. It merely specified that evidence of an administrative plan would be sufficient if it were derived from such neutral sources as statistics regarding employee concentration in certain area industries and if there is some statistical determination of how frequently those businesses with fewer employees and hazards should be inspected.[69]

Perhaps the Court's holding will spur Congress to redraft the inspection procedures of section 657(a). Since the section does not expressly authorize warrantless inspections, redrafting may not be necessary; a change in OSHA procedure pursuant to *Barlow's* would suffice. However, opponents of OSHA believe the decision opens the door to legislative reform of not only section 657(a) but the entire regulatory structure of OSHA.[70] Criticism of OSHA has focused on its alleged inability to reduce risks significantly in some high hazard industries,[71] the continuing decrease in the amount of time spent on inspections versus administrative responsibilities,[72] and the scope of OSHA as evidenced by an

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when it is taken or granted at the instance and for the benefit of one party only, and without notice to, or contestation by, any person adversely interested." BLACK'S LAW DICTIONARY 662 (4th rev. ed. 1968).

69. 436 U.S. at 321. The Court did seem to clarify the controversy between the *Shellcast* and *Chromalloy* decisions in favor of the *Chromalloy* decision that an administrative plan incorporating national accident statistics for the industry and the number of employees exposed will be a sufficient showing of probable cause. *See* Marshall v. Shellcast Corp., 46 U.S.L.W. 2079 (N.D. La. 1977); Marshall v. Chromalloy Am. Corp., 433 F. Supp. 330 (E.D. Wis. 1977).

70. *See* [1977] 7 OHS REP. (BNA) 877 (Nov. 24, 1977) (STOP OSHA plan to propose amendments stripping OSHA of enforcement powers and replacing them with a system of incentives to provide safety and health for workplace).

71. *Id.* at 1936 (May 25, 1978) (report of University of Pennsylvania's Wharton School concluding that there is little evidence of risk reduction in the aerospace, chemical, and textile industries).

72. *Id.* at 955 (Dec. 8, 1977) (statistics disclosing the percentage of time spent on inspections: 1975—62%; 1976—58%; 1977—53%; and for one month in the 1978 fiscal year—56%).

amendment to the OSHA budget exempting farms with ten or fewer employees.[73]

The impact of *Barlow's* to a great extent will depend upon the reaction of regulated businesses and the possible increase in refusals to permit inspections without a warrant.[74] OSHA has already indicated that its inspections will continue at their current schedule and that inspectors in most cases will not seek warrants until the employers refuse entry.[75] Because the burden placed upon the courts will become more severe as the refusals increase, the danger of the warrant becoming a mere rubber stamp likewise rises.

The most significant factor influencing the employer's decision to grant or refuse entry is the way in which OSHA has conducted previous inspections. Most businesses to some degree resent the added administrative costs associated with OSHA regulation, but the primary concern is harassment.

An increased frequency of inspections is one form of harassment. In one case, *Dravo Corp. v. Marshall*,[76] the employer has charged the Secretary with harassment produced by authorizing twenty-four inspections[77] since 1971 without inquiring into the validity of the employee complaints, which the union allegedly prompted and used to establish bargaining leverage over the company. In this context *Barlow's'* warrant requirement offers a degree of protection by assuring the owner that a magistrate will objectively evaluate the reason for the warrant request.

The dissenters in *Barlow's* argued that the warrant was not necessary because the employer could acquire the same degree of protection against harassment by simply denying entry to an inspector, who then had to acquire the approval of his superiors and obtain a court order to gain entry. The quantity of protection afforded by each procedure may not vary meaningfully, but the

73. *Id.* at 918 (Dec. 19, 1977). *See also* [1978] 8 OSH REP. (BNA) 29 (June 8, 1978) (House Appropriations Committee recommended that same amendment attach to the 1979 budget).

74. *See* [1978] 8 OSH REP. (BNA) 238 (July 20, 1978) (stating that 291 of 19,216 (1.51%) employers, visited by OSHA and by inspectors for OSHA-approved state programs, required a warrant for entry since May 23, 1978).

75. *Id.* at 3 (June 1, 1978) (memorandum from OSHA Field Coordinator Donald E. Mackenzie).

76. [1977] 5 OSHC (BNA) 2057, 2059 n.3 (W.D. Pa. Apr. 5, 1977).

77. *See* 29 U.S.C. § 657(f) (1976) (providing Secretary with authority to investigate or set aside an employee complaint at his discretion).

increased use of that warrant requirement may improve the protection against harassment. The key is the extent to which employers will require a warrant. There is a qualitative difference, from the employers' perspective, between challenging a law by denying entry and claiming a constitutional right. Employers will more freely claim the latter rather than resort to challenging authority granted by statute.

A second form of harassment concerns the qualitative content of the inspection and the discretionary role of the inspector. Manufacturers have expressed the concern that OSHA would consider a warrant request a sign of bad faith.[78] The result would be a subtle form of harassment achieved by lengthening the visit, converting a follow-up inspection into a general inspection,[79] or increasing the number of inspectors. *Barlows'* warrant requirement offers practically no protection from this form of harassment, except possible legislative reform, because the magistrate scrutinizes only the decision to inspect, not the inspection itself.

The crucial aspect of the *Barlow's* case is not the warrant requirement but the absence of a strict administrative probable cause standard. The Court, at least in form, reaffirmed the right of commercial privacy. However, the Secretary is still able to obtain a warrant for spot-check inspections with only a minimal showing of a general administrative plan. He can gain access without asserting the existence of violations or a reasonable belief in their existence. The case does not resolve the tension between the right of commercial privacy and the interest in regulatory expediency. A constitutional right should never be completely compromised for the sake of regulatory expediency, but the ultimate result of *Barlow's* may be the creation of mere inconvenience rather than a substantiation of either the privacy or expediency interests.

HERBERT SLATERY III

78. *See* [1978] 8 OSH REP. (BNA) 5 (June 1, 1978) (formal statement by National Association of Manufacturers).

79. *See* Electrocast Steel Foundry, Inc., [1978] 6 OSHC (BNA) 1562, 1563 (employer complaint claiming inspection to be punitive and unreasonable because, upon denial of warrantless entry, OSHA officials increased the scope and length of the inspection and also the number of inspections).

Domestic Relations—Divorce—Restrictions on Recrimination

Alleging abandonment, a divorce ground prescribed by Tennessee statute,[1] plaintiff sought a divorce from her husband. When defendant failed to answer plaintiff's complaint, a default judgment was rendered against him. At the hearing the circuit judge inquired about the parentage of a child who was with plaintiff in the courtroom. Upon plaintiff's admission that the baby was hers and that the infant was conceived after separating from her husband who allegedly had abandoned her, the judge dismissed the complaint because of plaintiff's adultery. The Tennessee Court of Appeals affirmed. On writ of certiorari to the Tennessee Supreme Court, *held*, reversed and remanded.[2] Because there is no applicable statutory defense and because the equitable doctrine of clean hands cannot be invoked as a defense, a wife's adultery subsequent to being abandoned by her husband does not preclude her obtaining a divorce on the ground of abandonment. *Chastain v. Chastain*, 559 S.W.2d 933 (Tenn. 1977).

Recrimination is a highly criticized divorce defense providing that if each spouse has committed a marital offense constituting a ground for divorce, neither spouse can obtain a divorce based on the other spouse's offense.[3] This concept differs fundamentally

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1. Tennessee Code Annotated section 36-802 (1977) provides:
The following shall be causes of divorce from bed and board; or from the bonds of matrimony, in the discretion of the court:
(1) That the husband or wife is guilty of such cruel and inhuman treatment or conduct towards the spouse as renders cohabitation unsafe and improper.
(2) That the husband has offered such indignities to the wife's person as to render her condition intolerable, and thereby forced her to withdraw.
(3) That he has abandoned her, or turned her out of doors, and refused or neglected to provide for her.

2. The Tennessee Supreme Court chose to address only the issue of whether plaintiff's adultery constituted a basis for dismissing her complaint. The court did not consider whether the trial court had the authority to raise sua sponte the affirmative defense of recrimination in an ex parte divorce. The court of appeals had held that the trial judge did have this authority. *See* Chastain v. Chastain, No. 444 (Tenn. Ct. App., Eastern Section, Dec. 29, 1976), *rev'd*, 559 S.W.2d 933 (1977).

3. M. Paulson, W. Wadlington & J. Goebel, Jr., Domestic Relations 864 (2d ed. 1974).

from the rule in English ecclesiastical law from which it was derived. During the time that absolute divorce was prohibited in England, recrimination was a rule of property used to determine the rights of each spouse following a divorce *a mensa et thoro*[4] in which both parties were at fault.[5] Most American jurisdictions have treated ecclesiastical law as part of the common law.[6] In so doing, the courts transformed recrimination from a property concept into a defense that could be raised by a defendant to bar a plaintiff's divorce.[7] The defense has been severely criticized in recent years because it "prevents the dissolution of those very marriages most appropriate for dissolution, insuring that warring spouses may never form happier attachments."[8] Consequently, the modern trend is to abolish recrimination or greatly limit its use.[9] In the instant case, the Tennessee Supreme Court was faced

4. The modern equivalent of a divorce *a mensa et thoro* is a legal separation. *Id.* at 829.

5. Beamer, *The Doctrine of Recrimination in Divorce Proceedings*, 10 U. KAN. CITY L. REV. 213, 222 (1942). In his exhaustive article, Beamer summarizes the history of recrimination as follows:

> The evolution of the doctrine of recrimination has been traced from the time of Christ down through the years to the close of the 19th Century. In Roman times it was seen that the doctrine was never used to prevent a divorce because divorce was a matter entirely within the discretion of the parties concerned, and that the principle was applied by the courts only as an equitable means of dividing up the common property after the separation had taken place. Later, under the canon law, recrimination was still used only as a means of allowing the wife to continue in the enjoyment of the common property. It did not prevent absolute divorce because absolute divorce was unknown to the canon law. The English ecclesiastical courts, as a result of the opposition of the common law courts, were powerless even to use the doctrine to prevent the wife from being turned out into the streets, much less as a defense to absolute divorce which could be granted only by Parliament. In the parliamentary cases, while the doctrine of recrimination was sometimes used to prevent an absolute divorce, it was a discretionary rather than a peremptory bar, and one to be invoked only when justified by the peculiar facts of the case and the dictates of good public policy. And in the early American cases the ecclesiastical law was applied under wholly dissimilar circumstances, with the result that a new and fundamentally different doctrine of recrimination came into being.

Id. at 243.

6. *Id.* at 241-42.

7. H. CLARK, JR., LAW OF DOMESTIC RELATIONS 374 (1968).

8. *Id.*

9. *See, e.g.*, 3 IND. LEGAL F. 538, 544 (1970); 11 J. FAM. L. 737, 742 (1972).

with the question of whether a plaintiff's marital misconduct could be used to bar a divorce only as specified by statute or whether the imposition of a recriminatory defense based upon the equitable clean hands rule but not statutorily specified would bar a plaintiff's divorce.

Tennessee's Acts of 1835-36 provided for the use of divorce defenses, and these defenses have been included almost verbatim in every subsequent enactment of Tennessee statutes.[10] The current versions are sections 36-811 and 36-818 of the Tennessee Code Annotated.[11] Section 36-811,[12] which applies only when the ground for divorce is adultery, includes recrimination as one of four defenses that can be utilized to bar a plaintiff's divorce. In the 1899 case of *Moore v. Moore*[13] the Tennessee Supreme Court relied on the predecessor to section 36-811 in holding that plaintiff's violation of his own marriage vows precluded his obtaining a divorce on the ground of his wife's adultery.[14] By neglecting to specify the nature of the husband's misconduct, the court left unclear whether "like act or crime" in section 36-811 requires that the plaintiff be guilty of adultery or whether any conduct constituting a divorce ground is sufficient to bar plaintiff's divorce.

See also text accompanying note 66 *infra*.

10. *See* Jones v. Jones, No. 77-12626, slip op. at 7, (Tenn. Ct. App., Middle Section, Feb. 22, 1977), *cert. denied*, No. 77-12626 (Tenn. June 20, 1977). The current Tennessee Code Annotated section 36-811 was formerly Code of 1932, section 8438; Shannon's Code, section 4213 (1896); Code of 1858, section 2460; and Acts of 1835-36, chapter 26, section 9. The current Tennessee Code Annotated section 36-818 was formerly Code of 1932, section 8444; Shannon's Code, section 4219 (1896); Code of 1858, section 2466; and Acts of 1835-36, chapter 26, section 20.

11. TENN. CODE ANN. §§ 36-811 and 36-818 (1977).

12. Tennessee Code Annotated section 36-811 (1977) provides:

> If the cause assigned for the divorce be adultery, it shall be a good defense and perpetual bar to the same if the defendant allege and prove:
>
> (1) That the complainant has been guilty of like act or crime.
>
> (2) That the complainant has admitted the defendant into conjugal society and embraces after knowledge of the criminal act.
>
> (3) That the complainant, if the husband, allowed of the wife's prostitutions and received hire for them.
>
> (4) That he exposed her to lewd company, whereby she became ensnared to the act or crime aforesaid.

13. 102 Tenn. 148, 52 S.W. 778 (1899).

14. *Id.* at 156, 52 S.W. at 780-81. The predecessor to section 36-811 was Shannon's Code, section 4213 (1896).

Courts have generally followed the latter view.[15]

Despite the requirement of section 36-811 that "the defendant allege and prove" the plaintiff's guilt of a like act or crime, the statute was interpreted to require plaintiff to prove affirmatively the absence of such guilt in *Cameron v. Cameron* in 1865.[16] Because he was unable to prove his own fidelity, plaintiff-husband was denied a divorce on the ground of his wife's adultery. This burden was imposed to ensure that no plaintiff with "unclean hands" would be granted a divorce.[17] The clean hands rule, an equitable theory that is the most common justification given for the doctrine of recrimination,[18] provides " 'that one who invokes the aid of a court must come into it with a clear conscience and clean hands.' "[19] Thus, a plaintiff seeking a divorce was not entitled to judicial relief unless he was able to prove that he had committed no act that by itself constituted a ground for divorce.[20]

The defense of recrimination is also set forth by Tennessee Code Annotated section 36-818.[21] This statute provides that if the ground for divorce is one of those specified in Tennessee Code Annotated section 36-802,[22] "the defendant may make [a] defense by alleging and proving the ill conduct of the complainant as a justifiable cause for the conduct complained of."[23] Unlike section 36-811(1), which demands no causal relationship between the defendant's misconduct and the plaintiff's actions, section 36-818 requires the defendant to show that the plaintiff's actions provoked the misconduct upon which the divorce is sought.[24]

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15. *See, e.g.*, Canning v. Canning, 59 Tenn. App. 678, 688, 443 S.W.2d 502, 507 (1968); H. CLARK, *supra* note 7, at 375 (noting that this is the common-law rule).

16. 42 Tenn. (2 Cold.) 375 (1865).

17. *Id.* at 377.

18. *See* H. CLARK, *supra* note 7, at 374. Other justifications given include *in pari delicto* (both parties are equally at fault), *compensatio criminum* (one party's guilt offsets the other's guilt), breach of mutually dependent covenants, and the notion that divorce is a remedy for the innocent against the guilty. *Id.*

19. Canning v. Canning, 59 Tenn. App. 678, 688, 443 S.W.2d 502, 507 (1968) (quoting 17 AM. JUR. *Divorce & Separation* § 233 (1957)).

20. *Id.*

21. TENN. CODE ANN. § 36-818 (1977).

22. *See* note 1 *supra*.

23. TENN. CODE ANN. § 36-818 (1977).

24. According to this statute the plaintiff may have, without committing a marital offense constituting a ground for divorce, provoked the defendant into

The predecessor of section 36-818 was cited in *McClanahan v. McClanahan*,[25] in which the wife sought a divorce on the ground of cruel and inhuman treatment. The court examined defendant's contention "that the outbreaks on his part were largely the result of the angry impatience of the wife"[26] but held that the wife's bad conduct had not justified her husband's "brutality and obscenity."[27] Because no adequate causal relationship was established, the husband's defense was ineffective and the wife was granted a divorce.

In cases following *McClanahan*, however, a theory of recrimination approximating the common-law rule emerged. Despite the requirements of section 36-811(1) and section 36-818 and their predecessors, courts barred divorce in any instance in which both parties were guilty of marital misconduct. Divorces were routinely denied in cases in which the ground was not adultery and no causal relationship was shown between the plaintiff's actions and the defendant's misconduct.[28] In some cases, the court neither cited nor acknowledged the existence of any recrimination statute.[29] Other courts cited the statutes but did not rely on them; instead, these courts based their decisions on earlier cases in which the clean hands doctrine had been utilized.[30] In the 1928 case of *Douglas v. Douglas*[31] the Tennessee Supreme Court outlined a common-law rule of recrimination in an opinion granting plaintiff a divorce on the ground of desertion. Defendant alleged that her husband was guilty of cruel and inhuman treatment but failed to establish this contention to the court's satisfaction. The court said that to bar plaintiff's requested divorce, defendant must prove plaintiff guilty of a matrimonial offense that would have entitled defendant to a divorce.[32] If defendant had satisfied

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doing the acts upon which the plaintiff's complaint is based. In such a situation, the defendant asserts a defense of justification for his or her conduct, rather than true recrimination. *See* TENN. CODE ANN. § 36-818 (1977).

25. 104 Tenn. 217, 56 S.W. 858 (1900). The predecessor of section 36-818 was Shannon's Code, section 4219 (1896).

26. 104 Tenn. at 231-32, 56 S.W. at 861.

27. *Id.* at 232, 56 S.W. at 862.

28. *See* notes 29 and 30 *infra*.

29. *E.g.*, Douglas v. Douglas, 156 Tenn. 655, 4 S.W.2d 358 (1928); Schwalb v. Schwalb, 39 Tenn. App. 306, 282 S.W.2d 661 (1955).

30. *E.g.*, Canning v. Canning, 59 Tenn. App. 678, 443 S.W.2d 502 (1968); Brewies v. Brewies, 27 Tenn. App. 68, 178 S.W.2d 84 (1943).

31. 156 Tenn. 655, 4 S.W.2d 358 (1928).

32. *Id.* at 660, 4 S.W.2d at 359.

this requirement, plaintiff's divorce would have been barred.

Fifteen years later, in *Brewies v. Brewies*,[33] the same rule was relied upon by an appellate court in denying a divorce to both spouses. The trial court had granted each spouse a divorce from the other upon finding the husband and wife equally at fault. In overturning this decision, the appellate court, although citing the predecessor of section 36-818, based its holding on the clean hands rule.[34] The court called divorce " 'a remedy for the innocent against the guilty' "[35] and held that because both spouses were equally at fault, neither was entitled to a divorce.[36] This principle of denying relief to a guilty party was expanded in *Elrod v. Elrod*[37] by a Tennessee appellate court that denied a divorce to a husband who failed to meet the state's residency requirement. In *Elrod* defendant-wife cross-filed for separate maintenance.[38] Her request was denied because of her misconduct, which the court found to be sufficient to entitle plaintiff to a divorce had he fulfilled the residency requirement.[39] Thus, the husband was relieved of his duty to support his wife because she was guilty of cruel and inhuman treatment.

The common-law recrimination theory evolving in these cases culminated in *Canning v. Canning*,[40] a case decided by the court of appeals in 1968. Although the court cited sections 36-811(1) and 36-818, it relied instead on "the broad language"[41] of the three cases just described[42] in holding that a plaintiff's admitted adultery is an absolute bar to his or her right to a divorce on the ground of cruel and inhuman treatment.[43] Relying upon the reasoning in *Cameron v. Cameron*,[44] but in a converse context, plaintiff-husband contended that defendant-wife must prove her own fidelity before invoking his adultery to prevent the divorce.

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33. 27 Tenn. App. 68, 178 S.W.2d 84 (1943).
34. *Id.* at 73, 178 S.W.2d at 85.
35. *Id.* at 72, 178 S.W.2d at 85 (quoting 27 C.J.S. *Divorce* § 67A (1936)).
36. 27 Tenn. App. at 73, 178 S.W.2d at 86.
37. 41 Tenn. App. 540, 296 S.W.2d 849, *cert. denied, id.* (1956).
38. *Id.* at 542, 296 S.W.2d at 851.
39. *Id.* at 547, 296 S.W.2d at 853.
40. 59 Tenn. App. 678, 443 S.W.2d 502 (1968).
41. *Id.* at 694, 443 S.W.2d at 509.
42. *See* notes 31-39 *supra* and accompanying text.
43. 59 Tenn. App. at 694, 443 S.W.2d at 509.
44. 42 Tenn. (2 Cold.) 375 (1865); *see* text accompanying note 16 *supra*.

This somewhat tautological argument[45] was rejected by the *Canning* court, which called *Cameron* "an extreme opinion"[46] and stated that "[i]t is the conduct of the husband which bars his right to a divorce."[47] The dissenting opinion agreed with plaintiff's interpretation of *Cameron* and further argued that the majority in *Canning* erred in applying recrimination in a situation not provided for by statute.[48] Ironically, less than a decade before *Canning*, this same appellate court in *Mount v. Mount*[49] had relied upon a Tennessee Supreme Court decision[50] in holding that divorce is exclusively statutory in this state. Although the issue specifically addressed in *Mount* was whether a divorce ground not present in the statutes may be invoked, there was no limiting language in the opinion to indicate that the holding was inapplicable to a divorce defense.

In the recent case of *Jones v. Jones*[51] another Tennessee appellate court severely criticized *Canning* and the decisions upon which that opinion was based.[52] The court held, as the *McClanahan*[53] court had many years earlier, that section 36-818 provides a defense of justification rather than recrimination. "Under § 36-818, it is not sufficient to prove any acts [by plain-

45. Even if the court had agreed with plaintiff's argument, reliance upon *Cameron* would have required plaintiff to prove his own fidelity before granting him the divorce. As a result, defendant would have been successful under either rationale. *See also* note 47 *infra*.

46. 59 Tenn. App. at 696, 443 S.W.2d at 510.

47. *Id.* The *Cameron* decision has been cited in support of arguments for both permitting and denying divorces in cases in which adultery was an issue. For example, in *Cameron* plaintiff was denied a divorce on the ground of adultery because he could not prove his own fidelity, but plaintiff in *Canning* cited *Cameron* as supporting his contention that he should be granted a divorce despite his adultery. His argument that his adultery should not be an issue unless his wife proved that she was not guilty of adultery was rejected by the court. *Cameron* was cited by the dissent in *Chastain* as precedent for the view that one guilty of adultery should not be granted legal relief, regardless of the other party's guilt.

48. *Id.* at 698-99, 443 S.W.2d at 511.

49. 46 Tenn. App. 30, 326 S.W.2d 493 (1959) (grounds for divorce must come from Tennessee Code Annotated section 36-801 or section 36-802).

50. Perrin v. Perrin, 201 Tenn. 354, 299 S.W.2d 19 (1957).

51. No. 77-12626 (Tenn. Ct. App., Middle Section, Feb. 22, 1977), *cert. denied*, No. 77-12626 (Tenn. June 20, 1977).

52. *Id.*, slip op. at 7-11.

53. 104 Tenn. 217, 56 S.W. 858 (1900).

tiff] constituting grounds for divorce, but rather acts which *justified* the acts of the defendant and thereby exonerated defendant from wrongdoing sufficient to warrant a divorce."[54] The *Jones* decision calls for the use of judicial discretion in granting a divorce when both spouses are at fault. "Where each party is guilty of unjustified misconduct constituting grounds for divorce; and where such misconduct is not an allowable defense under the provisions of the divorce statutes, the courts have the power to and may properly decree a divorce to one of the parties . . . ."[55]

Jones v. Jones was decided by the Tennessee Court of Appeals, Middle Section, two months after the Eastern Section reached a contrary conclusion in the instant case, *Chastain v. Chastain*.[56] Less than a year later, the Tennessee Supreme Court, reversing the Court of Appeals decision in *Chastain*, held that plaintiff's request for a divorce on the ground of abandonment could not be dismissed because of her adultery subsequent to her allegedly being abandoned by her husband.[57] The *Chastain* court examined several rationales for dismissing the complaint but found none to be applicable and therefore remanded the case for a new trial.[58]

In reaching this conclusion, the court expressly rejected the common-law version of recrimination illustrated by *Canning*. Citing its holding in *Perrin v. Perrin*,[59] the *Chastain* court noted that "the substantive law governing divorce in Tennessee is purely statutory; there is no common law of divorce."[60] Examining the Tennessee statutes, Justice Brock, writing for the majority, stated that "recrimination is allowed as a defense only to a complaint for divorce based upon the ground of defendant's adultery."[61] Because plaintiff sought a divorce on the ground of abandonment, the defense of recrimination provided by section 36-811(1) could not be raised. The court also held that section 36-818 was inapplicable because it requires the defense of justifica-

54. No. 77-12626, slip op. at 12 (emphasis in original).

55. *Id.* at 14-15.

56. No. 444 (Tenn. Ct. App., Eastern Section, Dec. 29, 1976), *rev'd*, 559 S.W.2d 933 (Tenn. 1977).

57. 559 S.W.2d 933, 934-35 (Tenn. 1977).

58. *Id.* at 935-36.

59. 201 Tenn. 354, 299 S.W.2d 19 (1957).

60. 559 S.W.2d at 934.

61. *Id.*

tion. Because plaintiff's adultery occurred after she was abandoned, the adultery could not have justified the abandonment.[62]

The *Chastain* court also rejected the argument that the clean hands rule requires denying plaintiff's divorce. The court noted that clean hands is not listed as a statutory defense to an action for divorce.[63] The court reasoned that application of the clean hands doctrine would have the effect of extending the defense of recrimination to all divorce actions and would be contrary to the legislature's specific limitation of this defense to those cases in which the ground for divorce is adultery.[64] Justice Brock also said that "the more recent and better reasoned cases hold that, except for fraud and deceit upon the court, which are always available as defenses in any court, the clean hands principle does not apply in divorce litigation."[65]

The *Chastain* decision is of great importance in the field of domestic relations in Tennessee. The holding that no common law of divorce exists was not specifically limited by the court to divorce defenses and may therefore be applicable to the entire area of divorce law in this state. The more certain effect of the court's holding is to limit greatly the use of the defense of recrimination. There is a growing national trend toward eliminating this defense altogether.[66] Recrimination is a misbegotton theory that fails to serve the interests of the state or the parties.[67] Of the many reasons that have been advanced for abolishing this "outrageous legal principle,"[68] the most obvious one is the absurdity of preventing "the dissolution of those very marriages most appropriate for dissolution, insuring that warring spouses may never form happier attachments."[69] Those spouses who seek to form happier relationships must forfeit the approval of the state and of society to do so.

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62. *Id.* at 935.

63. *Id.*

64. *Id.*

65. *Id.* (citing De La Portilla v. De La Portilla, 287 So. 2d 345 (Fla. Dist. Ct. App. 1973); Ryan v. Ryan, 277 So. 2d 266 (Fla. 1973)). The court also cited Bales v. Bales, 33 Ohio Misc. 221, 294 N.E.2d 252 (1971). In that case, an Ohio court held that the clean hands rule does not compel the continuation of a marriage that is grossly detrimental to everyone involved.

66. *See* note 9 *supra* and accompanying text.

67. *See* 11 J. FAM. L. 737, 739 (1972).

68. H. CLARK, *supra* note 7, at 373.

69. *Id.* at 374.

The *Chastain* court recognized several policy reasons for not extending recrimination beyond the statutory provisions. These reasons centered upon the problems arising from the adulterous relationships that may ensue when recrimination is invoked to prevent a broken marriage from being legally dissolved.[70] The court did not, however, indicate why these reasons should not also justify barring recrimination when both spouses are guilty of adultery. Presumably the court felt that further reform should be undertaken by the legislature. Furthermore, the court may have intended that the statute be directory rather than mandatory; that is, that the statutorily prescribed recrimination defense be applied at the court's discretion.[71] Regardless of the reasoning, the court's failure to indicate its approval or disapproval of the defense of "like act or crime"[72] is a potential basis for future litigation.

The dissenting opinion in *Chastain* adhered to the traditional view that Tennessee divorce law is not limited to the statutory provisions and includes principles of equity.[73] Asserting that recrimination based on the clean hands doctrine was a viable divorce defense, Justice Harbison, in dissent, set forth a much broader definition of recrimination than that provided by Tennessee Code Annotated section 36-811.[74] Although recognizing that Tennessee now has a "no-fault" divorce statute, the dissent pointed out that most of the divorce grounds in this state are based on fault principles and that recrimination is deeply embedded in this system.[75] The problem with this viewpoint is its emphasis on the past. The new "no-fault" divorce law is an example of the modern view that an unsuccessful marriage should be al-

70. 559 S.W.2d at 935 (citing 24 AM. JUR. 2d *Divorce & Separation* § 226 (1966)).

71. The court may have wanted to leave recrimination available in adultery cases as an option to be exercised at the judge's discretion, rather than as a defense available in every case. The particular circumstances of each case could then be the determining factor in the application of the doctrine of recrimination.

72. TENN. CODE ANN. § 36-811(1) (1977). *See* notes 12-15 *supra* and accompanying text.

73. 559 S.W.2d at 936 (Harbison, J., dissenting). *See also* notes 28-50 *supra* and accompanying text.

74. 559 S.W.2d at 936 (Harbison, J., dissenting). *See* text accompanying notes 13-20 *supra*.

75. 559 S.W.2d at 937 (Harbison, J., dissenting).

lowed to end. The *Chastain* majority follows this legal trend, which reflects a more realistic approach to the needs of the people. Although recrimination has been used as a defense for many years, it serves no valid purpose. *Chastain* is a progressive decision because it severely limits the use of this illogical principle. Since the Tennessee Supreme Court has by this decision endorsed the trend toward more liberal divorce laws, an increase in the number of laws and decisions concerned with the welfare of the parties, rather than the preservation of antiquated ideas, can be expected.

SARAH Y. SHEPPEARD

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CRIMINAL LAW IN TENNESSEE IN 1977-1978—A CRITICAL SURVEY

JOSEPH G. COOK*

I. INTRODUCTION 475
II. OFFENSES 475
A. *Against the Person* 475
1. Homicide 475
2. Rape 477
3. Incest 478
4. Attempt 479
B. *Against Property* 482
1. False Pretenses 482
2. Fraud 484
3. Forgery 484
4. Concealing Stolen Property 486
C. *Against Person and Property* 486
1. Larceny from the Person 486
D. *Public Offenses* 488
1. Gambling 488
III. DEFENSES 490
A. *Mental Impairment* 490
1. Competency to Stand Trial 490
2. Insanity 491
IV. PROCEDURE 494
A. *Arrest* 494
1. Warrants 494
2. Probable Cause 494
B. *Search and Seizure* 498
1. Warrant Affidavits 498
2. Incident to Arrest 499
3. Exigent Circumstances 504

* B.A., J.D., University of Alabama; L.L.M., Yale Law School; Professor of Law, University of Tennessee.

4. Open Fields 505
5. Third Party Consent 507
6. Fruit of the Poisonous Tree 508
C. *Right of Confrontation* 510
1. Confession of Codefendant 510
2. Laboratory Reports 512
D. *Right to Counsel* 512
E. *Identification* 513
1. Witnesses 513
2. Handwriting 517
F. *Self-Incrimination* 518
G. *Confessions* 519
1. Custodial Interrogation 519
2. Waiver of Rights 521
H. *Preliminary Hearing* 522
I. *Indictment by Grand Jury* 528
J. *Trial by Jury* 530
1. Applicability of Right 530
2. Number of Jurors 530
3. Juror Bias 531
4. Deliberations 532
K. *Fair Trial* 534
1. Presumption of Innocence 534
2. Discovery 535
L. *Guilty Pleas* 536
1. Standard for Acceptance 536
2. Plea Bargaining 537
M. *Punishment* 539
1. Determination of Sentence 539
2. Consecutive Sentences 540
3. Enhancement Statutes 541
N. *Probation* 547
O. *Double Jeopardy* 548
1. When Jeopardy Attaches 548
2. Dismissal of Indictment Subsequent to Trial . 548
3. Retrial Following Mistrial 549
4. Retrial Following Reversal for Insufficiency of Evidence 551
5. Vacation of Guilty Plea 553
6. Identity of Offenses 553
7. Lesser Included Offenses 554

I. INTRODUCTION

In the past eighteen months[1] there has been a flurry of activity by the United States Supreme Court concerning the rights of the accused, with significant decisions regarding searches incident to arrests,[2] the potential conflict of interest in representing more than one codefendant at trial,[3] the identification of suspects,[4] and double jeopardy.[5] Both the United States Supreme Court and the Supreme Court of Tennessee handed down decisions concerning the right of an accused to attack the accuracy of a facially sufficient affidavit for a warrant.[6] The state supreme court also sought to clarify the law of attempted crimes[7] and established standards for the acceptance of guilty pleas.[8]

II. OFFENSES

A. *Against the Person*

1. Homicide

The recognition of voluntary manslaughter as a lesser included offense of murder is anomalous to the theory of lesser included offenses because more is involved than the elimination of one or more of the elements of the greater offense. Voluntary manslaughter is homicide committed in a sudden heat of passion

1. This survey encompasses decisions published in the National Reporter System from mid-1977 to the end of 1978. While the focus is upon Tennessee criminal law and procedure, federal cases are included insofar as they concern constitutional standards and therefore impact upon state criminal proceedings.

Citations to the following have been abbreviated as indicated: J. COOK, CONSTITUTIONAL RIGHTS OF THE ACCUSED—PRETRIAL RIGHTS (1972) [hereinafter PRETRIAL RIGHTS]; J. COOK, CONSTITUTIONAL RIGHTS OF THE ACCUSED—TRIAL RIGHTS (1974) [hereinafter TRIAL RIGHTS]; J. COOK, CONSTITUTIONAL RIGHTS OF THE ACCUSED—POST-TRIAL RIGHTS (1976) [hereinafter POST-TRIAL RIGHTS]; Cook, *Criminal Law in Tennessee in 1976-1977—A Critical Survey*, 45 TENN. L. REV. 1 (1977) [hereinafter *1976-1977 Survey*]; Cook, *Criminal Law in Tennessee in 1971—A Critical Survey*, 39 TENN. L. REV. 247 (1972) [hereinafter *1971 Survey*].

2. *See* text accompanying notes 168-95 *infra*.
3. *See* text accompanying notes 233-45 *infra*.
4. *See* text accompanying notes 253-82 *infra*.
5. *See* text accompanying notes 487-515 *infra*.
6. *See* text accompanying notes 157-67 *infra*.
7. *See* text accompanying notes 32-51 *infra*.
8. *See* text accompanying notes 415-18 *infra*.

produced by adequate provocation,[9] a consideration wholly immaterial to second degree murder.[10] The decision by the Tennessee Supreme Court in *State v. Mellons*[11] helped clarify the propriety of an instruction on voluntary manslaughter when the defendant has been charged with murder.

When the defendant requests such an instruction, if there is evidence that, if believed, would warrant the jury finding the defendant guilty of voluntary manslaughter instead of murder, the instruction is mandatory.[12] Error does not result, however, from failure to give an instruction on a lesser included offense for which there is no evidentiary support,[13] and indeed such instructions should be avoided.[14]

In other cases, the defendant charged with murder may object to an instruction on voluntary manslaughter or a finding of that offense. A conviction of voluntary manslaughter will nevertheless be affirmed if, according to *Mellons*,

> the evidence demands a conviction of a higher degree of homicide than that found by the verdict, and there is either no evidence in support of acquittal of the greater crime, or if there is, the verdict of the jury clearly indicates that the evidence in support of acquittal was disbelieved . . . .[15]

Under these circumstances the defendant has not been prejudiced by the finding of the less serious offense.[16] The *Mellons* court, however, recognized one situation in which giving an instruction on voluntary manslaughter over the objection of the defendant is reversible error—if the evidence would support a finding of either murder or involuntary manslaughter but not voluntary manslaughter. Such a situation was present in *Mellons*, but the jury returned a verdict of voluntary manslaughter and

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9. *See* TENN. CODE ANN. § 39-2409 (1975), *construed in* Smith v. State, 212 Tenn. 510, 370 S.W.2d 543 (1963), and Capps v. State, 478 S.W.2d 905 (Tenn. Crim. App.), *cert. denied, id.* (Tenn. 1972).

10. TENN. CODE ANN. §§ 39-2401, -2403 (1975); *id.* § 39-2402 (Cum. Supp. 1978).

11. 557 S.W.2d 497 (Tenn. 1977).

12. *See* State v. Staggs, 554 S.W.2d 620, 626 (Tenn. 1977); Johnson v. State, 531 S.W.2d 558, 559 (Tenn. 1975).

13. Owen v. State, 188 Tenn. 459, 221 S.W.2d 515 (1949).

14. Whitwell v. State, 520 S.W.2d 338, 343-44 (Tenn. 1975).

15. 557 S.W.2d at 499.

16. *See also* Reagan v. State, 155 Tenn. 397, 293 S.W. 755 (1927); Howard v. State, 506 S.W.2d 951 (Tenn. Crim. App. 1973), *cert. denied, id.* (Tenn. 1974).

imposed the minimum permissible sentence. This sentence, the court concluded, "suggests that they would not have found the defendant guilty of second degree murder if given the choice, as they should have been, between that crime and involuntary manslaughter,"[17] and the conviction was therefore set aside.

2. Rape

The admissibility of evidence regarding the victim of an alleged rape was the subject of two decisions. In *Forbes v. State*[18] defendant moved prior to trial for a psychological examination of the victim for the purpose of introducing "expert testimony to impugn the credibility of the prosecutor and otherwise question her competency as a witness and truthfulness."[19] The trial judge denied the motion on the ground that there was no right to have the victim examined. The court of criminal appeals affirmed the conviction, finding "no authority in Tennessee that a trial judge has the power, discretionary or otherwise, to compel such an examination."[20] While affirming on certiorari, the Supreme Court of Tennessee did not agree that the trial court lacked power to order such an examination upon timely motion "supported by compelling reasons or a showing of a particularized necessity for such an examination."[21] At the same time, the court was unpersuaded by the idea of a mandatory rule,[22] which it considered to be inimical to the public policy favoring the alleviation of suffering of rape victims.[23] Instead, the court recognized the inherent

17. 557 S.W.2d at 500.

18. 559 S.W.2d 318 (Tenn. 1977).

19. *Id.* at 320.

20. *Id.*

21. *Id. See also* Ballard v. Superior Ct., 64 Cal. 2d 159, 410 P.2d 838, 49 Cal. Rptr. 302 (1966); Annot., 18 A.L.R.3d 1433 (1968).

22. The argument was made in Wigmore: "No judge should ever let a sex offense charge go to the jury unless the female complainant's social history and mental makeup have been examined and testified to by a qualified physician." 3A WIGMORE, EVIDENCE § 924a (Chadbourn rev. ed. 1970).

23. A woman raped is shorn of all her dignity. She is the victim of the most humiliating, degrading and debasing of all crimes. We know judicially that an alarming percentage of rape victims never make public complaint. This must be attributed in substantial part to the fact that she is subjected to examination and cross-examination on the most initimate details of the penetration and must testify to matters that are not even discussed among intimate friends, but are the legitimate sub-

power of a trial court to compel a psychiatric or psychological examination of the victim "where such examination is necessary to insure a just and orderly disposition of the cause."[24]

A state statute[25] bars the introduction into evidence of prior consensual sexual activity of a rape victim except when relevant to the issue of consent. In *Shockley v. State*[26] the Tennessee Court of Criminal Appeals held that the statute was intended "to eliminate the unjustified besmirching of a woman's reputation by examining her prior sexual activities when such testimony is of such a highly dubious relevance to the issue of her later consent or her credibility."[27] That purpose was overshadowed in *Shockley* by the fact that the strongest evidence against the accused was the pregnancy of the prosecutrix and medical testimony that conception could have occured at the time she claimed to have been raped. Under these circumstances evidence that the pregnancy was the result of intercourse with another male would have been relevant to the issue of guilt, and therefore the statute could not be used to bar the introduction of such evidence. The court emphasized that it was not declaring the statute unconstitutional but merely limiting its application to the perceived legislative purpose.

3. Incest

Under conventional rules of statutory construction, when two statutes are applicable to a set of facts, but one of the provisions is more particular in its application, the more particular provision should control.[28] In *State v. Nelson*[29] the accused sought to rely on this principle in moving to dismiss indictments for carnal knowledge of a female under twelve[30] because the acts charged

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ject of inquiry in a courtroom crowded with the participants, the court's retinue and the curiosity seekers.

559 S.W.2d at 320.

24. *Id.* at 321. "Such power should be invoked only for the most compelling reasons, all of which must be documented in the record." *Id.*

25. TENN. CODE ANN. § 40-2445 (Cum. Supp. 1978).

26. TENN. ATT'Y GEN. ABSTRACT, Vol. IV, No. 2, p.5 (Tenn. Crim. App., Feb. 8, 1978).

27. *Id.*

28. *See* 1A SANDS, SUTHERLAND, STATUTORY CONSTRUCTION, §§ 23.09, 23.16 (5th ed. 1973) [hereinafter 1A SANDS].

29. TENN. ATT'Y GEN. ABSTRACT, Vol. IV, Nos. 5, 6, p.7 (Tenn. Crim. App. Oct. 3, 1978).

30. TENN. CODE ANN. § 39-3705 (Cum. Supp. 1978).

came within the offense of incest.[31] The Tennessee Court of Criminal Appeals held that the rule of construction was inapplicable because neither of the two provisions in question was more particular than the other. In the court's view the principle of statutory interpretation could come into play only if one of the offenses could be subsumed within the other. While the facts alleged in *Nelson* would fit within either statute, the incest statute could not be considered a more particular provision because the carnal knowledge statute did not encompass all of the acts prohibited by the incest statute.

4. Attempt

Attempt crimes have always been a source of confusion in Tennessee, largely because the pertinent statute[32] is lodged among a series of assault offenses[33] and indeed is partially defined in terms of assault.

> *Assault with intent to commit felony—Attempt to commit felony—Penalty.*—If any person assault another, with intent to commit, or otherwise attempt to commit, any felony or crime punishable by imprisonment in the penitentiary, where the punishment is not otherwise prescribed, he shall, on conviction, be punished by 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).[34]

In *State v. Staggs*[35] the supreme court made a laudable effort to clarify the law of attempt. While the practical result of the holding is clear, the reasoning of the court is extraordinarily puzzling. Defendant was indicted and convicted of assault with intent to commit robbery with a deadly weapon.[36] On appeal defendant complained of the trial court's denial of a jury instruction for attempt to commit a felony under section 39-603. The court of

31. *Id.* § 39-705 (1975).

32. *Id.* § 39-603 (1975).

33. *Id.* §§ 39-601, -602, -603, -607 (Cum. Supp. 1978); *id.* §§ 39-603, -604 (1975); *id.* §§ 39-605, -606 (repealed by 1978 Tenn. Pub. Acts ch. 937, § 10).

34. *Id.* § 39-603.

35. 554 S.W.2d 620 (Tenn. 1977).

36. TENN. CODE ANN. § 39-607 (1975) (amended by 1977 Tenn. Pub. Acts ch. 68, § 2).

criminal appeals concluded that the trial court had committed reversible error, and the Tennessee Supreme Court affirmed.

The state maintained that section 39-603 was intended to reach all attempts at crimes unspecified in sections 39-604 through 39-607 and also attempts at all crimes specified in these sections when the attempts did not involve assaults. At the time of the *Staggs* decision, sections 39-604 through 39-607 proscribed assaults with intent to murder,[37] to rape,[38] to sexually abuse a child,[39] and to rob.[40] The state contended that because the attempt to rob in the present case took the form of assault, the particular assault statute, section 39-607, rather than section 39-603, was clearly the applicable provision. Moreover, a *non sequitur* would result if section 39-603 were made a lesser included offense of the other assault statutes. Since an assault is itself an attempt (in the context of these statutes), a charge under section 39-603 would require proof of an attempted attempt.

Ostensibly rejecting the state's interpretation, the court said that "all assaults are attempts"[41] and that section 39-603 was the "general attempt statute"[42] in Tennessee. Therefore, while the statute apparently defines two crimes, both are encompassed in the rubric of attempt.[43] This interpretation of the statute is eminently reasonable. The court's statement that the "most compelling reason" for its conclusion is that "[w]e have no other such statute"[44] is, however, less than satisfactory. Although the absence of a general attempt statute might well be a compelling reason for the legislature to pass such a statute, it is not a compelling reason for the court to create one.

The court ventured upon even thinner ice by insisting that if the state's interpretation of section 39-603 were adopted, "we would [for example] have no such crime as an attempt to commit murder or rape."[45] As an examination of the state's position makes clear, the court's reasoning is simply incorrect. Under the

37. *Id.* § 39-604.
38. *Id.* § 39-605 (repealed by 1978 Tenn. Pub. Acts ch. 937, § 10).
39. *Id.* § 39-606 (repealed by 1978 Tenn. Pub. Acts ch. 937, § 10).
40. *Id.* § 39-607 (Cum. Supp. 1978).
41. 554 S.W.2d at 623.
42. *Id.* at 624.
43. *Id.* at 623.
44. *Id.*
45. *Id.* at 624.

state's interpretation of the statute, as quoted by the court,[46] if murder were attempted by means of an assault, the crime would be prosecuted under the assault with intent to commit murder provision.[47] If murder were attempted without an assault, then the crime would be prosecuted under section 39-603. Indeed, the state's interpretation is entirely consistent with the court's objective in reading section 39-603 as a general attempt statute. The section would cover all attempted felonies except when murder, rape, sexual abuse of a child, or robbery were attempted by means amounting to an assault. The legislature has determined that the conduct in these instances deserves more severe punishment than other attempts, and therefore these attempts by assault have been particularly defined and accorded independent ranges of punishment. The state's interpretation does not result in the gap in the law feared by the court.

The court also ostensibly rejected the state's contention that application of section 39-603 to the assault statutes would result in a charge of attempted attempt. "Sec. 39-603 does not proscribe an attempt to commit an assault with intent to commit a felony; it proscribes an attempt (by assault or otherwise) to commit a substantive offense, in this case robbery."[48] This reasoning, however, is tantamount to conceding the state's argument that the attempt statute does not apply to the assault statute but rather to the robbery statute.[49]

Defendant in *Staggs* was not charged with robbery since no property was taken but, instead, was charged with assault with intent to commit robbery. If defendant is entitled to an attempt instruction based on a lesser included offense theory, the attempt must relate to the offense with which he was charged. Ultimately, the court so held, noting that an attempt under section 39-603 "is a lesser included offense within *any* felony"[50] if no punishment for attempt is otherwise prescribed.

The court concluded that "assault with intent to commit robbery by means of a deadly weapon . . . embraces and includes: a. Assault with intent to commit simple robbery (without a deadly weapon) . . . . b. Attempt to commit a felony . . . . c.

46. *Id.* at 623.
47. *See* TENN. CODE ANN. § 39-604 (1975).
48. 554 S.W.2d at 624.
49. *See* TENN. CODE ANN. § 39-3901 (Cum. Supp. 1978).
50. 554 S.W.2d at 624 (emphasis added).

Assault and battery . . . . d. Simple assault . . . . "[51] While listing these potential charges under the heading "Lesser Included Offenses," the court implicitly recognized that assault and battery is not a lesser included offense since proof of a battery is not required for the greater offense. Defendant was therefore not entitled to an instruction on that offense.

The court's reasoning suggests that the *Staggs* holding does not mean a defendant is automatically entitled to an attempt instruction whenever an aggravated assault is charged. In *Staggs* the question whether an assault had occurred was apparently a disputed issue. While defendant had a sawed-off shotgun in his possession at the time of the attempted robbery, the proof was undisputed that he did not point it at the victim. The jury might have concluded that an assault had not occurred (either with or without a deadly weapon), in which event the evidence would still support a finding of attempt to commit a felony. The jury in *Staggs* was denied this alternative by the trial court's refusal of an attempt instruction. When the occurrence of an assault is not disputed, *Staggs* does not necessarily require an instruction on attempt under section 39-603.

B. Against Property

1. False Pretenses

The accused in *Horn v. State*[52] had been indicted for taking property under false pretenses[53] by selling clover seed under the false representation that the seed was of a superior quality. The trial court dismissed the indictment on the accused's motion that he could be charged only with a misdemeanor under the Tennessee Seed Law[54] because that law addressed the conduct described in the indictment more specifically and should be construed as superseding the general criminal provision where applicable. While not disputing the theory of statutory construction urged by the accused,[55] the Tennessee Supreme Court was not persuaded that the Seed Law was applicable.[56] The pertinent provisions of

51. *Id.* at 626.
52. 553 S.W.2d 736 (Tenn. 1977).
53. TENN. CODE ANN. § 39-1901 (1975).
54. *Id.* §§ 43-921 to 934 (Cum. Supp. 1978).
55. *See* 1A SANDS, *supra* note 28, § 23.26.
56. The court's position is well taken. A subsequently enacted specific

the Seed Law prohibited sale of seeds "having a false or misleading labeling" or about which "there has been false or misleading advertisement."[57] Since the indictment did not indicate that the accused had engaged in any such activities, his conduct did not clearly fall within the provisions of the Seed Law. Moreover, the pertinent provisions of the Seed Law established a strict liability misdemeanor punishable by a fine.[58] The crime of false pretenses required proof of fraudulent intent and was apparently directed to more serious instances of criminal behavior. Conceivably, depending upon the evidence adduced at trial, the Seed Law prohibition might be a lesser included offense, but this possibility is quite a different matter from concluding that the lesser offense precludes a charge of the greater.

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statute implicitly repeals those provisions of the general statute with which the specific statute is in irreconcilable conflict. Tennessee-Carolina Transportation, Inc. v. Pentecost, 211 Tenn. 72, 362 S.W.2d 461 (1962). When the statutes do not irreconcilably conflict, however, the general statute is not repealed and the specific statute merely exists as an exception to its terms. That two statutes overlap in that both prohibit the same act does not, without more, make them conflicting. 1A SANDS, *supra* note 28, §§ 23.09, 23.16. *See also* Chadwick v. State, 175 Tenn. 680, 137 S.W.2d 284 (1940) (no implied repeal without identity of subject matter and legislative purpose).

57. TENN. CODE ANN. § 43-925 (Cum. Supp. 1978).

58. Justice Henry, dissenting, did not agree that the Seed Law had created a strict liability offense.

> To follow the majority's reasoning is to hold that it is made a criminal offense in Tennessee to sell seeds that are merely incorrectly labelled, irrespective of intent and scienter. False and misleading labelling to my mind connotes affirmative, knowledgeable, false and deceptive action as opposed to passive conduct in failing to insure that seeds are labelled correctly.

553 S.W.2d at 739 (Henry, J., dissenting). It suffices to say that the language of the Seed Law, "having a false or misleading labeling," refers to the label itself vis-à-vis the commodity labeled and makes no reference, express or implicit, to the party doing the labeling. "Regulatory" and "public welfare" penal statutes quite often do not require *mens rea*. 1 WHARTON'S CRIMINAL LAW § 23 (14th ed., C. Torcia ed. 1978). *See, e.g.*, United States v. Johnson, 221 U.S. 488 (1911) (selling misbranded articles). Even if it be conceded, however, either that the legislature did not intend to create a strict liability offense or that such an interpretation would be inimical to due process in some instances, it does not follow that the only alternative is to read a requirement of fraudulent intent into the statute. To the contrary, the more likely construction would be a requirement that the seed seller either know of the mislabeling or be negligent in failing to discover it. *E.g.*, ALI MODEL PENAL CODE § 2.02(2)(d) (Proposed Official Draft 1962) (acting negligently as culpable mental state). Under such a construction false pretenses would continue to require a higher degree of culpability.

2. Fraud

In prosecutions for drawing checks without sufficient funds[59] a presumption of intent to defraud and of knowledge of the insufficiency arises if the maker fails to pay the holder the amount due within five days after receiving notice of nonpayment by the drawee.[60] In *Stines v. State*[61] the accused received this statutory notice after a preliminary hearing had been held and he had been bound over to the grand jury. The accused argued that had he paid the amount upon receiving notice he would have been compounding the offense.[62] How this act would tend to compound the offense as defined in the statute is not at all clear, and, not surprisingly, the Tennessee Court of Criminal Appeals rejected the argument.[63] The offense of drawing a check with insufficient funds is committed, if at all, at the time the check is drawn or delivered. While under the previous version of the statute[64] the giving of written notice was an element of the offense,[65] as a result of the 1967 revision, refusal to pay after notice merely creates a presumption of knowledge and intent; the prosecution may prove the mens rea in other ways.[66]

3. Forgery

In *Anderson v. State*[67] the Tennessee Court of Criminal Appeals distinguished the crimes of forgery[68] and uttering a forged instrument[69] and held that an accused could be convicted of both as a result of a single transaction. Defendant obtained a valid check made payable to another individual and endorsed the name

59. TENN. CODE ANN. § 39-1959 (Cum. Supp. 1978).

60. *Id.* § 39-1960.

61. 556 S.W.2d 234 (Tenn. Crim. App.), *cert. denied, id.* (Tenn. 1977).

62. TENN. CODE ANN. § 39-3102 & -3103 (1975).

63. "Payment at that time of the amount certainly owed as a civil debt would do no more than nip in the bud any statutory presumption of guilty knowledge and fraudulent intent." 556 S.W.2d at 235.

64. TENN. CODE ANN. § 39-1904 (1955).

65. *See* Meadows v. State, 220 Tenn. 615, 421 S.W.2d 639 (1967); Jones v. State, 197 Tenn. 667, 277 S.W.2d 371 (1955); State v. Crockett, 137 Tenn. 679, 195 S.W. 583 (1917).

66. *See also* Jett v. State, 556 S.W.2d 236 (Tenn. Crim. App.), *cert. denied, id.* (Tenn. 1977).

67. 553 S.W.2d 85 (Tenn. Crim. App.), *cert. denied, id.* (Tenn. 1977).

68. TENN. CODE ANN. § 39-1701 (1975).

69. *Id.* § 39-1704.

of the payee upon it in the presence of a grocery store cashier who honored the full amount of the check. Defendant was convicted of both offenses and given consecutive sentences.[70] The appeals court affirmed, holding that defendant committed forgery when he signed the check and uttered a forged instrument upon offering to transfer the paper to the cashier. The court recognized that the two offenses were committed at the same place and virtually at the same time, with the purpose of achieving a single result. The court concluded, however, that "[u]nity of intent does not merge the offenses,"[71] and there was no evidence that the legislature had intended a merger.

The dissent argued that, since the two crimes were proved by the same evidence, a merger should be recognized.[72] At common law, however, forgery was defined as the false making or material alteration, with intent to defraud, of any writing that, if genuine, might be of apparent legal efficacy.[73] The writing must be of such nature that the rights of another might be prejudiced by the forgery, but actual injury was not required.[74] While apparently a matter of first impression in Tennessee, forgery and uttering a forged instrument have been recognized as separately punishable offenses elsewhere.[75]

In *Grizzle v. State*[76] the court of criminal appeals recognized that uttering a forged instrument is a "specific and particular species of false pretenses."[77] The charge of uttering a forged instrument, therefore, should be used whenever applicable to the facts.

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70. *See* text accompanying notes 432-34 *infra*.

71. 553 S.W.2d at 88.

72. Indeed, the multiple convictions could then be found to violate the protection against double jeopardy. *See* POST-TRIAL RIGHTS, *supra* note 1, § 63.

73. Carr v. United States, 278 F.2d 702 (6th Cir. 1960); Mallory v. State, 179 Tenn. 617, 168 S.W.2d 787 (1943). *See also* 2 WHARTON'S CRIMINAL LAW & PROCEDURE § 621, at 396 (R. Anderson ed. 1955).

74. Ratliff v. State, 175 Tenn. 172, 133 S.W.2d 470 (1939); Girdley v. State, 161 Tenn. 177, 29 S.W.2d 255 (1930). *See also* 2 WHARTON'S CRIMINAL LAW & PROCEDURE § 646, at 435 (R. Anderson ed. 1955).

75. *See* United States v. Peters, 434 F. Supp. 357 (D.D.C. 1977); Bronstein v. State, 355 So. 2d 817 (Fla. Ct. App. 1978).

76. TENN. ATT'Y GEN. ABSTRACT, Vol. IV, Nos. 5, 6, p.8 (Tenn. Crim. App., Sept. 11, 1978).

77. *Id.*

4. Concealing Stolen Property

The word "concealing," as used in the offense of concealing stolen property, is a term of art and should not be interpreted literally.[78] In *State v. Hatchett*[79] the owner of two bird dogs discovered that his dogs had been stolen. The following day the owner asked defendant, a dealer in dogs, if he knew of the dogs' whereabouts. Defendant replied that he had purchased two dogs from an unidentified man on the previous day and had since sold them to another. After reimbursing the purchaser $200 and recovering the dogs, the owner swore out a warrant for defendant's arrest, whereupon defendant paid him $500 for expense and trouble incurred. In sustaining defendant's conviction for concealing stolen property,[80] the Tennessee Supreme Court relied upon the principle that unexplained possession of recently stolen goods may lead to the inference that the possessor knew the goods were stolen.[81] Defendant had no less concealed the dogs simply because he had transported them to the purchaser in an open truck.[82] The fact that the sale was made within a very short time of acquisition was evidence of an intent to make discovery of the theft more difficult. While the admission of the sale the following day was of some evidentiary weight, the repayment could be viewed as consciousness of guilt. All in all, the proof was sufficient to support the conviction.

C. Against Person and Property

1. Larceny from the Person

The statutory definition of larceny from the person provides that "[t]he theft must be from the person; it is not sufficient that the property be merely in the presence of the person from whom it is taken."[83] In *Prigmore v. State*[84] defendant took the

78. *See* 2 WHARTON'S CRIMINAL LAW & PROCEDURE § 570, at 290 (R. Anderson ed. 1955).

79. 560 S.W.2d 627 (Tenn. 1978).

80. The court of criminal appeals had reversed the conviction. *Id.* at 630.

81. *See, e.g.*, State v. Veach, 224 Tenn. 412, 456 S.W.2d 650 (1970); Tackett v. State, 223 Tenn. 176, 443 S.W.2d 450 (1969).

82. "The crime of concealing stolen property does not require an actual hiding or secreting of the property; it is sufficient to show any acts which render its discovery more difficult and prevent identification, or which will assist those stealing it in converting the property to their own use." 560 S.W.2d at 630.

83. TENN. CODE ANN. § 39-4206(2)(a) (Cum. Supp. 1978).

84. 565 S.W.2d 897 (Tenn. Crim. App. 1977).

purse of a woman seated on a park bench with her arm extended over the purse at her side. Even though the victim had been unaware of the seizure until she saw the thief running away, the Tennessee Court of Criminal Appeals held that the accused's taking the purse satisfied the requirement of the statute.[85]

A second issue raised by the defense was the refusal of the trial judge to instruct the jury on the offenses of a grand and petit larceny. The offense of larceny is inevitably proven whenever larceny from the person is proven, but the court nevertheless was unwilling to recognize the applicability of the lesser included offense principle. The problem is a puzzling one analytically because, unlike robbery, larceny from the person cannot be said to be an aggravated larceny.[86] The punishment prescribed for larceny from the person, three to ten years imprisonment, is identical to that for grand larceny and is more than the punishment for petit larceny.[87] Larceny is therefore an included offense but only petit larceny is a lesser included offense. The latter possibility is not pertinent in the present case because the value of the goods taken was sufficient to constitute grand larceny. Whether the accused was convicted of larceny from the person or grand larceny would seem unimportant since both carry the same potential punishment. The defense might, however, believe that punishment would more likely fall within the low end of the range if a conviction of simple larceny were returned. The position of the *Prigmore* court was that offenses of larceny and larceny from the person are exclusive, with the latter being applicable to "those cases where the ordinary forms of larceny do not apply."[88] This explanation is curious since, had the prosecution in the present case chosen to charge mere larceny, the conviction apparently would have been sustained. Indeed, in the early case of *Fanning v. State*,[89] the court sustained a conviction of larceny upon an indictment for larceny from the person because larceny was "necessarily included in the offense charged."[90] While conceding

85. "The purse was within the area between her arm and body, a natural and normal place for it to be." *Id.* at 899.

86. Compare State v. Scates, 524 S.W.2d 929 (Tenn. 1975); Watson v. State, 207 Tenn. 581, 341 S.W.2d 728 (1960).

87. TENN. CODE ANN. § 39-4204 (1975).

88. Prigmore v. State, 565 S.W.2d at 899.

89. 80 Tenn. 651 (1883).

90. *Id.* at 652.

this, the *Prigmore* court nevertheless maintained that the offense of larceny from the person was distinguishable because the value of the property taken was immaterial.[91] Since the evidence would support a conviction for this offense, instruction as to any other offense was unnecessary.

D. Public Offenses

1. Gambling

Proof that an accused is guilty of professional gambling[92] may be established by the frequency and amount of his wagers.[93] In *Stroup v. State*[94] the Tennessee Court of Criminal Appeals held that the acceptance of over three thousand dollars in bets from an undercover agent during a two-week period was sufficient to establish the offense. The court attached no significance to defendant's nonparticipation in the exchange of money or to his lack of profit from the operation.

If the proceeds are dedicated exclusively to charitable purposes, however, criminal prohibitions are inapplicable.[95] In *Vance v. State*[96] the court of criminal appeals held that proof that the operation was church-related was insufficient to satisfy the statutory requirement that "no part of the gross receipts inures to the benefit of any private shareholder, member or employee of such organization,"[97] and that no part of the gross receipts go to other than charitable purposes.[98] While generally the burden of proof rests on the prosecution to prove the elements of the offense charged, "where certain categories of activities similar to the acts which constitute a crime are exempted from criminal liability by an independent section of the act defining the particular crime,

91. The court relied upon English v. State, 219 Tenn. 568, 411 S.W.2d 702 (1966), in which the court had said just that.

92. TENN. CODE ANN. § 39-2032 (1975).

93. Squires v. State, 525 S.W.2d 686 (Tenn. Crim. App.), *cert. denied, id.* (Tenn. 1975).

94. 552 S.W.2d 418 (Tenn. Crim. App.), *cert. denied, id.* (Tenn. 1977).

95. TENN. CODE ANN. § 39-2033(8) (1975).

96. 557 S.W.2d 750 (Tenn. Crim. App.), *cert. denied, id.* (Tenn. 1977).

97. TENN. CODE ANN. § 39-2033(8) (1975).

98. The statute defines "charitable organization" as organizations subject to exemption under the Internal Revenue Code of 1954, § 501(c)(3). *See* TENN CODE ANN. § 39-2033(8) (1975).

it is up to the defendant to bring himself within the exemption."[99] The court cited a single case, *Villines v. State*,[100] decided in 1896, in which defendant had been convicted of unlawfully dispensing pharmaceuticals. Defendant in *Villines* had contended on appeal that the indictment failed to state that he did not come within the statutory exception for physicians. In affirming the conviction, the *Villines* court relied on a United States Supreme Court decision[101] for the notion that the dispositive consideration was the relationship of the exception to the definition of the crime: "Is it so incorporated with the substance of that clause as to constitute a material part of the description of the acts, omission, or other ingredients which constitute the offense?"[102] If so, then the inapplicability of the exception should be alleged in the indictment. In *Vance*, since the charitable purposes exception was not a material part of the description of the offense, the burden of proof was at least initially on defendant.

At this point the proper result in *Vance* becomes problematical. The remainder of the opinion is an extended quotation from a treatise on criminal evidence,[103] generally supportive of the *Villines* holding cited by the *Vance* court. Judge Galbreath, dissenting, however, quoted the same section in the same treatise: "By weight of authority, when evidence appears which tends to bring the defendant within an exception not located in the enacting clause, the burden of proof is on the prosecution, on the whole case, to overcome the evidence beyond reasonable doubt."[104] The majority and the dissent disagreed whether evidence in the record indeed tended to bring defendant within the exception. The dissent submitted that "[s]ubstantial proof was adduced that religious services and charitable works had been conducted by and on behalf of the church,"[105] but the majority did not see this as the crucial question of fact. The majority viewed the significant point to be that "no evidence was presented tending to show that no person benefited individually or that all of the gross receipts

99. 557 S.W.2d at 751.

100. Villines v. State, 96 Tenn. 141, 33 S.W. 922 (1896).

101. United States v. Cook, 84 U.S. (17 Wall.) 168, 176 (1872).

102. 96 Tenn. at 145, 33 S.W. at 923 (citing United States v. Cook, 84 U.S. (17 Wall.) 168, 176 (1872)).

103. 1 WHARTON'S CRIMINAL EVIDENCE § 20 (13th ed., C. Torcia, ed. 1972).

104. *Id.*

105. 557 S.W.2d at 753.

were used for benevolent, charitable or religious purposes."[106] Defendant testified that the money derived from the gambling activity "went into the general fund of the church,"[107] but there was no indication how the funds thus acquired were dispersed by the church.

Since the enforcement of the statute may require a court to pass judgment on church expenditures, a potential constitutional problem of governmental entanglement in religion obviously is presented.[108] The allocation of a portion of income from gambling sponsorship to a minister's salary probably could be justified as coming within the exception. At the other extreme, should the proceeds from gambling operations be allocated by the church exclusively as compensation for the minister, particularly if this is the major source of church income, statutory exemption appears unlikely. In any case, if there is some evidence of a bona fide religious organization,[109] judicial scrutiny of its operations may be constitutionally impermissible.[110] In the final analysis, the majority simply did not take defendant's religious pretensions seriously. This attitude might cause some pause but for the fact that defendant apparently did not take the pretensions too seriously himself since he filed a two sentence brief on appeal that did no more than reiterate the statute.[111]

III. DEFENSES

A. Mental Impairment

1. Competency to Stand Trial

A defendant is considered competent to stand trial if "he has mind and discretion which would enable him to appreciate the

106. *Id.* at 751.

107. *Id.* at 752 (quoting defendant's testimony at trial).

108. *See* Walz v. Tax Comm'n, 397 U.S. 664, 674, 691 (1970); L. TRIBE, AMERICAN CONSTITUTIONAL LAW 869-70 (1978).

109. In a concluding rhetorical flourish, the dissent submitted that the organization served by defendant had been recognized as a church by both the state and the Internal Revenue Service. 557 S.W.2d at 754. This observation would appear to be a particularly strong argument for the defense were not an inscrutable footnote appended: "It is not clear that documents admitted for identification purposes only purporting to establish tax exempt status were in effect at the time of appellant's arrest." *Id.* at 754 n.1.

110. *See* note 108 *supra.*

111. 557 S.W.2d at 751.

charge against him, the proceedings thereon, and enable him to make a proper defense."[112] In *State v. Stacy*[113] the Tenneseee Court of Criminal Appeals found "nothing offensive in allowing a defendant's competency to stand trial to be induced by the use of tranquilizing medication."[114]

In *State v. Patty*[115] the accused was arrested in connection with the shooting of five people and sent to a state mental hospital for psychiatric evaluation.[116] He was thereafter indicted on three charges of first degree murder and two charges of felonious assault, whereupon the prosecution moved that he be transferred back to the county jail "for evaluation by independent psychiatric experts." The trial court ruled that the prosecution lacked authority to demand an independent psychiatric evaluation, and at the ensuing hearing the accused was found incompetent to stand trial. The prosecution appealed the denial of its motion, and the court of criminal appeals affirmed.[117] Just as the defense is not entitled to the appointment of a private psychiatrist,[118] so too the statute does not authorize the prosecution to obtain an independent evaluation, and the denial of the motion by the trial court was not an abuse of discretion.

2. Insanity

When the jury is given an instruction on insanity,[119] both the prosecution and the defense may wish to apprise the jury of what would happen to the defendant if he were found not guilty by reason of insanity. The prosecution may wish to impress upon the jury that a verdict of not guilty by reason of insanity is a verdict

112. Jordan v. State, 124 Tenn. 81, 88, 135 S.W. 327, 329 (1911).

113. 556 S.W.2d 552 (Tenn. Crim. App.), *cert. denied, id.* (Tenn. 1977).

114. *Id.* at 557. "In this modern age, the administering of drugs under proper medical supervision has effectively restored many mentally ill citizens to a useful life in which they can function as normally as other citizens not so impaired." *Id.* at 557-58.

115. 563 S.W.2d 911 (Tenn. Crim. App. 1977), *cert. denied, id.* (Tenn. 1978).

116. TENN. CODE ANN. § 33-708 (1977).

117. 563 S.W.2d at 913.

118. Graham v. State, 547 S.W.2d 531 (Tenn. 1977).

119. The ALI Model Penal Code test for criminal responsibility was adopted by the Tennessee Supreme Court in Graham v. State, 547 S.W.2d 531 (Tenn. 1977). *See 1976-1977 Survey, supra* note 1, at 18-20. *Graham* was accorded retroactive effect in Sampson v. State, 553 S.W.2d 345 (Tenn. 1977).

of not guilty and, therefore, the defendant will be released from custody as the result of such a verdict. The defense may wish to assure the jury that following such a verdict the defendant would still be vulnerable to civil commitment proceedings, possibly initiated by the prosecution. Tennessee courts have held that all such instructions respecting the effect of finding the defendant not guilty by reason of insanity are improper. In *Edwards v. State*[120] the Tennessee Supreme Court held that a defendant was not entitled to such an instruction because it would not be relevant to the issue of guilt and "the trial judge is not supposed to tell the jury what the legal effect of their verdict is."[121] A majority of jurisdictions are apparently in accord with *Edwards*.[122]

The authority of *Edwards* was challenged in *Glasscock v. State*,[123] in which defendant had been denied an instruction on the possibility of hospitalization if he were found not guilty by reason of insanity.[124] Defendant contended that such an instruction was mandatory because of a passage in *Graham v. State*[125] acknowledging "a deficiency in Tennessee law relating to the disposition of a criminal defendant found not guilty by reason of insanity," and noting that "the district attorney-general *may*

120. 540 S.W.2d 641 (Tenn. 1976).

121. *Id.* at 648.

122. United States v. Borum, 464 F.2d 896 (10th Cir. 1972); Pope v. United States, 372 F.2d 710 (8th Cir. 1967); United States *ex rel.* Hand v. Redman, 416 F. Supp. 1109 (D. Del. 1976); State v. Doss, 116 Ariz. 156, 568 P.2d 1054 (1977); State v. Holmquist, 173 Conn. 140, 376 A.2d 1111, *cert. denied*, 434 U.S. 906 (1977); McCarthy v. State, 372 A.2d 180 (1977); Malo v. State, 361 N.E.2d 1201 (Ind. 1977); State v. Dyer, 371 A.2d 1079 (Me. 1977); State v. Bott, 246 N.W.2d 48 (Minn. 1976); State v. Black Feather, 249 N.W.2d 261 (S.D. 1976); Granviel v. State, 552 S.W.2d 107 (Tex. Crim. App. 1976), *cert. denied*, 431 U.S. 933 (1977); State v. McDonald, 89 Wash. 2d 256, 571 P.2d 930 (1977); Dodge v. State, 562 P.2d 303 (Wyo. 1977). *Contra* Taylor v. United States, 222 F.2d 398 (D.C. Cir. 1955); Wheeler v. State, 344 So.2d 244 (Fla. 1977); State v. Liesk, 326 So. 2d 871 (La. 1976); Commonwealth v. Mutina, 366 Mass. 810, 323 N.E.2d 294 (1975); People v. Cole, 382 Mich. 695, 172 N.W.2d 354 (1969); Commonwealth v. Mulgrew, 475 Pa. 271, 380 A.2d 349 (1977).

123. 570 S.W.2d 354 (Tenn. Crim. App.), *cert. denied, id.* (Tenn. 1978).

124. The requested instruction read: "When a person charged with a criminal offense is acquitted of the charge on a verdict of not guilty by reason of insanity, the district attorney general may seek hospitalization of the defendant under [TENN. CODE ANN.] § 33-603 or § 33-604 as appropriate, if he determines hospitalization to be justified." *Id.* at 355.

125. 547 S.W.2d 531 (Tenn. 1977).

seek hospitalization."[126] The court of criminal appeals in *Glasscock* dismissed this language as dicta addressed to the legislature, largely prompted by the fact that such action on the part of the prosecution was purely discretionary. The *Glasscock* court saw no reason to believe the *Graham* court had intended to disturb its previous conclusion in *Edwards*.

In fact, the court noted legislative response had been forthcoming, albeit not in effect until some three months following Glasscock's trial. The jury must now be instructed whenever insanity is an issue "that a verdict of not guilty by reason of insanity . . . shall result in automatic detention of the person so acquitted in a mental hospital or treatment center."[127]

In the converse situation the Supreme Court of Tennessee relied on *Edwards* in *Sampson v. State*,[128] holding it error to instruct the jury that if they found defendant not guilty or not guilty by reason of insanity, that "in either of these events the defendant would be a free man."[129] Once again, in light of the legislative response, such an instruction is now simply untrue.[130]

126. *Id.* at 544.

127. TENN. CODE ANN. § 33-709(e) (Cum. Supp. 1978).

128. 553 S.W.2d 345 (Tenn. 1977).

129. *Id.* at 349 (emphasis deleted).

130. Few jurisdictions have addressed the precise issue raised in *Sampson*. A similar instruction was held to constitute reversible error in People v. Morales, 62 App. Div. 2d 946, 404 N.Y.S.2d 344 (1978), because it unfairly prejudiced defendant's insanity defense. An analogous situation arose in State v. Hammonds, 290 N.C. 1, 224 S.E.2d 595 (1976). In his closing argument the district attorney claimed that defendant would be "returned to this community" if the jury returned a verdict of not guilty by reason of insanity. *Id.* at 601. The trial court's instruction to disregard the statement was held insufficient to cure the prejudice to the defense. Rather, the trial court should have informed the jury of the appropriate statutory commitment procedures. Similarly, in Johnson v. State, 265 Ind. 639, 359 N.E.2d 525 (1977), the court observed that although a defendant is not normally entitled to an instruction on dispositional consequences, if the jury is misinformed or misled (as by prosecutor comment), the court should immediately inform the jury of the actual dispositional alternatives. *But cf.* Jewell v. Commonwealth, 549 S.W.2d 807 (Ky. 1977) (where there is no realistic provision for detention of violent deranged people, prosecutor may remind jury that there is little assurance the defendant will not go free if found not guilty by reason of insanity); Commonwealth v. McColl, 376 N.E.2d 562 (Mass. 1978) (trial court's instruction that defendant might be found to be sane at a subsequent hearing, in which case he would go free, was not error).

IV. PROCEDURE

A. *Arrest*

1. Warrants

Arrest warrants may be issued only by a "neutral and detached magistrate,"[131] a requirement that is primarily aimed at precluding issuance by a party associated with prosecutorial authority.[132] In *Connally v. Georgia*[133] the United States Supreme Court found the admonition equally applicable to the issuance of a search warrant by a justice of the peace who received a fee when a warrant was issued but no fee when a warrant was refused.[134] In Tennessee justices of the peace are authorized to issue arrest and search warrants[135] and are compensated in the same manner as was the case in Georgia.[136] In *In re Dender*[137] the Tennessee Supreme Court held that the issuance of warrants by nonsalaried justices of the peace violated both the federal and state constitutions.[138]

2. Probable Cause

The prevalence of drug traffic through commercial airports has led the Drug Enforcement Administration (DEA) to develop a "drug courier profile" that may be communicated to concerned airport personnel. The profile includes the following factors: (1) youthfulness; (2) the use of small denomination currency in the purchase of tickets; (3) travel to and from major drug import centers over short periods of time; (4) travelling alone; (5) empty suitcases or no luggage at all; (6) nervousness; and (7) use of an

131. Johnson v. United States, 333 U.S. 10, 13-14 (1948). *See also* United States v. Evans, 574 F.2d 352 (6th Cir. 1978).

132. *See generally* PRETRIAL RIGHTS, *supra* note 1, § 16.

133. 429 U.S. 245 (1977).

134. "His financial welfare, therefore, is enhanced by positive action and is not enhanced by negative action." *Id.* at 250.

135. TENN. CODE ANN. § 19-312 (Cum. Supp. 1978).

136. *Id.* § 8-2115(A)I(1)(b) (Cum. Supp. 1978).

137. 571 S.W.2d 491 (Tenn. 1978).

138. *Id.* at 492 (specifically found to violate U.S. CONST. amend. XIV; TENN. CONST. art. I, § 8). The court approved the same result reached earlier in the year by the court of criminal appeals in an unreported case involving the issuance of a search warrant by a justice of the peace. Birdsong v. State, Tenn. Crim. App., Feb. 22, 1978 (unreported).

alias.[139] In *United States v. Lewis*[140] a ticket agent reported to a DEA agent that a suspicious person, later the defendant, had just purchased a one-day round trip ticket to Los Angeles with small bills. He had checked a small suitcase that seemed empty but for one item that slid around inside. The drug agent checked the address that corresponded with the phone number provided the airline by the purchaser and thereby determined not only that an alias had probably been used in purchasing the ticket but also that, according to the apartment manager, the individual had been under surveillance by local law enforcement officers regarding suspected narcotics traffic. Further investigation disclosed that the occupant of the apartment had been arrested for possession of heroin some two years earlier and that the description in the police file matched that of the individual observed at the airport. DEA agents met the return flight, informed defendant that they believed he was in possession of heroin, and requested him to accompany them to a small office. After receiving the *Miranda* warnings, defendant unlocked the suitcase, and the agent found a quantity of heroin. On appeal to the Sixth Circuit Court of Appeals from a conviction for unlawful possession of heroin, defendant contended that at the time of the apprehension and the search of the suitcase probable cause to arrest was lacking. In an earlier decision the same court had held that the drug courier profile could not, *by itself*, provide either probable cause to arrest or even sufficient suspicion for a temporary detention.[141]

The *Lewis* court held that the drug courier profile "was not a relevant factor"[142] in the determination of probable cause to arrest. The court reached this conclusion because first, the profile was "too amorphous to be integrated into a legal standard"[143] and second, use of the profile "would engage this Court in an improper analysis."[144] By the latter point, the court believed it was being

139. United States v. Smith, 574 F.2d 882 (6th Cir. 1978); United States v. Lewis, 556 F.2d 385 (6th Cir.), *cert. denied*, 434 U.S. 863 (1977).

140. 556 F.2d 385 (6th Cir.), *cert. denied*, 434 U.S. 863 (1977).

141. United States v. McCaleb, 552 F.2d 717 (6th Cir. 1977).

142. 556 F.2d at 389.

143. *Id.* The court found that this profile, as the one in *McCaleb*, " 'was not written down, nor was it made clear to agents exactly how many or what combination of the characteristics needed to be present in order to justify an investigative stop or an arrest.' " *Id.* (quoting United States v. McCaleb, 552 F.2d 717, 720 (6th Cir. 1977)).

144. *Id.*

asked to weigh "individual" layers of probable cause, as opposed to the "laminated total."[145] The distinction being drawn is quite fine, for the court acknowledged the propriety of considering all the *facts* that match the enumeration in the profile. Thus, one may properly say: because facts *a*, *b*, *c*, and *d*[146] are present, this plus additional information known to the officers established probable cause. One may not properly say: because facts *a*, *b*, *c*, and *d* are present, the suspect fits the drug courier profile; fitting the drug courier profile plus additional information known to the officers established probable cause.

In the context of *Lewis* the distinction may seem frivolous, but the apprehensions of the court are entirely legitimate. First, the profile is constructed by nonjudicial authority and, if taken too seriously, runs the substantial risk of bypassing a judicial determination of facts for the establishment of probable cause.[147] The problem is complicated by the fact that the profile will inevitably change with the experience of drug enforcement officers and the persistent efforts of narcotics handlers to evade detection.[148] If the relevance of the factors and the reliability of the profile must be determined in each instance, the prosecution has merely inserted an intermediate step in its burden of proof, and the court must still make an ad hoc evaluation of the facts.

Second, the *Lewis* court noted that the "use of the profile could too easily result in giving an undeserved significance to certain facts and distort the appraisal of the sum total of facts."[149] The danger sensed by the court is hypostatization, whereby a concept achieves legitimacy as a fact.[150] Thus, the several empirical observations in the present case are hypostatized into the concept "drug courier." Once a court takes this step, the suspect

145. The phrases were taken from Smith v. United States, 358 F.2d 833, 837 (D.C. Cir. 1966), *cert. denied*, 386 U.S. 1008 (1967).

146. *a* = small bill ticket purchase; *b* = travel to and from major import center in brief time frame; *c* = near empty suitcase; *d* = use of alias.

147. *Cf.* Aguilar v. Texas, 378 U.S. 108 (1964) (conclusory allegations in affidavit for search warrant insufficient).

148. For example, once these profile characteristics are made public through case reports, mass media, and the present article, one may assume that drug couriers will buy their tickets with large bills, will wait until they reach their destination before purchasing their return ticket, and will weigh down their suitcases. So goes the war against crime.

149. 556 F.2d at 389.

150. *See* Ross, *Tû-Tû*, 70 HARV. L. REV. 812 (1957).

thereafter is viewed as, in all probability, a drug courier. The facts have been transposed into a value judgment, and this value judgment thereafter is treated as a fact.[151] Appraising the facts in *Lewis*, the court found probable cause to sustain the arrest independent of the drug courier profile.[152]

The "drug courier profile" was again the subject of attention of the United States Court of Appeals for the Sixth Circuit in *United States v. Smith*.[153] In *Smith* a narcotics agent observed the accused deplaning in Detroit and was attracted to her by the presence of several characteristics in the profile.[154] In addition, the agent observed an abnormal bulge around the abdomen of the accused which, on the basis of his experience, further suggested that she was carrying illegal drugs. The agent detained the accused outside the airport and asked her to accompany him to the office of the Drug Enforcement Agency in the airport. In the DEA office the accused consented to a search of her carry-on bag and purse. The accused was arrested upon discovery of marijuana in the purse. A search of her person revealed a package of heroin strapped to her body.

Applying the standard established by *Lewis*, the court concluded that the presence of several of the profile characteristics

151. The argument has been advanced frequently that ultimately no fundamental distinction exists between statements of fact, on one hand, and statements of value or opinion, on the other. *See* B. RUSSELL, THE PROBLEMS OF PHILOSOPHY 7-12 (1959); E. D'ARCY, HUMAN ACTS 138 (1963).

Oliphant has contended that the difference between the statements, "This is a table," and, "This injury caused the plaintiff to lose his hearing," is primarily "the number of items of sense experience constituting the basis of the inference in each case and the frequency with which the person involved is called upon to draw the inference." Oliphant, *Facts, Opinions, and Value-Judgments*, 10 TEX. L. REV. 127, 133 (1932).

Even assuming, however, that what the law traditionally treats as difference in kind is merely difference in degree, the court in the present case is nonetheless justified in its preference for judicial scrutiny of each description of observed phenomena, as opposed to a systematic organization of that data, which comes closer to resolution of the ultimate question for the court.

152. The court found the facts substantially similar to those in United States v. Prince, 548 F.2d 164 (6th Cir. 1977) (involving the work of one of the same DEA agents), in which probable cause was found.

153. 574 F.2d 882 (6th Cir. 1978).

154. The agent observed that she was a "youth, carrying only a purse and small carry-on bag and picking up no luggage at the airport, traveling alone and being met by no one at the airport, and directly leaving the airport in a hurried and nervous manner." *Id.* at 883.

plus the abnormal bulge provided a sufficient basis for a temporary detention. While moving the accused from the point of detention to the DEA office exceeded the scope of authority to detain temporarily under circumstances short of probable cause,[155] the court concluded that the finding of the lower court that the accused had gone to the office voluntarily was not clearly erroneous.[156] The consent to search was likewise voluntary, and, therefore, the evidence was properly admitted.

B. Search and Seizure

1. Warrant Affidavits

The grounds upon which a facially sufficient search warrant was issued may be controverted by the accused,[157] but this right has been judicially limited to a challenge before the magistrate who issued the warrant.[158] In *State v. Little*[159] the Tennessee Supreme Court held that by virtue of a 1965 statute[160] an attack upon the affidavit may be made at a suppression hearing before the trial court. Adopting the standard fixed for federal courts in Tennessee,[161] the court held that two circumstances authorize the impeachment of a facially sufficient affidavit: "(1) A false statement made with intent to deceive the Court, whether material or immaterial to the issue of probable cause, and (2) a false statement, essential to the establishment of probable cause, recklessly made."[162]

Less than six months after the decision in *Little*, the United States Supreme Court decided *Franks v. Delaware*[163] and held that an accused is entitled to a hearing to challenge the truthful-

155. *See* PRETRIAL RIGHTS, *supra* note 1, at 60-62.

156. 574 F.2d at 886 n.15. *Cf.* United States v. McCaleb, 552 F.2d 717, 720 (6th Cir. 1977) (taking defendants to airport office after invalid *Terry* stop was an unconstitutional arrest). Judge Edwards dissented in *Smith*, concluding that the accused had been arrested without probable cause when she was taken to the office. 574 F.2d at 887 (Edwards, J., dissenting).

157. TENN. CODE ANN. § 40-514 (1975).

158. *See, e.g.*, O'Brien v. State, 205 Tenn. 405, 326 S.W.2d 759 (1959); Solomon v. State, 203 Tenn. 583, 315 S.W.2d 99 (1958).

159. 560 S.W.2d 403 (Tenn. 1978).

160. TENN. CODE ANN. § 40-519 (1975).

161. United States v. Luna, 525 F.2d 4 (6th Cir. 1975).

162. 560 S.W.2d at 407. *See also* Moore v. State, 568 S.W.2d 632 (Tenn. Crim. App.), *cert. denied, id.* (Tenn. 1978).

163. 438 U.S. 154 (1978).

ness of factual statements in an affidavit upon "a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause."[164] Notably, the standard articulated in *Franks* does not distinguish deliberate from reckless misstatements, and, in all events, requires a finding that the statements in dispute were critical to the determination of probable cause. The United States Court of Appeals for the Sixth Circuit has now revised its standard to comply.[165]

The Tennessee standard, therefore, is more protective in permitting the invalidation of the warrant when "intent to deceive the Court" is present irrespective of materiality. While the Tennessee Supreme Court possibly will now conform its standard to that adopted by the United States Supreme Court as compelled by the fourth amendment, the Tennessee decision cited the state constitution as well,[166] and nothing precludes the state court from adhering to a standard affording a broader protection than that required by the federal constitution.[167]

2. Incident to Arrest

The permissible scope of a warrantless search incident to an arrest was once again scrutinized in *United States v. Chadwick*,[168] in which the United States Supreme Court for the first time drew a distinction between the power to seize and the power to search that which was seized. The accused was arrested while standing

164. *Id.* at 155.

165. United States v. Barone, 584 F.2d 118 (6th Cir. 1978).

166. 560 S.W.2d at 406 (quoting TENN. CONST. art. I, § 7).

167. *But see* State v. Wert, 550 S.W.2d 1 (Tenn. Crim. App.), *cert. denied*, *id.* (Tenn. 1977) (court of criminal appeals rejected the argument that TENN. CONST. art. I, § 7, was broader than U.S. CONST. amend. IV). *See 1976-1977 Survey*, *supra* note 1, at 28. Even if the language employed in the respective provisions is found to be functionally equivalent, however, the Tennessee Supreme Court can nevertheless construe the state constitution to afford greater protection than the United States Supreme Court chooses to construe the Bill of Rights to afford. *See generally* Wilkes, *The New Federalism in Criminal Procedure Revisited*, 64 KY. L.J. 729 (1976); Falk, *The State Constitution: A More than 'Adequate' Non-Federal Ground*, 61 CALIF. L. REV. 273 (1973); Morris, *New Horizons for a State Bill of Rights*, 45 WASH. L. REV. 474 (1970); Countryman, *Why a State Bill of Rights?*, 45 WASH. L. REV. 454 (1970).

168. 433 U.S. 1 (1977).

next to the open trunk of an automobile in which he and others had just deposited a 200-pound footlocker. The footlocker was seized at the time of the arrest but was not opened until an hour and a half later. At the time of the search, the locker was safely in the custody of federal officers and was found to contain a large quantity of marijuana.[169]

At trial the government attempted to justify the search as falling within the automobile exception to the warrant requirement,[170] but the court dismissed the relationship between the footlocker and the automobile as purely coincidental. The government did not pursue this argument on appeal but instead argued that the inherent mobility of luggage was analogous to the mobility of automobiles, a factor frequently noted in justifying the warrantless search of vehicles.[171] The Court responded that the key factor was "the diminished expectation of privacy which surrounds the automobile."[172] In contrast, a footlocker was not subject to similar governmental regulation and was frequently intended as a container for personal effects. Moreover, the "mobility" argument carried little weight because the footlocker was in the exclusive control of the authorities.[173] "With the footlocker safely immobilized, it was unreasonable to undertake the additional and greater intrusion of a search without a warrant."[174]

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169. Prior to the arrest, officers had probable cause to believe the footlocker contained marijuana, the contents having been identified by a marijuana-sniffing dog while the container was in transit. Probable cause is not a prerequisite to seizing or searching an item seized incident to an arrest, but the reasonable assumption of the officers as to the contents of the footlocker was significant, first, in providing probable cause for the arrest, and second, in precluding any claim "that the footlocker contained explosives or other inherently dangerous items, or that it contained evidence which would lose its value unless the footlocker were opened at once." *Id.* at 4.

170. *See* Chambers v. Maroney, 399 U.S. 42 (1970).

171. *See, e.g.*, Carroll v. United States, 267 U.S. 132 (1925).

172. 433 U.S. at 12. " 'One has a lesser expectation of privacy in a motor vehicle because its function is transportation and it seldom serves as one's residence or as the repository of personal effects.' " *Id.* (quoting Cardwell v. Lewis, 417 U.S. 583, 590 (1974)).

173. *Id.* at 13. This distinction is substantially neutralized by the Court's recognition that "we have also sustained 'warrantless searches of vehicles . . . in cases in which the possibilities of the vehicle's being removed or evidence in it destroyed were remote, if not nonexistent.' " *Id.* at 12 (quoting Cady v. Dombrowski, 413 U.S. 433, 441-42 (1973)).

174. *Id.* at 13.

In *Chambers v. Maroney*[175] the Court had been unimpressed by the argument that fourth amendment values would be better protected by seizing a vehicle without a warrant, but not searching it until a warrant had been obtained.[176] Once again, the Court found the greater expectation of privacy in the footlocker in *Chadwick* to warrant a different conclusion.[177]

Finally, the *Chadwick* Court addressed the government's attempt to justify the search of the footlocker as simply a search incident to an arrest. In *Chimel v. California*[178] the Court had held that both the person and the area within reach of the arrestee could be searched incident to an arrest.[179] The seizure in *Chadwick*, the government reasoned, fell within the permissible scope of a *Chimel* search, and in *United States v. Robinson*[180] and *Gustafson v. Florida*,[181] the Court held that a cigarette pack seized from the person of the arrestee could be examined for its contents after the object was in the exclusive control of the arresting officer. The latter cases were distinguishable from *Chadwick* in that the search occurred at the moment of the arrest and seizure, while the search in *Chadwick* was remote in time and place from the arrest.[182] *Chimel* had articulated the justifications for the warrantless search incident to arrest as the protection of the arresting officer, the preclusion of escape, and the prevention of destruction of evidence.[183] Since none of these dangers were present in *Chadwick*, the search was invalid.

The dissenting justices in *Chadwick*[184] contended that the search would doubtless have been legitimate had the officers ei-

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175. 399 U.S. 42 (1970).

176. *Id.* at 51-52.

177. It was the greatly reduced expectation of privacy in the automobile, coupled with the transportation function of the vehicle, which made the Court in *Chambers* unwilling to decide whether an immediate search of an automobile, or its seizure and indefinite immobilization, constituted a greater interference with the rights of the owner. This is clearly not the case with locked luggage.

433 U.S. at 14 n.8.

178. 395 U.S. 752 (1969).

179. *See* Cook, *Warrantless Searches Incident to Arrest*, 24 ALA. L. REV. 607 (1972).

180. 414 U.S. 218 (1973).

181. 414 U.S. 260 (1973).

182. *See* Preston v. United States, 376 U.S. 364 (1964).

183. Chimel v. California, 395 U.S. at 763-64.

184. 433 U.S. at 22-23 (Blackmun, J., dissenting, joined by Rehnquist, J.).

ther waited for the vehicle to leave, leading to a bona fide vehicle search, or searched the footlocker at the time of the arrest. Apparently, however, the opinion of the Court left no room for either of these possibilities. The Court was unequivocal in its assertion that the contents of a footlocker are constitutionally distinguishable from the contents of an automobile[185] and that the reasonable expectation of privacy in the footlocker should not be diminished merely because the locker is placed in a vehicle. As to the second possibility, while a search of the footlocker at the scene of the arrest would make the case comparable to *Robinson* and *Gustafson* in one respect, this fact should not lightly be assumed to be the only distinction in the case. In a final footnote to the opinion the Court observed that "[u]nlike searches of the person, . . . searches of possessions within an arrestee's immediate control cannot be justified by any reduced expectations of privacy caused by the arrest. Respondents' privacy interest in the contents of the footlocker was not eliminated simply because they were under arrest."[186] Such reasoning presumably would apply equally whether the search was made at the time of the arrest or at a later time in a different place.

Chadwick thus indicated the existence of gradations of intrusion upon reasonable expectations of privacy. Certainly the arrest and search of the person of the accused were invasions of privacy, arguably more intrusive than the search of the footlocker. The warrantless arrest for a felony is nevertheless justifiable once probable cause is established,[187] and the search of the person satisfies reasonable protection interests recognized in *Chimel.* The search of the footlocker, however, involved independent privacy interests, in respect to which the chain of reasonableness had been broken.

Privacy interests at an earlier stage in the confrontation were considered in the per curiam opinion of the United States Supreme Court in *Pennsylvania v. Mimms,*[188] a case that may be viewed as a logical extension of *Chadwick,* although that decision

185. "The factors which diminish the privacy aspects of an automobile do not apply to respondents' footlocker. . . . In sum, a person's expectations of privacy in personal luggage are substantially greater than in an automobile." *Id.* at 13.

186. *Id.* at 16 n.10 (citation omitted).

187. *See* United States v. Watson, 423 U.S. 411, 421-23 (1976).

188. 434 U.S. 106 (1977).

is not cited. The accused in *Mimms* was stopped for the purpose of issuing a traffic summons for the expired license plate on his automobile. An officer requested that the accused alight from the vehicle and produce his driver's license and owner's card. A large bulge was noticed in his jacket, and thereupon the officer frisked the accused and discovered a loaded revolver.

No question was raised as to the reasonableness of stopping the vehicle for purposes of issuing the citation for a violation observed by the officers. Nor was there any doubt that, once the bulge was observed, the frisk and ultimate seizure were justified.[189] The critical issue was the intermediate step: "[W]hether the order to get out of the car, issued after the driver was lawfully detained, was reasonable and thus permissible under the Fourth Amendment."[190] The Court concluded that the order was reasonable because the major intrusion upon the liberty of the accused occurred when he was detained. "We think this additional intrusion [getting out of the car] can only be described as *de minimis*."[191]

The similarity to *Robinson* and *Gustafson* on one hand, and the contrast with *Chadwick* on the other, is obvious: Just as the examination of the contents of a cigarette pack is a minor intrusion given a legal arrest and seizure of the object, so asking Mimms to alight from his automobile added little to the intrusion already occasioned by the detention. The footlocker in *Chadwick*, on the other hand, was protected by privacy interests independent of the arrest of its possessor. Additionally, while in *Robinson*, *Gustafson*, and *Mimms* the arresting officer reasonably could claim that the action taken was for self-protection, no such countervailing interest was present in *Chadwick*.

Lower courts have tended to find exceptional circumstances that will serve to broaden the scope of a *Chimel* search. If, for example, in the course of an arrest the arrestee must go into another portion of the premises prior to being taken into custody, the *Chimel* area follows the arrestee.[192] In *Watkins v. United States*,[193] after the accused was arrested in his residence, the offi-

189. *See* Terry v. Ohio, 392 U.S. 1, 24 (1968).

190. 434 U.S. at 109.

191. *Id.* at 111.

192. *See* PRETRIAL RIGHTS, *supra* note 1, § 44 at 291 n.9 & n.9.12 (Cum. Supp. 1978).

193. 564 F.2d 201 (6th Cir. 1977).

cers followed him into his bedroom to get a shirt. The officers seized a firearm, the butt of which they observed under the mattress of the bed. The United States Court of Appeals for the Sixth Circuit sustained the admission of the evidence.

A stricter approach was deemed appropriate in *United States v. Rowan*,[194] in which an officer of the National Parks Service observed a can of beer on the dashboard of a car, and, after advising the accused that beer was not permitted in the park, the officer asked to see his driver's license and vehicle registration papers. The accused entered the car on the passenger side and endeavored to open the glove compartment, which was stuck. Simultaneously, the officer seized a crumpled brown paper bag that was visible under the seat on the driver's side and, after opening it, found seizable evidence within. The United States District Court for the Eastern District of Tennessee suppressed the evidence, holding that the bag was "not only too far from the defendant but also located in an area too difficult to reach, for the seizure to be justified under *Chimel*."[195]

3. Exigent Circumstances

The exigent circumstances exception to the warrant requirement is utilized when the facts indicate that delaying the search until a warrant is obtained is impossible or unwise.[196] If, for example, officers have reason to believe that a person within given premises is in need of immediate medical attention, a warrantless entry is reasonable, and evidence of criminal behavior fortuitously discovered may be seized.[197] Similarly, officers in hot pursuit of a fleeing felon may enter a residence without a warrant for purposes of making an arrest, and evidence discovered in the process is seizable.[198]

Exigent circumstances are not created, however, simply by the subject matter of the investigation. In *Mincey v. Arizona*[199] the prosecution sought to justify a four-day warrantless search of the apartment of the accused under a so-called "murder scene

194. 439 F. Supp. 1020 (E.D. Tenn. 1977).
195. *Id.* at 1022.
196. *See generally* PRETRIAL RIGHTS, *supra* note 1, § 49.
197. *Id.* at 317 n.12.
198. Warden v. Hayden, 387 U.S. 294 (1967).
199. 437 U.S. 385 (1978).

exception" recognized under state law.[200] The United States Supreme Court held that no such exception existed and that the search could not be justified under any recognized exception. The accused could not be said to have relinquished a reasonable expectation of privacy either because the crime had purportedly occurred on his premises[201] or because he was under arrest before the search occurred.[202] No emergency existed that would support the search as an effort to protect life or limb.[203] Despite a vital public interest in the prompt apprehension of a murderer, the deprivation of fourth amendment rights could not be the price of police efficiency.[204]

4. Open Fields

In 1977 in *State v. Wert*[205] the Tennessee Court of Criminal Appeals held that the open fields exception to the warrant requirement, first recognized in *Hester v. United States*,[206] had been modified by *Katz v. United States*[207] to the extent that any warrantless search must henceforth be evaluated in terms of a reasonable expectation of privacy.[208] The application of the open fields exception arose again in *Sesson v. State*,[209] in which officers

200. State v. Duke, 110 Ariz. 320, 518 P.2d 570 (1974); State *ex rel.* Berger v. Superior Ct., 110 Ariz. 281, 517 P.2d 1277 (1974); State v. Sample, 107 Ariz. 407, 489 P.2d 44 (1971).

201. In any event, the "murder scene exception" as defined by the Arizona Supreme Court applied to places other than the residence of the accused. "We find nothing in the Constitution . . . which should prevent the police from making a warrantless search of the premises in which the victim is found dead and this is true even if the suspect exercised joint control of said premises along with the victim." State v. Sample, 107 Ariz. at 409, 489 P.2d at 46.

202. The Court reasoned, analogously to United States v. Chadwick, 433 U.S. 1 (1977), that the invasion of privacy caused by the arrest did not compromise the separate privacy interest in the apartment. 437 U.S. at 393-94.

203. "All the persons in Mincey's apartment had been located before the investigating homicide officers arrived there and began their search. And a four-day search that included opening dresser drawers and ripping up carpets can hardly be rationalized in terms of the legitimate concerns that justify an emergency search." 437 U.S. at 393.

204. *Id.*

205. 550 S.W.2d 1 (Tenn. Crim. App.), *cert. denied, id.* (Tenn. 1977).

206. 265 U.S. 57 (1924).

207. 389 U.S. 347 (1967).

208. *See 1976-1977 Survey, supra* note 1, at 28-30.

209. 563 S.W.2d 799 (Tenn. Crim. App.), *cert. denied, id.* (Tenn. 1978).

had placed under surveillance a still located in a wooded area and on three occasions had observed the accused illegally manufacturing whiskey. The court of criminal appeals found *Wert* distinguishable because no evidence in *Sesson* indicated that the accused was either the owner or the lawful possessor of the property involved. Nor was there any assertion of a right of privacy similar to the "no trespassing" signs in *Wert*. The court concluded that the surveillance was therefore justifiable under the open fields doctrine.

Judge Tatum, in a concurring opinion, was inclined to go beyond drawing factual distinctions and preferred to challenge the authority of the *Wert* holding, which he noted had not been embraced by the state supreme court in that or any other case. In *Wert* the court had placed substantial reliance on a federal district court decision[210] that had been effectively overruled by the United States Court of Appeals for the Seventh Circuit.[211] Indeed, Judge Tatum concluded, "Insofar as I know, Tennessee is the only American jurisdiction protecting open fields."[212]

The court in *Wert*, however, did not make the sweeping pronouncement attributed to it by Judge Tatum. It said only that the scope of the open fields exception must be limited by the *Katz* reasonable expectation of privacy concept, a point recognized by the United States Supreme Court[213] as well as by numerous lower courts.[214] Two courts from other jurisdictions, in recent decisions involving facts substantially similar to those in *Wert*, have come to the same conclusion. In *State v. Chort*[215] the accused occupied an unenclosed ten-acre tract of land, within which was a garden enclosed by a board fence with approximately four inch spaces between the boards. An officer rode horseback across the open pasture portion of the property, and, from a vantage point some thirty feet from the garden fence, he recognized mari-

210. United States *ex rel.* Gedko v. Heer, 406 F. Supp. 609 (W.D. Wis. 1975).

211. United States *ex rel.* Saiken v. Bensinger, 546 F.2d 1292 (7th Cir. 1976).

212. 563 S.W.2d at 804. Judge Tatum had dissented in *Wert*. *See* 550 S.W.2d at 3.

213. Air Pollution Variance Bd. v. Western Alfalfa Corp., 416 U.S. 861 (1974).

214. PRETRIAL RIGHTS, *supra* note 1, § 60 at 368 n.4.

215. 577 P.2d 892 (N.M. Ct. App. 1978).

juana plants growing in the garden. The Court of Appeals of New Mexico found the search unreasonable, holding that

> [t]he "open field" doctrine must be viewed in light of the facts of each case subject to the requirements of *Katz* . . . .
>
> . . . [D]efendants, by the placement of the garden surrounded by an almost solid five foot fence, exhibited an actual expectation of privacy. Further, this expectation of privacy was such that society would recognize as reasonable. It would not be unreasonable to expect the shielding of the garden was for the purpose of privacy.[216]

In *State v. Byers*[217] an officer, acting on a tip from a hunter, entered the 640-acre tract of the accused and discovered marijuana in cultivation. The property was not fenced, but, as in *Wert*, "no trespassing" signs were posted. Distinguishing *Hester*, the Supreme Court of Louisiana concluded that the accused had a reasonable expectation of privacy.

As the Supreme Court of Colorado observed in *People v. McLaugherty*,[218] "*Hester* is now viewed as merely an application of the principle that Fourth Amendment protections do not apply where no reasonable expectation of privacy exists."[219] In finding the search in *Wert* unreasonable, the Tennessee court did not foreclose sustaining warrantless searches under the open fields exception when no reasonable expectation of privacy has been invaded.[220]

5. Third Party Consent

Consent to a search may be effective when made by a party other than the accused if that party has an interest in the area searched comparable to that of the accused.[221] In *United States v. Matlock*[222] the United States Supreme Court held that such consent was binding on the accused, notwithstanding his presence at the time consent was secured. In *Matlock* the officer did not ask the accused for his consent, but in *United States v.*

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216. *Id.* at 893 (citations omitted).

217. 359 So. 2d 84 (La. 1978).

218. 566 P.2d 361 (Colo. 1977).

219. *Id.* at 363.

220. Indeed, the court again reached such a conclusion in Delay v. State, 563 S.W.2d 905 (Tenn. Crim. App. 1977), *cert. denied, id.* (Tenn. 1978).

221. *See* PRETRIAL RIGHTS, *supra* note 1, § 53.

222. 415 U.S. 164 (1974).

Sumlin[223] the officer asked for the accused's consent and it was denied. The Sixth Circuit Court of Appeals in *Sumlin* found no constitutional significance in this additional fact because the rationale of *Matlock* was that a joint occupant has no reasonable expectation of privacy to the extent that he assumes the risk of a co-occupant exposing a commonly shared area. The refusal of the accused to give his consent was immaterial to the question of reasonable expectation of privacy.

This conclusion is not incompatible with the attitude of the Court in *Matlock*, given the fact that the accused in that case was present at the time consent was obtained from the third party. A few lower courts, however, have concluded that *Matlock* is distinguishable when the party in interest is present and objects to the search, notwithstanding consent by the co-occupant,[224] or when the police have been advised that an absent co-occupant objects to the search.[225]

6. Fruit of the Poisonous Tree

When a search has been determined invalid, not only is the evidence that was immediately seized in the course of the search excluded, but any fruits of the search are likewise inadmissible.[226] In *Bentley v. State*[227] officers searched a motel room occupied by defendant under a warrant found to be based on an affidavit of insufficient particularity.[228] Marijuana and purportedly obscene photographs discovered in the search were clearly inadmissible. The photographs, however, led to the arrest and search of a co-defendant, which produced additional photographs introduced in evidence against the first defendant as well. The court of criminal appeals held that the second search was the fruit of the first, and the product was equally inadmissible.

One of the more troublesome fruit of the poisonous tree problems arises when prosecution witnesses have been identified through an illegal search and the defense contends that their

223. 567 F.2d 684 (6th Cir. 1977).

224. People v. Reynolds, 55 Cal. App. 3d 357, 127 Cal. Rptr. 561 (1976); Silva v. State, 344 So. 2d 559 (Fla. 1977); Lawton v. State, 320 So. 2d 463 (Fla. Dist. Ct. App. 1975).

225. People v. Reynolds, 55 Cal. App. 3d 357, 127 Cal. Rptr. 561 (1976).

226. *See* PRETRIAL RIGHTS, *supra* note 1, § 71.

227. 552 S.W.2d 778 (Tenn. Crim. App.), *cert. denied, id.* (Tenn. 1977).

228. *See* PRETRIAL RIGHTS, *supra* note 1, § 36.

testimony should be excluded.[229] This issue was addressed by the Supreme Court for the first time in *United States v. Ceccolini.*[230] While visiting a flower shop, an officer picked up and examined the contents of an envelope, thereby discovering evidence of gambling activities. An employee identified the accused, who had been under investigation for gambling activities, as the owner of the envelope. The following year, the accused testified before a federal grand jury that he had never taken policy bets. The employee testified to the contrary, and the accused was indicted for perjury. At trial the employee's testimony was excluded as the fruit of what was conceded to be an illegal search, and the ruling was affirmed by the court of appeals.

The Supreme Court reversed, citing two principles it considered uniquely relevant to witness testimony in the fruit of the poisonous tree context. First, "the degree of free will exercised by the witness is not irrelevant in determining the extent to which the basic purpose of the exclusionary rule will be advanced by its application."[231] Second, the exclusion of the testimony "would perpetually disable a witness from testifying about relevant and material facts, regardless of how unrelated such testimony might be to the purpose of the original illegal search or the evidence discovered thereby."[232] The Court was thus led to the conclusion that reliability, while not relevant to the exclusion of inanimate evidence, was properly considered in regard to witness testimony. On the basis of this analysis, the testimony was found to have been improperly excluded.

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229. For earlier cases, see PRETRIAL RIGHTS, *supra* note 1, § 71 at 432 nn. 7 & 8.

230. 435 U.S. 268 (1978).

231. *Id.* at 276.

> The greater the willingness of the witness to freely testify, the greater the likelihood that he or she will be discovered by legal means and, concomitantly, the smaller the incentive to conduct an illegal search to discover the witness. Witnesses are not like guns or documents which remain hidden from view until one turns over a sofa or filing cabinet. Witnesses can, and often do, come forward and offer evidence entirely of their own volition.

Id.

232. *Id.* at 277.

C. *Right of Confrontation*

1. Confession of Codefendant

In *Bruton v. United States*[233] the Supreme Court held that when defendants are jointly tried the right of confrontation may be violated by the introduction into evidence of a confession that implicates another defendant if the confessor does not take the stand. The problem is sometimes avoided by removing all references to codefendants,[234] but merely deleting names may be insufficient.[235] In *Alexander v. State*[236] the name of the implicated codefendant was replaced with the phrase "my friend." The court of criminal appeals concluded that the reference was obviously to the codefendant, particularly in light of the admission in the codefendant's own confession that he had been in the company of the confessor at the time in question.[237] The court distinguished *Gwin v. State*,[238] in which "blank" had been substituted for the names of the other participants, because, it said, "there were multiple co-defendants in *Gwin*, and not just two, as here, whose identities were otherwise obvious to the jury."[239] While the cases may be legitimately distinguished, this reason is hardly the proper basis because nothing in the *Gwin* opinion suggests that the number of defendants in the prosecution was critical to the result. Rather, the court found that in addition to the redaction, the other defendants had also confessed, and the jury had been instructed to consider each confession only against its maker. The court concluded that either no error occurred, or, if any had occurred, it was harmless.[240] In *Alexander*, while the appellant also

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233. 391 U.S. 123 (1968).

234. *See* TRIAL RIGHTS, *supra* note 1, § 12 at 50 n.10.

235. *See* Randolph v. Parker, 575 F.2d 1178 (6th Cir. 1978); Hodges v. Rose, 570 F.2d 643 (6th Cir. 1978); Kelley v. Rose, 346 F. Supp. 83 (E.D. Tenn. 1972).

236. 562 S.W.2d 207 (Tenn. Crim. App. 1977), *cert. denied, id.* (Tenn. 1978).

237. *Id.* at 209. The court found the case comparable to White v. State, 497 S.W.2d 751 (Tenn. Crim. App.), *cert. denied, id.* (Tenn. 1973), in which the phrase "the other person" had been substituted. *See* 562 S.W.2d at 209.

238. 523 S.W.2d 636 (Tenn. Crim. App.), *cert. denied, id.* (Tenn. 1977).

239. Alexander v. State, 562 S.W.2d 207, 210 unnumbered footnote (Tenn. Crim. App. 1977), *aff'd, id.* (Tenn. 1978).

240. The harmless error rule was applied to *Bruton* violations in Harrington v. California, 395 U.S. 250 (1969).

confessed, "the substance of the two confessions was not the same,"[241] and instructions limiting the use of the confessions were not given; both factors are adequate to distinguish *Gwin*.

Moreover, the multiple-codefendant distinction would appear inimical to the purpose of the *Bruton* rule. The "multiple codefendants" referred to by the court were in fact three in *Gwin*, as opposed to two in *Alexander*. With the deletion of the specific identifications, the jury was left with an ambiguous reference that it might reasonably conclude applied to one of the two remaining defendants. Actual implication was replaced with speculative implication. If the juror or jurors speculated accurately, the net result would be a violation of the *Bruton* rule. If the speculation was inaccurate, the result would be more offensive than a *Bruton* error since the juror or jurors would thereby inculpate a defendant when no inculpatory statement was actually made.

A *Bruton* error may be harmless, but, according to the Sixth Circuit Court of Appeals in *Hodges v. Rose*,[242] the test for the harmlessness is not the strength of the prosecutor's case; rather, the test is "whether the statement incriminates the defendant against whom it is inadmissible in such a way as to create a 'substantial risk' that the jury will look to the statement in deciding on that defendant's guilt."[243] In cases in which the name of the cross-implicated defendant has been deleted, a consideration of other evidence may be required to determine whether the referent of the confession is apparent, but this approach is quite different from weighing the strength of the prosecution's case independent of the confession. While such a rule is faithful to the *Bruton* rule and sensitive to the persuasive impact of confessions, it would appear at odds with the holding in *Harrington v. California*,[244] the first case in which the Supreme Court found a *Bruton* error harmless. In *Harrington* the accused had been tried with three codefendants, two of whom implicated the accused in their confessions, which were introduced although neither confessor testified. The other codefendant, however, made a similar confession and did testify, and the accused's own confession was similar to that of the codefendants. The Court viewed the challenged confessions as cumulative evidence and concluded that

241. 562 S.W.2d at 209.
242. 570 F.2d 643 (6th Cir. 1978).
243. *Id.* at 647.
244. 395 U.S. 250 (1969).

"the case against Harrington was so overwhelming . . . that this violation of *Bruton* was harmless beyond a reasonable doubt."[245]

2. Laboratory Reports

In *State v. Henderson*[246] the Tennessee Supreme Court addressed the question whether a toxicology laboratory report could be admitted in evidence through a witness other than the one who performed the test. Defendant had been charged with the possession and sale of LSD. At the time of the trial the laboratory assistants who conducted the identification tests were on vacation and unavailable to testify, and the court permitted the evidence to be admitted as an exhibit to the testimony of the director of the laboratory. The supreme court held that in the face of an objection "the State can not prove an essential element of a criminal offense by test results introduced through a witness other than the one who conducted the tests"[247] and quoted the opinion of the court of criminal appeals at length. That court had concluded that defendant had been denied the sixth amendment right of confrontation.

D. Right to Counsel

While the representation of two or more codefendants by a single attorney is not impermissible per se,[248] it may constitute a denial of the sixth amendment right to counsel when the interests of the clients are in conflict.[249] In *Halloway v. Arkansas*[250] appointed counsel for three defendants charged with robbery and rape moved well in advance of the scheduled date for trial that separate counsel be appointed for each defendant because of the possibility of a conflict of interest, and the motion was denied. On the day of the trial the motion was renewed, counsel calling par-

245. *Id.* at 254.

246. 554 S.W.2d 117 (Tenn. 1977).

247. *Id.* at 122.

248. *See, e.g.*, Moran v. State, 457 S.W.2d 886 (Tenn. Crim. App.), *cert. denied, id.* (Tenn. 1970).

249. Glasser v. United States, 315 U.S. 60 (1942). *Cf.* Mattress v. State, 564 S.W.2d 678 (Tenn. Crim. App. 1977) (assistant district attorney general had previously been assigned, as staff attorney for legal clinic, to defend defendants on different charges. Conflict of interests was sufficiently cured by barring the assistant attorney general from prosecution of the instant case).

250. 435 U.S. 475 (1978).

ticular attention to the possibility that one or two of the defendants might testify and that this would place upon counsel the impossible burden of eliciting favorable testimony from the witness while also cross-examining him in the interest of the codefendants. Although the conflict of interest became increasingly obvious and counsel called the matter to the attention of the court repeatedly, the trial judge adamantly refused to appoint additional counsel. Defendants were convicted on all counts, and the state supreme court affirmed.

In reversing the conviction, the United States Supreme Court held that defendants had been denied the effective assistance of counsel when, notwithstanding the repeated requests of counsel, the trial judge "failed either to appoint separate counsel or to take adequate steps to ascertain whether the risk was too remote to warrant separate counsel."[251] Furthermore, the Court held, once such a potential conflict is established, the defendant is not required to prove actual prejudice. The Court found the application of the harmless error rule in this context unmanageable,[252] and therefore reversal was mandatory.

E. Identification

1. Witnesses

The Supreme Court in *Manson v. Brathwaite*[253] clarified the due process requirement for precritical-stage identifications. When the identification of a suspect, either corporeal or photographic, occurs prior to a critical stage in the criminal proceedings, the right to presence of counsel does not apply,[254] but this identification and any subsequent courtroom identification must satisfy due process standards.[255]

In *Simmons v. United States*[256] the Court had held that an

251. *Id.* at 484. *Cf.* United States v. Steele, 576 F.2d 111 (6th Cir. 1978) (rejecting per se rule requiring a conflict of interest hearing in all cases of dual representation).

252. 435 U.S. at 490-91.

253. 432 U.S. 98 (1977).

254. The right to counsel attaches only to corporeal identifications conducted "at or after the initiation of adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment." Kirby v. Illinois, 406 U.S. 682, 689 (1972).

255. *Id.* at 690-91.

256. 390 U.S. 377 (1968).

in-court identification did not violate due process unless a prior out-of-court idenfication was "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification."[257] The focus was on the reliability of the courtroom identification in light of the "totality of circumstances" surrounding the witness's observations during the commission of the crime.[258]

If the prosecution seeks to introduce evidence of the pretrial identification, however, the issue is whether the confrontation was "unnecessarily suggestive and conducive to irreparable mistaken identification."[259] In *Stovall v. Denno*[260] the Court had found no due process violation in an admittedly suggestive confrontation, ostensibly because the suggestiveness was not only necessary but "imperative."[261] *Stovall*, thus, implied a prophylactic rule requiring exclusion of evidence of identifications made during an unnecessarily suggestive confrontation.[262]

In *Manson* the Court rejected the apparent implication of *Stovall*. *Manson* involved the admissibility of a precritical-stage photographic identification that was concededly both suggestive and unnecessary.[263] The Court acknowledged that some circuit courts had determined such evidence to be inadmissible per se[264] whereas others looked instead to the reliability of identifications despite unnecessarily suggestive confrontation procedures.[265] The per se approach, however, was dismissed by the Court as unnecessary for deterring police misconduct and inconsistent with ensuring jury access to reliable evidence.[266] Instead, the Court concluded that "reliability is the linchpin in determining the admis-

257. *Id.* at 384.

258. *Id.* at 383.

259. Stovall v. Denno, 388 U.S. 293, 301-02 (1967).

260. *Id.*

261. *Id.* at 302. In *Stovall* the accused, a black, was brought handcuffed by five white police officers and two white members of the prosecutor's staff to the hospital room of the only witness to a murder. *Id.* at 295. The police reasonably feared that the witness might die before any less suggestive confrontation could be arranged. *Id.* at 302 (citing Stovall v. Denno, 355 F.2d 731, 735 (2d Cir. 1966)).

262. *See* 432 U.S. at 120 (Marshall, J., dissenting).

263. *Id.* at 99.

264. *Id.* at 110.

265. *Id.*

266. *Id.* at 112-13.

sibility of identification testimony."[267]

The *Manson* Court listed five factors to be considered in assessing the reliability of the pretrial identification:[268] (1) the opportunity of the witness to view the criminal at the time of the crime; (2) the witness's degree of attention; (3) the coincidence of the description of the culprit given by the witness prior to the identification and the actual appearance of the party identified; (4) the level of certainty of the witness at the time of the identification; and (5) the amount of time between the crime and the identification.[269] In *Manson* the identification fared well under each factor: (1) the witness observed the offender for two to three minutes, at a distance of two feet, with adequate lighting; (2) the witness was a trained police officer; (3) the witness's detailed description matched that of defendant; (4) the photographic identification was unequivocal; and (5) the verbal description was given within minutes of the crime, and the photographic identification occurred two days later.[270] Given these factors, the Court saw no reason to exclude evidence of the pretrial identification, notwithstanding its suggestiveness. While presenting the witness with an array of photographs including a number of individuals of similar appearance to the one selected would have been preferable, "[t]he defect, if there be one, goes to weight and not to substance."[271]

Taken together, the holdings in *Stovall* and *Manson* apparently give prosecutors the best of both worlds. Under *Stovall* even an unreliable identification from a suggestive confrontation is admissible if the suggestiveness was necessary in view of the totality of the circumstances.[272] According to *Manson* an identification from an unnecessarily suggestive procedure is admissible if the identification is deemed reliable under the totality of the

267. *Id.* at 114.

268. These factors were first articulated in Neil v. Biggers, 409 U.S. 188, 199-200 (1972).

269. 432 U.S. at 114.

270. *Id.* at 114-16.

271. *Id.* at 117. "We are content to rely upon the good sense and judgment of American juries, for evidence with some element of untrustworthiness is customary grist for the jury mill. Juries are not so susceptible that they cannot measure intelligently the weight of identification testimony that has some questionable feature." *Id.* at 116.

272. 388 U.S. at 302.

circumstances.[273]

At first blush *Manson* appeared not only to dilute due process protections but also to withdraw the sixth amendment protections extended in *Gilbert v. California.*[274] *Gilbert* and the companion case of *United States v. Wade*[275] established that a postindictment lineup identification without the protection of the right to presence of counsel was inadmissible per se. Although *Manson* was a precritical-stage case, at no point did the Court limit its holding to precritical-stage identifications. Rather, the Court concluded broadly that the criteria set forth "are to be applied in determining the admissibility of evidence offered by the prosecution concerning a post-*Stovall* identification."[276] The more recent decision in *Moore v. Illinois,*[277] however, demonstrates that the *Wade-Gilbert* standard has not been abandoned.

In *Moore* the victim of rape had selected the picture of the accused, along with one or two additional ones, from an array of about ten photographs. A notebook found at the scene contained a letter written by a woman with whom the accused was staying. On the basis of this information, the accused was arrested and the following morning taken for a preliminary hearing. The victim was also taken to the hearing and told that she was going to view a suspect whom she should identify if she could. She also signed a complaint that named the accused as her assailant. At the hearing the accused, unrepresented by counsel, was called to the bench by name and charged with rape and deviant sexual behavior. The victim was then called to the bench and informed that the police had evidence linking the accused to the crime. She confirmed the identification. Evidence of this identification was admitted at the trial of the accused, and he was convicted on all counts.

The Supreme Court held first that the *Wade-Gilbert* standard was applicable to the identification even though the accused had not been indicted at the time of the confrontation.[278] *Wade*

273. 432 U.S. at 114.

274. 388 U.S. 263 (1967).

275. 388 U.S. 218 (1967).

276. 432 U.S. at 117.

277. 434 U.S. 220 (1977).

278. "It is plain that '[t]he government ha[d] committed itself to prosecute,' and that petitioner found 'himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural

and *Gilbert* were no less applicable because the identification was a one-on-one confrontation rather than a lineup.[279] Had the accused been represented by counsel, the Court noted, much of the suggestiveness of the confrontation could have been avoided by, for example, (1) postponing the hearing until a lineup could be arranged, (2) or excluding the victim from the courtroom during the reading of the charges and seating the accused among the spectators for the identification, and (3) permitting cross-examination of the victim to test the identification.[280] In light of the prohibition in *Gilbert* of the use of proof of an identification at which the right to counsel had been improperly denied, the conviction was reversed and the case remanded for a determination whether the admission of the evidence was harmless error.[281] On the other hand, on remand the accused would have the opportunity to show that the in-court identification was itself the product of the improper identification at the preliminary hearing and therefore should also have been excluded.[282] Very likely, the question of harmless error will turn on the success or failure of the defense in urging the latter point.

2. Handwriting

Even when obtained involuntarily, samples of handwriting may be secured for purposes of identification without violating the fourth amendment protection against unreasonable seizures of the fifth amendment privilege against self-incrimination.[283] This principle was subjected to a unique challenge in *United States v. Waller*[284] in which the accused had refused to provide the police with a sample of his handwriting for comparison with the handwriting on several checks that allegedly had been fraudulently signed. At trial, the prosecution offered in evidence a fingerprint card bearing the signature of the accused, at which point the accused left the courtroom, ostensibly to go to the rest-

criminal law.'" *Id.* at 228 (quoting from Kirby v. Illinois, 406 U.S. 682, 689 (1972)).

279. *Id.* at 229. "Indeed, a one-on-one confrontation generally is thought to present greater risks of mistaken identification than a lineup." *Id.*

280. *Id.* at 230 n.5.

281. *See* Chapman v. California, 386 U.S. 18 (1967).

282. 434 U.S. at 332 n.7.

283. *See* TRIAL RIGHTS, *supra* note 1, § 56.

284. 581 F.2d 585 (6th Cir. 1978).

room, but never returned. The trial nevertheless continued, during the course of which the prosecutor observed that the accused had left on the table a yellow pad on which he had been taking notes. The trial judge ordered the seizure of the pad, and subsequently an expert positively identified the handwriting as that present on the checks. The accused was convicted in absentia[285] of eight counts of mail fraud and was apprehended a year later. The accused contended, first, that the notes were a privileged communication in which he had a legitimate expectation of privacy. The United States Court of Appeals for the Sixth Circuit found neither aspect of this argument compelling, observing that the notes were not confidential communications between attorney and client, and that the action of the accused in leaving the note pad prominently displayed in the courtroom was inconsistent with a claim of privacy.[286] Second, the accused argued that the trial court had abandoned its role as an impartial judge in ordering the seizure. Here the appellate court responded that at the time the seizure was ordered, the trial judge had no way of knowing whether the handwriting sample would exonerate the accused or establish his guilt.[287] The seizure had not occurred in the presence of the jury, and apparently the court was doing no more than attempting to determine the facts.

F. Self-Incrimination

A fundamental right secured by the privilege against self-incrimination of the fifth amendment is the right of a defendant in a criminal case not to take the stand. The failure of the defendant to testify is not to be considered evidence of guilt, and any suggestion by the prosecutor or the trial judge to this effect is itself a violation of the privilege.[288] If the defendant requests an instruction on the nature of the privilege, such an instruction should be given.[289] The more difficult question, whether the trial

285. Where an accused voluntarily absents himself from his trial, the proceedings may continue, and the sixth amendment right of confrontation has not been violated. *See* Taylor v. United States, 414 U.S. 17 (1973).

286. From a fourth amendment perspective, the evidence had clearly been abandoned, and therefore the court order might even be superfluous. *See* PRETRIAL RIGHTS, *supra* note 1, § 48.

287. 581 F.2d at 587.

288. *See* Griffin v. California, 380 U.S. 609 (1965). "It cuts down on the privilege by making its assertion costly." *Id.* at 614.

289. *See* TRIAL RIGHTS, *supra* note 1, § 64 at 255 n.98.

court may instruct the jury on the nature of the privilege over the objection of the defendant,[290] was considered by the Supreme Court in *Lakeside v. Oregon.*[291] Defendant contended that the privilege against self-incrimination was violated when the "trial judge [drew] the jury's attention in any way to a defendant's failure to testify unless the defendant acquiesce[d]."[292] The Court disagreed, finding "strange indeed" the suggestion that the privilege could be violated by an instruction "that the jury must draw *no* adverse inferences of any kind from the defendant's exercise of his privilege not to testify."[293]

G. *Confessions*

1. Custodial Interrogation

The parameters of "custody" for *Miranda* purposes arose in *United States v. Lewis.*[294] Defendant mail carrier was the second endorsee on a state welfare check that was made payable to a person who lived on the route defendant served. The payee had reported the nonreceipt of the check, and suspicion quickly focused upon defendant. He was requested to report to the Postal Inspector's Office and did so voluntarily. Although defendant was given *Miranda* warnings, the court assumed an ineffective waiver of those rights for purposes of addressing the issue raised.[295] Nevertheless, on the authority of *Oregon v. Mathiason*[296] and *Beckwith v. United States,*[297] the Sixth Circuit Court of Appeals in *Lewis* concluded that defendant was not in custody since the meeting was mutually arranged and defendant appeared voluntarily. The fact that the officials had taken the precaution of

290. For earlier decisions, see *id.* at 255 nn.99 & 1.

291. 435 U.S. 333 (1978).

292. *Id.* at 338.

293. *Id.* at 339 (emphasis in original). A second argument, that giving the instruction over objection violated the sixth amendment right to counsel, was found to fall of its own weight once it was determined that the instruction itself was constitutionally permissible. "To hold otherwise would mean that the constitutional right to counsel would be implicated in almost every wholly permissible ruling of a trial judge, if it is made over the objection of the defendant's lawyer." *Id.* at 341.

294. 556 F.2d 446 (6th Cir. 1977).

295. *Id.* at 449. Later in the opinion, the court found full compliance with *Miranda.*

296. 429 U.S. 492 (1977).

297. 425 U.S. 341 (1976).

giving *Miranda* warnings did not convert a noncustodial situation into a custodial one.

In *Trail v. State*[298] the Tennessee Court of Criminal Appeals held that "an officer may, in the course of an investigation of an automobile accident, make inquiry of a person to determine if he had been operating a vehicle involved in a collision without giving the *Miranda* advice,"[299] and the response elicited will be admissible. Even though the officer had followed the accused to a hospital where the accused had received treatment and was asked by the officer if he had been driving the car, the inquiry was still the equivalent of an on-the-scene investigation[300] and not a custodial interrogation.

While this reasoning would have been sufficient to answer defendant's argument, the court chose to respond to a theory not advanced by defendant—that the requirement that a motorist involved in an accident identify himself violates the privilege against self-incrimination. The *Trail* court repudiated this theory with *California v. Byers*,[301] in which a similar California statute had been sustained. Defendant in *Trail*, however, had not questioned the validity of the statute. Moreover, even though information may be required by the state without warnings, the conclusion does not follow that the same information can be demanded during custodial interrogation without warnings. By comparison, the Supreme Court has held that warnings are not constitutionally required prior to obtaining a consent to search,[302] but at the same time the Court noted that a different result might be reached if the accused were in custody at the time the consent was sought.[303] By correctly finding that defendant in *Trail* was not in custody at the time of the inquiry, the court adequately disposed of the case; the comparison with *Byers* is both misleading and unnecessary.

298. 552 S.W.2d 757 (Tenn. Crim. App. 1976), *cert. denied, id.* (Tenn. 1977).

299. *Id.* at 758.

300. *See* State v. Morris, 224 Tenn. 437, 456 S.W.2d 840 (1970); Braziel v. State, 529 S.W.2d 501 (Tenn. Crim. App.), *cert. denied, id.* (Tenn. 1977).

301. 402 U.S. 424 (1971).

302. Schneckloth v. Bustamonte, 412 U.S. 218 (1973).

303. *Id.* at 240 n.29.

2. Waiver of Rights

Courts should be reluctant to find a waiver of the rights secured by *Miranda* if the circumstances accompanying the giving of the rights manifest a design to discourage the assertion of the rights.[304] In *Maglio v. Jago*[305] the accused was a sixteen-year-old runaway arrested on suspicion of murder. Upon receiving *Miranda* warnings and being asked if he wished to waive them, he responded, "Maybe I should have an attorney."[306] The officer replied that the accused could not have an attorney at that time, but would have to wait until the following day when one would be appointed by the court. Although the accused was again informed that he did not have to talk without a lawyer, questioning continued, and ultimately an oral confession was obtained. Forty-five minutes later, the prosecutor arrived to tape record a confession. The transcript of this exchange left little doubt that the accused did not fully appreciate his right to the assistance of appointed counsel prior to interrogation.[307] Moreover, the transcript indicated that the accused saw no reason not to give the second confession in light of the previous unrecorded one.[308]

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304. *See* TRIAL RIGHTS, *supra* note 1, § 87 at 339 n.43.

305. 580 F.2d 202 (6th Cir. 1978).

306. *Id.* at 203.

307. "Q. Okay, the next question is this. Do you understand further that if you want a lawyer but didn't feel that you could afford one, that we would have to appoint one for you before you talked to us. Do you understand that?"

"A. Before I did talk to you?"

"Q. Yea, do you understand that—duly appointed for you?"

"A. I understand it now. It's not the way it seemed before, but it doesn't matter."

Id. at 203 (quoting trial court record).

308. "Q. Okay, I have just explained what your rights are, and Dan I am going to ask you this, Dan at this time. Do you wish to go ahead and tell us what you know about this death of Walter Lee Weyrick and talk to us now without a lawyer present?"

"A. Am I just supposed to start talking or?"

"Q. No, do you want to talk to us without a lawyer being present?"

"A. Yes. You two are lawyers anyway."

"Q. Yes, but I'm, do you want a lawyer yourself before you talk to us? You have to say no, you can't just shake your head."

"A. Yea, I know, I forgot. It doesn't matter now."

"Q. In other words, you are willing at this point to go ahead and tell Mr. Rodgers and myself about what happened out there without

The United States Court of Appeals for the Sixth Circuit held that the confession was improperly admitted into evidence. The accused had initially expressed a desire to consult with an attorney, and *Miranda* indicated that the interrogation should cease at that point.[309] Instead, the officer responded in a fashion that would appear designed to discourage the use of the right. Moreover, after indicating that counsel could not be obtained until the following day, the officer resumed interrogation without permitting the accused even to consider the options available to him. The court concluded: "[A] suspect must not be forced to constantly and vigorously assert his or her right to counsel in order to counter a finding of waiver especially when the suspect is only sixteen years old."[310] Even if the rights of the accused were scrupulously honored in the second recorded statement, this confession was inadmissible as the fruit of the prior confession, and the statements of the accused provided a classic instance for application of the "cat out of the bag" theory.[311]

A similar question was raised in *Lee v. State*,[312] in which the accused was advised of his rights, waived them, and then asked to call his attorney who was out of his office at that time. The prosecution contended that the request to consult counsel was made after the confession was given, but the appellate court found no evidence in the record as to when the statements were made. Under an interpretation most favorable to the prosecution, the request to consult with counsel after the confession cast an aura of suspicion on the purported prior waiver and placed a heavy burden upon the prosecution to show that the waiver was voluntarily and knowingly given. In the absence of a clear showing of waiver, the Tennessee Court of Criminal Appeals concluded that the evidence was improperly admitted.

H. Preliminary Hearing

The statutory right to a preliminary hearing[313] has been the

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having your own lawyer here with you, is that correct?"

"A. Yea, it's the same story, it doesn't much matter."

Id. at 207 (quoting trial court record).

309. *Id.* at 205.

310. *Id.* at 206-07.

311. *See* United States v. Bayer, 331 U.S. 532, 540-41 (1947).

312. 560 S.W.2d 82 (Tenn. Crim. App. 1977), *cert. denied, id.* (Tenn. 1978).

313. TENN. CODE ANN. § 40-1131 (Cum. Supp. 1978).

subject of constant legislative revision[314] and judicial scrutiny and was recently examined by the court of criminal appeals in *Nolan v. State*.[315] Under the 1971 version of the statute,[316] the right to a preliminary hearing ceased once an indictment had been returned, and in any event the hearing was conditioned upon the request of the accused.[317] The 1974 amendment[318] to the statute extended the right to a preliminary hearing to those arrested without a warrant who were already entitled to a hearing under a separate statute[319] and to those arrested with a warrant who had requested a preliminary hearing. In either event the indictment could be abated if no hearing was held, provided the motion for abatement was made within thirty days of the arrest.[320] The requirement that the accused request a preliminary hearing was eliminated by the 1976 amendment[321] to the statute. A party indicted without being arrested prior thereto, however, is not entitled to a preliminary hearing under the statute.[322]

In *Nolan* the accused was arrested with a warrant, was not granted a preliminary hearing prior to indictment, and was denied a motion to abate the indictment. The appellate court indicated that the statutory right to a preliminary hearing obviously had been denied,[323] but the question remained whether the denial could be dismissed as harmless error.[324] If the only legitimate purposes served by a preliminary hearing were to determine probable cause and to fix bail, then apparently the error always would be harmless once an indictment has been returned. Since, at least in theory, the indictment requires more rigorous proof of probability of guilt than that required to establish probable cause at a preliminary hearing, the failure to satisfy formally the lesser stan-

314. For a thorough analysis, see Comment, 43 TENN. L. REV. 635 (1976).

315. 568 S.W.2d 837 (Tenn. Crim. App.), *cert denied, id.* (Tenn. 1978).

316. 1971 Tenn. Pub. Acts ch. 245, § 2.

317. This aspect of the statute was criticized in *1971 Survey*, *supra* note 1, at 268.

318. 1974 Tenn. Pub. Acts ch. 701, § 1.

319. TENN. CODE ANN. § 40-604 (1975).

320. For criticism of the thirty-day limitation, see 43 TENN. L. REV. at 644-45.

321. 1976 Tenn. Pub. Acts ch. 760, § 1.

322. Waugh v. State, 564 S.W.2d 654 (Tenn. 1978); Vaughn v. State, 557 S.W.2d 64 (Tenn. 1977).

323. 568 S.W.2d at 839.

324. *Id.*

dard is analytically insignificant. As to the fixing of bail, the denial of bail (if such was the case) may or may not be harmful error, but if it is, the error is in the denial of bail, not in the denial of a preliminary hearing. The denial of pretrial release is a question of constitutional dimension[325] irrespective of whether there has been a preliminary hearing or indictment. If the question arises following conviction on appeal, the accused must show that the denial of pretrial release adversely affected the fairness and possibly the outcome of the trial.[326]

The legislature, however, intended more when it amended the statute to permit abatement of the indictment: "[T]he Legislature was aware that preliminary hearings were sometimes useful to a defendant for discovering of the State's case, including material for possible impeachment of witnesses at trial."[327] The appellate court saw its responsibility to review the trial record to determine whether "the denial of discovery of at least the prima facie portion of the State's case necessary to establish probable cause upon a preliminary hearing amounted to reversible error."[328] To this end, the court focused upon the cross-examination of prosecution witnesses and concluded, in effect, that defense counsel did a good job. "It does not affirmatively appear that the error affected the result upon the trial."[329]

In a vigorous dissent, Judge Daughtrey contended that the denial of a preliminary hearing violated due process[330] and was prejudicial per se, but even if this were not true, the case must nevertheless be remanded for a determination whether the error was harmless. While the reasoning of the majority on this issue is vulnerable to criticism, Judge Daughtrey's first argument appears to say too much and her second argument says too little.

The due process argument is as follows: While the right to a preliminary hearing is only a statutory right, the United States

325. U.S. CONST. amend. VIII; TENN. CONST. art. 1, §§ 15 & 16.

326. *Cf.* Justice Douglas, as Circuit Justice, in Bandy v. United States, 81 S. Ct. 197, 198, *vacated and remanded*, 364 U.S. 477 (1960) (denial of release on personal recognizance pending appeal from conviction could interfere with effective appeal by preventing defendant's investigation of case and consultation with counsel).

327. 568 S.W.2d at 839.

328. *Id.*

329. *Id.*

330. Apparently under the fourteenth amendment of the United States Constitution, although the basis of the due process right is never made explicit.

Supreme Court held in *Coleman v. Alabama*[331] that a statutorily created preliminary hearing is a "critical stage" for purposes of the right to counsel. From this, the conclusion is drawn,

> If we acknowledge the preliminary hearing to be a "critical stage" of the proceedings, I do not understand how the deprivation of one's right to a preliminary hearing can ever be viewed as "harmless error." Indeed, it seems clear to me that failure to provide the defendant with a hearing at a critical stage of the proceedings is a violation of due process so serious as to constitute prejudice per se.[332]

The conclusion, however, does not follow from the premise. First, the argument is circular because it concludes that an accused is entitled to a hearing at a "critical stage," when the hearing itself is the critical stage. Second, and more fundamentally, the labeling of an event as a "critical stage" in the criminal proceedings does not mean that the accused is therefore entitled to this "stage" as a matter of constitutional right. The Supreme Court has held, for example, that a postindictment lineup is a "critical stage" in the proceedings[333] but has never held that an accused therefore has a right to participate in a lineup to test the identification capability of witnesses. Many lower courts have held that no such right exists.[334]

The dissent cited seven decisions from other jurisdictions in support of the conclusion reached. In cases from California[335] and South Carolina[336] the courts treated the failure to hold a preliminary hearing as fatal to the jurisdiction of the trial court.[337] The California court cited no authority, statutory or otherwise, for its conclusion. The South Carolina court applied a statute[338] that was only applicable when a magistrate issued an arrest warrant

331. 399 U.S. 1 (1970).

332. 568 S.W.2d at 841 (Daughtrey, J., dissenting).

333. United States v. Wade, 388 U.S. 218 (1967).

334. *See* TRIAL RIGHTS, *supra* note 1, § 52 at 195 n.48. The only case to the contrary appears to be Evans v. Superior Ct., 11 Cal. 3d 617, 522 P.2d 681, 114 Cal. Rptr. 121 (1974).

335. People v. Bomar, 73 Cal. App. 372, 238 P. 758 (1925).

336. State v. Wheeler, 259 S.C. 571, 193 S.E.2d 515 (1972).

337. In the dissenting opinion two other decisions to the opposite effect are noted. Cline v. Smith, 229 Ga. 190, 190 S.E.2d 51 (1972); Douglas v. Maxwell, 175 Ohio St. 317, 194 N.E.2d 576 (1963). *See* 568 S.W.2d at 841 n.3 (Daughtrey, J., dissenting).

338. S.C. CODE § 22-5-30 (1976).

for a crime committed outside the jurisdiction of the magistrate. The South Carolina court concluded that, "the court of general sessions [is] not to acquire jurisdiction until after such preliminary hearing."[339] The Tennessee statute contains no such language, and the prior interpretations of the statute in its varied forms indicate that the statute is not jurisdictional in nature. The dissent in *Nolan* suggests nothing to the contrary.

A second group of four cases cited by the dissent described the statutory right to a preliminary hearing as "fundamental,"[340] "substantial,"[341] or "valuable."[342] In at least three of the four cases, the judicial attitude may be attributed to the mandatory language employed in the statute.[343] Primary reliance is placed on *Manor v. State*,[344] in which the indictment and conviction of the accused were set aside by the Georgia Supreme Court for want of a preliminary hearing. The sweeping implication of *Manor* was substantially deflated in *Cannon v. Grimes*,[345] however, which emphasized the fact that *Manor* involved "a coerced waiver of a commitment hearing prior to indictment."[346] In *Cannon*, the Georgia Supreme Court held that no preliminary hearing is re-

339. *Id.*

340. State v. Howland, 153 Kan. 352, 363, 110 P.2d 801, 808 (1941); Davis v. State, 121 Neb. 399, 402, 237 N.W. 297, 298 (1931).

341. State v. Howland, 153 Kan. at 363, 110 P.2d at 808; State v. Trow, 49 S.D. 485, 487, 207 N.W. 466, 466 (1926).

342. Manor v. State, 221 Ga. 866, 868, 148 S.E.2d 305, 307 (1966).

343. GA. CODE ANN. § 27-210 (1978): "Every officer arresting under a warrant shall exercise reasonable diligence in bringing the person arrested before the person authorized to examine, commit or receive bail and in any event to present the person arrested before a committing officer within 72 hours after arrest . . . . " KAN. STAT. ANN. § 62-610 (1964) (current version at KAN. STAT. ANN. § 22-2901 (1974)): "Every person arrested by warrant for any offense . . . shall be brought before some magistrate for the same county . . . ;" S.D. COMPILED LAWS ANN. § 23-20-2 (1967) (repealed by 1978 S.D. Sess. Laws ch. 178, § 577 effective July 1, 1979): "No information shall be filed against any person for any offense until such person shall have had a preliminary examination . . . ." No statute is cited in the Nebraska case. The pertinent provisions would appear to be NEB. REV. STAT. § 29-412 (1975): "It shall be the duty of the officer making the arrest to take the person so arrested before the proper magistrate . . . ," and *id.* § 29-504: "When the complaint is for a felony, upon the accused being brought before the magistrate, he shall proceed as soon as may be, in the presence of the accused, to inquire into the complaint."

344. 221 Ga. 866, 148 S.E.2d 305 (1966).

345. 223 Ga. 35, 153 S.E.2d 445 (1967).

346. *Id.* at 35-36, 153 S.E.2d at 446.

quired when the accused is indicted before incarceration "or after arrest but while, in the present case, he is undergoing medical treatment in a hospital until after indictment."[347] Moreover, as the dissent acknowledges, in none of the four cases do the courts resort to constitutional invocations in reaching their decisions.

Finally, a case is cited[348] in which the Arizona Supreme Court concluded that "[d]ue process of law requires that an accused must be given a full hearing meeting the requirements of due process."[349] The court was applying a state constitutional provision, however, which stated unequivocally that "no person shall be prosecuted for felony by information without having had a preliminary examination before a magistrate or having waived such preliminary examination."[350]

If the *Nolan* dissent is correct "that the denial of a preliminary hearing violates due process and is prejudicial per se,"[351] then the Tennessee statute is unconstitutional in not guaranteeing a right to a preliminary hearing in *all* cases, including those in which indictment is obtained prior to arrest. None of the cases cited will support such a conclusion. The dissent, however, is not unwarranted in its dissatisfaction with the majority's conclusion that the error was harmless. As Judge Daughtrey observes, "[w]hat we cannot tell from the trial transcript is how much better prepared the defense attorney might have been had he been given the benefit of learning 'the precise details of the prosecution's case' in advance of trial."[352] Moreover, a remand for a consideration of the possibilty of prejudice would not appear adequate. One of the principal reasons the Supreme Court in *Gideon v. Wainwright*[353] made the right to counsel mandatory in all felony cases was the judicial frustration resulting from attempts to second-guess how the presence of counsel might have changed the outcome in any case. Admittedly, the potential for prejudice in the present case is not so great as that entailed in the complete absence of counsel at trial, but when the statutory mandate is clear and calls for no sophisticated exercise of judgment by the

347. *Id.* at 36, 153 S.E.2d at 446.
348. State v. Essman, 98 Ariz. 228, 403 P.2d 540 (1965).
349. *Id.* at 232, 403 P.2d at 543.
350. ARIZ. CONST. art. 2, § 30.
351. 568 S.W.2d at 840-41 (Daughtrey, J., dissenting).
352. *Id.* at 843 (Daughtrey, J., dissenting).
353. 372 U.S. 335 (1963).

trial court, judicial economy would suggest automatic reversal when, as in the present case, an abatement of the indictment is sought prior to trial and is denied. Such a solution is not an attractive one in a case such as *Nolan*, which concerned a homicide conviction in which the appellate court failed to perceive any likelihood of prejudice. By addressing the issue of harmless error, however, the court discourages strict adherence to the statute by trial courts and assumes the burden of evaluating the record in each case. As the dissent in *Nolan* pointed out, the conclusion reached will frequently be highly speculative.

I. Indictment by Grand Jury

An indictment may be held constitutionally void if racial discrimination occurred in the selection of the grand jury.[354] The presence of some blacks on grand juries does not foreclose a finding of discrimination, nor does an absence of any blacks compel such a finding.[355] The critical question is whether invidious discrimination was present in the creation of the pool from which grand jurors were selected.[356] Nevertheless, a prima facie case of discrimination may be established through the use of statistical patterns.[357] The burden then shifts to the state to rebut this showing.[358] In *Mitchell v. Rose*[359] the United States Court of Appeals for the Sixth Circuit found the statistics regarding the participation of blacks on grand juries too fragmentary to prove or disprove

354. *See* Strauder v. West Virginia, 100 U.S. 303 (1879).

355. Mitchell v. Rose, 570 F.2d 129, 133 (6th Cir. 1978).

356. *See* Akins v. Texas, 325 U.S. 398 (1945).

357. *See* TRIAL RIGHTS, *supra* note 1, § 119.

358. Once the burden has shifted to the state, it may rebut the prima facie case in several ways. The state may impose any reasonable qualifications it wishes on its grand jurors; for instance, it may require that they be literate, that they not be convicted felons, or that they be registered voters. The neutral imposition of any of these requirements may *possibly* result in the exclusion of more members of one race than another . . . . The state must present some concrete evidence of the effect of its neutral requirements, not merely present to the court unfounded suppositions about the literacy, intelligence and good character of its black citizens. Finally, it should be noted that self-serving protestations from the officials involved that racial considerations played no part in the selection are not enough to rebut a prima facie case.

570 F.2d at 134 (footnote omitted) (emphasis in original).

359. 570 F.2d 129 (6th Cir. 1978).

discrimination but held that petitioner was entitled to relief upon the sufficiently clear showing of discrimination in the selection of grand jury foremen. Not only was there no evidence that a black had ever served as foreman, but a trial judge conceded that he "never really gave any thought to appointing a black foreman."[360] The court held that this was evidence analagous to the concession in *Norris v. Alabama*[361] that the jury commissioners had "never discussed" the inclusion of blacks in the venire, which led to a judicial finding of discrimination.[362] The court was unimpressed by the state's contention that petitioner was in any event unprejudiced because the foreman did not vote on the indictment. Just as no need existed to show prejudice when the grand jury was improperly selected,[363] the court saw no reason to reach a different result when the foreman was improperly selected. The court noted that by statute the foreman had "equal power and authority in all matters coming before the grand jury with the other members thereof,"[364] and that his or her duties included "assisting the district attorney in ferreting out crime,"[365] subpoenaing witnesses, administering oaths,[366] and endorsing indictments,[367] all of which afforded opportunities for the influence of prejudice.[368] Moreover, acknowledging that any foreman, however selected, could be motivated by prejudice, the court observed that the integrity of the judicial process is a separate interest served by the absence of discrimination.[369]

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360. *Id.* at 131.

361. 294 U.S. 587 (1935).

362. "Officials who select grand jurors have a duty to learn who is qualified to fill the position of grand juror, and to consider qualified individuals from all segments of society. Failure to perform that duty, resulting in the exclusion of a qualified segment of society, is unconstitutional discrimination." 570 F.2d 135.

363. Hill v. Texas, 316 U.S. 400 (1942).

364. TENN. CODE ANN. § 40-1506 (1975).

365. *Id.* § 40-1510.

366. *Id.* §§ 40-1510, -1622.

367. *Id.* § 40-1706.

368. It seems clear that the potential for prejudice, given the position of authority and influence the foreman or forewoman holds, is considerable, and in such cases where the fact of prejudice may be impossible to prove, yet its effect could be so insidious and far-reaching, the courts have refused to require proof of prejudice before granting relief.

570 F.2d at 136.

369. *See* Peters v. Kiff, 407 U.S. 493, 498 (1972); Ballard v. United States,

J. Trial by Jury

1. Applicabilty of Right

The circumstances under which the right to trial by jury applies were addressed in *United States v. Stewart*.[370] Defendants had been convicted of what the court characterized as simple battery,[371] an offense carrying a maximum punishment of a $500 fine and six months imprisonment. The Supreme Court had held in *Baldwin v. New York*[372] that an offense calling for punishment in excess of six months was serious, and therefore the right to trial by jury was applicable. In *Stewart* the United States Court of Appeals for the Sixth Circuit held that *Baldwin* did not require a finding that an offense carrying a maximum penalty of six months was serious. Indeed, Congress had classified such offenses as petty.[373] While the court viewed the potential penalty as the "most relevant" consideration, it was not the exclusive one. The court noted that the simple battery was characterized by Blackstone as "the first and lowest stage" of violence[374] and concluded that "the offense is not in common understanding a serious one"[375] that mandated trial by jury.

2. Number of Jurors

In 1970, the Supreme Court held in *Williams v. Florida*[376] that the sixth amendment right to trial by jury could be satisfied with a jury composed of less than twelve members, in that instance six.[377] In *Ballew v. Georgia*[378] the Court held that the line

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329 U.S. 187, 195 (1946) ("The injury is not limited to the defendant—there is injury to the jury system, to the law as an institution, to the community at large, and to the democratic ideal reflected in the processes of our courts.").

370. 568 F.2d 501 (6th Cir. 1978).

371. 18 U.S.C. § 113(d) (1976).

372. 399 U.S. 66 (1970).

373. 18 U.S.C. § 1 (1976).

374. It encompasses the kind of conduct which is common enough in daily life, although universally disapproved. Society's knowledge of a person's conviction of simple assault and battery carries with it perhaps the inference that the defendant was quarrelsome or ill-tempered, but without more does not usually attribute to him any more serious or lasting opprobrium.

568 F.2d at 505.

375. *Id.*

376. 399 U.S. 78 (1970).

377. The Court took note that under the procedure challenged the require-

was drawn at six and that a conviction by a unanimous verdict of a five-member jury deprived the accused of the right to trial by jury. Taking advantage of the reservation in *Williams* that "the number should probably be large enough to promote group deliberation, free from outside attempts at intimidation, and to provide a fair possibility for obtaining a representative cross-section of the community,"[379] the principal opinion, signed by only two Justices,[380] relied upon "recent empirical data"[381] that raised "substantial doubt about the reliability and appropriate representation of panels smaller than six."[382]

3. Juror Bias

A potential juror may be disqualified to serve if his or her relationship to the prosecuting attorney would tend to bias the juror's viewpoint.[383] In *Clariday v. State*[384] defense counsel discovered, subsequent to conviction, that the jury foreman had been a part-time law student enrolled in a class taught by the district attorney general for the county in which the trial occurred. The Tennessee Court of Criminal Appeals found that the voir dire for defendant had been perfunctory, and that the particular juror was not shown to have answered any questions falsely or withheld any requested information. Nevertheless, defendant contended that the undisclosed teacher-student relationship was a per se disqualification under the authority of *Toombs v. State*,[385] in which the first cousin of the prosecuting witness' wife was found

ment of unanimous verdict had been retained. *Cf.* Apodaca v. Oregon, 406 U.S. 404 (1972); Johnson v. Louisiana, 406 U.S. 356 (1972) (both sustaining less than unanimous verdicts by twelve-member juries).

378. 435 U.S. 223 (1978).

379. 399 U.S. at 100.

380. Justice Blackmun was joined by Justice Stevens, 435 U.S. at 224. Justices Brennan, Stewart, and Marshall, however, concurred in the opinion but opposed the granting of a new trial, because they considered the obscenity statute under which the accused was tried unconstitutionally overbroad. *Id.* at 246.

381. *Id.* at 232.

382. *Id.* at 239. Chief Justice Burger and Justices White, Powell, and Rehnquist concurred in the judgment.

383. *See* TRIAL RIGHTS, *supra* note 1, § 116.

384. 552 S.W.2d 759 (Tenn. Crim. App. 1976), *cert. denied, id.* (Tenn. 1977).

385. 197 Tenn. 229, 270 S.W.2d 649 (1954).

under an obligation to divulge this fact when asked if he knew any reason why he could not give the parties a fair trial. There, however, the court had found a "very close kinship . . . together with the friendly relations and associations existing between the two families."[386] The *Clariday* court found the circumstances clearly distinguishable and declined to extend *Toombs* to these facts.[387]

4. Deliberations

In the course of deliberations on a second degree murder charge, the jury in *Leach v. State*[388] requested and received supplemental instructions regarding defendant's eligibility for a parole should they convict for a lesser included offense and impose a three year sentence. Thereafter, they returned a verdict of guilty of second degree murder with a sentence of from ten to twenty years in the penitentiary. Defendant contended that once the jury undertook consideration of the lesser included offense, it could not return to a deliberation on the greater offense without violating the right to protection against double jeopardy.

Avoiding what was undoubtedly a bogus double jeopardy claim,[389] the Tennessee Court of Criminal Appeals turned instead to *Farris v. State*,[390] which had held a statute[391] mandating instructions on parole eligibility unconstitutional.[392] Interpreting that decision as mandating reversal when "the charge on the parole statutes brought about the verdict,"[393] the court had no difficulty in surmising that such charge was a factor in the verdict in *Leach*.

Moreover, the challenged instruction was not included in the trial court's original instruction. While acknowledging that subsequent instructions are not improper, the court suggested that "the better practice [would be] to admonish the jury not to place

386. *Id.* at 233, 270 S.W.2d at 651.

387. *See also* Sears v. Lewis, 49 Tenn. App. 631, 357 S.W.2d 839 (1961), *cert. denied, id.* (Tenn. 1962).

388. 552 S.W.2d 407 (Tenn. Crim. App.), *cert. denied, id.* (Tenn. 1977).

389. The fact that jurors repeatedly consider different charges against an accused in whatever order they choose is obviously their prerogative. *Leach* differs only in that counsel had gotten a glimpse of what was going on in the jury room.

390. 535 S.W.2d 608 (Tenn. 1976).

391. TENN. CODE ANN. § 40-2707 (1975).

392. *See 1976-1977 Survey, supra* note 1, at 49-50.

393. 552 S.W.2d at 408.

undue emphasis on the supplemental instructions and to consider them in conjunction with the entire charge."[394] The failure to so admonish could be, and in this case was, reversible error.[395]

The *Farris* issue also influenced a reversal by the Tennessee Supreme Court in *Sampson v. State*[396] in which the length of the sentence was indirectly argued through the contention that if defendant were found not guilty by reason of insanity he would be "back on the streets."[397]

A novel issue relating to jury deliberations arose in *Rushing v. State*,[398] in which, after deliberations in the accused's rape trial had begun, the trial judge permitted the jurors to separate and return to their homes for the night. Although the parties had agreed at the commencement of the trial that the jury would be permitted to separate, the accused contended on appeal that the agreement was inapplicable once deliberations had begun. The controlling statute provided that upon agreement of the parties, the court "may permit jurors to separate at times when they are not duly engaged in the trial or deliberations of the case."[399] In an explanation worthy of Lewis Carroll, the court held that the jurors were not engaged in deliberations once the trial judge permitted them to separate, and deliberations only resumed when the jury reconvened.[400] Under this reading of the statute, circumstances are difficult to imagine in which the trial judge would have committed error in permitting the jurors to go home if the parties have given their prior consent. The procedure could only be attacked if any of the jurors, having been so released, contin-

394. *Id.* at 409.

395. The court's conclusion was buttressed by a post-trial interview with one of the jurors.

396. 553 S.W.2d 345 (Tenn. 1977).

397. *Id.* at 350. Since the instruction on insanity was found improper for independent reasons, *see* text accompanying notes 128-29 *supra*, the *Farris* aspect may be of little significance.

398. 565 S.W.2d 893 (Tenn. Crim. App. 1977), *cert. denied, id.* (Tenn. 1978).

399. TENN. CODE ANN. § 40-2528 (1975) (current version in Cum. Supp. 1978).

400. When the trial judge adjourns court and allows the jury to separate, deliberation within the meaning of T.C.A. § 40-2528 ceases, and does not resume until the jurors are reassembled in the proper setting and context of the trial process. We, therefore, hold that the jury was not allowed to separate while deliberating . . . .

565 S.W.2d at 895-96.

ued their deliberations outside the institutional setting. In *Rushing* the trial judge had determined the following morning that none of the jurors had been approached by anyone. The court of criminal appeals held that at a minimum the accused would have to show some prejudice. Evidence indicated that some of the jurors had conversed as they left the courtroom, but the appellate court was satisfied with the absence of any evidence that the case had been discussed.[401]

As a corollary of the principal contention, the accused argued that by permitting the jurors to go home the court had deprived him of the prospect of having a hung jury. The defense suggested that "noises from the jury room" indicated that the jurors were unable to agree, and that ultimate agreement was only possible because of the interruption and the extended rest period.[402] Without dismissing the argument as unmeritorious in theory, the appellate court found the prospect of a hung jury unsupported by the record since the jury foreman had requested that they be allowed to resume their deliberations on the following day.[403]

K. Fair Trial

1. Presumption of Innocence

In *Taylor v. Kentucky*[404] the accused was tried for robbery, and the trial court, while instructing the jury on the prosecution's burden of proving guilt beyond a reasonable doubt, refused instructions requested by defendant on the presumption of innocence and the indictment's lack of evidentiary value. The Supreme Court noted that while "the presumption of innocence and the prosecution's burden of proof are logically similar, the ordinary citizen may well draw significant additional guidance from an instruction on the presumption of innocence."[405] While conceding that an instruction including the phrase "presumption of innocence" was not mandated by the due process clause of the

401. A claim that one juror had spoken to the prosecutor was not supported by the record. *Id.* at 896.

402. *Id. Cf.* Hembree v. State, 546 S.W.2d 235 (Tenn. Crim. App. 1976) (a reversal was obtained, probably because of jury fatigue) (discussed in *1976-1977 Survey*, *supra* note 1, at 44).

403. 565 S.W.2d at 896.

404. 436 U.S. 478 (1978).

405. *Id.* at 484.

fourteenth amendment, it was "one means of protecting the accused's constitutional right to be judged solely on the basis of proof adduced at trial."[406] The Court noted that the relatively curt instructions placed little emphasis on the requirement of proof beyond a reasonable doubt and did not address the duty to consider only evidence presented in the course of the trial. The significance of these omissions was compounded by the prosecutor's arguments to the jury, which suggested guilt by association and alluded to the arrest and indictment of defendant as evidence of his guilt. Without extending its holding beyond the facts of the case, the Court concluded that the failure to give the requested instruction on the presumption of innocence denied defendant a fair trial as guaranteed by the due process clause.[407]

2. Discovery

While a request to order the prosecutrix in a sexual assault case to undergo a psychiatric examination may not receive judicial sympathy,[408] different questions were raised in *State v. Brown*,[409] in which the accused sought discovery of the medical records of the prosecutrix while she was a patient in a state mental hospital. The prosecution contended that the communications between psychiatrist and patient were privileged by statute,[410] and none of the exceptions to the privilege were applicable in this case. The court noted, however, that such communications were not privileged when sought in a criminal case in which "the mental condition of the patient is an issue."[411] The Tennessee Supreme Court concluded that, "[c]learly, the mental condition of the prosecuting victim was an issue,"[412] which indicated that the supreme court apparently thought the case against the accused was weak, and the credibility of the victim was material. Several facts from the record were cited as significant: (1) the conviction rested solely on the testimony of the victim and her twelve-year-

406. *Id.* at 486.

407. By implication the Court saw no need for a separate instruction respecting the lack of evidentiary value in the indictment.

408. *See* text accompanying notes 18-24 *supra*.

409. 552 S.W.2d 383 (Tenn. 1977).

410. TENN. CODE ANN. § 24-112 (Cum. Supp. 1978).

411. 552 S.W.2d at 385 (quoting TENN. CODE ANN. § 24-112 (Cum. Supp. 1978)).

412. *Id.* at 385.

old grandson; (2) although the victim claimed to have bitten defendant on the hand "real hard," no evidence of this bite was observed at the time of the arrest; (3) both witnesses testified that defendant had been shot in his face, among other places, repeatedly with a BB gun, but no evidence of this was observed at the time of the arrest; (4) defendant put forward a strong alibi defense; and (5) the jury had been "hung" prior to receiving a supplemental charge from the court.

Having determined that the communications were therefore not privileged, the court turned to the question whether the communications were discoverable. A state statute permits discovery by the defendant of documents "obtained from others which are in possession of, or under the control of the attorney for the state."[413] While the documents in question do not appear to be of the sort contemplated by the statute, the court achieved the essential logical leap by holding that "the District Attorney General represents 'the State' and [the hospital] is a 'State' mental health facility."[414] The court concluded that the records should be given an *in camera* examination by the trial court and divulged to defendant if they are found to have probative value for the preparation of the defense.

L. Guilty Pleas

1. Standard for Acceptance

In *State v. Mackey*[415] the Supreme Court of Tennessee, in the exercise of its supervisory power over the state courts, articulated standards for the acceptance of guilty pleas, which it acknowledged went beyond the constitutional minimum mandated by the United States Supreme Court in *Boykin v. Alabama.*[416] First, prior to the acceptance of a plea of guilty, the judge must address the defendant personally in open court and inform him of, as well as determine that he understands, the following: (1) the nature of the charge, the minimum and maximum punishment possible, and the applicability of any punishment enhancement provisions; (2) the right to be represented by counsel, appointed or retained, at every stage of the proceedings; (3) the right to plead

413. TENN. CODE ANN. § 40-2044 (1975).
414. 552 S.W.2d at 385.
415. 553 S.W.2d 337 (Tenn. 1977).
416. 395 U.S. 238 (1969).

not guilty, to be tried by jury, and at the trial to have the assistance of counsel, the right of confrontation, and the right not to testify; (4) in the event the defendant pleads guilty, no further trial will result, other than proceedings for the determination of sentence; (5) in the event the defendant pleads guilty, he may be asked questions regarding the offense by the judge or prosecutor, and, if answers are given under oath in the presence of counsel, they may be thereafter used in prosecution for perjury, and further, any prior convictions may be considered in the determination of sentence.

Second, "[t]he court shall not accept a plea of guilty without first, by addressing the defendant in open court, determining that the plea is voluntary and not the result of force or threats or of promises apart from a plea agreement."[417] Additionally, the court is to determine whether the willingness of the defendant to plead guilty is the result of prior discussions with the prosecution.

Third, the court must determine that a factual basis underlies the plea.[418]

Fourth, a verbatim record of the proceedings is to be made including: the judge's admonitions to the defendant; the inquiry on the issue of voluntariness, including any plea agreement; the defendant's understanding of the consequences of the plea; and the inquiry as to the accuracy of the plea.

2. Plea Bargaining

In a series of decisions decided under either the double jeopardy clause or closely related notions of due process, the Supreme Court has affixed constitutional limitations to the imposition of punishment where an earlier determination has been aborted. In *North Carolina v. Pearce*[419] the Court held that an accused cannot receive a more severe punishment following conviction on retrial than he received following conviction at the previous trial, unless the record cited new evidence that would justify harsher treatment by the sentencing court.[420] The same principle led to the

417. 553 S.W.2d at 341.

418. *See* Farmer v. State, 570 S.W.2d 359 (Tenn. Crim. App.), *cert. denied, id.* (Tenn. 1978).

419. 395 U.S. 711 (1969).

420. "[V]indictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial." *Id.* at 725.

conclusion in *Blackledge v. Perry*[421] that an accused could not be indicted on a felony charge following a reversal of a misdemeanor conviction based on the same facts.

In *Bordenkircher v. Hayes*[422] the Court was called upon to determine whether this constitutional inhibition of prosecutorial vindictiveness was equally applicable to events occurring in the course of plea negotiations. The accused was indicted for uttering a forged instrument, an offense punishable by from two to ten years in prison. In the course of plea bargaining the prosecution offered to recommend a sentence of five years if the accused would plead guilty to the indictment. If, however, he refused to plead guilty, then the prosecution would seek a further indictment under the habitual criminal act, which, upon conviction, would result in a mandatory life sentence. The accused refused to plead guilty, was indicted under the habitual criminal statute, and was found guilty on both counts.

In sustaining the denial of the writ of habeas corpus by the federal district court,[423] the Supreme Court noted initially that even though the habitual criminal charge had not been obtained until after the negotiations, the intention of the prosecutor was at all times clear. Analytically, the Court saw no difference between this case and one in which the recidivist charge had been obtained at the outset and the prosecution then offered to drop it in exchange for a plea of guilty. If no suggestion of a recidivist charge had been made during the course of the negotiations, and when the accused had refused to plead guilty the prosecution without notice had sought and had obtained the additional count, the Court suggested it might view the case differently.

In *Bordenkircher,* however, the matter complained of was no more than the inevitable give and take of plea bargaining: "[B]y tolerating and encouraging the negotiations of pleas, this Court has necessarily accepted as constitutionally legitimate the simple reality that the prosecutor's interest at the bargaining table is to persuade the defendant to forego his right to plead not guilty."[424] Whether a prosecutor has acted vindictively, or even what that

421. 417 U.S. 21 (1974).

422. 434 U.S. 357 (1978).

423. The United States Court of Appeals for the Sixth Circuit had reversed. *See* Hayes v. Cowan, 547 F.2d 42 (6th Cir. 1976), *rev'd sub nom.* Bordenkircher v. Hayes, 434 U.S. 357 (1978).

424. 434 U.S. at 364.

term means in a constitutional sense is difficult to determine. *Pearce* and *Blackledge* avoided that question by assuming vindictiveness until shown otherwise.

To assume that the prosecutor was not vindictive in *Bordenkircher* may be unconvincing. *Pearce* is distinguishable in that the feared partiality is on the part of the judiciary rather than on the part of a party to the case. *Blackledge,* however, is not so distinguishable; there, the ante was raised after conviction and successful appeal, here, after a refusal to plead guilty. The ultimate explanation for the *Bordenkircher* decision may be in the Court's recognition that, except for a blatant case of vindictiveness, the phenomenon is uncontrollable. Had the Court held the added count invalid in this case, in the future prosecutors would simply gang all conceivable charges against the accused prior to initiating negotiations. Proof of vindictiveness would be virtually impossible so long as the prosecution offered only reductions in the charges or recommended sentences. Such a result would be antithetical to the preference for candor and "could only invite unhealthy subterfuge that would drive the practice of plea bargaining back into the shadows from which it has so recently emerged."[425]

M. Punishment

1. Determination of Sentence

The issue of the admissibility into evidence of prior convictions of the accused following a plea of guilty was addressed in *State v. Mackey.*[426] In holding such evidence properly admitted, the Tennessee Supreme Court went beyond the facts of the case before it and established guidelines for hearings to determine sentencing following a plea of guilty. Any matter relevant to sentencing may be presented by the defendant or by the prosecution, including, but not limited to (1) matters of fact concerning the offense; (2) the prior criminal record of the defendant, as well as evidence of reputation and character; (3) the educational background of the defendant; (4) the employment background of the defendant, including military record and present employment status and capabilities; (5) the social history of the defendant, including family relationships, interests and religion; (6) the

425. *Id.* at 365.

426. 553 S.W.2d 337 (Tenn. 1977).

medical history of the defendant, with any psychological or psychiatric reports available to both sides; and (7) reports from any social agencies with which the defendant has been involved.[427]

2. Consecutive Sentences

While trial judges have the statutory power to impose consecutive sentences,[428] in *Gray v. State*[429] the Tennessee Supreme Court held that the record should include some reasons for such a judgment.[430] In *Wiley v. State*,[431] however, the court of criminal appeals held that this rule would not apply to sentences imposed prior to the *Gray* decision, particularly in light of the fact that the record clearly showed that defendant was a dangerous offender — one of the categories that would warrant the imposition of consecutive sentences as defined in *Gray*. Consecutive sentences for forgery and uttering a forged instrument that arose in a single transaction[432] were approved by the court of criminal appeals in *Anderson v. State*[433] in light of the fact that defendant was both a persistent and a multiple offender in the terminology of *Gray*.[434]

Whether *Gray*, in delineating five categories of offenders eligible for consecutive sentences, intended its list to be exclusive arose as an issue in *Bethany v. State*.[435] The accused, a scoutmaster, was convicted on six charges of crime against nature perpetrated against young boys in his charge. While recognizing that the facts of the case did not fall squarely within any of the *Gray* categories, the Tennessee Court of Criminal Appeals concluded that a precise definition of every possible factual situation had not been intended. The dissenting judge took the language

427. *Id.* at 344.

428. TENN. CODE ANN. § 40-2711 (1975).

429. 538 S.W.2d 391 (Tenn. 1976).

430. *See 1976-1977 Survey, supra* note 1, at 50.

431. 552 S.W.2d 410 (Tenn. Crim. App.), *cert. denied, id.* (Tenn. 1977).

432. *See* text accompanying notes 67-75 *supra*.

433. 553 S.W.2d 85 (Tenn. Crim. App.), *cert. denied, id.* (Tenn. 1977).

434. Judge Galbreath, dissenting, found the result inconsistent with the holding in Patmore v. State, 152 Tenn. 281, 277 S.W. 892 (1925). *See* 553 S.W.2d at 90 (Galbreath, J., dissenting). In a concurring opinion Judge Daughtrey submitted that *Patmore* had been overruled sub silentio by State v. Black, 524 S.W.2d 913 (Tenn. 1975), and Duhac v. State, 505 S.W.2d 237 (Tenn. 1973). *See* 553 S.W.2d at 89 (Daughtrey, J., concurring).

435. 565 S.W.2d 900 (Tenn. Crim. App.), *cert. denied, id.* (Tenn. 1978).

used in *Gray* at face value: "Types of offenders for which consecutive sentencing should be reserved may be classified as follows."[436] As the present case did not fit within any of the specifications, the dissent concluded that consecutive sentencing was impermissible.

A sentence may only run consecutively to a sentence previously imposed. In *Thompson v. State*,[437] following the entry of a guilty plea, the trial court imposed a sentence to run consecutively to any sentence the accused might thereafter receive in connection with other charges pending in another county at the time. The court of criminal appeals held that the language used in the statute authorizing cumulative sentencing[438] left no doubt that "a sentence may only be run consecutively to a previously imposed sentence."[439]

3. Enhancement Statutes

A habitual criminal is defined by statute[440] as any person convicted three times of a felony within the state with at least two of the felonies being among a designated list or convicted three times of a felony elsewhere with at least two of the felonies such that they would have been among the same list had they occurred in Tennessee. If an accused charged with a felony is found guilty as a habitual criminal, the punishment for the offense is enhanced to life imprisonment without the possibility of parole.[441]

Prior to *Evans v. State*[442] life imprisonment could be imposed by operation of the statutes upon conviction of the third felony as long as other conditions were satisfied.[443] As recently as 1975 the Supreme Court of Tennessee declared in *Pearson v. State*:[444] "The third conviction of one of the prescribed felonies is the triggering mechanism which brings the habitual criminal statute

436. 538 S.W.2d at 393.

437. 565 S.W.2d 889 (Tenn. Crim. App. 1977).

438. TENN. CODE ANN. § 40-2711 (1975).

439. 565 S.W.2d at 890.

440. TENN. CODE ANN. § 40-2801 (1975).

441. *Id.* § 40-2806.

442. 571 S.W.2d 283 (Tenn. 1978).

443. In addition to meeting the felony specification requirement, the three offenses must have been committed on three separate occasions. *See* Harrison v. State, 217 Tenn. 31, 394 S.W.2d 713 (1965).

444. 521 S.W.2d 225 (Tenn. 1975).

into play."[445] In *Evans* this passage was dismissed as "misleading dicta,"[446] and the supreme court declared to the contrary that punishment as a habitual criminal can only follow a *fourth* conviction. However surprising this result may appear, the construction of the statutes given by the court is analytically unassailable. The punishment enhancement section[447] is by its terms operative "when an [*sic*] habitual criminal . . . shall commit" one of the enumerated felonies. Thus, "to bring the defendant within the ambit of the statute, the State must show that he was an [*sic*] habitual criminal *at the time he committed the principal offense.*"[448] The state may not, therefore, use the offense of the instant prosecution as an element of the habitual criminal charge.

Defendant in *Evans* had previously been convicted of five felonies: two charges of felonious escape and one charge of crime against nature all occurring in Tennessee; one charge of larceny from the person, and one charge of attempted breaking and entering, both taking place in Michigan. Since the instant charge of burglary was excluded from consideration, two of the prior felonies must have fallen within the specified list to sustain the habitual criminal charge.[449] Only two of defendant's prior felonies, crime against nature and larceny from the person, were even arguably within the specification, and neither of those were free of difficulty. The statutory list of infamous crimes[450] that are incorporated into the habitual criminal statute included buggery and sodomy, which at common law did not include any form of oral-genital sex. The crime against nature statute,[451] however, had been interpreted to include such acts.[452] Therefore, the court

445. *Id.* at 227.

446. 571 S.W.2d at 285. In a concurring opinion Chief Justice Henry labeled the passage "erroneous dictum." *Id.* at 288 (Henry, C.J., concurring). He would appear to be the more accurate as to both words.

447. TENN. CODE ANN. § 40-2806 (1975).

448. 571 S.W.2d at 285 (emphasis in original).

449. A literal reading of the statute would require *both* specified felonies to have been committed either in Tennessee or in Michigan. While such an interpretation would thwart the purpose of the statute, the fourth felony requirement may be condemned for the same reason, *see* 571 S.W.2d at 289-90 (Henry, C.J., dissenting), and the plain meaning is no less obvious in this instance.

450. TENN. CODE ANN. § 40-2712 (1975).

451. *Id.* § 39-707 (1975).

452. *See* Rose v. Locke, 423 U.S. 48 (1975); Young v. State, 531 S.W.2d 560 (Tenn. 1975).

concluded, a crime against nature could qualify as a specified felony only if the act upon which the conviction was based would have constituted buggery or sodomy at common law.[453] Less troublesome was the conviction for larceny from the person. The incorporated list of infamous crimes referred simply to larceny, but the court concluded that the term was intended to encompass all statutory forms of larceny. The court noted that the statute defining habitual criminality excluded petit larceny from the specified offenses, a proviso that would have been unnecessary if larceny in the incorporated statute had not referred to all forms of the offense. The case was remanded for a new trial on the habitual criminal count, in respect to which the critical inquiry would concern the factual basis for the crime against nature conviction.

Since the habitual criminal statute merely enhances the punishment following conviction of a subsequent felony, Tennessee courts have followed the rule that the accused is not being placed twice in jeopardy for the prior offenses.[454] Apparently following the same principle, the court of criminal appeals in *Glasscock v. State*[455] held that following a conviction for grand larceny the accused could be punished as a habitual criminal, even though the same three prior felony convictions had been used to support a habitual criminal charge in a previous trial for a different felony, and even though the first jury had not found the accused to be a habitual criminal. Conversely, an accused could be sentenced under the habitual criminal statute any number of times, using any or all of the same three felonies to prove the count, as long as each prosecution was brought for a separate subsequently committed felony.[456] If, however, an accused were convicted of a felony and not sentenced under the habitual criminal statute either because no such charge was brought or the jury declined to find the charge proven, and, if on appeal the conviction were reversed, the accused probably could not be charged under the habitual criminal statute on retrial. This result would appear to follow from the United States Supreme Court's holding

453. Chief Justice Henry, dissenting on this point, contended that "crime against nature" and "sodomy" were equivalent terms. 521 S.W.2d at 290 (Henry, C.J., dissenting).

454. *See* Pearson v. State, 521 S.W.2d 225 (Tenn. 1975).

455. 570 S.W.2d 354 (Tenn. Crim. App.), *cert. denied, id.* (Tenn. 1978).

456. *See, e.g.*, Pearson v. State, 521 S.W.2d 225 (Tenn. 1975).

in *North Carolina v. Pearce*,[457] which precluded greater punishment upon retrial, absent events between the two trials that supported an increase in the sentence. Only in the unlikely event that the accused had been convicted of a different felony between the original trial and the trial on remand would a habitual criminal charge properly be considered at the retrial.

Two constitutional challenges directed at the habitual criminal statute were rejected by the court of criminal appeals in *Marsh v. State*.[458] First, the accused contended that the statute violated the eighth amendment protection against cruel and unusual punishment because it did not provide for the consideration of mitigating or aggravating circumstances. While such considerations have been held essential insofar as the imposition of capital punishment is concerned,[459] the court saw no compelling constitutional reason to limit similarly the imposition of a life sentence that could "hardly be likened to the irretrievable infliction of death."[460] Second, the accused contended that the equal protection clause of the fourteenth amendment was violated by the arbitrary authority of the prosecutor to select those who would be charged under the statute. While conceding that many defendants eligible for prosecution under the statute were not so charged, the court held that the use of such discretion was constitutionally irrelevant.[461]

Under Tennessee statute[462] the use of a firearm in the perpetration of a felony is itself designated a felony. In *State v. Hudson*,[463] however, the Tennessee Supreme Court held that the provision did not create a new felony but rather supplemented other felony statutes by enhancing punishment when a firearm was employed. The court conceded that the statute defined a felony separate and distinct from the underlying felony committed by means of the firearm[464] but nevertheless concluded that to

457. 395 U.S. 711 (1969).

458. 561 S.W.2d 767 (Tenn. Crim. App.), *cert. denied, id.* (Tenn. 1977).

459. *See* POST-TRIAL RIGHTS, *supra* note 1, § 5.

460. 561 S.W.2d at 770-71.

461. *See* Oyler v. Boles, 368 U.S. 448 (1962). The same conclusion was reached in McPherson v. State, 562 S.W.2d 210 (Tenn. Crim. App. 1977), *cert. denied, id.* (Tenn. 1978).

462. TENN. CODE ANN. § 39-4914 (1975).

463. 562 S.W.2d 416 (Tenn. 1978).

464. If the legislature had intended to enact a punishment enhancement

sustain separate convictions would violate the protection against double jeopardy.[465]

While the bringing of multiple charges may result in double jeopardy in some cases, the problem is not inherent in the statute. If, for example, the accused were to use a firearm in the perpetration of rape, no double jeopardy problem would arise in convictions for both rape and use of a firearm in committing a felony. Under the *Blockburger* same-evidence test,[466] which the court embraces,[467] "two offenses are distinct and separate if the statutory definition of each requires proof of a fact which the other does not require."[468] In this instance, rape would require proof of carnal knowledge, which is not required for the firearm offense, and the firearm charge would require proof of the use of a firearm, which is not necessary for a conviction of rape. This analysis is equally persuasive in the present case, in which the two underlying felonies were armed robbery and assault with intent to commit murder. The concession made by the state that the use of the firearm charge merged into armed robbery was unnecessary. Armed robbery requires proof of larceny, which is not required for the other charge, and the firearms charge requires proof of the use of a firearm, which is not required for armed robbery since armed robbery can be committed by the use of any number of weapons other than a firearm.[469] The same analysis applies to the charge

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statute it could easily have done so. Compare WIS. STAT. ANN. § 946.62 (West 1975):

> *Concealing Identity.* Whoever commits a crime while his usual appearance has been concealed, disguised or altered, with intent to make it less likely that he will be identified with the crime, may in addition to the maximum punishment fixed for such crime, in case of conviction for a misdemeanor be imprisoned not to exceed one year in county jail, and in case of conviction for a felony be imprisoned not to exceed 5 years.

465. The court cited Brown v. Ohio, 432 U.S. 161 (1977), in which the Supreme Court acquiesced in a state court determination that joy riding was a lesser included offense of auto theft.

466. Blockburger v. United States, 284 U.S. 299 (1932).

467. 562 S.W.2d at 418; *id.* at 421 (Henry, C.J., concurring).

468. *Id.* at 418.

469. *Id.* The court conceded this point but only after it had concluded that to avoid the double jeopardy problem, the firearms provision must be construed as a punishment enhancement statute. Even with this construction it concluded that the statute could not be applied to a charge of robbery by use of a deadly weapon because even though " 'deadly weapon' obviously may include more

of assault with intent to commit murder. For purposes of double jeopardy under the *Blockburger* test, the question is not whether the same evidence (*e.g.*, use of a firearm) was sufficient for both offenses, but whether the definitions of the offenses required proof of the same fact.[470]

A similar but less troublesome question was presented to the Tenneseee Supreme Court in *Key v. State*.[471] The Tennessee burglary statute[472] provides for sentence enhancement when the "person convicted of the crime had in his possession a firearm at the time of the breaking and entering."[473] Defendant in *Key* was not so armed, but his accomplice in the crime was. The court concluded that the legislative intent was not to impose enhanced punishment on one in the position of defendant, contrasting the language of the burglary statute with that used in the robbery statute—"if the robbery be accomplished by the use of deadly weapon."[474] The robbery statute was "aimed at the methodology of the crime,"[475] and, therefore, all parties chargeable as principals could be subjected to the more severe punishment. The burglary statute, by contrast, focused upon "the modus operandi of the individual,"[476] and, therefore, called for sentence enhancement only in respect to parties actually armed. Nor did the general aiding and abetting statute[477] call for a different result because first, the reference to aiding and abetting "any criminal offense" did not encompass an enhanced sentencing provision, and, second, an offense requiring personal participation may not be charged through an aiding and abetting provision.[478] The party charged need not have exclusive control of the weapon, but "[c]onstructive or joint possession may occur only where the

than a 'firearm,' . . . [w]e are not convinced that the legislature meant to twice enhance the penalty for one who commits robbery by means of a firearm." *Id.* at 419.

470. *See* Gore v. United States, 357 U.S. 386 (1958). *See also* Anderson v. State, 553 S.W.2d 85 (Tenn. Crim. App.), *cert. denied, id.* (Tenn. 1977) (discussed in text accompanying notes 67-75 *supra*).

471. 563 S.W.2d 184 (Tenn. 1978).

472. TENN. CODE ANN. § 39-901 (1975).

473. *Id.*

474. 563 S.W.2d at 187 (quoting TENN. CODE ANN. § 39-3901 (1975)).

475. *Id.*

476. *Id.*

477. TENN. CODE ANN. § 39-109 (1975).

478. *See* Looney v. State, 156 Tenn. 337, 1 S.W.2d 782 (1928).

personally unarmed participant has the power and ability to exercise control over the firearm."[479]

N. Probation

In finding an abuse of discretion in the denial of probation in *Moten v. State*,[480] the Tennessee Supreme Court, under the guise of statutory interpretation,[481] held as a matter of public policy that rehabilitation must take precedence over retribution and deterrence in the determination of the propriety of punishment. Defendant had pleaded guilty to a reduced charge of petit larceny, the charge arising from his participation in a scheme to steal carpeting valued at $3,000 from his employer's warehouse. The trial court imposed a sentence of nine months in the workhouse and denied probation because of (1) the circumstances and nature of the offense, (2) the deterrent effect of punishment, and (3) the reduction of the charge from grand to petit larceny.

The court of criminal appeals affirmed, finding "no indication of arbitrary action on the part of the trial judge,"[482] but the Tennessee Supreme Court found none of the reasons given sufficient for denial of probation. In respect to the first factor, the court noted that defendant had no prior criminal record, no violence was involved in the offense, and the property stolen was all recovered. Defendant had been verbally enticed and then bribed to commit the offense. In regard to the second factor, the court held simply that deterrence is not a legitimate consideration in deciding whether to grant probation because "deterrence is a factor which is uniformly present" in all cases.[483] The court was

479. 563 S.W.2d at 188. *See also* Storey v. State (Tenn. Crim. App., Nov. 9, 1978), *abstracted in* TENN. ATT'Y GEN. ABSTRACT, Vol. IV, Nos. 5, 6, p. 11 (*Key* followed in requiring personal use of a weapon under TENN. CODE ANN. § 39-4914 (1975): "Any person who employs any firearm . . . . ").

480. 559 S.W.2d 770 (Tenn. 1977).

481. TENN. CODE ANN. §§ 40-2901 (Cum. Supp. 1977), -2904 (1975).

482. 559 S.W.2d at 770.

483. *Id.* at 773. "Reliance on this factor is no more realistic or reasonable than denying probation on grounds that the defendant committed a crime." *Id.* (*Cf. id.* at 774 (Harbison, J., dissenting, "It seems to me to be legitimate for a trial judge to consider whether the serving of some or all of a sentence would deter the offender from engaging in further criminal activity. . . . [I]t can hardly be contended that every criminal is entitled to a first offense without serving time."). TENN. CODE ANN. § 40-2904 was amended by 1978 Tenn. Pub. Acts ch. 911, § 1 to allow trial judges to "deny probation upon the ground of

similarly displeased with the attitude of the trial court that "the defendant should pay for his crime," because such an approach "places retribution above rehabilitation without reason."[484] Finally, on the authority of a decision of the court of criminal appeals[485] the supreme court held that the fact that the charge had been reduced prior to the plea of guilty was "an improper basis for denial of probation."[486]

O. *Double Jeopardy*

1. When Jeopardy Attaches

The United States Supreme Court had previously held that in a jury trial jeopardy attaches at the time the jury is empanelled and sworn,[487] but, prior to *Crist v. Bretz*,[488] the issue had never been raised in the context of a state proceeding. In *Crist* the prosecution argued that the federal rule was an arbitrary rule of convenience, and the state rule—that jeopardy does not attach until the first witness is sworn[489]—was equally acceptable for constitutional purposes. The Supreme Court disagreed, finding that the federal rule was "an integral part of the constitutional guarantee against double jeopardy."[490]

2. Dismissal of Indictment Subsequent to Trial

In 1975 the Supreme Court held in *United States v. Jenkins*[491] that a dismissal of an indictment at the close of the evidence precluded a retrial for reasons of double jeopardy because the

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the deterrent effect upon other criminal activity." TENN. CODE ANN. § 40-2904 (Cum. Supp. 1978).

484. *Id.* at 773.

485. Mattino v. State, 539 S.W.2d 824 (Tenn. Crim. App.), *cert. denied, id.* (Tenn. 1976) (discussed in *1976-1977 Survey*, *supra* note 1, at 47-48).

486. 559 S.W.2d at 773. *Moten* was distinguished in Cronan v. State, TENN. ATT'Y GEN. ABSTRACT, Vol. IV, No. 2, p.8, in which the accused, indicted for murder, was convicted of involuntary manslaughter.

487. Downum v. United States, 372 U.S. 734 (1963); Green v. United States, 355 U.S. 184 (1957). *See also* Delay v. State, 563 S.W.2d 905 (Tenn. Crim. App. 1977), *cert. denied, id.* (Tenn. 1978).

488. 437 U.S. 28 (1978).

489. This was the test used in some jurisdictions in nonjury trials. *See* POST-TRIAL RIGHTS, *supra* note 1, § 50 at 127 n.68.

490. 437 U.S. at 38.

491. 420 U.S. 358 (1975).

ambiguity of the reasons for dismissal would require further factual proceedings following a successful governmental appeal. *Jenkins* was expressly overruled in *United States v. Scott*,[492] in which, at the close of the evidence, the trial court granted defendant's motion for dismissal based on pretrial delay. The Court held that

> the defendant, by deliberately choosing to seek termination of the proceedings against him on a basis unrelated to factual guilt or innocence of the offense of which he is accused, suffers no injury cognizable under the Double Jeopardy Clause if the Government is permitted to appeal from such a ruling of the trial court in favor of the defendant.[493]

Should the prosecution be successful on appeal, retrial would be permitted because the double jeopardy clause "does not relieve a defendant from the consequences of his voluntary choice."[494]

3. Retrial Following Mistrial

The protection against double jeopardy does not prevent a retrial following a mistrial if the mistrial was ordered as a matter of "manifest necessity"[495] and no other reasons preclude a retrial.[496] In *Arizona v. Washington*[497] the first conviction of the accused was reversed and a new trial ordered because the prosecution had withheld exculpatory evidence from the defense. In the opening statement to the jury at the second trial, defense counsel said that at the first trial, "evidence was suppressed and hidden . . . and purposely withheld."[498] At the conclusion of the opening statements, the prosecutor moved for a mistrial, but the trial judge withheld ruling on the motion upon the offer of defense counsel to find some authority supporting the admissibility of proof of the wrongful suppression of evidence prior to the first trial. The following morning the prosecutor renewed the motion

492. 437 U.S. 82 (1978).

493. *Id.* at 98-99.

494. *Id.* at 99.

495. The phrase was first used in United States v. Perez, 22 U.S. (9 Wheat.) 579 (1824). *See generally* POST-TRIAL RIGHTS, *supra* note 1, § 55.

496. For example, if the manifest necessity for the mistrial were deliberate misconduct on the part of the prosecution, retrial would be barred. *See* POST-TRIAL RIGHTS, *supra* note 1, § 61.

497. 434 U.S. 497 (1978).

498. *Id.* at 499 (quoting from opening argument of counsel for defense).

for a mistrial, and upon no offer of authority by defense counsel, the mistrial was granted. The trial judge did not use the phrase "manifest necessity," nor did he expressly state that alternative solutions to the granting of a mistrial had been considered. The state supreme court refused to review the mistrial ruling.

Thereafter, the accused filed a petition for writ of habeas corpus in a federal district court alleging that retrial would violate the protection against double jeopardy. The writ was granted in the absence of any indication in the record that the trial court had considered alternatives before concluding that a manifest necessity existed for granting the mistrial. The United States Court of Appeals for the Ninth Circuit agreed.

The Supreme Court reversed. Defense counsel had made no further argument that the evidence of the prior indiscretions of the prosecution was admissible, and the Supreme Court agreed that the argument was improper and highly prejudicial. The Court submitted that in such circumstances "a trial judge's decision to declare a mistrial based on his assessment of the prejudicial impact of improper argument is entitled to great deference."[499] Nor did the Court deem significant the trial court's failure to use the phrase "manifest necessity" in making its ruling. The failure to explain the ruling more completely was insignificant as long as the basis for the mistrial order was adequately disclosed by the record.[500]

At a very early date, the Supreme Court established that the declaration of a mistrial when the jury is hopelessly deadlocked may be followed by a new trial on the same charges without violating the protection against double jeopardy.[501] The decision to dismiss the jury is always subject to challenge on the ground that the trial judge acted too hastily, and if this is found to be the case, retrial will be prohibited.[502] Theoretically, a series of

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499. *Id.* at 514.

> He has seen and heard the jurors during their *voir dire* examination. He is the judge most familiar with the evidence and the background of the case on trial. He has listened to the tone of the argument as it was delivered and has observed the apparent reaction of the jurors. In short, he is far more "conversant with the factors relevant to the determination" than any reviewing court can possibly be.

Id. at 513-14.

500. *Id.* at 516-17.

501. United States v. Perez, 22 U.S. (9 Wheat.) 579 (1824).

502. *See generally* POST-TRIAL RIGHTS, *supra* note 1, § 58.

retrials may continue *ad infinitum* without raising a double jeopardy issue,[503] but courts become increasingly receptive to the complaint of the defendant as the proceedings are protracted.[504] In *State v. Witt*[505] defendant had been tried three times for first degree murder and each trial had ended in a mistrial because of a deadlocked jury. After the third mistrial the trial court dismissed the charges, and the prosecution appealed. While finding no constitutionally compelling reason for the dismissal, the Supreme Court of Tennessee affirmed in light of "the inherent authority to terminate a prosecution in the exercise of sound judicial discretion"[506] when repeated trials have resulted in genuinely deadlocked juries and little likelihood of a different result in the future is apparent. The court declined to determine the number of mistrials necessary to warrant a dismissal and cautioned that the action of the trial judge would always be subject to review for abuse of discretion.

While there is nothing explicit in the holding, the court may be assumed to have envisioned a dismissal with prejudice, which would preclude the prosecution from pursuing a new indictment for the same offense. This result would appear to follow from the observation that "[r]equiring defendants to face additional juries with the continuing prospect of no verdict offends traditional notions of fair play and substantial justice."[507] If the dismissal was without prejudice, the prosecution would be only slightly inconvenienced by the dismissal and the intention of the trial court would be effectively thwarted. If, on the other hand, the dismissal is with prejudice, the prosecution will be foreclosed from reviving the charges, even if newly discovered evidence of substantial significance led to the conclusion that a conviction would be more probable.

4. Retrial Following Reversal for Insufficiency of Evidence

From an early date the United States Supreme Court has held that an accused who successfully appeals a conviction can-

503. *Id.* at 145 n.58.

504. *Id.* at 145 n.59.

505. 572 S.W.2d 913 (Tenn. 1978).

506. *Id.* at 917.

507. *Id.* Even the dismissal of the charges will not create a double jeopardy defense so long as the dismissal is not based on an evaluation of the evidence. *See* POST-TRIAL RIGHTS, *supra* note 1, § 52.

not thereafter plead double jeopardy as a bar to retrial.[508] Curiously, this principle had been persistently applied even when the reversal of the conviction was based on an insufficiency of the evidence.[509] The result made little sense, for had the jury returned a verdict of not guilty, or had the trial judge directed a verdict of not guilty, the double jeopardy clause would preclude retrial.[510] In *Burks v. United States*[511] the Court finally acknowledged that in this area "our past holdings do not appear consistent with what we believe the Double Jeopardy Clause commands,"[512] and concluded that retrial was constitutionally impermissible when the prior conviction was reversed for legally insufficient evidence.[513] In a companion case, *Greene v. Massey*,[514] the Court underscored the limited application of *Burks* by remanding the case for a determination whether the reversal of the conviction was based on the insufficiency of the evidence or trial error.[515]

One casualty of the *Burks* holding is the Tennessee procedural rule permitting a trial judge, acting as the "thirteenth juror," to set aside a jury verdict and grant a new trial on grounds of the preponderance of the evidence without entering a judgment of acquittal. In *State v. Cabbage*[516] the Tennessee Supreme Court held that such action could no longer be taken at the trial or appellate level.[517] Moreover, *Burks* required that if the evidence

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508. United States v. Ball, 163 U.S. 662 (1896).

509. United States v. Tateo, 377 U.S. 463 (1964); Foreman v. United States, 361 U.S. 416 (1960); Yates v. United States, 354 U.S. 298 (1957); Bryan v. United States, 338 U.S. 552 (1950).

510. Green v. United States, 355 U.S. 184 (1957).

511. 437 U.S. 1 (1978).

512. *Id.* at 12.

513. [S]uch an appellate reversal means that the Government's case was so lacking that it should not have been *submitted* to the jury. Since we necessarily afford absolute finality to a jury's *verdict* of acquittal—no matter how erroneous its decision—it is difficult to conceive how society has any greater interest in retrying a defendant when, on review, it is decided as a matter of law that the jury could not properly have returned a verdict of guilty.

Id. at 16 (emphasis in original). *See also* United States v. Jones, 580 F.2d 249 (6th Cir. 1978).

514. 437 U.S. 19 (1978).

515. *See also* United States v. Scott, 437 U.S. 82 (1978).

516. 571 S.W.2d 832 (Tenn. 1978).

517. Compare Ricketts v. Williams, 248 S.E.2d 673, 674 (Ga. 1978):

[T]here has always been a distinction between a decision holding the

is insufficient to warrant a conviction, the trial judge must direct a verdict of acquittal. In *Overturf v. State*[518] the supreme court held that the trial court cannot deny the motion and instead grant a new trial following a verdict of guilty.

5. Vacation of Guilty Plea

The Supreme Court has never considered the constitutional propriety of increasing the charges against an accused following the vacation of a guilty plea;[519] but the United States Court of Appeals for the Sixth Circuit has held that when the accused pleads guilty to a lesser included offense, subsequent prosecution for more serious offenses is impermissible.[520] In *United States v. Smith*[521] the Sixth Circuit Court of Appeals held that this limitation was only applicable when lesser included offenses were involved. Thus, when the accused had pleaded guilty to one of five substantive counts, he could be prosecuted on all five substantive counts as well as a conspiracy count following vacation of the plea.[522]

6. Identity of Offenses

In *Maples v. State*[523] the accused had been summarily held in contempt and fined for instituting fraudulent divorce proceedings in which he gave false testimony. He was thereafter convicted of perjury for the same false testimony, a conviction that the accused contended was precluded by the protection against double jeopardy. Distinguishing cases in which the accused had been formally tried for contempt,[524] the Tennessee Supreme Court

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"evidence legally insufficient" and the discretionary decision of a trial court that the verdict is against the "weight of the evidence."

We hold that . . . the grant of a new trial by the trial court on the discretionary ground that the verdict is against the weight of the evidence is legally insufficient so as to bar a second trial under the Double Jeopardy Clause of the Federal Constitution.

518. 571 S.W.2d 837 (Tenn. 1978).

519. *See* POST-TRIAL RIGHTS, *supra* note 1, § 80.

520. Rivers v. Lucas, 477 F.2d 199 (6th Cir.), *vacated on other grounds*, 414 U.S. 896 (1973); Mullreed v. Kropp, 425 F.2d 1095 (6th Cir. 1970).

521. 584 F.2d 759 (6th Cir. 1978).

522. *See also* Bordenkircher v. Hayes, 434 U.S. 357 (1978), discussed in text accompanying notes 422-25 *supra*.

523. 565 S.W.2d 202 (Tenn. 1978).

524. *See, e.g.*, People v. Gray, 36 Ill. App. 3d 720, 344 N.E.2d 683 (1976).

held that the use of the summary power to punish for contempt committed in the presence of the court did not preclude a criminal prosecution for the same behavior.[525] Chief Justice Henry dissented, contending that under the *Blockburger* test[526] the two convictions were based on the same evidence. While the same facts are assuredly the basis of both convictions, the question for double jeopardy purposes is whether all of the elements of one offense are subsumed in the other offense. Contrary to Justice Henry's contention that "[t]he contempt statute and the perjury statute do not have distinct elements for purposes of this case,"[527] the elements of the offenses do not vary with the facts of the case.[528] Thus, the United States Supreme Court reaffirmed *Blockburger* in *Gore v. United States*[529] while sustaining a conviction for three offenses—sale of drugs not pursuant to a written order; sale of drugs not in the original package; and sale of drugs with knowledge that they had been unlawfully imported—on the basis of one sale. A single act of the accused was found to have violated three provisions of the narcotics law, each with distinct elements, absent evidence of congressional intent to the contrary.

7. Lesser Included Offenses

The accused in *Jones v. State*[530] was indicted for burglary, larceny, and receiving and concealing stolen property, and was convicted for burglary. On appeal the conviction was reversed, and upon retrial the accused was convicted of larceny. The accused contended on appeal that the conviction for burglary alone in the first trial carried the implication of acquittal on the other

525. "It is a power which in our opinion, is indispensible to the orderly dispatch and conduct of the business of the courts. Its use is not intended to, nor should it, immunize the contemnor from prosecution for violation of specific provisions of the criminal code." 565 S.W.2d at 206.

526. Blockburger v. United States, 284 U.S. 299 (1932).

527. 565 S.W.2d at 209 (emphasis deleted).

528. The dissent would appear to be confusing the "required evidence" test, adopted in *Blockburger*, with the "actual evidence" test, which "focuses on whether the evidence adduced at trial to prove the lesser offense is an integral part of the evidence used to prove the greater offense." 7 BALT. L. REV. 345, 348 (1978). The latter formulation was explicitly rejected in Harris v. United States, 359 U.S. 19 (1959), and therefore cannot be viewed as compelled by the protection against double jeopardy.

529. 357 U.S. 386 (1958).

530. 569 S.W.2d 462 (Tenn. 1978).

charges, and, therefore, retrial on these charges was precluded by the protection against double jeopardy. The argument was, in principle, undeniably correct.[531]

At the first trial, however, the judge had instructed the jury that the burglary charge embraced the larceny charge, and, therefore, the accused could be found guilty of either offense but not of both. As the Tennessee Supreme Court noted, this instruction was an incorrect statement of the law. An element of burglary is the *intent* to commit a felony (any felony), but the felony does not have to be committed.[532] Thus, larceny is never subsumed into burglary, at least in an analytical sense, and, therefore, conviction for both offenses would not run afoul of the protection against double jeopardy.[533] Nevertheless, the instruction placed the jury verdict in a different light. The court of criminal appeals concluded that the jury had expressed no opinion on the larceny charge since the trial judge had denied it the option of finding the accused guilty of both charges. The Tennessee Supreme Court was dissatisfied with this analysis because the accused had been charged with burglary and larceny in the same count. The court found that the jury, by finding the accused guilty as charged, had in fact found the accused guilty of both offenses, and, as a result, upon retrial either or both offenses could be once again considered.[534]

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531. *See* POST-TRIAL RIGHTS, *supra* note 1, § 85.

532. *See* 2 R. ANDERSON, WHARTON'S CRIMINAL LAW & PROCEDURE § 410 (1957).

533. This assumes that the same evidence test, as opposed to the same transaction test, is used. If the second conviction were barred by the same transaction test, such a result would not be reached for constitutional reasons. On the other hand, had the accused been found not guilty of one of the two charges, collateral estoppel might (but not necessarily would) preclude a subsequent trial on the other charge. *See* Ashe v. Swenson, 397 U.S. 436 (1970).

534. The same conclusion had been reached under the reasoning of the court of criminal appeals. 569 S.W.2d at 464.

CLASS ACTIONS PURSUANT TO TENNESSEE RULE OF CIVIL PROCEDURE 23

MARTHA S.L. BLACK*

I. INTRODUCTION 556
II. THE MECHANICS OF TENNESSEE RULE 23 558
Rule 23.01: Prerequisites to a Class Action Determination 559
Rule 23.02: Types of Class Actions Maintainable 566
Rule 23.02(1): Classes 566
Rule 23.02(2): Classes 569
Rule 23.02(3): Actions 570
Rule 23.03: Procedures for Conducting Class Suits 576
Rule 23.03(1): The Class Action Certification Order 577
Rule 23.03(2): Notice in a 23.02(3) Action 580
Rule 23.03(3): Class Action Judgments 588
Rule 23.03(4): Limited Issues and Subclasses 589
Rule 23.04: Orders in Conduct of Actions 594
Rule 23.05: Dismissal or Compromise 599
III. JURISDICTION AND VENUE 602
IV. CONCLUSION 604

I. INTRODUCTION

Class action procedures are almost as old as English chancery practice and were born of the desire to adjudicate efficiently disputes involving multiple parties with common issues through the device of a bill of peace.[1] Likewise, class suits in the United States have long been valued, the Supreme Court recognizing as early as 1853 that:

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* B.A., Mount Holyoke College; J.D., University of Tennessee; Associate Professor of Law, University of Tennessee.

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1. *See* Chafee, *Bills of Peace with Multiple Parties*, 45 HARV. L. REV. 1297 (1932).

The earliest case granting class relief is How v. Tenants of Bromsgrove, 1 Vern. 22 (1681), in which a manor lord sought a determination of the rights of multiple tenants.

> Where the parties interested in the suit are numerous, their rights and liabilities are so subject to change and fluctuation by death or otherwise, that it would not be possible, without very great inconvenience to make all of them parties, and would oftentimes prevent the prosecution of the suit to a hearing. For convenience, therefore, and to prevent a failure of justice, a court of equity permits a portion of the parties in interest to represent the entire body, and the decree binds all of them the same as if all were before the court. The legal and equitable rights and liabilities of all being before the court by representation, and especially where the subject-matter of the suit is common to all, there can be very little danger but that the interest of all will be protected and maintained.[2]

From 1842 to 1938 Federal Equity Rules 48[3] and 38[4] provided for representative suits as did the procedural codes adopted by many states.[5] Thus, when Federal Rule of Civil Procedure 23[6] was

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2. Smith v. Swormstedt, 57 U.S. (16 How.) 288, 300 (1853).

3. Equity Rule 48 provided:

> Where the parties on either side are very numerous, and cannot, without manifest inconvenience and oppressive delays in the suit, be all brought before it, the Court in its discretion may dispense with making all of them parties, and may proceed in the suit, having sufficient parties before it to represent all the adverse interest of the plaintiffs and the defendants in the suit properly before it. But, in such cases, the decree shall be without prejudice to the rights and claims of all the absent parties.

42 U.S. (1 How.) lvi (1842).

4. Equity Rule 38 provided: "When the question is one of common or general interest to many persons constituting a class so numerous as to make it impracticable to bring them all before the court, one or more may sue or defend for the whole." 226 U.S. 659 (1912).

5. *See* C. CLARK, CODE PLEADING § 63, at 396-404 (2d ed. 1947); F. JAMES, CIVIL PROCEDURE § 10.18 (1965).

6. Original Rule of Civil Procedure 23, omitting (b) regarding shareholder actions, provided:

> (a) REPRESENTATION. If persons constituting a class are so numerous as to make it impracticable to bring them all before the court, such of them, one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued, when the character of the right sought to be enforced for or against the class is
>
> (1) joint or common, or secondary in the sense that the owner of a primary right refuses to enforce that right and a member of the class thereby becomes entitled to enforce it;
>
> (2) several, and the object of the action is the adjudication of claims which do or may affect specific property involved in the action; or

adopted in 1938, class actions were neither new nor unfamiliar to American courts. In 1966 rule 23 was completely revised and, according to the Advisory Committee's Note accompanying it, the revised rule improved the procedural guidelines for such actions in that it

> describes in more practical terms the occasions for maintaining class actions; provides that all class actions maintained to the end as such will result in judgments including those whom the court finds to be members of the class, whether or not the judgment is favorable to the class; and refers to the measures which can be taken to assure the fair conduct of these actions.[7]

Effective January 1, 1971, Tennessee updated its procedural rules, including a detailed class action provision substantially identical in most respects to Federal Rule 23 while significantly different in one major aspect. The purpose of this presentation is to examine Tennessee Rule of Civil Procedure 23 in the hopes that the analysis will heighten the awareness of the utility of the rule and the mechanisms by which it operates.

II. THE MECHANICS OF TENNESSEE RULE 23

The analysis of Tennessee Rule 23 that follows will for the sake of clarity address all sections of the statute, even those about which little, if any, explanation is required. Those sections presenting more difficulty, however, will be discussed more fully as seems appropriate. While there are no published Tennessee decisions interpreting Tennessee Rule 23, since it is identical in most respects to its federal counterpart, the wealth of available federal decisions can be examined profitably in determining the appropriate application of the Tennessee rule. Likewise, the majority

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(3) several, and there is a common question of law or fact affecting the several rights and a common relief is sought.

. . . .

(c) DISMISSAL OR COMPROMISE. A class action shall not be dismissed or compromised without the approval of the court. If the right sought to be enforced is one defined in paragraph (1) of subdivision (a) of this rule notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs. If the right is one defined in paragraphs (2) or (3) of subdivision (a) notice shall be given only if the court requires it.

308 U.S. 689-90 (1939).

7. Advisory Committee's Note, 39 F.R.D. 69, 99 (1966).

of states have adopted class action rules patterned after Federal Rule 23, thus providing further interpretative materials.[8]

Rule 23.01: Prerequisites to a Class Action Determination

Before any action can be considered for certification as a class action, rule 23.01 like its federal counterpart, rule 23(a), specifies four prerequisites: 1) impracticability of joinder, 2) common questions of law or fact, 3) typical claims held by representatives, and 4) adequacy of representation.[9] Inherent in these four prerequisites are two additional requirements: an ascertainable class must exist and the representative parties must belong to that class.

The existence of a definable class is a requirement met with little difficulty since some delineation of the group represented will almost always be readily known. Indeed, some courts have indicated that satisfaction of the 23.01 prerequisites automatically signals the existence of a class.[10] That the outlines of the class be known is necessary to the extent that the court must be able to determine if any given individual is a member. Furthermore, the more precisely the class is defined, the more readily a court can determine the propriety of other aspects of the action.

8. With varying modifications the following states have adopted class action procedures that follow amended Federal Rule 23: Alabama, Arizona, Colorado, Delaware, Hawaii, Indiana, Kansas, Kentucky, Maryland, Massachusetts, Minnesota, Missouri, Montana, Nevada, New Jersey, New York, North Dakota, Ohio, Oregon, South Dakota, Tennessee, Texas, Utah, Vermont, Washington, and Wyoming.

The purpose of this article being to explore the appropriate application of Tennessee Rule 23, treatment of federal and other state decisions is not exhaustive but rather illustrative only. For more encyclopedic compilations see 3B MOORE'S FEDERAL PRACTICE (1978); 1-6 H. NEWBERG, NEWBERG ON CLASS ACTIONS (1977); 7 & 7A C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE (1972).

9. Tennessee Rule of Civil Procedure 23.01 (1977) provides:

> One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interest of the class.

10. *E.g.*, Carpenter v. Davis, 424 F.2d 257 (5th Cir. 1970); McAdory v. Scientific Research Instruments, Inc., 355 F. Supp. 468 (D. Md. 1973).

Yet, except in those cases when individual notice must be sent,[11] the precise identity of each member of the class should not be necessary at the outset,[12] and a fluctuating class membership should be permitted as long as identification within the defined group can be ascertained at any particular stage in the proceeding.[13]

Implicit within the meaning of rule 23.01 is a requirement that the representative party or parties belong to the group being represented. This representation question often is closely linked to standing[14] and rule 17(a) requirements for a real party in interest.[15] An independent inquiry into the composition of the class is usually necessary only in a suit by or against an association as representative for its members. Although some courts have held that the association itself may not be a class member,[16] other courts have recognized an exception when the association has authority to represent the members or was organized to do so.[17]

The first stated prerequisite to class certification requires only that the class be of a size that joinder of all members would be impracticable. Factors relevant in determining this impracticability range from size of class, nature of the action, and size of claims, to the location of members or property affected.[18] Thus, no arbitrary numerical limitation has been or could be adopted, and classes have been allowed to proceed with as few as eighteen[19]

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11. *See* text accompanying notes 164-95 *infra*.

12. *E.g.*, Yaffe v. Powers, 454 F.2d 1362, 1366 (1st Cir. 1972); Dolgow v. Anderson, 43 F.R.D. 472, 492 (E.D.N.Y. 1968), *rev'd*, 438 F.2d 825 (2d Cir. 1970).

13. *E.g.*, Baird v. Lynch, 390 F. Supp. 740, 746 (D.C. Wis. 1974). *See also* 3B MOORE, *supra* note 8, § 23.04(1); 7 C. WRIGHT & A. MILLER, *supra* note 8, § 1760.

14. *See* text accompanying notes 308-11 *infra* for another instance of standing considerations in the class action context.

15. *E.g.*, Booth v. Prince George's County, 66 F.R.D. 466, 472 (D. Md. 1975).

16. *E.g.*, Wilhite v. South Cent. Bell Tel. & Tel. Co., 426 F. Supp. 61 (E.D. La. 1976); Lynch v. Sperry Rand Corp., 62 F.R.D. 78 (S.D.N.Y. 1973).

17. *E.g.*, Norwalk Core v. Norwalk Redev. Agency, 395 F.2d 920 (2d Cir. 1968); Thompson v. Board of Educ., 71 F.R.D. 398 (W.D. Nev. 1975).

18. *See* Donelan, *Prerequisites to a Class Action Under New Rule 23*, 10 B. C. INDUS. & COM. L. REV. 527 (1969).

19. *See, e.g.*, Arkansas Educ. Ass'n v. Board of Educ., 446 F.2d 763 (8th Cir. 1971); Cypress v. Newport News Gen. & Nonsectarian Hosp. Ass'n, 375 F.2d 648 (4th Cir. 1967).

and denied with as many as three hundred and fifty.[20] The party seeking certification is not required to establish the exact membership of the class but must provide more than mere speculation as a basis for the court's determination of the appropriateness of class size.[21]

The second requirement that "questions of law or fact [be] common to the class" goes to the essence of the class device, which is the treatment of many common causes of action in one suit. The 23.01(2) requirement is not stringent and does not require complete typicality or the absence of individual legal or factual questions.[22] A single common question can also be sufficient.[23] The standard is a threshold one only and perhaps unnecessary since later sections, 23.02(1), (2), and (3), require a more explicit showing of commonality for the class suit to proceed.[24] Thus, the 23.01(2) requirement is generally accepted as satisfied once the 23.02(1), (2), or (3) standard is met, and, therefore, courts generally give the 23.01(2) requirement little attention.

With respect to the propriety of any given representative, the central issue is his or her ability to protect the interests of the class. The 23.01(3) requirement that the claims or defenses of the representative be typical of the claims or defenses of the class members is an effort to assure adequacy of representation since then the representatives' advancement of their own cause will similarly benefit the claims of the absent class members.[25] Since this prerequisite is covered also by the next prerequisite, the exact meaning of the typicality requirement has been given little attention by the courts. Claims need not be identical as long as the advancement of the representative claims advances the absent claims as well[26] and ensures that due process protections will

20. Utah v. American Pipe & Constr. Co., 49 F.R.D. 17 (C.D. Cal. 1969).

21. *E.g.*, Al Barnett & Son, Inc. v. Outboard Marine Corp., 64 F.R.D. 43 (D. Del. 1974).

22. *E.g.*, Katz v. Carte Blanche Corp., 52 F.R.D. 510, 514 (W.D. Pa. 1971).

23. *E.g.*, Gordon v. Forsyth County Hosp. Auth., Inc., 409 F. Supp. 708 (M.D.N.C. 1976).

24. *See* text accompanying notes 63-124 *infra*.

25. *E.g.*, Fertig v. Blue Cross, 68 F.R.D. 53 (N.D. Iowa 1974).

26. *See* Degnan, *The Supreme Court of California 1970-1971 Foreword: Adequacy of Representation in Class Actions*, 60 CALIF. L. REV. 705, 713-16 (1972); Note, 53 B.U.L. REV. 406 (1973). *See also* text accompanying notes 297-307 *infra*.

be afforded the absent parties.[27]

Because any judgment rendered in a class action is binding on all parties, representative and absent, the adequacy of representation of the class by the named parties is critical.[28] Thus, the fourth prerequisite of 23.01 that "the representative parties will fairly and adequately protect the interest of the class" has received significant judicial attention. As early as 1940 the Supreme Court recognized the due process requirements of adequate class representation,[29] and one commentator has recently characterized adequacy of representation as "the class suit's most urgent problem."[30] Like most of the class action standards, the requirement of adequacy of representation is not susceptible to a simple formula determination but rather must be based upon the facts of the given case. The 1968 *Eisen v. Carlisle & Jacquelin*[31] decision provides an often cited definition of the adequacy of representation requirement and specifies that both the representative parties and the attorneys must meet the adequacy requirement.

> To be sure, an essential concomitant of adequate representation is that the party's attorney be qualified, experienced and generally able to conduct the proposed litigation. Additionally, it is necessary to eliminate so far as possible the likelihood that the litigants are involved in a collusive suit or that plaintiff has interests antagonistic to those of the remainder of the class.[32]

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27. *See* text accompanying notes 170-79 *infra*.

28. Since this was not true of the pre-1966 "spurious" class suits, the pre-1966 requirement in rule 23(a), *supra* note 6, that representatives "fairly insure the adequate representation of all" did not carry with it the responsibility inherent in the 23.01(4) finding. Therefore, pre-1966 cases are not appropriate on this issue. For a discussion of "spurious" class suits, see note 93 *infra*.

29. Hansberry v. Lee, 311 U.S. 32 (1940).

30. Degnan, note 26 *supra*, at 710.

31. 391 F.2d 555 (2d Cir. 1968).

32. *Id.* at 562. The *Eisen* case has a curious history. The case was initially dismissed as a class suit. 41 F.R.D. 147 (S.D.N.Y. 1966). On appeal, the court of appeals held in what is known as *Eisen I*, that the denial of class status was an appealable order under 28 U.S.C. § 1291. 370 F.2d 119 (2d Cir. 1966), *cert. denied*, 386 U.S. 1035 (1967). Eighteen months later the court of appeals reversed the dismissal in *Eisen II*. 391 F.2d 555 (2d Cir. 1968). The district court then certified a class action. 52 F.R.D. 253 (S.D.N.Y. 1971). The court of appeals in *Eisen III* then reversed the district court's treatment of notice. 479 F.2d 1005 (2d Cir. 1973). This decision was ultimately settled by the United States Supreme Court. 417 U.S. 156 (1974).

Identifying attorneys that are "qualified, experienced and generally able to conduct the proposed litigation" is a question of fact[33] that has presented several distinct avenues of inquiry. Although courts usually will look at the prior experience of an attorney,[34] especially in the same field of litigation,[35] greater experience of other counsel will not result in noncertification of the class.[36] Courts also consider the attorney's conduct in the case at bar by evaluating the attorney's role in discovery and briefs and oral arguments[37] and the timeliness with which counsel proceeds through the various stages of the litigation.[38] Furthermore, courts note that ethical standards of counsel are critical[39] because the attorney in a class action possesses fiduciary obligations to the absent class members.[40] Thus, evidence of conflicts of interest[41] and solicitation[42] may disqualify class counsel from proceeding as an adequate representative although one court has held that a slight breach of ethics will not justify a denial of class status.[43]

Maintenance of the suit has presented significant ethical problems, especially in cases when the cost of notice will be high.[44] Some courts have held that when counsel advances funds without reasonable expectation of repayment, a breach of ethics is committed rendering counsel unfit to represent the class.[45]

33. *E.g.*, Predmore v. Allen, 407 F. Supp. 1053 (D.C. Md. 1975).

34. *E.g.*, Shields v. Valley Nat'l Bank of Arizona, 56 F.R.D. 448 (D.C. Ariz. 1971).

35. *E.g.*, Santiago v. City of Philadelphia, 72 F.R.D. 619 (E.D. Pa. 1976).

36. *E.g.*, Simon v. Westinghouse Elec. Corp., 73 F.R.D. 480 (E.D. Pa. 1977).

37. *E.g.*, Fisher v. International Tel. & Tel. Corp., 72 F.R.D. 170 (E.D.N.Y. 1976).

38. *E.g.*, Lau v. Standard Oil Co., 70 F.R.D. 526 (N.D. Cal. 1975).

39. *E.g.*, Korn v. Franchard, 50 F.R.D. 57 (S.D.N.Y. 1970), *motion to dismiss appeal denied*, 443 F.2d 1301 (2d Cir. 1971).

40. *E.g.*, Greenfield v. Villager Indus., Inc., 483 F.2d 824 (3d Cir. 1973).

41. *E.g.*, Richardson v. Hamilton Int'l Corp., 62 F.R.D. 413 (E.D. Pa. 1974).

42. *E.g.*, Stavrides v. Mellon Nat'l Bank & Trust Co., 60 F.R.D. 634 (W.D. Pa. 1973); Korn v. Franchard, FED. SEC. L. REP. (CCH) ¶ 92,845 (S.D.N.Y. 1970).

43. Halverson v. Convenient Food Mart, 458 F.2d 927 (7th Cir. 1972).

44. *E.g.*, Guse v. J.C. Penney Co., Inc., 409 F. Supp. 28 (E.D. Wis. 1976); Waldman v. Electrospace Corp., 68 F.R.D. 281 (S.D.N.Y. 1975); Wilson v. General Motors Corp., 21 F.R. SERV. 2d 730 (S.D. Ind. 1975).

45. Wilson v. General Motors Corp., 21 F.R. SERV. 2d 730 (S.D. Ind. 1975); P.D.Q., Inc. v. Nissan Motors Corp., 61 F.R.D. 372 (S.D. Fla. 1973).

Other courts have held that as long as the parties agree to reimburse counsel for expenses, inquiry into the reasonableness of that expectation is irrelevant.[46] The difficulty in this area was articulated by a Pennsylvania district court:

> It is this Court's judgment—admittedly based on experience and hunch rather than any collected empirical data—that to deny a class whenever plaintiffs' counsel advances significant funds to plaintiffs of little or modest means would be to defeat the very purposes which class actions were designed to achieve. This is particularly true where, as here, the costs of litigating the suit would exceed the damages allegedly sustained by an individual plaintiff. In other words, in precisely those cases where the class action device is most appropriate the disparity between the costs of litigation and the resources of the individual plaintiffs will be most pronounced. As much as we are concerned with possible unethical conduct by counsel, we cannot condone a policy which would effectively limit class action plaintiffs to corporations, municipalities, or the rich.[47]

The ABA's apparent position is that no impropriety exists if the client agrees to be ultimately responsible for any costs advanced.[48] The ABA's position, although arguably avoiding the difficulty outlined by the Pennsylvania court, is in reality somewhat hypocritical. Although authority exists that attorney advancement of expenses without client liability for reimbursement is not a bar to recovery in nonclass contingent fee litigation,[49] the majority of bar association ethics rulings are to the contrary.[50] The precise issue in a class action contest has not been addressed but undoubtedly requires consideration.[51]

The parties are generally accepted as adequate representatives when the parties and the class members have coinciding

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46. Sayre v. Abraham Lincoln Fed. Sav. & Loan Assoc., 65 F.R.D. 379 (E.D. Pa. 1974); Stavrides v. Mellon Nat'l Bank & Trust Co., 60 F.R.D. 634 (W.D. Pa. 1973).

47. Sayre v. Abraham Lincoln Fed. Sav. & Loan Assoc., 65 F.R.D. at 385.

48. ABA Informal Opinion 1283 (Nov. 20, 1973).

49. Watkins v. Sedberry, 261 U.S. 571 (1923); Burnes v. Scott, 117 U.S. 582 (1886); Brannan v. Stark, 185 F.2d 871 (D.C. Cir. 1950); Welch v. Coro, Inc., 97 F. Supp. 185 (S.D.N.Y. 1951).

50. *See generally* O. MARU, DIGEST OF BAR ASSOCIATION ETHICS OPINIONS (AB Foundation 1970).

51. The issue is particularly acute in Tennessee where barratry is a criminal offense. *See* TENN. CODE ANN. §§ 39-3405 to 3410 (1977).

interests and there is no question that the parties will " 'put up a real fight.' "[52] Since quality not quantity of the representative parties is determinative,[53] courts must look to the tenacity and integrity of the individual party or parties as the touchstone of class certification.[54] Clearly, the parties must not have interests antagonistic to those of the class,[55] but all claims need not be identical.[56] The degree of participation by other class members is generally recognized as inconclusive in determining the adequacy of representation.[57] As one court stated, "[The absent class members'] failure to come forward is as consistent with the view that they are sitting back, watching the action proceed, content with the job their representatives are doing as it is with the view that they disapprove of the action."[58] Also, the size of the parties' individual stake in the outcome of the litigation has been recognized as not being evidence of the parties' commitment to the suit, for, as acknowledged in the *Eisen* case, "one of the primary functions of the class suit is to provide 'a device for vindicating claims which, taken individually, are too small to justify legal action but which are of significant size if taken as a group.' "[59] The representative parties must indicate a willingness to pursue vigorously the litigation,[60] but they need not have sophisticated knowledge of the legal issues.[61] As discussed above, a willingness and ability to bear the burden of the expenses of the action can also be critical.[62]

Other than the determination of the adequacy of representation, these threshold prerequisites are not often dispositive of

52. Dolgow v. Anderson, 43 F.R.D. 472, 494 (E.D.N.Y. 1968), *rev'd*, 438 F.2d 325 (2d Cir. 1970) (quoting Z. CHAFEE, SOME PROBLEMS OF EQUITY 231 (1950)).

53. *See* Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 562-63 (2d Cir. 1968).

54. *E.g.*, Carpenter v. Hall, 311 F. Supp. 1099 (S.D. Tex. 1970).

55. *E.g.*, Hansberry v. Lee, 311 U.S. 32 (1940).

56. *E.g.*, Russell v. American Tobacco Co., 528 F.2d 357 (4th Cir. 1975), *cert. denied*, 425 U.S. 935 (1976).

57. *E.g.*, Green v. Wolf Corp., 406 F.2d 291 (2d Cir. 1968), *cert. denied*, 395 U.S. 977 (1969).

58. 43 F.R.D. at 495-96.

59. 391 F.2d at 563 (quoting Escott v. Barchris Constr. Corp., 340 F.2d 731, 733 (2d Cir. 1965), *cert. denied*, 382 U.S. 816 (1966)).

60. *E.g.*, Norman v. Arcs Equities Corp., 72 F.R.D. 502 (S.D.N.Y. 1976); *In re* Goldchip Funding Co., 61 F.R.D. 59 (M.D. Pa. 1974).

61. *E.g.*, Surowitz v. Hilton Hotels Corp., 383 U.S. 363 (1966).

62. *See* notes 43-49 *supra*.

class status since they are in practice "lesser included" standards of later sections; yet, the prerequisites must always be addressed.

Rule 23.02: Types of Class Actions Maintainable

Once the prerequisites of rule 23.01 are satisfied, the action must also qualify under at least one of the subsections of rule 23.02. Only two minor stylistic changes distinguish the provisions of the Tennessee rule from the parallel provisions in the federal rules.[63] If an action can qualify under subsection (3) and either subsection (1) or (2), certification as a subsection (1) or (2) class is required because, as will be seen, the proviso of subsection (3) allowing members to "opt out" of the class is inconsistent with the requirements of subsections (1) and (2).[64] Since the effect of certification under subsection (1) or (2) is identical, no preference is required between those sections.

Rule 23.02(1) Classes

A class action can be maintained pursuant to rule 23.02(1) whenever one of two results otherwise would be forthcoming:

> (a) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or
>
> (b) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or would substantially impair or impede their ability to protect their interest . . . .

Since the interests of the party opposing the class are examined under subsection (a), certification under this section is appropriate whenever the risk appears that separate actions might require the opposing party to act inconsistently. Initially, there must be a showing of a realistic risk that separate actions will be

63. The only differences are in subsection (1)(b). Federal Rule 23(b)(1)(B) concludes with "or substantially impair or impede their ability to protect their interests." The similar Tennessee Rule 23.02(1)(b) reads: "or would substantially impair or impede their ability to protect their interest."

64. *E.g.*, Zachary v. Chase Manhattan Bank, 52 F.R.D. 532 (S.D.N.Y. 1971); Mungin v. Florida E. Coast Ry., 318 F. Supp. 720 (M.D. Fla. 1970), *aff'd per curiam*, 441 F.2d 728 (5th Cir. 1971), *cert. denied sub nom.* Howard v. Florida E. Coast Ry., 404 U.S. 897 (1971); Van Gemert v. Boeing, 259 F. Supp. 125 (S.D.N.Y. 1966).

brought. Thus, pursuant to the federal counterpart of 23.02(1)(a), a federal court denied certification when an alleged conspiracy had existed for over fifty years without protest from the members of the injured class.[65] Another federal court denied certification to a group of politically active American citizens living abroad because recurrence of a similar fact situation would be unlikely.[66]

Upon a determination that a risk of several suits exists, the court must consider the possibility that the adjudications will exact inconsistent standards of conduct from the party opposing the class. The fact that liability might be found in some cases and not in others[67] is not sufficient for class certification since the inconsistent judgments must require the opposing party simultaneously to occupy inconsistent positions. Thus, if the constitutionality[68] or illegality[69] of conduct directed at the class is at issue, a 23.02(1)(a) certification is appropriate, for the class members' conduct cannot be simultaneously legal and illegal. For example, a 23.02(1)(a) action was certified on behalf of professional basketball players against the professional basketball league to enjoin the league from merging or entering into a noncompetitive agreement, to establish antitrust violations of the league, and to recover damages resulting therefrom.[70] In sustaining the action the court concluded:

> That separate actions could establish incompatible standards of conduct for the NBA is well within the realm of possibility. For example, if this action were allowed to continue only for the benefit of the named plaintiffs, it is conceivable that other members of the proposed class would file similar complaints in

65. National Auto Brokers Corp. v. General Motors Corp., 60 F.R.D. 476 (S.D.N.Y. 1973).

66. Berlin Democratic Club v. Rumsfeld, 410 F. Supp. 144 (D.D.C. 1976). In the 1968 decision of Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 564, the Second Circuit suggested that 23(b)(1)(A) did not apply if the individual claims were so small that individual suits were unlikely to be initiated, a position that seems wholly contrary to the fundamental purpose of the class action device of providing an effective vehicle for vindicating small claims.

67. *E.g.*, McDonnell Douglas Corp. v. United States Dist. Ct., 523 F.2d 1083 (9th Cir. 1975), *cert. denied*, 425 U.S. 911 (1976).

68. *E.g.*, Gary-Northwest Ind. Women's Servs., Inc. v. Bowen, 421 F. Supp. 734 (N.D. Ind. 1976), *aff'd without op.*, 429 U.S. 1067 (1977).

69. *E.g.*, Robertson v. National Basketball Ass'n, 389 F. Supp. 867 (S.D.N.Y. 1975).

70. *Id.*

> other courts. The court might grant injunctive relief, another court might refuse, and a third may give relief which differs in material respects from the first. Differing results in the individual actions would impair the NBA's ability to "pursue a uniform continuing course of conduct" where pragmatic considerations require that the defendants act in the same manner to all members of the class.[71]

This case also illustrates that the awarding of damages in conjunction with relief establishing a common standard of conduct is entirely appropriate.[72]

To qualify for certification pursuant to subsection (b) of 23.02(1), a decision in an individual case must be likely "as a practical matter"[73] to dispose of the interests of other members of the class or to hinder substantially their ability to protect their interests. The Advisory Committee's Note to Federal Rule 23 explain that the section is appropriate whenever the class members' rights may be abridged.

> This clause [(b)(1)(B)] takes in situations where the judgment in a nonclass action by or against an individual member of the class, while not technically concluding the other members, might do so as a practical matter. The vice of an individual action would lie in the fact that the other members of the class, thus practically concluded, would have had no representation in the lawsuit.[74]

The mere fact that an individual decision may have a stare decisis effect on later cases has been held to be an insufficient basis for (b)(1)(B) certification;[75] however, if the affirmative relief sought would preclude certain options for absent class members, as in the antitrust action against the National Basketball Association discussed above, (b)(1)(B) certification is appropriate.[76] A common application of (b)(1)(B) is to those situations in which

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71. *Id.* at 901.

72. *E.g.*, Zachary v. Chase Manhattan Bank, 52 F.R.D. 532 (S.D.N.Y. 1971); Mungin v. Florida E. Coast Ry., 318 F. Supp. 720 (M.D. Fla. 1970), *aff'd per curiam*, 441 F.2d 728 (5th Cir. 1971), *cert. denied sub nom.* Howard v. Florida E. Coast Ry., 404 U.S. 897 (1971).

73. TENN. R. CIV. P. 23.02(1)(b).

74. Advisory Committee's Note, *supra* note 7, at 100-01.

75. *E.g.*, Larionoff v. United States, 533 F.2d 1167 (D.C. Cir. 1976), *aff'd on the merits*, 431 U.S. 864 (1977).

76. 389 F. Supp. at 901.

the claims of all the members must be satisfied out of a common fund and the satisfaction of individual claims may deplete the assets, thereby, as a practical matter, foreclosing the claims of other members of the class.[77]

Rule 23.02(2): Classes

Once the prerequisites of rule 23.01 have been met, a class action may be maintained pursuant to rule 23.02(2) if "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole."[78] Pursuant to this section, the initial requirement for certification, that the opposing party's conduct be "generally applicable to the class,"[79] usually results from either common constitutional[80] or regulatory enactments[81] or from a consistent course of conduct.[82] Not all members of the class need have been directly affected or similarly aggrieved by the actions as long as the conduct could affect all similarly situated persons alike.[83] In fact, the Supreme Court has recently determined that a class action can proceed even though the representative party's claim becomes moot before the case is concluded.[84]

77. *E.g.*, Bradford Trust Co. v. Wright, 70 F.R.D. 323 (E.D.N.Y. 1976); Louisiana v. Weinberger, 369 F. Supp. 856 (E.D. La. 1973).

78. TENN. R. CIV. P. 23.02(2). This section of the Tennessee rule is identical to its federal counterpart, FED. R. CIV. P. 23(b)(2).

79. TENN. R. CIV. P. 23.02(2). Note that the language of rule 23.02(2), unlike subsections (1) and (3) of rule 23.02, seems to preclude certification against a defendant class.

80. *E.g.*, Doe v. Israel, 358 F. Supp. 1193 (D.R.I.), *stay terminated*, 482 F.2d 156 (1st Cir. 1973), *cert. denied*, 416 U.S. 993 (1974); Thomas v. Clarke, 54 F.R.D. 245 (D. Minn. 1971).

81. *E.g.*, Aitchison v. Berger, 404 F. Supp. 1137 (S.D.N.Y. 1975), *aff'd*, 538 F.2d 307 (2d Cir.), *cert. denied*, 429 U.S. 890 (1976); Berends v. Butz, 357 F. Supp. 143 (D. Minn. 1973).

82. *E.g.*, Andujar v. Weinberger, 69 F.R.D. 690 (S.D.N.Y. 1976); Bermudez v. United States Dep't of Agric., 490 F.2d 718 (D.C. Cir.), *cert. denied*, 414 U.S. 1104 (1973).

83. Advisory Committee's Note, *supra* note 7, at 102.

84. Sosna v. Iowa, 419 U.S. 393 (1975). In a subsequent case, however, the Court in distinguishing *Sosna* noted that a major consideration in allowing the class to proceed after the representative's claim has become moot is whether a proper class is otherwise before the court. Kremens v. Bartley, 431 U.S. 119 (1977). Thus, in a case in which not only the representative's claims but also

Once the defendant has been determined to have acted in a manner generally applicable to the class, the class must seek final injunctive or declaratory relief.[85] The Advisory Committee's Note to the Federal Rules defines corresponding declaratory relief as any action that "as a practical matter . . . affords injunctive relief or serves as a basis for later injunctive relief."[86] Thus, declaring a statute or a practice unconstitutional[87] or an action unlawful[88] has the effect of an injunction. For this reason, rule 23(b)(2) is commonly used to certify classes seeking to vindicate constitutional rights.[89]

While an action predominantly seeking money damages is not appropriate pursuant to 23.02(2),[90] certification is appropriate when injunctive relief is primary even though damages are also sought.[91] Two courts have held that a 23(b)(2) certification is proper even when the declaratory issue has become moot and only the damage claim remains.[92] The mere fact that damages have resulted from the improper conduct should not foreclose the possibility of seeking class relief in 23.02(1) cases; certainly nothing in the rule dictates such a result.

Rule 23.02(3): Actions

After the prerequisites of 23.01 have been met, rule 23.02(3) provides a third possible type of class action whenever "the court finds that the question of law or fact common to the members of the class predominate [*sic*] over any questions affecting only individual members, and that a class action is superior to other

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those of a large portion of the class become moot, the class may be improper as originally defined.

85. *E.g.*, Muller v. Curtis Publishing Co., 57 F.R.D. 532 (E.D. Pa. 1973).

86. Advisory Committee's Note, *supra* note 7, at 102.

87. *E.g.*, Doe v. Israel, 358 F. Supp. 1193 (D.R.I.), *stay denied*, 482 F.2d 156 (1st Cir. 1973), *cert. denied*, 416 U.S. 993 (1974).

88. *E.g.*, Lund v. Affleck, 388 F. Supp. 137 (D.R.I. 1975).

89. *E.g.*, Torres v. New York State Dep't of Labor, 318 F. Supp. 1313 (S.D.N.Y. 1970); Caldwell v. Laupheimer, 311 F. Supp. 853 (E.D. Pa. 1969).

90. Advisory Committee's Note, *supra* note 7, at 102. *See, e.g.*, Al Barnett & Son, Inc. v. Outboard Marine Corp., 64 F.R.D. 43 (D. Del. 1974).

91. *E.g.*, Robinson v. Lorillard, 444 F.2d 791 (4th Cir.), *cert. dismissed*, 404 U.S. 1006 (1971); Alexander v. Avco Corp., 380 F. Supp. 1282 (M.D. Tenn. 1974).

92. Arkansas Ed. Ass'n v. Board of Educ., 446 F.2d 763 (8th Cir. 1971); Rodgers v. U.S. Steel Corp., 69 F.R.D. 382 (W.D. Pa. 1975).

available methods for the fair and efficient adjudication of the controversy."[93] Subsection (3) class suits are quite dissimilar from subsection (1) or (2) actions. Subsection (3) suits are appropriate whenever the class device is found to be a superior means of handling the actions of the class members; subsection (1) and (2) actions require the more demanding standard that a common binding judgment in favor of the class be necessitated by the facts. This difference is best illustrated by the fact that rule 23.03 (2) provides that any member of a subsection (3) class may be excluded from the action if he or she so notifies the court.[94] This "opt out" provision obviously could not be available in subsection (1) or (2) actions without defeating their purpose. The rationale for providing class treatment in this third situation was stated in the Advisory Committee's Note to the Federal Rules.

> In the situations to which this subdivision (b)(3) relates, class-action treatment is not as clearly called for as in those [brought under subdivision (b)(1) or (b)(2)], but it may nevertheless be convenient and desirable depending upon the particular facts. Subdivision (b)(3) encompasses those cases in which a class action would achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results.[95]

One prominent jurist summarized the 23(b)(3) action as one "where common questions of law and fact predominate, and where the court makes certain basic findings showing that a class action is the fairest, most efficient, and (in a word) the most just

93. Prior to 1966, Federal Rule 23(b)(3) class suits based solely on common questions were called "spurious" class suits and were not in reality class actions, for only the representative parties and members of the class who opted to join in the action were bound by the judgment.

Tennessee Rule 23.02(3) is identical to present Federal Rule 23(b)(3) except that the Tennessee rule refers to "the question of law or fact common to the members of the class" instead of the "questions of law or fact common to the members of the class." Rule 23.01(2), of course, sets a prerequisite of "questions of law or fact common to the class," but a single question has been consistently held sufficient to satisfy that requirement. *See* text accompanying note 23 *supra*. The more accurate wording for both provisions would clearly be "question or questions."

94. Rule 23.03(2) provides special notice provisions for actions under 23.02(3). *See* text accompanying notes 164-210 *infra*.

95. Advisory Committee's Note, *supra* note 7, at 102-03.

way over all of resolving the clash of opposed interests."[96]

For certification to be appropriate as a subdivision (3) action, the court must make two findings. Initially, the court must determine that "the question of law or fact common to the members of the class predominate [*sic*] over any questions affecting only individual members." This standard is obviously a comparative one, and no precise formula is provided by the rule. The ultimate objective, of course, is a determination of the best way to settle all the disputes. Obviously, more than the presence of common questions is required, but there need not be complete identity of issues.[97] The Advisory Committee, while not articulating a standard, indicates a distinction between determinations of liabilities and of damages;[98] yet, some differing questions of liability may exist and common questions still predominate so that class relief would be appropriate. Ordinarily, individual damage claims will remain, and other individual claims may survive as well without destroying the utility of the class device.[99]

Closely connected with the determination that common questions predominate is the second requirement that the class action device be superior to other available methods for the fair and efficient adjudication of the controversy. The court initially must determine what other possibilities exist for settling the dis-

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96. Frankel, *Some Preliminary Observations Concerning Civil Rule 23*, 43 F.R.D. 39, 43 (1967). Judge Frankel is a United States District Judge for the Southern District of New York.

97. *E.g.*, *In re* Sugar Indus. Litigation, 73 F.R.D. 322 (E.D. Pa. 1976); Partain v. First Nat'l Bank, 59 F.R.D. 56 (M.D. Ala. 1973).

98. The Committee states:

> A "mass accident" resulting in injuries to numerous persons is ordinarily not appropriate for a class action because of the likelihood that significant questions, not only of damages but of liability and defenses to liability, would be present, affecting the individuals in different ways. In these circumstances an action conducted nominally as a class action would degenerate in practice into multiple lawsuits separately tried.

39 F.R.D. at 103.

99. Judge Frankel observed that:

> It is broadly implicit that a single determination by representative parties alone cannot in itself decide the claims or defenses of all class members; it is assumed that individual questions peculiar to individual class members, but overweighed by the common questions, will or may remain after the common questions have been finally determined.

Frankel, *supra* note 96, at 43.

putes and weigh the advantages of each. Thus, the court must consider the feasibility of individual actions,[100] joinder of claims,[101] intervention,[102] a test case,[103] litigation before the multidistrict panel,[104] administrative relief,[105] or the likelihood of settlements.[106] Often, there will not be a possibility of individual actions, even considering the possibility of joinder or intervention, because many or all of the individual claims are too small to litigate individually, trial costs often exceeding any expected recovery.[107] "[T]he class action's 'historic mission [having been to take] care of the smaller guy,' "[108] 23.03(3) actions often provide the only possible access to the courts. Without the class device there is often "no recourse for thousands."[109] As the Second Circuit stated in 1965:

> In our complex modern economic system where a single harmful act may result in damages to a great many people there is a particular need for the representative action as a device for vindicating claims which, taken individually, are too small to justify legal action but which are of significant size if taken as a group. In a situation where we depend on individual initiative, particularly the initiative of lawyers, for the assertion of rights, there must be a practical method for combining these small claims and the representative action provides that

100. *E.g.*, Ingenito v. Bermec Corp., 376 F. Supp. 1154 (S.D.N.Y. 1974); Seligson v. Plum Tree, Inc., 61 F.R.D. 343 (E.D. Pa. 1973).

101. *E.g.*, McAdory v. Scientific Research Instruments, Inc., 355 F. Supp. 468 (D. Md. 1973).

102. *E.g.*, Monarch Asphalt Sales Co. v. Wilshire Oil Co., 511 F.2d 1073 (10th Cir. 1974); Reichert v. Bio-Medicus, Inc., 70 F.R.D. 71 (D. Minn. 1974).

103. *E.g.*, Gelman v. Westinghouse Elec. Corp., 73 F.R.D. 60 (W.D. Pa. 1976), *appeal dismissed*, 556 F.2d 699 (3d Cir. 1977).

104. *E.g.*, Causey v. Pan Am World Airways, Inc., 66 F.R.D. 392 (E.D. Va. 1975).

105. *E.g.*, Berlin Democratic Club v. Rumsfeld, 410 F. Supp. 144 (D.D.C. 1976); Schaffner v. Chemical Bank, 339 F. Supp. 329 (S.D.N.Y. 1972).

106. *E.g.*, Weight Watchers of Philadelphia, Inc. v. Weight Watchers Int'l, Inc., 455 F.2d 770 (2d Cir. 1972); Berley v. Dreyfus & Co., 43 F.R.D. 397 (S.D.N.Y. 1967).

107. *E.g.*, Eisen v. Carlisle & Jacquelin, 391 F.2d 555 (2d Cir. 1968); Dolgow v. Anderson, 43 F.R.D. 472 (E.D.N.Y. 1968).

108. Frankel, *Amended Rule 23 from a Judge's Point of View*, 32 ANTITRUST L.J. 295, 299 (1966) (quoting statement of Prof. B. Kaplan, Reporter of the new Federal Rules).

109. Green v. Wolf Corp., 406 F.2d 291, 301 (2d Cir. 1968).

> method. . . . The usefulness of the representative action as a device for the aggregation of small claims is "persuasive of the necessity of a liberal construction of . . . Rule 23."[110]

The possibility of a test case is often not an alternative if applicable principles of res judicata or collateral estoppel will not ensure the binding effect of the decision or will leave parties financially unable to assert their claims.

A determination that the class action is the appropriate action is by definition a pragmatic and relative one that must be based on a consideration of all aspects of the litigation.[111] Rule 23.03(3) lists four factors that should be included in the deliberations:

> (a) the interest of members of the class in individually controlling the prosecution or defense of separate actions;
> (b) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class;
> (c) the desirability or undesirability of concentrating the litigation of the claims in the particular forum;
> (d) the difficulties likely to be encountered in the management of a class action.

The interest of the individual in controlling his or her own suit entails an inquiry beyond that of a member's desire for a separate suit or the court's preference for the traditional two-party lawsuit.[112] Yet, a class action may not be appropriate when individual claims are quite large[113] or the claims may affect signif-

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110. Escott v. Barchris Constr. Corp., 340 F.2d 731, 733 (2d Cir.) (footnote omitted) (quoting Weeks v. Bareco Oil Co., 125 F.2d 84, 88 (7th Cir. 1941)), *cert. denied sub nom.* Drexel & Co. v. Hall, 382 U.S. 816 (1965).

111. The Third Circuit has identified six vantage points that must be considered: those of the judicial system, the potential class members, the representatives, the attorneys, the party opposing the class, and the public at large. Katz v. Carte Blanche Corp., 496 F.2d 747, 760 (3d Cir.), *cert. denied*, 419 U.S. 885 (1974).

> 112. Defendants' attack upon the superiority of a class action would appear to rest upon the truism that the interests of individual plaintiffs are best protected through vigorous and capable prosecution of separate trials. If such were a proper basis for the determination of superiority, there would never be a class action.

Vernon J. Rockler & Co. v. Graphic Enterprises, Inc., 52 F.R.D. 335, 346 (D. Minn. 1971).

113. *E.g.*, Al Barnett & Son, Inc. v. Outboard Marine Corp., 64 F.R.D. 43 (D. Del. 1974).

icantly the lives of the claimants and there is a wide range of choice of strategy and tactics in the litigation.[114] Objections to the class status must be carefully scrutinized to make certain that they are not prompted by considerations irrelevant to the efficient administration of justice.[115] At the same time the court must be convinced that each member of the class will be adequately represented.[116]

The second suggested criterion, the presence or absence of other pending litigation, will often indicate whether the risk of multiple suits can be avoided, thus making class relief appropriate. The presence of pending litigation may defeat the utility of the class action[117] although courts have recognized that the presence of multiple lawsuits is not necessarily determinative of the class certification.[118] The third suggested factor, the desirability of concentrating the litigation in the particular forum, also brings into consideration the desirability of one action as opposed to several. In addition, a determination must be made that the particular forum is the appropriate place for the single suit. In evaluating the appropriateness of the particular forum, courts consider the location of the class members,[119] the availability of witnesses and experts,[120] the court's docket,[121] and any other factor bearing upon the efficient and expeditious handling of the claims.

The fourth suggested criterion, the one most cited by courts, is the manageability of the case as a class action. Any determination of manageability of a class action is a relative one that re-

114. *E.g.*, Crasto v. Estate of Kaskel, 63 F.R.D. 18 (S.D.N.Y. 1974).

115. The potential of collecting sizable attorney's fees would be one example of an irrelevant consideration.

116. The court may choose to appoint further representatives or counsel to protect the interests of absent members of the class. This power of the court is particularly crucial in the context of a defendant class, since the plaintiff could potentially choose the weakest representative against whom to proceed.

117. *E.g.*, Kamm v. California City Dev. Co., 509 F.2d 205 (9th Cir. 1975); Technograph Printed Circuits, Ltd. v. Methode Elec., Inc., 285 F. Supp. 714 (N.D. Ill. 1968).

118. Hohmann v. Packard Instrument Co., 399 F.2d 711 (7th Cir. 1968); Rogelstad v. Farmers Union Grain Terminal Ass'n, 226 N.W.2d 370 (N.D. 1975).

119. *E.g.*, Gold Strike Stamp Co. v. Christensen, 436 F.2d 791 (10th Cir. 1970); Hobbs v. Northeast Airlines, Inc., 50 F.R.D. 76 (E.D. Pa. 1970).

120. *E.g.*, Hobbs v. Northeast Airlines, Inc., 50 F.R.D. 76 (E.D. Pa. 1970); American Trading & Prod. Corp. v. Fischbach & Moore, Inc., 47 F.R.D. 155 (N.D. Ill. 1969).

121. Frankel, *supra* note 108, at 296.

quires the court to consider available administrative alternatives for reaching a just resolution of all the issues.

A class action without doubt is always administratively more burdensome on a court than is the traditional two-party action. Thus, courts must look beyond the immediate work load necessitated by the class action and recognize that "the difficulties likely to be encountered in the management of a class action are not important when weighed against the benefits to the class, and any subclasses thereof, and to the administration of justice."[122] Courts have recognized that a class action may place "an onerous burden on the trial court,"[123] and every party opposing class certification undoubtedly seeks to alarm the court with dire predictions of the unmanageability of a class suit. Until those administrative difficulties outweigh the total benefits derived by the parties and the court system as a whole, the trial judge, if complying with the spirit of the rules, should undertake the task. The observation has been made that "[i]ronically, those Rule 23(b)(3) actions requiring the most management may yield the greatest pay-off in terms of effective dispute resolution."[124] Rule 23 presumes that a court will consider the interests of all the parties and the entire judicial system and conscientiously undertake the management of even a difficult class action if in reality that is the most just and efficient means for administering relief to the aggrieved parties.

Rule 23.03: Procedures for Conducting Class Suits

Four disparate provisions are contained in section (3) of rule 23; three of these provisions establish procedures for conducting class actions and the fourth states the effect of class action judgments. The three procedural provisions are extremely important when determining the propriety of class relief because they grant flexibility to the court and contain requirements for notice that are significantly different from the Federal Rules. A class action determination can only be made in light of the 23.03 provisions.

122. Technograph Printed Circuits, Ltd. v. Methode Elec., Inc., 285 F. Supp. 714, 724-25 (N.D. Ill. 1968).

123. Esplin v. Hirschi, 402 F.2d 94, 99 (10th Cir. 1968), *cert. denied*, 394 U.S. 928 (1969).

124. 7A C. WRIGHT & A. MILLER, *supra* note 8, § 1780 at 76.

Rule 23.03(1): The Class Action Certification Order

Subsection 1 of section (3) provides that "[a]s soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether the action is to be so maintained. An order under this section may be conditional and may be altered or amended before the decision on the merits."[125] The determination of the propriety of class treatment may be initiated by the plaintiff,[126] the defendant,[127] or by the court itself.[128] Indeed, the court is obligated to make the determination regardless of motions by the parties in order to protect the interests of all persons from possible prejudice by delay.[129] Failure of the party seeking class certification to so move generally does not bar certification[130] unless class members have been prejudiced[131] or the delay has convinced the court that the class representation is inadequate.[132]

The determination is to be made "as soon as practicable after the commencement"[133] of the action. The time that "is practicable" varies with each case and has been interpreted to mean "prompt"[134] or "when the trial court has had [an] adequate opportunity to acquaint itself with the case"[135] or "earliest possible

125. This subsection is identical to its federal counterpart 23(c)(1) except that the Tennessee rule has omitted an unnecessary comma in the last sentence. The federal provision did not exist prior to 1966.

126. *E.g.*, Minnesota v. United States Steel Corp., 44 F.R.D. 559 (D. Minn. 1968).

127. *E.g.*, Local 1600, Am. Fed'n of Teachers v. Byrd, 456 F.2d 882 (7th Cir.), *cert. denied*, 409 U.S. 848 (1972).

128. *E.g.*, Boring v. Medusa Portland Cement Co., 63 F.R.D. 78 (M.D. Pa. 1974); Johnson v. City of Baton Rouge, 50 F.R.D. 295 (E.D.La. 1970).

129. *E.g.*, Satterwhite v. City of Greenville, 557 F.2d 414 (5th Cir. 1977); Senter v. General Motors Corp., 532 F.2d 511 (6th Cir.), *cert. denied*, 429 U.S. 870 (1976).

130. *E.g.*, Marquez v. Kiley, 436 F. Supp. 100 (S.D.N.Y. 1977); Muth v. Dechert, Price & Rhoads, 70 F.R.D. 602 (E.D. Pa. 1976); Sheridan v. Liquor Salesmen's Union, Local 2, 60 F.R.D. 48 (S.D.N.Y. 1973).

131. Feder v. Harrington, 52 F.R.D. 178 (S.D.N.Y. 1970).

132. *E.g.*, Walker v. Columbia Univ., 62 F.R.D. 63 (S.D.N.Y. 1973).

133. TENN. R. CIV. P. 23.03(1).

134. Clantan v. Orleans Parish School Bd., 72 F.R.D. 164, 167 (E.D. La. 1976).

135. Link v. Mercedes-Benz, 550 F.2d 860, 864 (3d Cir.), *cert. denied*, 431 U.S. 933 (1977).

time"[136] or "earliest pragmatically wise moment."[137] Some courts have adopted their own rules setting specific times within which a motion for certification is to be brought.[138] The determination need not always be made at the outset of the litigation,[139] but the Supreme Court has resolved considerable uncertainty in the lower courts[140] by holding that certification, at least in (b)(3) actions, cannot be delayed until after a preliminary hearing on the merits because a determination at that time would be "directly contrary to the command of subdivision (c)(1)"[141] and would allow "a representative plaintiff to secure the benefits of a class action without first satisfying the requirements for it."[142] Although this reasoning implies that a court may not delay certification until a decision on the merits has been rendered, the Seventh Circuit has recognized that a court still retains much latitude in (b)(1) and (b)(2) actions.

> The rule unquestionably allows the district judge to exercise his discretion in deciding upon the earliest "practicable" time to determine whether the case is to be processed as a class action; but the text certainly implies, even if it does not state expressly, that such a decision should be made in advance of the ruling on the merits. For the explicit permission to alter or amend a certification order before decision on the merits plainly implies disapproval of such alteration or amendment thereafter. On the other hand, that degree of flexibility permitted before the merits are decided also indicates that in some cases the final certification need not be made *until* the moment the merits are decided.[143]

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136. Horn v. Associated Wholesale Grocers, Inc., 555 F.2d 270, 273 (10th Cir. 1977).

137. Berman v. Narragansett Racing Ass'n, 48 F.R.D. 333, 336 (D.R.I. 1969).

138. *E.g.*, Coffin v. Secretary of HEW, 400 F. Supp. 953 (D.D.C. 1975), *appeal dismissed*, 430 U.S. 924 (1977).

139. *E.g.*, Link v. Mercedes-Benz, 550 F.2d 860 (3d Cir.), *cert. denied*, 431 U.S. 933 (1977).

140. *See* Milberg v. Western Pac. R.R., 51 F.R.D. 280 (S.D.N.Y. 1970); Dolgow v. Anderson, 43 F.R.D. 472 (E.D.N.Y. 1968); Mersay v. First Republic Corp., 43 F.R.D. 465 (S.D.N.Y. 1968).

141. Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 178 (1974).

142. *Id.* at 177.

143. Jimenez v. Weinberger, 523 F.2d 689, 697 (7th Cir. 1975), *cert. denied*, 427 U.S. 912 (1976).

Thus, most courts have recognized that certification should not follow a decision on the merits[144] although the Third Circuit[145] and the District of Columbia Circuit[146] have allowed certification after liability has been established. Unlike subsection (1) or (2) actions, 23.02(3)'s opt-out provision dictates an early determination in cases filed thereunder so that there can be a meaningful opportunity to be excluded from the class.[147]

Yet, while 23.03(1) certification cannot follow a preliminary hearing into the merits of the case, the decision need not be based solely on the pleadings[148] because discovery is essential in most cases to determine the propriety of class relief.[149] Briefings are generally necessary,[150] and the court may require a preliminary hearing on the matters relevant to certification, such as common questions or manageability.[151] Similarly, special inquiries might need to be ordered in particular cases.[152]

The court should issue orders once it has sufficient bases for determining the certification issue.[153] Rule 23.03(1) gives the court substantial flexibility in that the order "may be conditional and may be altered or amended before the decision on the merits."[154] Thus, the court may grant certification subject to decerti-

144. Horn v. Associated Wholesale Grocers, Inc., 555 F.2d 270 (10th Cir. 1977); Nance v. Union Carbide Corp., 540 F.2d 718 (4th Cir. 1976), *cert. denied*, 431 U.S. 953 (1977); Peritz v. Liberty Loan Corp., 523 F.2d 349 (7th Cir. 1975); United States v. School Bd., 418 F. Supp. 639 (E.D. Va. 1976).

145. McLaughlin v. Wohlgemuth, 535 F.2d 251 (3d Cir. 1976); Katz v. Carte Blanche Corp., 496 F.2d 747 (3d Cir.), *cert. denied*, 419 U.S. 885 (1974).

146. Larionoff v. United States, 533 F.2d 1167 (D.C. Cir. 1976), *aff'd on the merits*, 431 U.S. 864 (1977).

147. See discussion in Jimenez v. Weinberger, 523 F.2d 689 (7th Cir. 1975), *cert. denied*, 427 U.S. 912 (1976).

148. *See* Sturdevant v. Deer, 73 F.R.D. 375 (E.D. Wis. 1976).

149. *E.g.*, Pittman v. E.I. duPont de Nemours & Co., 552 F.2d 149 (5th Cir. 1977); Kirby v. Blackledge, 530 F.2d 583 (4th Cir. 1976); Yaffee v. Powers, 454 F.2d 1362 (1st Cir. 1972).

150. *E.g.*, McDonald v. General Mills, Inc., 387 F. Supp. 24 (E.D. Cal. 1974).

151. *E.g.*, Guerine v. J & W Investment, Inc., 544 F.2d 863 (5th Cir. 1977); Weathers v. Peters Realty Corp., 499 F.2d 1197 (6th Cir. 1974); Huff v. N.D. Cass Co., 485 F.2d 710 (5th Cir. 1973).

152. *E.g.*, Adderly v. Wainwright, 272 F. Supp. 530 (M.D. Fla. 1967).

153. Rule 23.04 provides for the issuing of orders in a class action. *See* text accompanying notes 244-81 *infra*.

154. TENN. R. CIV. P. 23.03(1).

fication if further discovery so dictates[155] or make the order conditional upon a more precise identification of the class[156] or more adequate representation.[157] Likewise, the order may be unconditional as granted but may be altered at some later stage in the proceedings. For example, the definition of the class may be modified,[158] the issues to be tried as a class may be narrowed,[159] representation may be altered,[160] or the action may at any time be decertified.[161] This flexibility is central to any class action determination and must be carefully considered by the court. Accordingly, one court has recognized that "if there is to be an error made, let it be in favor and not against the maintenance of the class action, for it is always subject to modification should later developments during the course of the trial so require."[162]

Parties who come within rule 23 should be granted class relief to satisfy the purposes and the spirit of rule 23. The flexibility of 23.03(1) ensures the availability of class status resulting in little risk to the courts or opposing parties since the class aspect of the action can be dismissed if dismissal becomes appropriate. Subsection (2) of rule 23.04 gives the court full authority to issue any orders necessary to protect the parties' interests, including the issuance of notice of decertification.[163]

Rule 23.03(2): Notice in a 23.02(3) Action

One of the key provisions in rule 23, subsection (2) of section .03, provides that once the court certifies a 23.02(3) class action, absent class members must be apprised of their right to opt out of the class.

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155. *E.g.*, Bryan v. Amrep Corp., 429 F. Supp. 313 (S.D.N.Y. 1977).

156. *E.g.*, Hardy v. United States Steel Corp., 289 F. Supp. 200 (N.D. Ala. 1967).

157. *E.g.*, Page v. Curtiss-Wright Corp., 332 F. Supp. 1060 (D.N.J. 1971).

158. *E.g.*, Harriss v. Pan Am World Airways, Inc., 74 F.R.D. 24 (N.D. Cal. 1977); *In re* United States Financial Secs. Litigation, 69 F.R.D. 24 (S.D. Cal. 1975).

159. *E.g.*, Herrmann v. Atlantic Richfield Co., 65 F.R.D. 585 (W.D. Pa. 1974). *See generally* text accompanying notes 214-43 *infra*.

160. *E.g.*, Price v. Skolnik, 54 F.R.D. 261 (S.D.N.Y. 1971).

161. *E.g.*, Fox v. Prudent Resources Trust, 69 F.R.D. 74 (E.D. Pa. 1975); Samuel v. University of Pittsburg, 375 F. Supp. 1119 (W.D. Pa. 1974).

162. Esplin v. Hirschi, 402 F.2d 94, 99 (10th Cir. 1968).

163. TENN. R. CIV. P. 23.04(2). *See generally* note 276 *infra* and accompanying text.

> In any class action maintained under 23.02(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including publication when appropriate or individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (a) the court will exclude him from the class if he so requests by a specified date; (b) the judgment, whether favorable or not, will include all members who do not request exclusion; and (c) any member who does not request exclusion may, if he desires, enter an appearance.[164]

The key language in this section directs that "the best notice practicable under the circumstances" be given. The notice requirement in the 23.02(3) action is designed to allow the class members an opportunity to exercise their rights to be excluded from the class and to ensure the binding effect of the judgment. Notice is central to the operation of rule 23(b)(3) because only those parties who are aware of the pending action can take steps to protect their interests adequately, either by passively pursuing the class judgment, actively participating in the class proceeding, or opting out entirely. As indicated by the Advisory Committee's Note to the Federal Rules, this notice provision, in conjunction with discretionary notice for which section (4) of the rule provides,[165] was "designed to fulfill requirements of due process to which the class action procedure is of course subject."[166]

Not surprisingly, courts have struggled to determine the appropriate kind of notice that will satisfy the requirements of both the rule and due process. The Tennessee rule requires state courts to send "the best notice practicable under the circumstances, *including publication when appropriate or individual notice to all members who can be identified through reasonable effort.*"[167] The Tennessee rule differs significantly from its federal counterpart, rule 23(c)(2), that requires federal courts to send "the best notice practicable under the circumstances, *including individual notice to all members who can be identified through reasonable effort.*"[168] The difference is striking in that individual notice is man-

164. As discussed in text accompanying notes 167-69 *infra* this section of the Tennessee rule varies significantly from its federal counterpart, FED. R. CIV. P. 23(c)(2).

165. *See* text accompanying notes 252-68 *infra.*

166. Advisory Committee's Note, *supra* note 7, at 107 (1966).

167. TENN. R. CIV. P. 23.03(2) (emphasis added).

168. FED. R. CIV. P. 23(c)(2) (emphasis added).

datory in federal actions when members can be identified[169] while publication and individual notice are appropriate means of notification under the Tennessee rule. Thus, given the flexibility of the Tennessee rule, a determination of the requirements of due process in this context is critical.

In 1974 in *Eisen v. Carlisle & Jacquelin*[170] the United States Supreme Court considered the notice requirements in a federal (b)(3) action and in doing so elucidated the requirements of both Federal Rule 23(c)(2) and due process.[171] The Court held that "individual notice . . . is not a discretionary consideration to be waived in a particular case. It is, rather, an unambiguous requirement of [Federal] Rule 23."[172] This holding is based solely on a reading of Federal Rule 23 rather than on any due process consideration. The Court's language is decisive—"quite apart from what due process may require, the command of Rule 23 is clearly to the contrary."[173]

Cases that have established the notice required by the due process clause have not set arbitrary requirements of personal notice but rather have articulated flexible standards applied on a case-by-case basis.[174] The landmark case of *Mullane v. Central Hanover Bank & Trust Co.*[175] involved a judicial settlement of a common trust fund created pursuant to a New York statute that provided for the consolidating of many small private trusts under

169. Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974).

170. *Id.*

171. *Id.*

172. *Id.* at 176.

173. *Id.* at 177. That this decision does not rest on due process requirements that would be binding on state class actions but rather hinges merely on the notice requirements under the federal rules has been widely acknowledged. McGhee v. Bank of America Nat'l Trust and Sav. Ass'n, 60 Cal. App. 3d 442, 131 Cal. Rptr. 482 (1976); People *ex rel.* Wilcox v. Equity Funding Life Ins. Co., 61 Ill. 2d 303, 335 N.E.2d 448 (1975); Johnson v. Chrysler Credit Corp., 26 Md. App. 122, 337 A.2d 210 (1975); Charles v. Spradling, 524 S.W.2d 820 (Mo. 1975); Ray v. Marine Midland Grace Trust Co., 35 N.Y.2d 147, 316 N.E.2d 320, 359 N.Y.S.2d 28 (1974); McMonagle v. Allstate Ins. Co., 331 A.2d 467 (Pa. 1975); *see also* McCall, *Due Process and Consumer Protection: Concepts and Realities in Procedure and Substance—Class Action Issues*, 25 HASTINGS L.J. 1351 (1974); Schuck & Cohen, *The Consumer Class Action: An Endangered Species*, 12 SAN DIEGO L. REV. 39 (1974).

174. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950); Hansberry v. Lee, 311 U.S. 32 (1940).

175. 339 U.S. 306 (1950).

one trustee. The only notice afforded all beneficiaries was by publication. The Supreme Court held that the statute authorizing such notice denied due process to beneficiaries whose whereabouts were known. The Court expressly declined to establish a precise rule for notice and carefully noted that a requirement of personal notice to *all* beneficiaries would not be required for the expense of doing so would be such as to diminish the trust itself, which would clearly be against the beneficiaries' best interests. The Court adopted a "balancing" approach, weighing the interests of the beneficiaries in receiving notice against the interest of settling and preserving the beneficiaries' trust assets. In noting the need to settle trust accounts, the Court observed that "[a] construction of the Due Process Clause which would place impossible or impractical obstacles in the way could not be justified."[176] *Mullane* apparently would not dictate personal notice in any case in which such a requirement would "place impossible or impracticable obstacles in the way" of class members' vindication of their rights. Under such circumstances, notice by publication would satisfy both the Tennessee rule and due process.

Hansberry v. Lee,[177] decided by the Court before *Mullane*, did not require personal notice to class members. Respondents in *Hansberry* were property owners who had signed a racially restrictive covenant that was effective only if signed by owners of 95% of the frontage within the area. Respondents did not argue that too few property owners had signed the covenant but contended that the issue was governed by a prior case that rested on an erroneous stipulation that enough owners had signed the agreement. The Supreme Court overruled the finding of res judicata, not because petitioners had not been personally served in the prior case but because petitioners' interests in the prior case had not been adequately protected.[178] The Court concisely articulated the basis for due process requirements:

> With a proper regard for divergent local institutions and interests, this Court is justified in saying that there has been a *failure of due process only in those cases where it cannot be said that the procedure adopted, fairly insures the protection of the interests of absent parties who are to be bound by it.*[179]

176. *Id.* at 313-14.
177. 311 U.S. 32 (1940).
178. *Id.* at 44-46.
179. *Id.* at 42 (emphasis added).

Thus, *Hansberry* does not set out a rigid due process requirement of personal notice in all cases but only requires personal service when necessary to protect the interests of absent parties.

Since the 1974 *Eisen* decision requiring personal notice in federal 23(b)(3) actions, the overwhelming number of state courts addressing the issue have determined that personal notice is not mandatory in all subsection (3) class actions.[180] Thus, under Tennessee Rule 23.03(2) personal notice is not dictated since neither the rule nor due process requires it.

Indeed, in some instances personal notice arguably could not be constitutionally ordered. In many subsection (3) actions the individual claims of the class members are quite small relative to the costs of bringing the litigation, and unless class relief is allowed, those parties will not be able to redress their grievances. The representative parties in such an action may be financially unable to bear the costs of individual notice to all class members, especially if the injury is widespread. The requirement of individual notice would effectively foreclose relief to all the class members, thereby denying them access to the courts and depriving them of due process.[181] In *Boddie v. Connecticut*,[182] the Court struck down a state statute that required an indigent couple to pay court costs in a divorce action. The Court held that the statute violated due process by effectively denying indigent persons access to the courts and concluded:"[D]ue process requires, at a minimum, that absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard."[183] The reasoning of *Boddie* implicitly dictates that the case's holding extends beyond the arena of divorce proceedings to all civil cases. Although the Court has held that a right of access to the courts does not exist with respect to a bankruptcy petition,[184] there is a significant difference between access to the court to escape one's valid legal obligations and access to redress a wrong. Whenever judicial relief is the only means of vindicating legal rights, *Boddie* apparently holds that

180. *See* note 173 *supra*.

181. Boddie v. Connecticut, 401 U.S. 371 (1971). *See also* McCall, *supra* note 173, at 1378, 1384.

182. 401 U.S. 371 (1971).

183. *Id.* at 377.

184. *See* United States v. Kras, 409 U.S. 434 (1973).

due process is denied by statutory or judicial requirements that in effect foreclose access to the courts. If the cost of individual notice has such an effect, absent a showing that the due process right to adequate representation was not met without notice being sent,[185] it could not be required.

Determining that personal notice is not compelled in every case by either the Tennessee statute or the Constitution does not, however, end the inquiry. To satisfy the statute, a court must always determine what constitutes "the best notice practicable"[186] and what notice will be effective to ensure that the ultimate decree will have a binding effect.[187] While the argument has been made that due process does not require any notification to absentees whose interests are otherwise protected,[188] at least in the area of .02(3) common-question classes in which the interests of the members are not as closely identified as in the .02(1) or .02(2) classes,[189] notification is apparently mandated by the right of absent parties to opt out of the class. What constitutes "the best notice practicable under the circumstances"[190] must be ascertained by the facts of each case.[191] The nature and size of the claims, the likelihood of members' desiring to opt out of the class, the likelihood of reaching class members through various media, and the cost of each means of notification relative to the claims are all variables to be weighed by the court. When the names and addresses of absent class members are easily obtained, the claims are large, and many individuals might prefer not to litigate, individual notice is preferable. On the other hand, when the class

185. *See* note 174 *supra* and accompanying text. The importance of considering relative notice costs was highlighted in the case of Cartt v. Superior Ct., 50 Cal. App. 3d 960, 124 Cal. Rptr. 376 (1975), in which the cost of individual notice would have been $68,718 and publication costs only approximately $1,580. *Id.* at 379-80 & n.9.

186. TENN. R. CIV. P. 23.03(2).

187. *See* Schroeder v. City of New York, 371 U.S. 208 (1962); Mullane v. Central Hanover Bank & Trust Co., 399 U.S. 306 (1950).

188. Note, 51 VA. L. REV. 629 (1965).

189. *See* discussion in text accompanying notes 252-68 *infra* for consideration of sending notice in .02(1) and .02(2) actions in which the classes are identified by some prior or existing legal relationship.

190. TENN. R. CIV. P. 23.03(2).

191. *E.g.*, *In re* Nissan Motor Corp. Antitrust Litigation, 552 F.2d 1088 (5th Cir. 1977); West Virginia v. Chas. Pfizer & Co., 440 F.2d 1079 (2d Cir. 1971), *cert. denied sub nom.* Cotler Drugs, Inc. v. Chas. Pfizer & Co., 404 U.S. 871 (1971).

consists of thousands of claimants, none of whom is likely to object to the litigation because of the size of the claims, notice by publication would be the "best notice practicable under the circumstances."[192] Other methods of notification such as radio and television advertising,[193] postings on bulletin boards,[194] and news media coverage[195] should also be considered. The ultimate inquiry in every case is whether the absent members will be reasonably apprised of their rights; the facts of each case will dictate the best practicable way to ensure that.

Once a decision is made about the form of notification, the timing of that notice is critical. Although the rule is silent as to when notice should be issued, it should ordinarily be sent as soon as, but not before,[196] the court issues the rule 23.03(1) order certifying the class. Further discovery may be required before notice is sent.[197] Prompt notice gives the absent members a full opportunity to intervene or to appear through counsel. Timing of notice is not as critical to the reservation of a right to opt out since that right may be exercised at any time prior to the judgment and members who are without fault in being unaware of the action until after the opt-out date may be allowed to opt out at a later date.[198]

Rule 23.03(2) lists three items that must be communicated to the absent members: the right to be excluded from the class, the binding effect of the judgment on members who do not exercise the option to be excluded, and the right of members remaining in the class to appear before the court. Since no precise forms are prescribed, any formulation reasonably apprising the absent

192. TENN. R. CIV. P. 23.03(2). Cases sanctioning notice by publication are, *e.g.*, Nolop v. Volpe, 333 F. Supp. 1364 (D.S.D. 1971); Biechele v. Norfolk & W. Ry., 309 F. Supp. 354 (N.D. Ohio 1969); Booth v. General Dynamics Corp., 264 F. Supp. 465 (N.D. Ill. 1967). Being federal court cases these cases have, of course, been overruled by Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974).

193. *E.g.*, Nolop v. Volpe, 333 F. Supp. 1364 (D.S.D. 1971).

194. *E.g.*, Ostapowicz v. Johnson Bronze Co., 54 F.R.D. 465 (W.D. Pa. 1972).

195. *E.g.*, Johnson v. Robinson, 296 F. Supp. 1165 (N.D. Ill. 1967), *aff'd*, 394 U.S. 847 (1969).

196. Pan Am World Airways, Inc. v. United States Dist. Ct., 523 F.2d 1073 (9th Cir. 1975).

197. *E.g.*, Wolfson v. Solomon, 54 F.R.D. 584 (S.D.N.Y. 1972); Cusick v. N.V. Nederlandsche Combinatie Voor Chemische Industrie, 317 F. Supp. 1022 (E.D. Pa. 1970).

198. *E.g.*, Berland v. Mack, 48 F.R.D. 121 (S.D.N.Y. 1969).

members of their rights in a manner that enables them to make intelligent choices is acceptable.[199] The statements should be "clear and succinct"[200] and "must be neutral and objective in tone, and should neither promote nor discourage the assertion of claims."[201] To signal the import of any mailing or publication and to avoid the appearance of claim solicitation, the notice should issue from the court.[202] In addition to the mandatory communications, the notice should identify the litigation and describe the stage of the proceedings and the relief sought. Notice should also indicate that once liability is determined, a proof of claim may be necessary.[203] While some cases have required that absent members be notified of a potential for counterclaims or other liability exposure,[204] such warnings generally should not be included unless a real possibility of such exposure exists, for class participation may be unnecessarily discouraged, thereby undermining the efficacy of the action.[205]

Another controversial aspect of the notice required by Federal Rule 23(c)(2) is the allocation of the costs of such notice. While the party seeking class relief generally is required to bear the notice costs,[206] courts have recognized that under some cir-

199. *See* Miller, *Problems of Giving Notice in Class Actions*, 58 F.R.D. 313 (1973).

200. *In re* Antibiotic Antitrust Actions, 333 F. Supp. 278, 290 (S.D.N.Y. 1971).

201. Lamb v. United Sec. Life Co., 59 F.R.D. 25, 42 (S.D. Iowa 1972); Philadelphia Elec. Co. v. Anaconda Am. Brass Co., 43 F.R.D. 452, 462 (E.D. Pa. 1968).

202. *E.g.*, Illinois v. Harper & Row Publishers, Inc., 301 F. Supp. 484 (N.D. Ill. 1969).

203. For example, "In case of recovery, you will be required to prove your membership in the class and your individual damage." 2 NEWBERG § 2475i, at 155 n.115 (quoting published notice for Fischer v. Kletz, 65 Civ. 787 (S.D.N.Y. 1970) (unreported class action notice, Wall Street Journal, Oct. 19, 1970)).

204. *E.g.*, Donson Stores, Inc. v. American Bakeries Co., 58 F.R.D. 485 (S.D.N.Y. 1973).

205. Most courts have now held that class members are not subject to counterclaims unless the defendant independently satisfies rule 23 in the case of declaratory or injunctive relief or otherwise proceeds against the members individually for damage claims. *See, e.g.*, Gold Strike Stamp Co. v. Christensen, 436 F.2d 791 (10th Cir. 1970). The absent members clearly are not liable for litigation costs when the action is unsuccessful. *See, e.g.*, Lamb v. United Sec. Life Co., 59 F.R.D. 44 (S.D. Iowa 1973); Herbst v. Able, 47 F.R.D. 11 (S.D.N.Y. 1969), *order amended*, 49 F.R.D. 286 (S.D.N.Y. 1970).

206. *E.g.*, Katz v. Carte Blanche Corp., 53 F.R.D. 539 (W.D. Pa. 1971);

cumstances the opposing party may be expected to share the expense.[207] The Supreme Court has clarified at least some aspects of the problem. Initially, in the 1974 *Eisen* decision, the Court held that a preliminary hearing on the merits of the case could not be used to determine allocation of notice costs and that the plaintiff must bear the initial costs "as part of the ordinary burden of financing his own suit."[208] Subsequently, however, in *Oppenheimer*, a 1978 case that required the use of defendant's records for identification of class members, the Court held that

> where a defendant can perform one of the tasks necessary to send notice, such as identification, more efficiently than the representative plaintiff, the district court has discretion to order him to perform the task under Rule 23(d). In such cases, the district court also has some discretion in allocating the cost of complying with its order.[209]

The defendant may be required to assume the costs if "the expense involved may be so insubstantial as not to warrant the effort required to calculate it and shift it to the representative plaintiff."[210] Thus, the Court noted that the defendant may have to bear the cost of producing its files for inspection or any costs of tasks "that the defendant must perform in any event in the ordinary course of its business."[211] Otherwise, the costs apparently must be borne by the plaintiff.

Rule 23.03(3): Class Action Judgments

The third section of rule 23.03 provides that in the judgment the court must define the class that was represented:

> The judgment in an action maintained as a class action under 23.02(1) or 23.02(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under 23.02(3), whether or not favorable to the

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Herbst v. Able, 47 F.R.D. 11 (S.D.N.Y. 1969).

207. *E.g.*, Battle v. Municipal Hous. Auth., 53 F.R.D. 423 (S.D.N.Y. 1971); Korn v. Franchard Corp., 50 F.R.D. 57 (S.D.N.Y. 1970), *appeal dismissed*, 443 F.2d 1301 (2d Cir. 1971).

208. Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 179 (1974).

209. Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 350 (1978).

210. *Id.* at 359.

211. *Id.*

> class, shall include and specify or describe those to whom the notice provided in 23.03(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

This provision cannot dictate that all persons within the named class are in fact bound by the judgment since a court can never predetermine the res judicata effect of its judgment.[212] Yet, requiring the judgment to list those represented before the court is an invaluable aid to any reviewing court. One commentator observed that the rule is a "statement of how the judgment shall read, not an attempted prescription of its subsequent res judicata effect, although looking ahead with hope to that effect."[213]

Rule 23.03(4): Limited Issues and Subclasses

The fourth provision of rule 23.03, one of the most important provisions of the entire rule, must be considered with the decision to certify the class. This provision grants the court authority to limit the issues of the action and to divide the members into separate subclasses as necessary: "When appropriate (a) an action may be brought or maintained as a class action with respect to particular issues, or (b) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly."[214] Thus, when an action is presented for certification, the court does not have to accept the class characterization or the issues as originally presented. Those issues that meet the rule's requirements can be tried as a class action, and the remaining issues can be left for individual determinations. Likewise, if the class members' claims fit into several homogenous groups, the action may proceed for each subclass.

The court can decide initially what issue or issues will meet the requirements for class treatment. Thus, a common question of liability can be tried for the class and such other issues as individual damages,[215] reliance,[216] retroactive benefits,[217] proxi-

212. *See* text accompanying notes 221-36 *infra*.

213. Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedue (I)*, 81 HARV. L. REV. 356, 393 (1967).

214. This subsection is identical to its federal counterpart, rule 23(c)(4), which section was new to the rule in 1966.

215. *E.g.*, Weathers v. Peters Realty Corp., 499 F.2d 1197 (6th Cir. 1974); Bing v. Roadway Express, Inc., 485 F.2d 441 (5th Cir. 1973); Nix v. Grand Lodge

mate cause,[218] and counterclaims[219] can be specifically reserved for later adjudications. The judgment in the class suit then settles only the issues certified and is res judicata only as to those issues. All claims or defenses other than those certified remain unmerged in the judgment and are thereby distinguished from the usual situation in which a judgment purports to settle all claims between the parties.[220]

This limitation of issues for class treatment pursuant to rule 23.03(4) is well accepted under the rule's federal counterpart, rule 23(c)(4), and is recognized as necessary for the viability of many class actions. For example, in *Cohen v. District of Columbia National Bank*[221] class plaintiffs sought to recover from defendant banks for usurious overcharges and for antitrust violations. The district court, however, only certified the usury question for the class action and noted that "[t]he Court remains convinced that the interests of justice and judicial administration require, as nearly as possible, the separate treatment of the two questions raised herein."[222] In a similar action, *Partain v. First National Bank of Montgomery*,[223] defendants sought to defeat certification of the class by alleging the presence of counterclaims. The court responded to that argument by stating: "The potential assertion of counterclaims against these few members of the proposed class cannot be allowed to defeat an otherwise valid class action when to do so would effectively deprive thousands of class members of the relief to which they are entitled."[224] The court then concluded that if counterclaims existed, defendant could "set off the dam-

Machinists & Aerospace Workers, 479 F.2d 382 (5th Cir.), *cert. denied*, 414 U.S. 1024 (1973).

216. *E.g.*, Vernon J. Rockler & Co. v. Graphic Enterprises, Inc., 52 F.R.D. 335 (D. Minn. 1971); Fogel v. Wolfgang, 47 F.R.D. 213 (S.D.N.Y. 1969).

217. *E.g.*, Eley v. Morris, 390 F. Supp. 913 (N.D. Ga. 1975); Doe v. Lukhard, 363 F. Supp. 823 (E.D. Va. 1973), *aff'd on the merits*, 493 F.2d 54 (4th Cir. 1974), *vacated on other grounds*, 420 U.S. 999 (1975).

218. *E.g.*, Hernandez v. Motor Vessel Skyward, 61 F.R.D. 558 (S.D. Fla. 1973), *aff'd*, 507 F.2d 1278 (5th Cir. 1975).

219. *E.g.*, Cohen v. District of Columbia Nat'l Bank, 59 F.R.D. 84 (D.D.C. 1972).

220. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 61.2(1)(b)(Tent. Draft No. 5, 1978).

221. 59 F.R.D. 84 (D.D.C. 1972).

222. *Id.* at 86.

223. 59 F.R.D. 56 (M.D. Ala. 1973).

224. *Id.* at 59.

ages owed in each case by reducing the balance outstanding on the account by the amount of damages due . . . . Should damages exceed the balance outstanding, the difference must be paid to the account holder."[225] The court noted the limited scope of the issue certified in that case by pointing out that "[t]his holding is without prejudice to these members of the class challenging in some other action the validity of the bank's claim against them."[226] Other cases wherein individual defenses of members of a defendant class were severed from the class treatment of common issues have recognized that those individual claims are not merged in the class action judgment.[227] As one court concluded, "[i]f a class action is declared as to the common issues, the individual defendants would not be at all deterred from asserting their personal defenses in the separate proceedings which will inevitably follow."[228]

Hernandez v. Motor Vessel Skyward[229] presents another example of limiting the issues subject to class action treatment under rule 23(c)(4)(A). Plaintiffs in *Hernandez* brought a class action on behalf of all passengers taken seriously ill during a voyage on defendants' ship. Plaintiffs asserted four causes of action: breach of contract, negligence in exposing passengers to contaminated food or water, breach of implied warranty of fitness of the food and water, and negligence in providing inadequate medical care. The court limited the class action to one issue and preserved the other claims or defenses for later actions:

> In the instant case, only one issue is available for class treatment. Whether the defendants were negligent in preparing either the drinking water or food that was available for consumption by the passengers is subject to a uniform determination. A ruling on this issue would be applicable to any prospective claimant. The issues of the proximate cause of each passenger's illness, contract liability, the adequacy of medical treatment afforded each passenger, and damages are individual in nature.

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225. *Id.* at 60 & n.8.

226. *Id.* at 60.

227. *E.g.*, Dale Elec., Inc. v. R.C.L. Elec., Inc., 53 F.R.D. 531 (D.N.H. 1971); Research Corp. v. Pfister Associated Growers, Inc., 301 F. Supp. 497 (N.D. Ill. 1969); Technograph Printed Circuits, Ltd. v. Methode Elec., Inc., 285 F. Supp. 714 (N.D. Ill. 1968).

228. Guy v. Abdulla, 57 F.R.D. 14, 16 (N.D. Ohio 1972).

229. 61 F.R.D. 558 (D. Fla. 1973), *aff'd*, 507 F.2d 1278 (5th Cir. 1975).

> The likelihood of individual defenses on these issues is at least recognizable.[230]

That such judgments, limited in scope pursuant to rule 23(c)(4) do not operate to bar other claims or defenses is well accepted as exemplified by the Fifth Circuit decision of *Dore v. Kleppe*.[231] In that case a recipient of a loan from the Small Business Administration brought an action on behalf of all other borrowers and challenged the Administration's interpretation of the forgiveness provision of the Southeast Hurricane Disaster Relief Act of 1965. The Act provided that the Small Business Administration " 'to the extent such loss or damage is not compensated for by insurance or otherwise, . . . shall at the borrower's option on that part of any loan in excess of $500 . . . cancel up to $1,800 of the loan.' "[232] The Administration asserted that plaintiffs' claims were barred by a prior class action, *Pottharst v. SBA*.[233] That action was brought on behalf of nearly the same class and challenged the Administration's interpretation of the words "not compensated for by insurance" in the above provision. In *Dore* the Administration argued that the *Pottharst* decision barred any further claims on the same provision since those claims could have been raised in the former action. The court noted the principle of res judicata and stated that "[t]he general rule is that a final judgment is conclusive on the parties as to all questions of fact and law relevant to the same cause of action which were or could have been litigated in the prior proceeding."[234] The court pointed out, however, that the nature of the issues litigated in a prior action must be of the same nature as those in the subsequent claim before the claims are merged.

> The key to deciding whether res judicata applies is a determination of whether the second suit involves the same cause of action as the prior litigation. . . . If the cause of action is different in the second suit the parties are estopped from relitigating only those issues actually and necessarily decided in the first suit.[235]

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230. *Id.* at 561.

231. 522 F.2d 1369 (5th Cir. 1975).

232. *Id.* at 1371 n.3 (quoting Southeast Hurricane Disaster Relief Act of 1965, Pub. L. No. 89-339, 79 Stat. 1301).

233. 329 F. Supp. 1142 (E.D. La. 1971).

234. 522 F.2d at 1374.

235. *Id.* Moreover, even the Restatement (Second) of Judgments recog-

Thus, the Fifth Circuit held that while plaintiffs could possibly have sought a determination on the provision's limitation of forgiveness in the prior suit, they would not be required to do so by "any such harsh, and erroneous, application of the doctrine of *res judicata*."[236] The court emphasized that the policies behind a flexible application of res judicata were especially compelling in a class action.

> In addition we emphasize that *Pottharst* was a class action. It is wise policy to encourage manageability of class suits by limiting both the size of the class and the complexity of the litigation. . . . In fact Rule 23(c)(4) permits the division of any action into subissues or subclasses so as to increase manageability . . . . While we consider the causes of action in *Pottharst* and *Dore* to be distinct, the Rule 23 provision for separability indicates the importance of maintaining manageable units for determination. If we were to penalize both those plaintiffs not joined in *Pottharst* and those who were, because a separate issue of statutory construction was not raised originally, we would be encouraging class plaintiffs to bring in all conceivable future issues and parties, in direct opposition to the intent of Rule 23(c)(4).[237]

In addition to utilizing the opportunity to limit issues, a court will take advantage of its ability to divide the class into subclasses whenever members' interests are not totally homogeneous. For example, subclasses can be formed around similar claims and divisions can be drawn between adverse interests,[238] present and prospective employees,[239] holders of insured and uninsured mortgages,[240] bases for relief,[241] adjudicated and nonadju-

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nizes as an exception to the general rule of merger and bar those instances in which "[t]he court in the first action has expressly reserved the plaintiff's right to maintain the second action." RESTATEMENT (SECOND) OF JUDGMENTS § 61.2(1)(b)(Tent. Draft No. 5, 1978).

236. 522 F.2d at 1374.

237. *Id.* at 1375.

238. *E.g.*, Carr v. Conoco Plastics, Inc., 423 F.2d 57 (5th Cir.), *cert. denied*, 400 U.S. 951 (1970).

239. Johnson v. ITT-Thompson Indus., Inc., 323 F. Supp. 1258 (N.D. Miss. 1971).

240. Sommers v. Abraham Lincoln Fed. Savs. & Loan Ass'n, 66 F.R.D. 581 (E.D. Pa. 1975).

241. *E.g.*, Benzoni v. Greve, 54 F.R.D. 450 (S.D.N.Y. 1972); Francis v. Davidson, 340 F. Supp. 351 (D. Md.), *aff'd without op.*, 409 U.S. 904 (1972); Wolfson v. Solomon, 54 F.R.D. 584 (S.D.N.Y. 1972).

dicated delinquent youths,[242] and types of relief.[243] In this way much greater flexibility is provided the court, and the benefits accorded the judicial system by the class device are not lost simply because of variations among class claims that do not defeat the utility of the class action when common questions still dictate the appropriateness of the class device.

The ability to limit the issues tried as a class action and the ability to divide the class into smaller units are valuable tools for the court and are designed to maximize the availability of class relief. Courts must always consider these options before denying class status.

Rule 23.04: Orders in Conduct of Actions

Rule 23.04 grants the trial court explicit authority to control the course of class action litigation by issuing appropriate orders.[244] The court is given full discretion regarding timing and issuance of the orders, including specific authority to issue the same in conjunction with any rule 16 pretrial order. Rule 23.04 enumerates four specific types of orders and specifies that the court can issue any other appropriate orders "dealing with similar procedural matters."[245]

The first type of order listed in the rule can be used to "determin[e] the course of proceedings or [to] prescrib[e] measures to prevent undue repetition or complication in the presentation of evidence or argument."[246] Thus, the rule recommends the issuance of any order promoting the efficient progression of the action. Pursuant to the rule, courts have utilized a variety of orders in conducting class actions such as orders limiting discovery,[247] bifurcating trials,[248] appointing lead counsel[249] or joint lead

242. Santiago v. City of Philadelphia, 72 F.R.D. 619 (E.D. Pa. 1976).

243. *E.g.*, Benzoni v. Greve, 54 F.R.D. 450 (S.D.N.Y. 1972); Shrivelhood v. Davis, 336 F. Supp. 1111 (D. Vt. 1971).

244. The Tennessee rule is identical to its federal counterpart, FED. R. CIV. P. 23(d).

245. TENN. R. CIV. P. 23.04(5). The *Manual for Complex & Multidistrict Litigation* (West 1969) offers many further suggestions about types of orders that may be appropriate. *See also* Newberg, *Orders in the Conduct of Class Actions: A Consideration of Subdivision (d)*, 10 B. C. IND. & COM. L. REV. 577 (1969).

246. TENN. R. CIV. P. 23.04(1).

247. *E.g.*, Western Elec. Co. v. Stern, 544 F.2d 1196 (3d Cir. 1976); MacAlister v. Guterma, 263 F.2d 65 (2d Cir. 1958).

248. *E.g.*, Alameda Oil Co. v. Ideal Basic Indus., Inc., 326 F. Supp. 98 (D.

counsel,[250] or staying the proceeding pending other litigation.[251]

The second suggested type of order permits the court to

> requir[e], for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise come into the action.[252]

This provision for discretionary notice must be distinguished from the requirement in rule .03(2) that notice be sent to members of classes certified as .02(3) classes.[253] The effect of the provision is twofold: the court may consider the propriety of preliminary notice in section .02(1) and .02(2) class actions, and the court can also consider the utility of supplemental notice at any stage of the proceeding in any section .02(1), .02(2), or .02(3) action. Although notice is not required explicitly by the rule in section .02(1) and .02(2) actions, the courts must consider whether due process requires such notice. The overwhelming majority of federal courts considering the issue have held that due process does not require preliminary or supplemental notice.[254] In

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Colo. 1971).

249. *E.g.*, *In re* Air Crash Disaster, 549 F.2d 1006 (5th Cir. 1977); Petition of Gabel, 350 F. Supp. 624 (C.D. Cal. 1972); Percodani v. Rikar-Maxson Corp., 51 F.R.D. 263 (S.D.N.Y. 1970), *aff'd per curiam sub nom.* Farber v. Riker-Maxson Corp., 442 F.2d 457 (2d Cir. 1971).

250. *E.g.*, Levine v. American Export Indus., Inc., 473 F.2d 1008 (2d Cir. 1973); Fields v. Wolfson, 41 F.R.D. 329 (S.D.N.Y. 1967).

251. *E.g.*, Levin v. Mississippi River Corp., 289 F. Supp. 353 (S.D.N.Y. 1968).

252. TENN. R. CIV. P. 23.04(2).

253. *See* text accompanying notes 164-95 *supra*.

254. *See* Mattern v. Weinberger, 519 F.2d 150, 158 (3d Cir. 1975); Frost v. Weinberger, 515 F.2d 57, 65 (2d Cir. 1975); *In re* Four Seasons Sec. Laws Litigation, 502 F.2d 834, 842 (10th Cir. 1974); Souza v. Scalone, 64 F.R.D. 654, 658-60 (N.D. Cal. 1974); American Fin. Sys. Inc. v. Harlow, 65 F.R.D. 94, 110-11 (D. Md. 1974); Lynch v. Household Fin. Corp., 360 F. Supp. 720, 722 (D. Conn. 1973); Citizens Environmental Council v. Volpe, 364 F. Supp. 286, 288 (D. Kan. 1973); Hooks v. Wainwright, 352 F. Supp. 163, 166 (M.D. Fla. 1972); Baxter v. Savannah Sugar Refining Corp., 350 F. Supp. 139, 141 (S.D. Ga. 1972), *modified*, 495 F.2d 437 (5th Cir.), *cert. denied*, 419 U.S. 1033 (1974); Vaughns v. Board of Educ., 355 F. Supp. 1034, 1035 (D. Md. 1972); Woodward

fact, only a handful of courts have ever held that due process requires notice in (b)(1) or (b)(2) class actions, and all jurisdictions but two of those, the Seventh Circuit[255] and the Sixth Circuit,[256] have changed positions.[257] The Sixth and Seventh Circuit's

v. Rodgers, 344 F. Supp. 974, 980 (D.D.C. 1972); Pennsylvania Ass'n for Retarded Children v. Pennsylvania, 343 F. Supp. 279, 292 (E.D. Pa. 1972); Francis v. Davidson, 340 F. Supp. 351, 361 (D. Md. 1972), *aff'd without op.*, 409 U.S. 904 (1972); Northern Natural Gas Co. v. Grounds, 292 F. Supp. 619, 636 (D. Kan. 1968), *aff'd in part, rev'd in part on other grounds*, 441 F.2d 704 (10th Cir. 1971), *cert. denied*, 404 U.S. 1063 (1972); Dolgow v. Anderson, 43 F.R.D. 472, 498 (E.D.N.Y. 1968).

Other courts have held that neither FED. R. CIV. P. 23(b)(1) nor 23(b)(2) requires notice, but did not specifically address the due process question. Childs v. United States Bd. of Parole, 511 F.2d 1270, 1276 (D.C. Cir. 1974); Hammond v. Powell, 462 F.2d 1053, 1055 (4th Cir. 1972); Yaffee v. Powers, 454 F.2d 1362, 1366 (1st Cir. 1972); Johnson v. Georgia Hy. Express, Inc., 417 F.2d 1122, 1125 (5th Cir. 1969); Musquiz v. City of San Antonio, 378 F. Supp. 949, 954 (W.D. Tex. 1974); Giguere v. Affleck, 370 F. Supp. 154, 159 (D.R.I. 1974); Harper v. Mayor of Baltimore, 359 F. Supp. 1187, 1192 (D. Md. 1973); Wilczynski v. Harder, 323 F. Supp. 509, 512 n.3 (D. Conn. 1971); Mungin v. Florida E. Coast Ry., 318 F. Supp. 720, 732 (M.D. Fla. 1970); Johnson v. City of Baton Rouge, 50 F.R.D. 295, 301 (E.D. La. 1970). Some of these cases that do not specifically address the due process question are cited for the proposition that absence of notice does not violate due process where the class is represented by adequate counsel. *See* Souza v. Scalone, 64 F.R.D. 654, 659 (N.D. Cal. 1974); American Fin. Sys., Inc. v. Harlow, 65 F.R.D. 94, 110-11 (D. Md. 1974).

255. Schrader v. Selective Serv. Sys., 470 F.2d 73 (7th Cir. 1972).

256. Zeilstra v. Tarr, 466 F.2d 111 (6th Cir. 1972).

257. The New York courts and the Second Circuit originally held that notice was required in all class actions, Eisen v. Carlisle & Jacquelin, 391 F.2d 555 (2d Cir. 1968); Zachary v. Chase Manhattan Bank, 52 F.R.D. 532 (S.D.N.Y. 1971), but since the Supreme Court decision in *Eisen*, 417 U.S. 156 (1974), the Second Circuit has changed its stance. Frost v. Weinberger, 515 F.2d 57 (2d Cir. 1975). One Louisiana court also required notice, Clark v. American Marine Corp., 297 F. Supp. 1305 (E.D. La. 1969), but the next year held otherwise, Johnson v. City of Baton Rouge, 50 F.R.D. 295 (E.D. La. 1970), as has the Fifth Circuit itself. Johnson v. Georgia Hy. Express, Inc., 417 F.2d 1122 (5th Cir. 1969). *But see* Neloms v. Southwestern Elec. Power Co., 72 F.R.D. 128, 131 (W. D. La. 1976), in which the court stated that: "Some form of notice reasonably calculated to apprise absent class members of the conduct of the suit is necessary even for Rule 23(b)(2) class actions, if the rights of those absent parties probably would be prejudiced as a practical matter by the eventual class judgment." One Virginia court held that notice was required, Moss v. Lane Co., 50 F.R.D. 122 (W.D. Va. 1970), but the Fourth Circuit thereafter held to the contrary. Hammond v. Powell, 462 F.2d 1053 (4th Cir. 1972).

decisions are based on the now overruled *Eisen* decision[258] and apparently were reached to avoid what the courts viewed as an incorrect decision that invalidated a selective service regulation in a suit brought on behalf of all draft inductees in the country.[259] A Seventh Circuit district court refused to follow this precedent and noted that the cases on which the Seventh Circuit based its notice requirement were tainted with "implications for national security" and that the recent Supreme Court decision in *Eisen*[260] "seems to require that the matter be re-examined."[261]

Very persuasive reasons support those courts that hold that due process does not require notice in all class actions.[262] These courts have held that "the essential requisite of due process as to absent members of the class is not notice, but the adequacy of representation of their interests by named parties,"[263] a mandatory prerequisite for all class actions.[264] When rule 23 was revised in 1966, the well-developed principles of due process requirements of notice[265] were considered by the drafters of rule 23.[266] The wording of the rule indicates that the drafters considered adequacy of representation and not notice to be the touchstone of due process in class actions.

Since notice to all absent parties is not a requirement of due process, the only remaining determination is whether discretionary notice pursuant to rule 23.04(2) should be given in any particular case. Courts will need to make the determination "in view of the character of the proceeding"[267] and should consider: whether the issue is limited so that there cannot be interests antagonistic to the representative plaintiffs' or defendants' inter-

258. 391 F.2d 555 (2d Cir. 1968).

259. Gregory v. Hershey, 311 F. Supp. 1 (E.D. Mich. 1969).

260. 417 U.S. 156 (1974).

261. Watson v. Branch County Bank, 380 F. Supp. 945, 960 n.11 (W.D. Mich. 1974). Contrary to the court's assertion, the *Eisen* Supreme Court decision, 417 U.S. 156 (1974), does not address the notice requirements in (b)(1) or (b)(2) actions, but merely considers the (c)(2) requirement of notice in (b)(3) actions. *See id.* at 177 n.14.

262. *See* note 254 *supra*.

263. Northern Natural Gas Co. v. Grounds, 292 F. Supp. 619, 636 (1968).

264. *See* text accompanying notes 28-62 *supra*.

265. *See* text accompanying notes 174-79 *supra*.

266. Advisory Committee's Note, *supra* note 7, at 106-07.

267. Mullane v. Central Hanover Bank & Trust Co., 399 U.S. 306, 317 (1950).

ests; whether the judgment will preserve all other claims and defenses of the parties; whether the individual stakes in the outcome are too small to warrant intervention; whether the costs of notice outweigh the value; and whether the administration of notice would unnecessarily consume judicial time and effort. After weighing these factors the court can decide whether notice of some type would be appropriate. In addition to sending notice initially under a 23.04(2) order in a .02(1) or .02(2) action, the rule suggests that a court may find ordering supplemental notice appropriate in any class actions

> to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses or otherwise come into the action.[268]

The appropriateness of such notification will depend on the particular situation.

Rule 23.04(3) directs the court to make appropriate orders "imposing conditions on the representative parties or on intervenors" and recognizes that the court need not simply accept or reject the action as formulated by the parties. Many types of orders have been sanctioned pursuant to this section of the rule, such as, orders restricting the size of the class,[269] redefining the class,[270] appointing lead counsel[271] or additional counsel,[272] seeking satisfaction of the adequacy of the representation by the representative parties,[273] limiting time for intervention,[274] and conditioning certification on notice being given properly.[275]

Rule 23.04(4) authorizes the court to issue orders "requiring that the pleadings be amended to eliminate therefrom allegations

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268. TENN. R. CIV. P. 23.04(2).

269. Aaron v. Clark, 342 F. Supp. 898, 901 n.4 (N.D. Ga. 1972).

270. *E.g.*, Weiss v. Tenney Corp., 47 F.R.D. 283 (S.D.N.Y. 1969).

271. *E.g.*, MacAlister v. Guterma, 263 F.2d 65 (2d Cir. 1958).

272. *E.g.*, Cullen v. New York State Civil Serv. Comm'n, 435 F. Supp. 546 (E.D.N.Y. 1977).

273. *E.g.*, Cusick v. N.V. Nederlandsche Combinatie Voor Chemische Industrie, 317 F. Supp. 1022 (E.D. Pa. 1970).

274. *E.g.*, City of Philadelphia v. Morton Salt Co., 385 F.2d 122 (3d Cir. 1967), *cert. denied sub nom.* New York v. Morton Salt Co., 390 U.S. 995 (1968).

275. *E.g.*, Cusick v. N.V. Nederlandsche Combinatie Voor Chemische Industrie, 317 F. Supp. 1022 (E.D. Pa. 1970).

as to representation of absent persons, and that the action proceed accordingly." The rule acknowledges the court's power to eliminate class aspects and allows the action to proceed as an individual claim with appropriately altered pleadings.[276] Such orders are directly related to the 23.03(1) order determining the propriety of class treatment, and as that order may be altered or amended at any time before the decision on the merits, so too a 23.04(4) order may be appropriate at any stage of the proceedings.

The last enumeration in 23.04 empowers the court to go beyond the enumerated orders and issue orders "dealing with similar procedural matters."[277] The court has discretion to enter any orders that are appropriate to the management of the class action. This subsection includes orders requiring preliminary hearings,[278] orders limiting contact between parties,[279] and orders appointing a guardian ad litem for class members whose attorneys apply for fees to be deducted from the settlement fund.[280]

Rule 23.04 concludes with the admonition that orders "may be altered or amended as may be desirable from time to time." This statement, reminiscent of the conditional nature of the 23.03(1) order,[281] serves to remind the court of the flexibility inherent in any class action proceeding. If a court's initial determination proves unwise in view of subsequent developments, that determination can be readily altered.

Rule 23.05: Dismissal or Compromise

Rule 23.05 provides that "[a] class action shall not be voluntarily dismissed or compromised without the approval of the court, and that notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs."[282] This provision protects the interests of absent class members when the representative parties wish to settle or

276. *E.g.*, Bantolino v. Aloha Motors, Inc., 75 F.R.D. 26 (D. Haw. 1977).

277. TENN. R. CIV. P. 23.04(5).

278. *E.g.*, Katz v. Carte Blanche Corp., 52 F.R.D. 510 (W.D. Pa. 1971); Zachary v. Chase Manhattan Bank, 52 F.R.D. 532 (S.D.N.Y. 1971).

279. *E.g.*, Weight Watchers of Philadelphia v. Weight Watchers Int'l, 53 F.R.D. 647 (E.D.N.Y. 1971).

280. *E.g.*, Miller v. Mackey Int'l, Inc., 70 F.R.D. 533 (S.D. Fla. 1976).

281. *See* text accompanying note 125 *supra*.

282. TENN. R. CIV. P. 23.05. This section of the rule is identical to its federal counterpart, rule 23(e).

to dismiss the action. One court recently noted that "balanced against [a court's] reluctance to interfere with a proposed settlement is [its] duty to insure that the interests of the class are reflected fairly and adequately in the decree."[283] To further the protection of absent class members, rule 41.01[284] specifically exempts rule 23 actions from its provisions for voluntary dismissals, and courts also scrutinize motions to drop one or more parties to determine if class members' interests are in jeopardy.[285]

The proposed settlements must be fair and reasonable as to all parties affected by the decision.[286]

> [F]actors . . . "relevant to a full and fair assessment" of the proposed settlement [in a class action are] 1) the complexity, expense and likely duration of the litigation; 2) the reaction of the class to the settlement; 3) the stage of the proceedings and the amount of the discovery completed; 4) the risks of establishing liability; 5) the risks of establishing damages; 6) the risks of maintaining the class action through the trial; 7) the ability of the defendants to withstand a greater judgment; 8) the range of the reasonableness of the settlement fund in light of the best possible recovery; 9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation.[287]

The burden of establishing the propriety of any proposed settlement rests on the proponents of the compromise.[288]

Under the dismissal and compromise provisions of rule 23.05, courts have held that notice is not required if the absent members will not be prejudiced by the dismissal,[289] just as interlocutory

283. Jamison v. Butcher & Sherrerd, 68 F.R.D. 479, 482 (E.D. Pa. 1975).

284. TENN. R. CIV. P. 41.01.

285. Philadelphia Elec. Co. v. Anaconda Am. Brass Co., 42 F.R.D. 324 (E.D. Pa. 1967); Elias v. National Car Rental Sys., Inc., 59 F.R.D. 276 (D. Minn. 1973).

286. *E.g.*, Shelton v. Pargo, Inc., 582 F.2d 1298 (4th Cir. 1978); Hartford Hosp. v. Chas. Pfizer & Co., 52 F.R.D. 131 (S.D.N.Y. 1971); Barnes v. Osafsky, 254 F. Supp. 721 (S.D.N.Y. 1966), *aff'd on other grounds*, 373 F.2d 269 (2d Cir. 1967).

287. Brucker v. Thyssen-Bornemisza Europe N.V., 424 F. Supp. 679, 687 (S.D.N.Y. 1976), *aff'd*, 559 F.2d 1202 (2d Cir. 1977). *See generally* Dole, *The Settlement of Class Actions for Damages*, 71 COLUM. L. REV. 971 (1971).

288. *E.g.*, Foster v. Boise-Cascade, Inc., 420 F. Supp. 674 (S.D. Tex. 1976); Feder v. Harrington, 58 F.R.D. 171 (S.D.N.Y. 1972).

289. *E.g.*, Shelton v. Pargo, 582 F.2d 1298 (4th Cir. 1978).

orders need not be communicated unless rights are finally determined thereby.[290] In an involuntary dismissal when the parties have had no opportunity to prejudice class rights in favor of their own, notice does not have to be sent to absent members.[291] Some uncertainty in the application of 23.05 results if a compromise is sought between the time of filing the complaint and the certification of the class pursuant to rule 23.03(1), but courts have generally accepted that the class must be presumed to be proper for purposes of applying 23.05, lest the parties be encouraged to reach a collusive or improper settlement, thereby avoiding the 23.05 approval of the court at the expense of absent members.[292] Thus, courts have repeatedly held that class representatives "may not abandon the fiduciary role they assumed at will or by agreement with [the opposing party], if prejudice to the members of the class they claimed to represent would result or if they have improperly used the class action procedure for their personal aggrandizement."[293] However, although some courts have been uncertain,[294] neither a certification hearing nor notice of the proposed settlement to absent class members is required if, after thorough consideration of the settlement, the trial court finds that the rule has not been abused and that absent members are not prejudiced.[295]

Since a court has complete discretion as to the form of the notification when notice is required, any communication will suffice that reasonably apprises absent parties of their rights. The notice must explain the effect of the proposed settlement and inform members of their right to object.[296] This precaution assures the protection of each class member's claims.

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290. *E.g.*, Sagers v. Yellow Freight Sys., Inc., 68 F.R.D. 686 (N.D. Ga. 1975), *aff'd on other grounds*, 529 F.2d 721 (5th Cir. 1976).

291. *E.g.*, Burgener v. California Adult Auth., 407 F. Supp. 555 (N.D. Cal. 1976); Manes v. Golden, 400 F. Supp. 23 (E.D.N.Y. 1975), *aff'd without op.*, 423 U.S. 1068 (1976).

292. *E.g.*, Shelton v. Pargo, Inc., 582 F.2d 1298 (4th Cir. 1978); Philadelphia Elec. Co. v. Anaconda Am. Brass Co., 42 F.R.D. 324 (E.D. Pa. 1967).

293. 582 F.2d at 1305.

294. *See* Wheeler, *Predismissal Notice and Statutes of Limitations in Federal Class Actions After American Pipe and Construction Co. v. Utah*, 48 S. CAL. L. REV. 771 (1975).

295. For a thorough discussion, see 582 F.2d 1298 (4th Cir. 1978).

296. The *Manual on Complex and Multidistrict Litigation* (West 1969) suggests that notice of the settlement should list the details of all expenses and fees to be charged, including the names of counsel and their fees. *Id.* § 1.61.

III. JURISDICTION AND VENUE

While an exploration of all considerations related to class actions is beyond the scope of this article, this analysis would be incomplete without a brief mention of jurisdiction and venue.

For jurisdiction over the members of a class, it has long been recognized that only the residency of the named representatives of a class is to be considered and that the residency of other class members is irrelevant.[297] Likewise, venue need only be satisfied by the representative parties, the whereabouts of the unnamed members of the class not being determinative.[298] With respect to defendant classes, however, two distinct problems arise relative to these threshold questions that require a more searching inquiry.

The first problem encountered by a plaintiff class that sues a defendant class is whether typicality of claims exists. In *La Mar v. H. & B. Novelty & Loan Company*,[299] the Ninth Circuit based its decision that named plaintiff could not sue a defendant class of pawnbrokers for alleged Truth-in-Lending Act violations on the fact that the representative claims would not necessarily be typical of all the claims since the violations could have varied. The court held that representative plaintiff never had a claim of any type against the particular illegal commercial practices of those defendants with whom plaintiff had not dealt. The court specifically noted that a representative party's claim meets the typicality requirement only when the defendant class is juridically related, that is, acting uniformly by reason of a statutory or constitutional provision.

> Obviously [the holding in *La Mar*] does not embrace situations in which all injuries are the result of a conspiracy or concerted schemes between the defendants at whose hands the class suffered injury. *Nor is it intended to apply in instances in which all defendants are juridically related in a manner that suggests a single resolution of a dispute would be expeditious.*[300]

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297. Supreme Tribe of Ben Hur v. Cauble, 255 U.S. 356 (1921).

298. United States *ex rel.* Sero v. Prieser, 506 F.2d 1115 (2d Cir. 1974), *cert. denied*, 421 U.S. 921 (1975); Dale Elec., Inc. v. R.C.L. Elec., Inc., 53 F.R.D. 531 (D.N.H. 1971); Research Corp. v. Pfister Associated Growers, Inc., 301 F. Supp. 497 (N.D. Ill. 1969), *appeal dismissed sub nom.* Research Corp. v. Asgrow Seed Co., 425 F.2d 1059 (7th Cir. 1970).

299. 489 F.2d 461 (9th Cir. 1973).

300. *Id.* at 466 (emphasis added).

When all members of the defendant class are alleged to have violated a statute or common law duty owed the plaintiff class, no certain typicality exists in the ways defendants have harmed the plaintiff class. Unless the representative plaintiffs have had dealings with all the defendants, therefore, there is no assurance that plaintiffs' claims are typical of all those asserted. When the allegations against a defendant class stem from a challenged juridical relationship that harms each member of the plaintiff class in the same manner, the representative party's claim against any one defendant is by definition typical of all other claims against all the defendants. Thus, many actions have been allowed to proceed against a defendant class whose common conduct was juridically compelled even though the representative claim was against only one or a few of the defendants. Class defendants have been varied: all banking institutions that carried out extrajudicial nonconsensual repossession of motor vehicles under color of challenged statutes;[301] all persons who had garnished debts owing the plaintiff class pursuant to statutes challenged as unconstitutional;[302] all officers and other officials enforcing laws prescribing unconstitutional qualifications for registration and voting;[303] all school districts in Pennsylvania applying unconstitutional standards;[304] all persons illegally confining alcoholics for treatment pursuant to state statutes;[305] persons enforcing a challenged vagrancy statute;[306] all persons charged with enforcing challenged statutes relating to segregation of prisoners.[307]

The second threshold hurdle encountered by a plaintiff class facing a defendant class is whether the named plaintiffs have standing to sue defendant class members with whom plaintiffs have not individually dealt. In *Weiner v. Bank of King of Prussia*[308] plaintiff sought to represent a class of borrowers against a defendant class of all national and some state banks in Pennsylvania for violations of the National Bank Act, state banking regulations, unspecified common laws, and the Truth-in-Lending Act.

301. Gibbs v. Titelman, 369 F. Supp. 38 (E.D. Pa. 1973).
302. Lynch v. Household Fin. Corp., 360 F. Supp. 720 (D. Conn. 1973).
303. Danforth v. Christian, 351 F. Supp. 287 (W.D. Mo. 1972).
304. Pennsylvania Ass'n for Retarded Children v. Pennsylvania, 343 F. Supp. 279 (E.D. Pa. 1972).
305. Rakes v. Coleman, 318 F. Supp. 181 (E.D. Va. 1970).
306. Broughton v. Brewer, 298 F. Supp. 260 (S.D. Ala. 1969).
307. Washington v. Lee, 263 F. Supp. 327 (M.D. Ala. 1966).
308. 358 F. Supp. 684 (E.D. Pa. 1973).

Since named plaintiff had dealt with only one bank, the court held that the representative party had no standing to sue defendants with whom he had not dealt. Like the *La Mar* court,[309] the *Weiner* court noted that plaintiff did not challenge any law controlling the various defendants but merely claimed individual violations of various laws.[310] That the *Weiner* court does not envision a standing hurdle when a state statutory procedure under which all of the members of the defendant class operate is being challenged was made evident by the fact that shortly after denying the defendant class in *Weiner*, the same district court granted recoveries against a defendant class in *Gibbs v. Titelman*,[311] in which defendant banking institutions were charged with carrying out extrajudicial, nonconsensual repossessions of motor vehicles under color of a challenged statute.

Although the threshold questions of jurisdiction and venue over the unnamed parties generally is not a difficult matter, careful attention must be paid to the precise allegations when defendant classes are sought.

IV. Conclusion

Tennessee Rule of Civil Procedure 23 was adopted in 1971 to provide a vehicle for determining multiple disputes in a single action. At first glance the rule is complex; upon examination, it is indeed redundant at times and unnecessarily indirect.[312] When carefully considered, however, the provisions provide a very flexible and workable mechanism for processing multiple claims in one efficient action.

In an age of mass technology and far-reaching application of common practices, the traditional two-party lawsuit is often ineffective in redressing widespread wrongs. An attempt to respond to this situation, rule 23 has been hailed as "a test of our claims as a profession."[313] The benefits resulting from the class action device are threefold: individual claimants whose claims are rela-

309. *See* text accompanying notes 299-307 *supra*.

310. 358 F. Supp. at 698.

311. 369 F. Supp. 38 (E.D. Pa. 1973).

312. Proposals for modifying rule 23 are beyond the scope of this article. *See, e.g.*, Meador, *Proposed Revision of Class Damage Procedure*, 65 A.B.A.J. 48 (1979); *The Uniform Class Actions Act*, Nat'l Conf. of Comm'rs on Uniform St. Laws 133 (1976).

313. Frankel, *supra* note 108, at 301.

tively small compared to the costs of litigation are provided access to the court; the judicial system benefits from the overall efficiency of one action instead of many; society benefits from the redress of mass wrongs that would otherwise go unchallenged. Indeed, the observation has been made that rule 23 "may ultimately prove to have been one of the most significant procedural developments of the century."[314] With access to the federal courts severely limited in (b)(3) class actions[315] and in diversity class actions,[316] the availability of state relief has become increasingly important. Tennessee rule 23 provides the mechanism for effectively responding to multiple claims: with proper application it can be profitably utilized to ensure access to the courts of Tennessee for the fair and efficient disposition of all grievances.

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314. Fullam, *Federal Rule 23—An Exercise in Utility*, 38 J. AIR. L. & COM. 369, 388 (1972).

315. The requirement of *Eisen*, 417 U.S. at 178-79, that personal notice be sent in all (b)(3) actions prohibits most such actions for all but relatively small classes or wealthy representatives.

316. *See* Zahn v. International Paper Co., 414 U.S. 291 (1973), holding that every class member in a diversity action must independently satisfy the jurisdictional amount of more than $10,000 or be dismissed from the case, effectively foreclosing relief to most diversity class actions.

COMMENT

CONSTITUTIONAL CHALLENGES TO MEDICAL MALPRACTICE REVIEW BOARDS

I. INTRODUCTION

Within the past few years the medical profession and the general public have been severely affected by an astronomical rise in medical malpractice insurance premiums[1] and a consequent rise in the cost of health care delivery throughout the country.[2] Concern for the general public and its struggle with increased medical costs and increased risks of physicians practicing medicine without liability insurance coverage, either because such coverage is unavailable or because physicians have simply refused to pay the extremely high rates,[3] have led many state legislatures to enact remedial legislation designed to curb the medical malpractice crisis.[4] The basic purpose underlying these legislative

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1. *See* Gouldin & Gouldin, *The Medical Malpractice Insurance Crisis*, 3 OHIO N.U.L. REV. 510 (1975); King, *The Standard of Care and Informed Consent Under the Tennessee Medical Malpractice Act*, 44 TENN. L. REV. 225, 226-27 (1977); Roth, *The Medical Malpractice Insurance Crisis: ItsCauses, the Effects, and Proposed Solutions*, 44 INS. COUNSEL J., 469, 470-72 (1977).

2. *See* King, *supra* note 1, at 227, 231; Roth, *supra* note 1, at 473-74. Roth noted in his article:

> [I]t is becoming increasingly undesirable for an insurance company to remain in the business of writing professional liability insurance. As a result many insurers have dropped malpractice insurance from their line and those who are continuing to write malpractice insurance are raising their premiums dramatically.
>
> The obvious result of all these increases is that the health care consumer is footing the bill.

Id. at 473-74.

3. According to a poll disclosed in October [1976] by the Center for Health Services Research and Development of the American Medical Association, one in eight physicians is now practicing without medical malpractice insurance. It was also reported that some 30 percent of the remaining physicians nationwide were considering dropping their insurance. In California,this figure reached 51 percent.

Knepper, *Review of 1976 Tort Trends*, 26 DEF. L.J. 1, 16 (1977). *See also* King, *supra* note 1, at 230.

4. The existence of such a "crisis" is a well-accepted fact among many

efforts is to aid and protect the general public by so changing and restricting the medical malpractice cause of action that insurance companies currently writing medical liability coverage will be induced to lower their rates and other insurance carriers will be encouraged either to return to writing such coverage or to begin doing so. The theory is that a reduction in liability insurance rates will produce a reduction in health care costs directly in proportion to the amount of the decrease in premiums. Additionally, with liability insurance available at reasonable cost, the number of physicians practicing without such coverage will decrease, thus providing better protection to the general public.[5]

Although the existence of a medical malpractice crisis may be a matter of dispute among certain commentators and courts, the state legislatures that have enacted remedial legislation have obviously been convinced that such a crisis does exist and that it poses a threat to the continued availability of high quality health

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commentators. *See* note 1 *supra*. A trial court in Ohio struck down Ohio's medical malpractice screening panel legislation, but in so doing the court noted:

> There is *no doubt that the plethora of medical malpractice suits represents a crisis situation*, not only to the medical profession but to their insurance carriers as well. However, in this Court's opinion, there is no crisis situation, short of civil insurrection, sufficient to deprive, water down or make less valuable the right to seek redress of grievances, to a dollar amount fully compensating one for his loss, through the medium of a free and unfettered jury trial.

Simon v. St. Elizabeth Med. Center, 3 Ohio Op. 3d 164, 172, 355 N.E.2d 903, 911-12 (C.P., Montgomery County 1976) (emphasis added).

Some courts have expressed doubt about the existence of such a crisis, at least in view of an absence of findings on the issue in the trial court. *See, e.g.*, Jones v. State Bd. of Med., 97 Idaho 859, 555 P.2d 399 (1976) (court discusses much literature regarding a national crisis and remands to the trial court for examination of question whether the state of Idaho was also affected by this crisis).

5. This legislation may also have the effect of reducing the practice of "defensive medicine" that has been defined as "the management of a patient's care not only with an eye for the patient's welfare, but also in an effort preemptively to fashion an unassailable record in anticipation of potential malpractice litigation." King, *In Search of a Standard of Care for the Medical Profession: The "Accepted Practice" Formula*, 28 VAND. L. REV. 1213, 1216 n.10 (1975). The practice of defensive medicine may also decrease with the renewed availability of liability insurance at reasonable cost. Defensive medicine has not only served to raise health care costs through the use of costly, unnecessary tests, "but may well have actually lowered the overall quality and efficacy of medical services." *See* King, *supra* note 1, at 230-31.

care at reasonable and stable costs. In fact, several state statutes contain a statement of legislative purpose or intent declaring that the legislature has in fact found that a medical malpractice crisis does exist and that the legislation adopted is designed to curtail that crisis in the particular state.[6]

The state legislatures that have responded to the medical malpractice crisis[7] have usually enacted legislative packages[8] containing provisions designed to eliminate some of the various causes of the crisis as they perceive them.[9] The types of legislation adopted by the states can be broken down into three broad cate-

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6. Typical of such statements is that made by the Nebraska legislature in the initial section of its Hospital-Medical Liability Act:

> (1) The Legislature finds and declares that it is in the public interest that competent medical and hospital services be available to the public in the State of Nebraska at reasonable costs, and that prompt and efficient methods be provided for eliminating the expense as well as the useless expenditure of time of physicians and courts in nonmeritorious malpractice claims and for efficiently resolving meritorious claims. It is essential in this state to assure continuing availability of medical care and to encourage physicians to enter into the practice of medicine in Nebraska and to remain in such practice as long as such physicians retain their qualifications.
>
> (2) The Legislature further finds that at the present time under the system in effect too large a percentage of the cost of malpractice insurance is received by individuals other than the injured party. The intent of sections 44-2801 to 44-2855 is to serve the public interest by providing an alternative method for determining malpractice claims in order to improve its quality and to reduce the cost thereof, and to insure the availability of malpractice insurance coverage at reasonable rates.

NEB. REV. STAT. § 44-2801 (Cum. Supp. 1978). Another example is the New York legislature's statement that the purpose of its bill was "to deal comprehensively with the critical threat to the health and welfare of the State as a result of the lack of adequate medical malpractice insurance coverage at reasonable rates." Comiskey v. Arlen, 55 App. Div. 2d 304, 314, 390 N.Y.S.2d 122, 130 (1976) (quoting Memorandum of State Executive Dept., N.Y. LEGIS. ANN. 419 (1975)).

7. As early as October 1975 at least twenty-two states had adopted legislation changing their rules of civil practice and procedure in an effort to remedy the medical malpractice crisis. M. REDISH, LEGISLATIVE RESPONSE TO THE MEDICAL MALPRACTICE CRISIS: CONSTITUTIONAL IMPLICATIONS 3 n.13 (1977). In addition, "legislatures in forty-one States have created State-operated funds to provide malpractice insurance or have established special mechanisms to promote marketing of medical malpractice coverage." Knepper, *supra* note 3, at 14 n.3.

8. *See* 5 STATE HEALTH LEGIS. REP. (May 1977); *id.* Supp. 1 (Aug. 1977); *id.* Supp. 2 (Dec. 1977).

9. *See* Roth, *supra* note 1, at 470-73.

gories. First are changes in the doctrine of professional liability, such as limitations on damages, shortening the time limitation period, definitions of the standard of care, and modification or elimination of the collateral source rule. These changes are designed generally to reduce the dollar amount of medical malpractice awards, to limit the time a physician remains exposed to a malpractice claim arising from a specific incident,[10] and to clarify the standard of care. The second type of legislation is adoption of a review board or screening panel whereby medical malpractice claims are reviewed before the claim reaches trial. This provision is designed to screen out spurious claims prior to trial. The third type of legislation is enactment of statutes assuring availability of medical liability coverage to physicians and hospitals.[11] Dividing these legislative packages into three broad categories should not suggest that states have chosen to adopt only one approach, for many states have enacted statutes that encompass all of these plans in an attempt to ensure that none of the causes of the crisis goes unchecked.

II. Constitutional Issues of Medical Malpractice Legislation—in General

The state medical malpractice statutes have been subjected to very specific and complex constitutional attacks under both the federal and state constitutions. Although not every state court decision in this area has discussed the full range of constitutional issues presented by the particular state's medical malpractice legislation, four basic constitutional challenges have been raised at various times: (1) violation of the equal protection clause of the fourteenth amendment to the United States Constitution, (2) violation of the right to free access to courts under a provision of the state constitution, (3) violation of the right to a trial by jury as guaranteed by a state constitutional provision, and (4) violation of the separation of powers provision or the judicial powers provision of the state constitution.[12]

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10. This change involving shortening the statute of limitations period is designed to help cure what the insurance industry terms the "long tail" problem. The longer the period of time a physician is exposed to liability arising from a specific incident, the more difficult is the insurer's job of attempting to evaluate his risk exposure.

11. *See* King, *supra* note 1, at 233.

12. *See generally* M. Redish, *supra* note 7, at 4-7; Lenore, *Mandatory*

Each specific legislative provision presents its own unique constitutional issues. The basic concept, however, of a special legislative scheme designed to deal specifically with the medical malpractice cause of action by the enactment of certain rules and regulations pertaining only to that cause of action raises the fundamental challenge that the legislation violates the equal protection clause of the fourteenth amendment to the United States Constitution. This argument is based upon the proposition that such special legislation creates a separate class of claimants and defendants without the requisite standard of need for such a classification having been established.

Most plaintiffs are unable to establish that they have been affected by all of the provisions of the legislative package; thus, they use the equal protection argument to attack a provision that directly affects their rights in the particular case. The plaintiff then proceeds with his "impermissible classification" rationale as discussed above. The three remaining constitutional challenges listed above are aimed at specific provisions contained in the legislative package because these challenges are more specific in nature than the equal protection argument.

This comment will focus upon an analysis of the constitutional challenges raised against the screening panel or review board[13] provision of a medical malpractice statute because this provision is most frequently attacked and because all four of the basic constitutional challenges have been raised against this provision. This analysis will, however, include much discussion that would apply equally to the other provisions that raise the same constitutional issues. This applicability is especially true of the equal protection argument since the equal protection challenge to the screening panel provision is based upon the same ground, *i.e.*, "impermissible classification," as it would be when applied to other provisions of the state medical malpractice statute.

Medical Malpractice Mediation Panels—A Constitutional Examination, 44 INS. COUNSEL J. 416 (1977); Stewart, *Constitutionality of Remedial Legislation in the Field of Professional Liability*, 18 FOR THE DEF. 73 (1977).

13. Unless otherwise stated, when reference is made to a screening panel, without regard to any specific jurisdiction, the term is intended to include review boards and other similar forums created by the malpractice acts under discussion.

III. CONSTITUTIONALITY OF THE MEDICAL MALPRACTICE SCREENING PANEL OR REVIEW BOARD

Although each state provision possesses its own unique characteristics, the screening panel concept does have fundamental principles that are, for the most part, common to each state's approach. The procedure provides for either voluntary or required submission of the patient's claim to a screening panel, either before or after filing suit; that panel conducts a hearing and makes a ruling or recommendation before the dispute goes to trial. The panel is most often composed of one trial court judge, one practicing physician, and one practicing attorney although panel composition does differ from state to state. Although hearing procedures differ from state to state, most are much more flexible than an actual trial, and this flexibility generally includes a relaxation of the rules of evidence and procedure. The parties generally may introduce evidence, call and cross-examine witnesses, and make oral argument. At least one state, however, limits the panel's consideration to written evidence only, allowing the attorney for each party to argue orally.[14] Once the hearing has been concluded and a recommendation or ruling has been made by the panel, some statutes require that the plaintiff post a substantial bond before he will be allowed to proceed at law.[15] The recommendation of the panel, although admissible into evidence under most statutes, will not be binding on the jury. Each party is free to comment on the panel recommendation in an attempt to impeach or to corroborate it. In many states, the parties are free to call members of the screening panel as witnesses at the trial for purposes of impeaching or corroborating the panel findings. Virtually every state act provides that the statute of limitations is tolled for the period of time during which the claim is involved in the screening panel procedure, and often for an additional period of time after the panel recommendation has been rendered, if the claim must be submitted before suit is filed thereon.[16]

State legislative provisions that establish a screening panel or review board to hear medical malpractice claims prior to a

14. *See* NEB. REV. STAT. § 44-2842 (Cum. Supp. 1978).

15. *See, e.g.*, ARIZ. REV. STAT. § 12-567(J) (Cum. Supp. 1978); MASS. GEN. LAWS ANN. ch. 231, 60B (West Supp. 1979).

16. *See* statutes cited note 19 *infra*.

regular court trial on the merits are apparently based upon the rationale that at least part of the medical malpractice crisis is attributable to such excesses of the jury system[17] as the jury's inability to sort out spurious claims and the jury's tendency to return excessively high damage awards. Since this legislation permits a jury trial subsequent to the panel hearing if the parties do not accept (or if permitted, agree to accept) the panel's conclusion, the screening panel procedure should be viewed as a supplement to, rather than a substitute for, a jury trial.[18] The screening panel provision has proved to be a popular approach to the crisis as evidenced by the fact that at least twenty-one states have enacted such provisions.[19] In at least ten of these states the

17. *See* King, *supra* note 1, at 233.

18. *See generally* notes 87-101 *infra* and accompanying text.

19. Knoxville News-Sentinel, Jan. 22, 1979, at 22, col. 7; *see, e.g.*, ARIZ. REV. STAT. § 12-567 (Supp. 1957-1978); ARK. STAT. ANN. §§ 72-625 to 627 (Supp. 1977); DEL. CODE ANN. tit. 18, §§ 6803-6814 (Cum. Supp. 1978); FLA. STAT. ANN. §§ 768.44,.47 (West Supp. 1979); ILL. ANN. STAT. ch. 110, §§ 58.2, .3-.10 (Smith-Hurd Supp. 1978), §§ 58.2, .3 - .10 *held unconstitutional*, Wright v. Central DuPage Hosp. Ass'n, 63 Ill. 2d 313, 347 N.E.2d 736 (1976); IND. STAT. ANN. §§ 16-9.5-9-1 to 10 (Burns Supp. 1978); KAN. STAT. ANN. §§ 65-4901 to 4909 (Supp. 1978); LA. REV. STAT. ANN. § 40:1299.47 (West 1977); ANN. CODE MD., CTS. & JUD. PROC. §§ 3-2A-01 to 09 (Supp. 1978); MASS. GEN. LAWS ANN. ch. 231, § 60B (West Supp. 1979); MICH. COMP. LAWS ANN. §§ 600.5040-.5065 (Supp. 1978-1979); MO. ANN. STAT. §§ 538.010-.055 (Vernon Supp. 1979); NEB. REV. STAT. §§ 44-2840 to 2847 (Cum. Supp. 1978); NEV. REV. STAT. §§ 41A.010-.095 (Supp. 1977); N.M. STAT. ANN. §§ 41-5-14 to 24, -28 (1978); N.Y. JUD. LAW 148-a (McKinney Supp. 1978-1979); OHIO REV. CODE ANN. § 2711.21-.24 (Page Supp. 1977); PA. STAT. ANN. tit. 40, §§ 1301.301-.606 (Purdon Supp. 1978-1979); TENN. CODE ANN. §§ 23-3401 to 3413 (Cum. Supp. 1978); VA. CODE §§ 8.01-581.1. to .12:2. (1977); WIS. STAT. ANN. §§ 655.02-.21 (West Special Pamphlet 1978). To this list, the STATE HEALTH LEGIS. REP., *supra* note 8, adds these nine states: Alabama, Alaska, Connecticut, Hawaii, Idaho, Maine, Montana, North Dakota, and Rhode Island.

The Delaware, Virginia, and Wisconsin statues are voluntary only. Under the Delaware statute, any party has the right to convene a panel by filing a demand with the clerk of the appropriate trial court, all parties, and the Commission. DEL. CODE ANN. tit. 18, § 6802(b) (Cum. Supp. 1977). In Virginia, the claimant must notify the health care provider of his intention to file suit and then must wait ninety days, during the first sixty days of which either party may request review by the panel, before filing suit. If a panel is requested by one party, the other party must participate in the panel proceeding before suit can be filed. VA. CODE § 8.01-581.2. (1977). Wisconsin provides a procedure whereby the administrator "assigns the controversy to the appropriate panel" but only if "the controversy has been first heard and findings and an order

screening panel provision has been subjected to constitutional attack either at the trial or appellate court level.[20] In at least three of these cases the state court was faced with all four of the constitutional challenges mentioned above: equal protection, free access to the courts, right to trial by jury, and separation of powers.[21] Of these four constitutional challenges to the screening panel provision, the most popular has been the asserted violation of the equal protection clause of the fourteenth amendment to the United States Constitution.

A. Equal Protection

The equal protection argument is based upon the fact that the medical malpractice legislation and the screening panel provision contained therein serve to establish a separate classification of personal injury claimants since the Act, with its rules and restrictions, applies only to medical malpractice claimants and not to other tort victims.[22] In an equal protection challenge the court first determines the standard of judicial scrutiny by which the challenged statute will be examined.

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have been made by the panel." WIS. STAT. ANN. § 655.04(1)(b) (West Special Pamphlet 1978).

In another variation of the voluntary approach, Louisiana provides that the panel proceeding can be waived upon agreement of both parties. LA. REV. STAT. § 40:1299.47(B) (West Supp. 1978). In Florida, the defendant has a choice of whether to participate in the panel proceeding. FLA. STAT. ANN. § 768.44(c) (West. Supp. 1979). The Florida Supreme Court construed its Act to allow the plaintiff to introduce evidence at trial that the defendant had failed to appear before the panel. *See* Carter v. Sparkman, 335 So. 2d 802, 805 (Fla. 1976). *See also* notes 47-50 *infra* and accompanying text.

20. *See* Eastin v. Broomfield, 116 Ariz. 576, 570 P.2d 744 (1977); Carter v. Sparkman, 335 So. 2d 802 (Fla. 1976); Wright v. Central DuPage Hosp. Ass'n, 63 Ill. 2d 313, 347 N.E. 2d 736 (1976); Johnson v. Burch, No. 111/978/6-099191 (Md., Balt. City Ct., June 6, 1977), *reported at* 35 CITATION 99 (1977); Paro v. Longwood Hosp., 369 N.E.2d 985 (Mass. 1977); Prendergast v. Nelson, 199 Neb. 97, 256 N.W.2d 657 (1977); Comiskey v. Arlen, 55 App. Div. 2d 304, 390 N.Y.S.2d 122 (1976); Simon v. St. Elizabeth Med. Center, 3 Ohio Op. 3d 164, 355 N.E.2d 903 (C.P., Montgomery County 1976); Parker v. Children's Hosp., Pa. No. 1424 (C.P., Phila. July 29, 1977), *reported at* 35 CITATION 134 (1977); Wisconsin *ex rel.* Strykowski v. Wilkie, 81 Wis. 2d 491, 261 N.W.2d 434 (1978).

21. *See, e.g.*, Paro v. Longwood Hosp., 369 N.E.2d 985 (Mass. 1977); Prendergast v. Nelson, 199 Neb. 97, 256 N.W.2d 657 (1977); Wisconsin *ex rel.* Strykowski v. Wilkie, 81 Wis. 2d 491, 261 N.W.2d 434 (1978).

22. *See, e.g.*, 81 Wis. 2d 491, 261 N.W.2d 434 (1978); M. REDISH, *supra* note 7, at 17.

Traditionally, equal protection challenges have involved one of two standards of review: the strict scrutiny test or the rational basis test. Strict scrutiny is invoked when a statute creates a classification involving a suspect class[23] or infringes upon fundamental rights.[24] Classifications based on race and national origin have traditionally been defined as suspect.[25] Fundamental rights include the right of interstate travel[26] and the right of procreation.[27] For a statute to be valid under the strict scrutiny test the state must demonstrate that the statute satisfies a compelling state interest[28] and that no less drastic alternative that can accomplish that compelling interest exists.[29] Challenged statutes that do not involve suspect classes or fundamental rights invoke the rational basis test. A statute is valid under the rational basis test if a reasonable relationship exists between the classification created and the objective of the statute.[30] This minimal level of scrutiny ensures that statutes analyzed under the rational basis test are almost always upheld.[31]

Recently, in cases involving equal protection challenges to gender-based discriminatory statutes, the United States Supreme Court has applied an intermediate standard of review.[32] This standard of review is more rigorous than the rational basis test but less demanding than strict scrutiny. To satisfy this standard "classifications by gender must serve important governmental objectives and must be substantially related to the achievement of those objectives."[33]

In *Wisconsin ex rel. Strykowski v. Wilkie*[34] plaintiff argued that Wisconsin's Health Care Liability and Patients Compensa-

23. *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 1012 (1978).

24. *See id.* at 1002.

25. *See* Loving v. Virginia, 388 U.S. 1, 9 (1967) (race); Oyama v. California, 332 U.S. 633, 644-46 (1948) (national origin).

26. *See* Shapiro v. Thompson, 394 U.S. 618, 631 (1969).

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

28. Roe v. Wade, 410 U.S. 113, 154, 155 (1973); Shapiro v. Thompson, 394 U.S. 618, 634 (1969).

29. Roe v. Wade, 410 U.S. 113, 155 (1973); Griswold v. Connecticut, 381 U.S. 479, 483 (1965).

30. *See* McGowan v. Maryland, 366 U.S. 420, 426 (1961).

31. L. TRIBE, *supra* note 23, at 995-96.

32. *See* Califano v. Webster, 430 U.S. 313 (1977) (per curiam); Califano v. Goldfarb, 430 U.S. 199 (1977); Craig v. Boren, 429 U.S. 190 (1976).

33. 429 U.S. 190, 197 (1976).

34. 81 Wis. 2d 491, 261 N.W.2d 434 (1978).

tion Act[35] should be subjected to "strict judicial scrutiny."[36] In rejecting this argument the court concluded that the strict scrutiny standard "applies only to classifications involving a 'suspect' category or fundamental right"[37] and that the Act involved neither classification since the classifications established by the Act "do not involve immutable personal characteristics or historical patterns of discrimination and political powerlessness."[38] The court thus applied the less strict rational basis standard of judicial scrutiny and concluded that there was in fact a "rational basis upon which the legislature could and did act"[39] in passing the malpractice legislation. In response to plaintiff's argument that no such rational basis existed because there was no medical malpractice crisis, the court said:

> [We are] not concerned with the wisdom or correctness of the legislative determination, however; its task is to determine only whether there was a reasonable basis upon which the legislature might have acted . . . .
>
> The legislature cited a sudden increase in the number of malpractice suits, in the size of awards, and in malpractice insurance premiums, and identified several impending dangers: increased health care costs, the prescription of elaborate "defensive" medical procedures, the unavailability of certain hazardous services and the possibility that physicians would curtail their practices . . . .
>
> The statute satisfies the five criteria of reasonableness set forth in many of this Court's opinions.[40] Medical malpractice

35. WIS. STAT. ANN. §§ 655.02 to .21 (West Supp. 1978).

36. 81 Wis. 2d at 506, 261 N.W.2d at 441.

37. *Id.*, 261 N.W.2d at 441 (citation omitted).

38. *Id.* at 507, 261 N.W.2d at 442 (citations omitted). The court here adopts the "rational basis" test because the legislation in question does not involve a "suspect class." However, an argument can be made that the "strict scrutiny" standard should be applied in these cases because the legislation has a tremendous effect upon the "fundamental rights" of trial by jury and free access to the courts. As noted by M. REDISH, *supra* note 7, at 20, and by Lenore, *supra* note 12, at 423 n.68, only those "fundamental rights" that are guaranteed by the United States Constitution invoke the strict scrutiny standard under traditional equal protection analysis. Yet, simply because the state right to trial by jury rather than the federal right is involved in these cases should not affect whether the right is considered "fundamental."

39. 81 Wis. 2d at 508, 261 N.W.2d at 442 (citing San Antonio School Dist. v. Rodriquez, 411 U.S. 1 (1973)).

40. The court listed these five criteria:

> actions are substantially distinct from other tort actions. The classification is plainly germane to this act's purposes. The law applies to all victims of health care providers as described therein. The legislature declares that the circumstances surrounding medical malpractice litigation and insurance required the enactment of this legislation.[41]

This court's discussion clearly demonstrates that employment of the rational basis test in equal protection analysis leads to virtually a complete deference to a legislature's conclusion that a medical malpractice "crisis" exists.

In *Eastin v. Broomfield*[42] plaintiff asserted that the Arizona review panel provision established an impermissible separate classification of malpractice claimants. After quoting the rational basis test as stated in the United States Supreme Court cases of *Dandridge v. Williams*[43] and *McGowan v. Maryland*[44] the Arizona Supreme Court concluded:

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(1) All classifications must be based upon substantial distinctions which make one class really different from another.

(2) The classification adopted must be germane to the purpose of the law.

(3) The classification must not be based upon existing circumstances only and must not be so constituted as to preclude addition to the numbers included within a class.

(4) To whatever class a law may apply, it must apply equally to each member thereof.

(5) The characteristics of each class should be so far different from those of other classes as to reasonably suggest at least the propriety, having regard to the public good, of substantially different legislation.

Id. at 509 n.8, 261 N.W.2d at 442 n.8.

41. *Id.* at 509, 261 N.W.2d at 442-43.

42. 116 Ariz. 576, 570 P.2d 744 (1977).

43. In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its law are imperfect. If 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 582, 570 P.2d at 750 (quoting Dandridge v. Williams, 397 U.S. 471, 485 (1970)).

44. "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

> We will uphold the classification if there exists any set of facts under which the classification rationally furthers a legitimate legislative purpose.
>
> . . . .
>
> . . . At the time the Act was enacted, there was evidence that medical malpractice insurance costs, as well as hospital professional liability costs, were doubling every three years
>
> . . . .
>
> By providing a system whereby the meritorious claims could be separated from the frivolous ones prior to trial and pretrial settlement would be encouraged, the Act promoted a legitimate legislative purpose.
>
> We do not believe that the panel provisions violate the equal protection clause because the classification created by the Act has a rational basis.[45]

The Wisconsin and Arizona courts are not alone in their rational basis approach to equal protection analysis of this type of legislation. At least four other states have concluded that their medical malpractice legislation did not violate the equal protection clause because the existence of a medical malpractice crisis, or at least the legislature's perception of a crisis, provided the requisite rational basis for the separate classification created by the acts.[46]

In Florida the review panel proceeding was challenged on the equal protection ground that the provision established an impermissible classification within the statute itself.[47] Plaintiff argued that under the Florida legislation a medical malpractice plaintiff is required to submit his claim to the administrative panel before filing suit but the defendant health care provider may choose

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aside if any state of facts reasonably may be conceived to justify it . . . ."

Id. at 582-83, 570 P.2d at 750-51 (quoting McGowan v. Maryland, 366 U.S. 420, 425-26 (1961)).

45. *Id.* at 583, 570 P.2d at 751 (citations omitted). The Nebraska Supreme Court, facing the same equal protection challenge, used language very similar to that of the Arizona court and also cited Dandridge v. Williams in concluding that no violation occurred. Prendergast v. Nelson, 199 Neb. 97, 113-14, 256 N.W.2d 657, 667-69 (1977).

46. *See* Eastin v. Broomfield, 116 Ariz. 576, 570 P.2d 744 (1977); Carter v. Sparkman, 335 So. 2d 802 (Fla. 1976); Paro v. Longwood Hosp., 369 N.E.2d 985 (Mass. 1977); Prendergast v. Nelson, 199 Neb. 97, 256 N.W.2d 657 (1977); Comiskey v. Arlen, 55 App. Div. 304, 390 N.Y.S.2d 122 (1976).

47. *See* 335 So. 2d at 805.

whether to participate in the administrative hearing.[48] The Florida Supreme Court noted its agreement with plaintiff's argument as applied to the literal wording of the statute but construed the statute to permit plaintiff to introduce at trial evidence of defendant's failure to appear before the administrative panel.[49] The court concluded that with this construction the statute did not violate the equal protection clause.[50]

A somewhat different equal protection attack was presented in *Paro v. Longwood Hospital*.[51] The Massachusetts Supreme Court applied the rational basis standard, but it did so sua sponte since plaintiff did not claim that either a fundamental interest or a suspect class was involved.[52] Additionally, plaintiff conceded that "the purpose that the statute is intended to serve, assuring the continued availability of medical malpractice insurance, . . . is a proper object of legislation."[53] Instead of the traditional equal protection attack, plaintiff contended that the classifications created by the statute "do not actually promote this goal."[54] Although the court did intimate that a factual inquiry into the question whether the legislation was actually serving its purpose might be proper at the trial court level in an action to challenge the constitutionality of particular legislation,[55] it declared that such inquiry was not appropriate at the appellate court level and that allegations in plaintiff's brief were not a sufficient substitute for trial court findings. The court concluded:

> Therefore, unless the legislation here is patently offensive, we must defer to the findings implicit in the enactment. We find

48. *See id.*; FLA. STAT. ANN. § 768.44(1)(c) (Cum. Supp. 1979). If the defendant files no answer within the twenty-day period, "the jurisdiction of the mediation panel over the subject matter shall terminate, and the parties may proceed in accordance with law."

49. 335 So. 2d at 805.

50. *Id.* at 806.

51. 369 N.E.2d 985 (Mass. 1977).

52. *Id.* at 988-89.

53. *Id.* at 989.

54. *Id.*

55. No statement of legislative purpose is found in the Massachusetts statute as is found in the Wisconsin statute. *See* note 40 *supra* and accompanying text. Thus, the Massachusetts court's statement that a factual inquiry into the relationship between the legislation and its success in promoting its goal would be appropriate at the trial court level would seem to apply only in those cases in which the legislature has not already "investigated" this issue and included a statement of its findings in the legislation.

> no patent offense. . . . It is not open to us to say that the Legislature could not reasonably have concluded that the imposition of a screening procedure and a bond requirement would discourage frivolous medical malpractice claims, thus reducing the losses to the insurance companies and enhancing the likelihood of the future availability of coverage.[56]

Plaintiff also challenged the Massachusetts statute on the ground that it violated equal protection by treating differently certain people covered by the Act. Specifically, the Act provided that if the panel decision is favorable to the defendant, the plaintiff must post a $2,000 bond with the court before he will be allowed to proceed to trial. If the panel decision is favorable to the plaintiff, however, and the plaintiff proceeds to trial, no such bond is required of the defendant health care provider.[57] In upholding the bond requirement the court held that the rational basis test was satisfied because "[t]he legislature could reasonably have determined that the bulk of frivolous malpractice litigation resulted from plaintiffs who filed and prosecuted suits without having a legally sufficient claim."[58]

No state's highest court has held a screening panel provision

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56. 369 N.E.2d at 989 (citation omitted).

57. MASS. GEN. LAWS ANN. ch. 231, § 60B (West Supp. 1978). The $2,000 bond is designed to cover court costs and expert witness' and attorney's fees incurred by the defendant if the plaintiff also loses at trial. If the plaintiff is an indigent the trial court can lower the amount of the bond, but it cannot eliminate the bond requirement altogether. *Id.*

58. 369 N.E.2d at 989. *See* Wisconsin *ex rel.* Strykowski v. Wilkie, 81 Wis. 2d 491, 261 N.W.2d 434 (1978). The *Strykowski* court referred to challenges of discrimination within the Act itself as challenges to "subclassifications" created by the Act among those whom the Act regulates. The court, in upholding all the Act's subclassifications, said that "[r]eview of 'subclassifications' is governed by the same principles applicable to all legislative classifications" and thus applied the rational basis standard. *Id.* at 510, 261 N.W.2d at 443. Because the subclassifications in question were quite unique to the Wisconsin Act and because the court rather cursorily upheld them in the face of constitutional attack, this author has chosen not to discuss them further herein.

The *Paro* court upheld the bond requirement in the face of a challenge regarding access to the courts, see notes 77-78 *infra* and accompanying text, and the right to trial by jury. 369 N.E.2d at 991.

The Arizona Supreme Court held the Arizona bond requirement unconstitutional on the ground that it denies an indigent plaintiff free access to the courts under the equal privileges and immunities clause of the Arizona Constitution. 116 Ariz. 576, 585-86, 570 P.2d 744, 753-54. *See also* notes 82-86 *infra* and accompanying text.

of a state malpractice Act violative of the equal protection clause. An Ohio trial court, however, in *Simon v. St. Elizabeth Medical Center*[59] did find such a violation on the ground that the Act conferred benefits upon medical malpractice defendants that are not available to defendants in other tort actions, thus giving the medical malpractice plaintiff a greater burden than the burden imposed upon plaintiffs in other tort actions.[60] The court apparently found a violation of the equal protection clause because the medical malpractice plaintiff is treated differently than other plaintiffs without any discussion of the applicable standard for judicial scrutiny. Not only does this lack of explanation and full discussion of the equal protection analysis weaken the court's opinion, but since the court's entire discussion of the constitutional issues is pure dicta,[61] what other persuasive value it might have had is certainly undermined. The weakness of the court's reasoning is further indicated by the Ohio legislature's failure to amend, much less repeal, the screening panel legislation after the *Simon* decision.[62] At least one state court, the Arizona Supreme Court in *Eastin v. Broomfield*,[63] expressly refused to follow the *Simon* court's opinion.

Each state high court that has considered the equal protection issue as it relates to the screening panel legislation has utilized the rational basis test. There is, however, one state supreme court that has apparently adopted a somewhat higher standard for its equal protection analysis of medical malpractice legislation although the court did not discuss the state's screening panel

59. 3 Ohio Op. 3d 164, 355 N.E.2d 903 (C.P., Montgomery County 1976).

60. *Id.* at 166-67, 355 N.E.2d at 906. The court also found the Ohio Act's special pleading requirements for medical malpractice claims and the Act's $200,000 limitation on general damages to be violative of the equal protection clause. *Id.*, 355 N.E.2d at 906. *See* OHIO REV. CODE ANN. § 2711.21 (Page Supp. 1977) ("Arbitration Board to Hear Medical Claims"); *id.* § 2307.43 (Page Supp. 1977) ($200,000 limitation on general damages); *id.* § 2307.42 (Page Supp. 1977) (special pleading requirements). Although the Act refers to its mediation process as "arbitration," the panel decision is not binding on the parties or upon the jury at a subsequent trial.

61. The court admitted it undertook the constitutional discussion "purely as dicta." *See* 3 Ohio Op. 3d at 165, 355 N.E.2d at 905.

62. *See* OHIO REV. CODE ANN. § 2711.21 (Page Supp. 1977). This supplement for 1978 includes all new laws passed by the general assembly through November 12, 1978.

63. 116 Ariz. 576, 583, 570 P.2d 744, 751 (1977). *See* note 42 *supra* and accompanying text.

provision in its opinion.

In *Jones v. State Board of Medicine*[64] the Idaho Supreme Court noted that the United States Supreme Court "has recognized and followed the utilization of a two-tier examination" of equal protection challenges:

> If the classification involves a fundamental right or a suspect classification such as race, the state bears a heavy burden to justify the classification by a compelling state interest. That has been termed the strict scrutiny test.
>
> In other classifications, particularly in the areas of social welfare legislation, a restrained standard of review is applied.[65]

Rather than apply the "restrained standard" as other state courts have done, the Idaho court discussed, and apparently instructed the trial court on remand to apply, "a different and higher standard than the traditional restrained analysis of equal protection."[66] After quoting from the United States Supreme Court case of *Reed v. Reed*[67] the court said:

> The standard set forth in *Reed* focuses upon the relationship between the subject legislation and the object or purpose to be served thereby. This new intermediate standard of equal protection review has been described as "means-focus" because it tests whether the legislative means *substantially furthers* some specifically identifiable legislative end.[68]

In applying this intermediate standard to the Act's provision that limits general damages in medical malpractice claims, the court said:

> In the usual and ordinary case where a statutory classification is to be tested in the context of equal protection, judicial policy has been, and continues to be, that the legislation should be upheld so long as its actions can reasonably be said to promote the health, safety and welfare of the public. Nevertheless,

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64. 97 Idaho 859, 555 P.2d 399 (1976), *cert. denied*, 431 U.S. 914 (1977).

65. 97 Idaho at 866, 555 P.2d at 406 (citing, *inter alia*, Dandridge v. Williams, 397 U.S. 471 (1970); McGowan v. Maryland, 366 U.S. 420 (1961). *See* notes 43-45 *supra* and accompanying text.

66. 97 Idaho at 867, 555 P.2d at 407. *See* note 73 *infra*.

67. 404 U.S. 71 (1971).

68. 97 Idaho at 867, 555 P.2d at 407 (emphasis added). *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 (1972).

> where the discriminatory character of a challenged statutory classification is apparent on its face and where there is also a patent indication of a lack of relationship between the classification and the declared purpose of the statute, then a more stringent judicial inquiry is required beyond that mandated by *McGowan* . . . .
>
> Here it is apparent from the face of the Act that a discriminatory classification is created based on the degree of injury and damage suffered as a result of medical malpractice. Rather obviously although the Act is said to be designed to insure continued health care to the citizens of Idaho it cannot do other than confer an advantage on doctors and hospitals at the expense of the more seriously injured and damaged persons . . . .[69]

The court then remanded the case to the trial court for a determination of the "factual basis underlying the purported correlation between limitation of claimant recovery and the promotion of health care for the people of Idaho."[70] Although the only impermissible classification challenged by plaintiff was the Act's discrimination between the medical malpractice claimant injured to an extent less than $150,000 and the claimant injured to an extent greater than $150,000, presumably the court's imposition of the "means-focus" or intermediate standard of equal protection would apply as well to the more general challenge that the Act as a whole creates an impermissible separate classification of personal injury claimants and imposes restrictions only upon those claimants. The tougher question is how much more strict the new standard is than the more commonly accepted rational basis test. Because the court remanded the case to the trial court for a factual analysis of the relationship between the legislation and its purpose even though the legislature provided an extensive "Declaration of necessity and purpose" as a preamble to the statute,[71] the existence of such a legislative declaration alone clearly is not enough to satisfy the standard. Those state courts that applied the "rational basis" standard in finding no violation of equal protection, however, deferred completely to the legislature's findings and upheld their state acts solely on the basis of the legislature's statement of purpose.[72] Thus, application of the

69. 97 Idaho at 871, 555 P.2d at 411.
70. *Id.*, 555 P.2d at 411.
71. IDAHO CODE § 39-4202 (1977).
72. *See* notes 34-58 *supra* and accompanying text.

intermediate standard requires the court to undertake its own inquiry into the existence of a medical malpractice crisis and "whether the legislative means *substantially* furthers some specifically identifiable legislative end."[73]

B. Free Access to the Courts

Plaintiffs have challenged various aspects of screening panel legislation with a "free access to the courts" argument under state constitutions. The fundamental argument is that the screening panel requirement imposes a financial burden upon the plaintiff in addition to the expenses of trial and thus restricts free access to the courts. State high courts have unanimously refused to hold medical malpractice legislation unconstitutional on this ground.[74] The approach of the Florida Supreme Court on this issue is typical:

> Although courts are generally opposed to any burden being placed on the rights of aggrieved persons to enter the courts because of the constitutional guaranty of access, there may be reasonable restrictions prescribed by law . . . .
>
> Cases are legend which hold that the police power of the state is available in the area of public health and welfare . . . .[75]

After discussing the preamble to the Florida Act that declares the existence of a medical malpractice crisis and concludes that the Act relates directly to public health and welfare, the court concluded: "Even though the pre-litigation burden cast upon the claimant reaches the outer limits of constitutional tolerance, we do not deem it sufficient to void the medical malpractice law."[76]

More specifically, the Massachusetts Supreme Judicial

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73. 97 Idaho at 867, 555 P.2d at 407 (emphasis added). Note, however, that the United States Supreme Court has applied this intermediate standard of review only to equal protection challenges based on sex discrimination, see Califano v. Webster, 430 U.S. 313 (1977); Califano v. Goldfarb, 430 U.S. 199 (1977); Craig v. Boren, 429 U.S. 190 (1976) and to equal protection challenges involving illegitimacy, see Lalli v. Lalli, 99 S.Ct. 518 (1978); Trimble v. Gordon, 430 U.S. 762 (1977). *See generally* 45 TENN. L. REV. 514 (1978).

74. *But see* notes 82-86 *infra* and accompanying text.

75. Carter v. Sparkman, 335 So. 2d 802, 805 (Fla. 1976). Other cases, not discussed in this section, finding no violation of free access to the courts, include Prendergast v. Nelson, 199 Neb. 97, 256 N.W.2d 657 (1977); Comiskey v. Arlen, 55 App. Div. 2d 304, 390 N.Y.S.2d 122 (1976).

76. 335 So. 2d at 806.

Court in *Paro v. Longwood Hospital*[77] held that the Massachusetts Act's requirement that the plaintiff, if he does not prevail before the screening panel, must post a $2,000 bond as a condition to pursuing his claim in court is not a violation of the due process principle of free access to the courts. Referring to the Act's provision allowing the trial judge to reduce the bond for an indigent plaintiff, the court said: "The constitutional issue is avoided in this case because of the wide discretion that the statute gives to the judge to set the bond amount. As long as the discretion is exercised without unreasonably prohibiting meritorious claims, no constitutional violation will exist."[78]

In *Wisconsin ex rel. Strykowski v. Wilkie*[79] plaintiff claimed that his right to free access to the courts was violated by several sections of the Wisconsin screening panel provision: the financial expense of the hearing, the special pleading process (defendant was not required to file an answer prior to the panel hearing), a biased panel (two of the five panel members are health care providers), and the denial of the right to present all claims involved (including, *e.g.*, a products liability claim) in a single proceeding.[80] In upholding the constitutionality of the statute the court applied this general rule:

> Whatever the precise status of the right of access to the courts, it is clear that due process is satisfied if the statutory procedures provide an opportunity to be heard in court at a meaningful time and in a meaningful manner. . . . Due process is flexible and requires only such procedural protections as the particular situation demands.[81]

The Arizona Supreme Court in *Eastin v. Broomfield*[82] reached a different conclusion on the free access issue as related to one aspect of the Arizona Act.[83] Although the court rejected the contention that the screening panel requirement denies a claimant free access to the courts, the court did strike the Act's requirement that a plaintiff post a $2,000 bond as a prerequisite to pursuing his claim in court: "As to the indigent, the statute vio-

77. 369 N.E.2d 985 (Mass. 1977).
78. *Id.* at 990.
79. 81 Wis. 2d 491, 261 N.W.2d 434 (1978).
80. *Id.* at 512-19, 261 N.W.2d at 444-46.
81. *Id.* at 512, 261 N.W.2d at 444 (citation omitted).
82. 116 Ariz. 576, 570 P.2d 744 (1977).
83. ARIZ. REV. STAT. § 12-567(I) (Cum. Supp. 1956-1978).

lates the Arizona constitutional privileges and immunities clause, Art. II, § 13 [84] by denying access to the courts. As to the non-indigent, it places a heavier burden upon his access to court and therefore violates the same clause of the Arizona Constitution."[85] In an apparent mixture of equal protection and free access analysis, the court found a violation of free access to the courts in the requirement that the medical malpractice litigant post a bond before going to trial in some instances since such a litigant is not "afforded an equal opportunity [for access] to the courts."[86]

C. Right to Trial by Jury

Virtually every state constitution contains a provision that guarantees the right to trial by jury. Most such provisions provide that the right to trial by jury shall remain inviolate.[87] In challenging state legislation establishing a malpractice screening panel, one must rely upon the applicable state constitutional provision because the right to trial by jury in civil matters guaranteed by the seventh amendment to the United States Constitution has not been applied to the states.[88] Because the screening panel legislation in each state allows a jury trial subsequent to the panel hearing if the parties do not accept (or if permitted, agree to accept) the panel's conclusion, this legislation obviously cannot be challenged upon the ground that it absolutely denies the right to a jury trial in favor of the screening panel procedure. Instead, the argument rests upon the theory that the state constitutional guarantee to a right to trial by jury is violated when the legislature alters and restricts this right as it has been "heretofore enjoyed"[89] or as it was known at common law. Therefore, challenges based upon the jury trial theory are most often focused upon the statutory requirement that the plaintiff submit his claim to the

84. ARIZ. CONST. art. 2, § 13. "No law shall be enacted granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which, upon the same terms, shall not equally belong to all citizens or corporations." *Id.*

85. 116 Ariz. at 586, 570 P.2d at 754.

86. *Id.* at 585, 570 P.2d at 753.

87. *See, e.g.*, FLA. CONST. art. I, § 22; ILL. CONST. art. I, § 13; IND. CONST. art. I, § 20; NEV. CONST. art. I, § 3; TENN. CONST. art. I § 6.

88. *See* Curtis v. Loether, 415 U.S. 189, 192 n.6 (1974).

89. Language to this effect is found in the Illinois Constitution article I, section 13: "[t]he right to trial by jury as heretofore enjoyed shall remain inviolate."

screening panel for a hearing before proceeding to trial (an impediment not heretofore imposed upon the right to a trial by jury) and upon the provision that the panel decision is admissible at a subsequent trial.[90] This latter restriction is a perpetuation and reinforcement of the impediment created by the hearing and also constitutes an additional restriction in that the jury might give undue weight to a report from an official panel. A third challenge was made in Massachusetts[91] to a provision requiring the plaintiff to post a $2,000 bond as a condition precedent to his right to a subsequent trial if he does not prevail before the hearing panel.[92]

The great majority of state courts have held that the right to trial by jury is not denied or impermissibly restricted by the screening panel legislation.[93] These courts reach this conclusion by reasoning that the right to trial by jury is simply not denied to the parties when they are free to proceed to trial following the screening panel hearing, at which time the panel decision, although admissible in evidence, is not binding on the jury. So long as the jury remains the ultimate arbiter at trial, the right to trial by jury as guaranteed by the state constitution is satisfied. The Wisconsin Supreme Court developed this reasoning very well in upholding a screening panel provision.[94] In its opinion the court attempted to eliminate some vagueness in the statute by construing it to allow both the majority and minority reports of the panel to be admitted into evidence, to allow both parties to comment upon and otherwise attempt to impeach or to corroborate the panel decision, and to require the trial judge to

> instruct the jury with clarity and simplicity to the end that the jurors are impressed with the fact that the panel's findings and order are in no way binding upon the jury, but are to be accorded such weight, and such weight only, as the jury choose to give them.[95]

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90. *See, e.g.*, Eastin v. Broomfield, 116 Ariz. 576, 580, 570 P.2d 744, 748 (1977).

91. Paro v. Longwood Hosp., 369 N.E.2d 985 (Mass. 1977).

92. *See* MASS. GEN. LAWS ANN. ch. 231, § 60B (West 1976).

93. *See, e.g.*, Eastin v. Broomfield, 116 Ariz. 576, 570 P.2d 744 (1977); Paro v. Longwood Hosp., 369 N.E.2d 985 (Mass. 1977); Prendergast v. Nelson, 199 Neb. 97, 256 N.W.2d 657 (1977); Comiskey v. Arlen, 55 App. Div. 304, 390 N.Y.S.2d 122 (1976); Wisconsin *ex rel.* Strykowski v. Wilkie, 81 Wis. 2d 491, 261 N.W.2d 434 (1978).

94. Wisconsin *ex rel.* Strykowski v. Wilkie, 81 Wis. 2d 491, 261 N.W.2d 434 (1978).

95. *Id.* at 528-29, 261 N.W.2d at 452.

The court concluded that the statute as thus construed does not serve to "contaminate the exclusive prerogatives of the jury."[96] As an additional reason for upholding this statute, the court construed the provision allowing the panel decision to be admitted into evidence to be of itself a rule of evidence. Thus construed, "the admissibility of the panel's findings is constitutionally unobjectionable because litigants have no vested rights in particular rules of evidence."[97]

This view of the right to trial by jury in the screening panel context is not unanimous, however. Trial courts in Pennsylvania[98] and Ohio[99] have held that the fact that the jury might be unduly influenced by the panel decision is enough to violate state constitutional guarantees to the right to trial by jury. This view of the statute has been expressed by an Ohio court as

> [putting] 'strings' upon one's right to trial by jury, thus, in reality, making it a far less effective right than would otherwise be the case. The right to trial by jury is thus substantially reduced in terms of the value of that right to a party who desires to challenge the decision of the arbitrators.[100]

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96. *Id.* at 529, 261 N.W.2d at 452. The court also concluded that the additional expenses demanded by the panel proceeding did not violate the parties' right to a trial by jury on the theory that the litigant is subject to reasonable regulation in his pursuit of a jury trial and the financial burden involved here is not unreasonable. *Id.* at 523-24, 261 N.W.2d at 449-50.

97. *Id.* at 528, 261 N.W.2d at 451 (citation omitted).

98. Parker v. Children's Hosp., Pa. No. 1424 (C.P., Phila. July 29, 1977).

99. Simon v. St. Elizabeth Med. Center, 3 Ohio Op. 3d 164, 355 N.E.2d 903 (C.P., Montgomery County, 1976).

100. *Id.* at 168, 355 N.E.2d at 908. Worthy of note is that the Wisconsin Supreme Court in *Strykowski* rejected the *Simon* opinion and distinguished the Ohio statute on the ground, among others, that it allows the "arbitrators" (although the Act refers to the mediation process as "arbitration," the panel decision is not binding; see note 60 *supra*) to be called as witnesses at trial. The Wisconsin court viewed this provision as one that would likely serve to increase the influence of the panel decision upon the jury. The court in *Simon* also mentioned this provision of its statute as one of those impermissible "strings" upon the right to trial by jury. However, as this author interprets the statute, the individual arbitrators are permitted to testify at trial only upon cross-examination by the party who did not offer the opinion, rendered by or concurred in by the particular arbitrator, in evidence at trial. In other words, the party who offers the majority panel opinion into evidence is free to call any arbitrator who filed a dissent or joined in a dissent to testify at trial on cross-examination. Likewise, the party who offers the dissenting panel opinion, or offers no opinion if the decision is unanimous, is free to call any arbitrator who

The court admits that the right to proceed to a jury trial is permitted by the statute, but it is no longer a "free and unfettered right as was certainly intended by the framers."[101]

The majority view that the right to a jury trial is not denied or impermissibly restricted by screening panel legislation appears to be better reasoned, especially because of the fact that the panel decision simply constitutes another approach to a highly technical subject and thus provides the jury with additional guidance in reaching its conclusions. The trial court system accepts the jury's competence to weigh complex evidence by permitting both parties to produce expert testimony at trial in support of their positions. The jury seems equally competent to weigh and to evaluate the decision of a medical malpractice screening panel.

D. Separation of Powers

Article VI of the Illinois Constitution provides that "[t]he judicial power is vested in a Supreme Court, an Appellate Court and Circuit Courts"[102] and that the circuit court shall have "original jurisdiction of all justiciable matters . . . [and] shall have such power to review administrative action as provided by law."[103] The Illinois Supreme Court in *Wright v. Central DuPage Hospital Association*[104] held the Illinois screening panel legislation[105] in violation of the judicial power provision of the Illinois

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joined in the majority opinion to testify at trial or cross-examination. If this construction of the statute is correct, then this provision is designed to *protect* the parties' right to trial by jury by allowing them to attack the panel decision at trial by cross-examining the very people who made that decision. *See generally* OHIO REV. CODE ANN. § 2711.21 (Anderson Supp. 1978).

101. 3 Ohio Op. 3d at 168, 355 N.E.2d at 908. The Illinois Supreme Court in Wright v. Central DuPage Hosp. Ass'n, 63 Ill. 2d 313, 347 N.E.2d 736 (1976), held that the Illinois screening panel provisions violated the parties' right to a trial by jury, but the court's reasoning is unclear. Apparently the court concluded that, since earlier in its opinion it had held the statute unconstitutional on another ground, see notes 104-10 *infra* and accompanying text, it must necessarily hold the provision allowing the decision of an unconstitutional panel to be admitted into evidence at a subsequent trial violative of the parties' right to a trial by jury. 63 Ill. 2d at 318, 347 N.E.2d at 741.

102. ILL. CONST. art. VI, § 1.

103. *Id.* § 9.

104. 63 Ill. 2d 313, 347 N.E.2d 736 (1976).

105. *See* Civil Practice Act §§ 58.2, .3-.10, ILL. REV. STAT. ch. 110, §§ 58.2, .3-.10 (Supp. 1978). The Illinois legislature passed the Health Care Arbitration Act to replace the 1975 screening panel legislation, which was declared unconsti-

Constitution because nonjudicial personnel serve on the panel. In essence, the court concluded that the legislation served to vest judicial powers in a nonjudicial body, a panel comprised of a trial judge, a practicing physician, and a practicing attorney. This conclusion was based upon two statutory provisions that structured the panel hearing very much like a formal trial and vested decision-making power in persons other than judges. First, the proceeding before the panel was to be "adversary," with each party free to call and to cross-examine witnesses.[106] Second, for all legal and factual issues the physician and attorney were to have equal powers with the trial judge member of the panel; thus by voting together they could overrule the judge on a question of law.[107] In essence then, with examination and cross-examination of witnesses and introduction of evidence "as at a trial in the circuit court,"[108] the proceeding was a judicial one that could be controlled by nonjudicial personnel. The constitutional infirmity was not cured by the provision that the trial court judge was to be the presiding member of the panel and was to determine all procedural issues, including questions relating to admissibility of evidence. This control of the panel by the trial court judge was significantly diluted by the fact that all three members were to participate in deciding issues of fact and substantive law and by the fact that the panel had discretion to relax the rules of evidence in the panel proceedings.[109] Thus, the court concluded that since "[t]he application of principles of law is inherently a judicial function and article VI, section 1, of the Constitution vests the exclusive and entire judicial power in the courts"[110] the provisions were invalid.

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tutional in *Wright*. *See* ILL. REV. STAT. ch. 10, §§ 201-214 (Cum. Supp. 1978). The new legislation is designed principally to approve agreements between patient and physician to arbitrate medical malpractice claims. *See* Historical and Practice Note to ILL. REV. STAT. ch. 110, § 58.2 (Cum. Supp. 1978). Illinois thus joins approximately ten other states that have legislation expressly approving agreements to arbitrate medical malpractice claims. *See* 5 STATE HEALTH LEGIS. REP. 17 (May 1977); *id.* (Supp. 1, August 1977).

106. 63 Ill. 2d at 320, 347 N.E.2d at 738 (quoting Civil Practice Act § 58.6, ILL. REV. STAT. ch. 110, § 58.6 (1975)).

107. *Id.* at 322, 347 N.E.2d at 739 (construing Civil Practice Act §§ 58.6-.7, ILL. REV. STAT. ch. 110, §§ 58.6-.7 (1975)).

108. *Id.*, 347 N.E.2d at 739 (construing Civil Practice Act § 58.6, ILL. REV. STAT. ch. 110, § 58.6 (1975)).

109. *Id.* at 320-24, 347 N.E.2d at 738-40.

110. *Id.* at 322, 347 N.E.2d at 739 (citations omitted).

The court's opinion, however, suffers from certain infirmities. The reasoning of the court would be convincing if the panel decision were binding upon the parties or binding upon the jury at a subsequent trial. However, under the Illinois procedure the panel decision is not binding upon the parties or the jury, and it is not even admissible at a subsequent trial. Moreover, the right to a subsequent trial is not restricted beyond the requirement that the parties participate in the screening panel hearing. The screening panel legislation does provide that the parties may, at any time by unanimous written agreement, elect to be bound by the panel decision.[111] If such an agreement is made, judgment will be entered by the trial court upon the panel decision.[112] Additionally, if no such agreement is made and if the panel decision is unanimous, any party who does not reject the decision within twenty-eight days after receipt of service of the opinion will be deemed to have accepted it; if the determination is accepted by all parties, the court may enter judgment.[113] Yet, in the absence of acceptance of the decision or an agreement to be bound by the decision, neither of these two provisions precludes a party from proceeding to trial, which would be conducted as if no panel hearing had ever been held. Because the panel decision is inadmissible at trial, the Illinois screening panel does nothing more than provide a forum for encouraging and assisting in the settlement of medical malpractice claims without precluding or restricting the parties' right to the traditional trial court resolution of the dispute.

Several other state high courts have considered the separation of powers challenge under this type of constitutional provision, and all have upheld their state legislation.[114] These courts have uniformly found no violation because the parties are not bound by the panel decision and the parties are entitled to a subsequent trial at which the panel decision, even if admissible in the state, is not binding upon the jury;[115] consequently, the

111. Civil Practice Act § 58.8(4), ILL.REV. STAT. ch. 110, § 58.8(4) (Cum. Supp. 1978).

112. *Id.* § 58.8(1).

113. *Id.* § 58.8(2).

114. *See* Eastin v. Broomfield, 116 Ariz. 576, 570 P.2d 744 (1977); Paro v. Longwood Hosp., 369 N.E.2d 985 (Mass. 1977); Prendergast v. Nelson, 199 Neb. 97, 256 N.W.2d 657 (1977); Wisconsin *ex rel.* Strykowski v. Wilkie, 81 Wis. 2d 491, 261 N.W.2d 434 (1978).

115. *See, e.g.*, 116 Ariz. 576, 570 P.2d 744 (1977); 81 Wis. 2d 491, 261

judicial function of the trial and appellate courts had not been displaced by the screening panel.

The Arizona Supreme Court, in *Eastin v. Broomfield*,[116] distinguished the Illinois Supreme Court's opinion in *Wright*[117] on the ground that the Illinois statute provides that a judgment can be entered upon the decision of the panel if the parties so agree. In contrast, the Arizona screening panel provision is designed simply to encourage settlements. The Arizona court noted that panel decisions "can never suffice for the entry of a judgment against either party"; the panel decision is advisory only and can be rejected by either party.[118]

Comparing the originally enacted Illinois screening panel legislation with that of Arizona, the distinction between the two is so minute in substance that it clearly does not provide a sound basis for the different conclusion reached by the Arizona court on the separation of powers question. Although the Illinois statute does provide that the panel decision can be binding on the parties, it becomes binding only if all the parties to the dispute so agree or upon individual parties who fail to reject a unanimous decision of the panel.[119] Essentially, then, the Illinois screening panel provision that allows the panel decision to be binding is fairly similar in some respects to some state legislation that provides for voluntary agreements to resolve malpractice claims by submitting them to arbitration.[120] The sounder analysis suggests a rejection of the Illinois court's reasoning in *Wright* and a conclusion that the powers of the judiciary are not usurped so long as the parties, absent an agreement to the contrary, may reject the decision of the panel; are allowed to proceed to trial following the panel hearing; and the panel decision, if admissible at trial, is not binding on the parties.

E. The Tennessee Act

The Tennessee Medical Malpractice Review Board and

N.W.2d 434 (1978).

116. 116 Ariz. 576, 570 P.2d 744 (1977).

117. 63 Ill. 2d 313, 347 N.E.2d 736 (1976).

118. 116 Ariz. at 582, 570 P.2d at 750.

119. *See* Civil Practice Act § 58.8(1), ILL. REV. STAT. ch. 110, § 58.8(1) (Cum. Supp. 1978).

120. *See, e.g.*, MICH. COMP. LAWS ANN. §§ 600.5040-.5065 (Supp. 1978).

Claims Act was adopted by the General Assembly in 1975.[121] The screening panel or review board provisions of the Act are consistent with the general scheme of such provisions as adopted in other states.[122] The General Assembly has amended the review board provisions each year since they were originally enacted with the most extensive amendments being adopted in 1976.[123]

The current review board provisions of the Act provide that "[w]hen a medical malpractice action[124] is filed in any court[125] and the case is at issue in accordance with rules of Tennessee rules of civil procedure," the judge of the court in which the action is filed refers the case to the review board by filing with the board a copy of the "pleading."[126] The board holds a hearing within ninety days after it receives the case and notifies the parties of its recommendation within thirty days after the hearing.[127] The hearing is informal,[128] and the rules[129] provide

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121. TENN. CODE ANN. §§ 23-3401 to 3421 (Supp. 1975).

122. *See* statutes cited note 19 *supra*.

123. *See* 1976 Tenn. Pub. Acts ch. 759.

124. "Medical malpractice action" means an action for damages for personal injury or death as a result of any medical malpractice by a health care provider, whether based upon tort or contract law. The term shall not include any action for damages as a result of negligence of a health care provider when medical care by such provider is not involved in such action.

TENN. CODE ANN. § 23-3402(1) (Cum. Supp. 1978).

125. The United States District Court for the Eastern District of Tennessee, Northeastern Division, has held that this provision requires that a medical malpractice action brought in federal court in Tennessee based on diversity jurisdiction must be referred to the Tennessee Medical Malpractice Review Board and a hearing held before the parties may proceed to trial. *See* Flotemersch v. Bedford County Gen. Hosp., 69 F.R.D. 556 (E.D. Tenn. 1975).

126. TENN. CODE ANN. § 23-3403(b) (Cum. Supp. 1978). As enacted in 1975 (and prior to the 1976 amendment), the Act required the plaintiff to submit a notice of his medical malpractice claim to the review board before filing his lawsuit. Such notice to the board tolled the running of the statute of limitations for the period of time during which the hearing was held and for an additional thirty days thereafter. If both parties accepted the board recommendation after the hearing, the statute of limitations was tolled for an additional thirty days to provide the parties with sufficient time to reach a settlement agreement. *See* TENN. CODE ANN. § 23-3403(c), (d) (1975) (amended 1976, 1978).

127. TENN. CODE ANN. § 23-3403(c) (Cum. Supp.1978).

128. *Id.* § 23-3409.

129. Rules and regulations governing the review board procedures are adopted by the executive director, who has the responsibility for administering the board procedures. *Id.* § 23-3404(b) (Cum. Supp. 1978).

that the parties may "present such evidence and testimony as desired"[130] and that the witnesses may be cross-examined by the opposing party and by members of the board.[131] The review board is comprised of one attorney, who serves as chairman, one physician, and one member of the general public.[132] If the defendant is

130. TENN. RULES & REGS. 0900-1-.05(5), (6) (Dec. 1977).

131. *Id.* 0900-1-.05(7) (Dec. 1976).

132. TENN. CODE ANN. § 23-3406 (Cum. Supp. 1978). As originally enacted, the statute provided that the board would be composed of one trial judge, one attorney, two physicians, and two members of the general public. If the defendant was not a physician, one of the physician members would be replaced with a member of the same health care field as the defendant. No provision expressly covering the case of multiple defendants was included. In 1976 the statute was amended to substitute a hearing examiner for the trial court judge as chairman of the review board. The amendment specified that the chairman would not take part in any determination of the facts nor vote in such determination.

The prohibition against the chairman's voting was deleted by the 1977 amendment to this section. The 1977 amendment has been applied in practice to provide for the board composition described in the accompanying text with the regular attorney member also serving as chairman. On its face, however, the statute could arguably be interpreted to provide either that the chairman be the regular attorney member of the panel or that he be a fourth member. If the chairman were to be a fourth member, presumably he would be able to vote on the board recommendation in view of the elimination of the prohibition against the chairman's voting.

In addition to changing the review board composition to one attorney, one physician, and one member of the general public, the 1977 amendment to this section also changed the provision regarding board composition in the case of a single nonphysician defendant. Rather than replacing one of the physicians on the board with the appropriate health care provider, the 1977 provision would replace "one of the members of the general public" with the appropriate health care provider, thus creating a board composed of one attorney, one physician, and one health care provider. (The wording of this provision is ambiguous since the 1977 amendment provided for a basic board containing only one member of the general public.) Under this scheme the health care professionals held a majority of the votes on the board. Such board composition presents due process problems, such as those raised by plaintiff in Parker v. Children's Hosp., Pa. No. 1424 (C.P., Phila. July 29, 1977); *see* notes 20 & 98 *supra* and accompanying text. Although this court rejected the due process argument based upon a statute providing that two of the panel's seven members be physicians, the argument is still persuasive that a board composition giving the health care providers a majority is grossly unfair and should be revised. *See also* NEB. REV. STAT. §§ 44-2801 to 2855 (Cum. Supp. 1978), which provides that the panel be composed of one trial court judge and three health care providers.

In 1978 the Tennessee provision relating to board composition in the case

not a physician, a fourth member will be appointed to the board from the health care field to which the defendant belongs. If there are multiple defendants, additional members will be appointed to the board from the appropriate health care field for each defendant.[133]

Once the parties have received the board's recommendation, they must either accept or reject the recommendation within thirty days.[134] If both parties accept the recommendation, they must then execute a settlement agreement.[135] If one party rejects the recommendation or if both accept it but are thereafter unable to agree on a settlement, the claimant is free to proceed with his lawsuit at the expiration of an additional thirty-day period.[136] If the case goes to trial, the majority recommendation of the board, as well as the minority report if one is filed, is admissible in evidence at that trial as an exception to the hearsay rule.[137]

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of a single nonphysician defendant was amended to read as follows:

> If the malpractice claim involves a health care provider other than a physician, the executive director shall select an additonal member from the appropriate category of health care providers to serve on the board. If multiple health care providers are involved, the executive director shall select an additional person from each health care provider category; provided, however, that none of the board members set forth in Section 23-3406 shall be dropped as a consequence of selecting additional members.

1978 Tenn. Pub. Acts ch. 576, § 4. This amendment was clearly intended to resolve the ambiguity mentioned above and to reinstate the general member to a permanent place on the board.

133. TENN. CODE ANN. § 23-3407(4) (Cum. Supp. 1978), *as amended by* 1978 Tenn. Pub. Acts ch. 576, § 4. Presumably, if there are two health care provider defendants, only one of whom is a physician, the board will be composed of four members: one attorney, one physician, one member of the general public, and one health care provider from the same field as the one nonphysician defendant.

134. An acceptance must be in writing. TENN. CODE ANN. § 23-3403(c) (Cum. Supp. 1978).

135. *Id.*

136. *Id.* § 23-3403(d).

137. *Id.* § 23-3409. The board members are prohibited from participating at the subsequent trial either as counsel or as witnesses. *Id.* The provision stating that the basis for admissibility of the panel decision at trial is "as an exception to the hearsay rule" was added by the 1976 amendment. As noted earlier, several state courts have interpreted their state statutes permitting the panel decision to be admitted at a subsequent trial as constituting a rule of evidence. *See* note 97 *supra* and accompanying text.

The Tennessee Supreme Court has recently upheld the admissibility at trial of the formal statement of the Medical Malpractice Review Board as provided

The Tennessee Medical Malpractice Review Board and Claims Act has been challenged several times on constitutional grounds, but the screening panel provisions have been challenged only at the trial court level. The first three challenges were asserted against the statute prior to the initial amendments made in 1976. In December 1975 the Chancery Court of Davidson County, Tennessee, in *Arnold v. Tennessee*[138] held that the Act violated the parties' rights to free access to the courts as guaranteed by article I, section 17, of the Tennessee Constitution[139] because the Act required the plaintiff to submit his claim to the review board prior to filing his lawsuit with the circuit court.[140] The chancellor reasoned that free access to the courts is denied when the review board, rather than the court, has control over when the lawsuit will finally be filed in court. In 1976 the Tennessee General Assembly amended the Act to require the trial judge to refer the case to the medical malpractice review board for hearing only after all the pleadings had been filed in the action. This amendment took effect before the Tennessee Supreme Court could hear the *Arnold* case. Thus, the court

for in TENN. CODE ANN. § 23-3409 (Cum. Supp. 1978). Baldwin v. Knight, 569 S.W.2d 450 (Tenn. 1978). However, the court refused to permit the admission of the formal statement to be a satisfactory substitute for the expert testimony that a plaintiff was ordinarily required to produce by case law and by TENN. CODE ANN. § 23-3414(b) (Cum. Supp. 1978). 569 S.W.2d at 453. The court went on to recognize an exception to the expert testimony requirement for matters lying within the common knowledge of laymen. *Id.* at 456. Based upon this common knowledge exception and perhaps also upon the testimony of the defendant-doctors, the court held that the directed verdict against plaintiff was improper and that plaintiff had presented sufficient evidence to reach the jury. *Id.* at 451. Thus, arguably, since the review board's statement was not necessary to establish plaintiff's case, the court's resolution of the question of whether the statement was a valid substitute for expert testimony may not have been necessary to the court's decision.

138. No. A-6030 (Davidson County Ch. Ct., part 2, Dec. 4, 1975), *reported in* 19 A.T.L.A. Newsletter 18 (Feb. 1976).

139. This provision reads in full:

> Sec. 17. Open courts—Redress of injuries—Suits against the State.
>
> That all courts shall be open; and every man, for an injury done him in his lands, goods, person or reputation, shall have remedy by due course of law, and right and justice administered without sale, denial, or delay. Suits may be brought against the State in such manner and in such courts as the Legislature may by law direct.

140. *See* TENN. CODE ANN. § 23-3403(c) (Cum. Supp. 1978), *as amended by* 1976 Tenn. Pub. Acts ch. 759, § 4.

remanded the case to the trial court for proceedings under the Act as amended.[141]

In September 1975 the Knox County Circuit Court denied defendant's motion to dismiss on the ground that plaintiff had not submitted his claim to the medical malpractice review board prior to bringing suit and held that the review board provisions of the Act constituted "class distinction" and thus violated article I, section 17, of the Tennessee Constitution.[142] The court's reference to class distinction gave rise to equal protection analysis, yet the court did not invalidate the review board procedure altogether. It simply held that the review board procedure violated the Tennessee constitutional guarantee to court access without delay if the review board served to cause an actual delay in the case getting to trial.[143] Thus, in this court's view, the 1976 amendment to the Act providing that the plaintiff file his lawsuit before his claim is submitted to the review board does not serve to cure the constitutional infirmity of the Act since this procedure does not guarantee that the review board hearing will not delay the case in getting to trial.[144]

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141. The remand of the *Arnold* case by the Tennessee Supreme Court is unreported.

142. *See* Knoxville Journal, Sept. 20, 1975, at 1, col. 2; Knoxville News-Sentinel, Sept. 19, 1975, at 2, col. 4.

143. As reported in the Knoxville Journal:

> Judge [T. Edward] Cole said that to require a plaintiff to first submit his grievance to arbitration contravenes Article I, Section 17 of the State Constitution.
>
> That article states in part that "all courts shall be open . . . and every man shall have remedy by due course of law, and right and justice administered without . . . delay."
>
> Such delays, the judge added, would be discriminatory and place doctors and health care specialists in a preferred class.
>
> . . . .
>
> But Judge Cole stressed that he was not declaring the review board itself to be unconstitutional.
>
> "The two processes can be performed at the same time," he said, "as long as the review boards do not delay the cases getting to court."

Knoxville Journal, Sept. 20, 1975, at 1, col. 2.

144. Judge [T. Edward] Cole stated that he pays no attention to the review board's calendar when he sets the docket for his court. Thus, if a case is set for trial on a date prior to the review board hearing date, Judge Cole will not delay the trial to accommodate the review board. Otherwise, said Judge Cole, the review board procedure would, in its application, violate article I, section 17, of the Tennessee Constitution by delaying the parties' access to the courts. Interview with Judge T. Edward Cole, Cir. Ct., Knox County, Tennessee

In the only federal court case concerning the Act, the Federal District Court for the Eastern District of Tennessee held that the medical malpractice claimant would be required to submit her claim to the medical malpractice review board prior to filing her diversity action in federal court even though the governor of Tennessee had not yet appointed the review board.[145] The court dismissed claimant's action on the ground that claimant had failed to allege that Tennessee substantive law entitled her to relief. To satisfy this requirement, claimant must "demonstrate that the prerequisites for relief under the Tennessee Medical Malpractice Review Board and Claims Act of 1975 were satisfied or have been excused."[146] Thus, the court held that the review board procedures are substantive state law and, accordingly, must be followed in a diversity action in federal court in Tennessee. In addition, and almost in passing, the court presumed, for the purpose of its ruling on the motion to dismiss, "that the General Assembly of Tennessee, in enacting the Tennessee Medical Malpractice Review Board and Claims Act of 1975, acted constitutionally."[147] The court admitted the existence of a possible equal protection challenge under the fourteenth amendment to the United States Constitution but concluded that the amendment "does not prevent the state of Tennessee from prescribing a reasonable and appropriate condition to the bringing of a lawsuit of a specified kind or class, so long as the basis of distinction is real and the condition imposed has a reasonable relation to a legitimate object."[148]

The screening panel provisions of the Tennesse Act follow the basic scheme of other state acts discussed above[149] and appear to present no unique constitutional problems. However, in a rather

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(May 11, 1978).

The particular case in which Judge Cole made his ruling arose after the review board provisions had become law but before the executive director and review board members had been selected. Thus, the parties had been unable to schedule a review board hearing prior to trial. Ordinarily, however, because of the strict time constraints upon the review board, more than adequate time is available for a review board hearing prior to trial.

145. Flotemersch v. Bedford County Gen. Hosp., 69 F.R.D. 556 (E.D. Tenn. 1975).

146. *Id.* at 557 (citations omitted).

147. *Id.* at 558.

148. *Id.* (citing Jones v. Union Guano Co., 264 U.S. 171, 181 (1924)).

149. *See* note 19 *supra.*

confusing amendment to the Act in 1976, the Tennessee General Assembly deleted some language from the original legislation. This amendment was designed to reduce the likelihood of the Act's being held to violate the litigant's rights to a jury trial and free access to the courts. As originally adopted, the Act provided that the review board's recommendation, although admissible at trial, would not be binding upon the jury and that the jury was free to give only such weight to the recommendation as it chose to give.[150] In 1976 the General Assembly adopted several changes to this section of the Code, including a complete deletion of the language regarding the effect of the board's recommendation at trial.[151] The purpose behind the deletion of this language is impossible to ascertain because of the absence of legislative history. However, surely the General Assembly could not have intended that the board recommendation be binding upon the jury at trial since no provision to that effect was enacted as a substitute for the deleted language. In addition, if such a provision had been enacted, it would clearly violate the Tennessee constitutional provisions guaranteeing the right to a trial by jury,[152] guaranteeing free access to the courts,[153] and establishing a separate branch of the government to exercise exclusive control over the judicial

150. TENN. CODE ANN. § 23-3409 (1975) (amended 1976) (current version at TENN. CODE ANN. § 23-3409 (Cum. Supp.1978)).

This section of the statute read:

> The formal statement of the board or the minority statement shall be admissible in evidence at a subsequent trial upon the request of either party to the medical malpractice action or upon the determination of the judge presiding at the trial. Such statement shall not be binding upon the jury but shall be accorded such weight as the jury chooses to ascribe to it.

151. 1976 Tenn. Pub. Acts ch. 759, § 10. This amendment changed the paragraph quoted in note 150 *supra* to read as follows:

> The formal statement of the board and the minority statement, if any, shall be admitted at a subsequent trial as an exception to the hearsay rule. The formal statement of recommendations of the board or the minority statement shall include, but not be limited to, (1) the standard of conduct applied; (2) the alleged deviation from such standard; and (3) findings and conclusions.

TENN. CODE ANN. § 23-3409 (Cum. Supp. 1978).

152. TENN. CONST. art. I, § 6. *See* notes 87-101 *supra* and accompanying text.

153. TENN. CONST. art. I, § 17. *See* notes 74-86 *supra* and accompanying text.

function.[154] In the absence of such a specific provision replacing the deleted language, the General Assembly cannot be presumed to have acted unconstitutionally. Neither of the above factors, however, provides any indication of legislative intent regarding this provision. Thus, to ensure that the statute does not violate the rights enumerated above, the trial court must instruct the jury that the board recommendation is not binding upon the jury and should be given only such weight as the jury chooses to give.[155]

A constitutional challenge to the Act finally reached the Tennessee Supreme Court in *Harrison v. Schrader*.[156] The statute of limitations contained in the Act[157] prescribes a one-year period of limitations, but (subject to a number of provisos) the statute does not begin to run until (under the court's interpretation) plaintiff discovers or should have discovered the injury.[158] The statutory

154. TENN. CONST. art. II, §§ 1, 2; *id.* art. VI, § 1. *See* notes 102-20 *supra* and accompanying text.

155. At least one state supreme court read into its state statute a requirement that the trial judge instruct the jury that the panel recommendation is not binding upon the jury and that the jury should give to the recommendation only such weight as it so chose. The court held that such a requirement was necessary for the statute to stand up in the face of a challenge "that the admissibility of panel findings undercuts [the parties'] right to have a jury determine the facts." Wisconsin *ex rel.* Strykowski v. Wilkie, 81 Wis. 2d at 523, 261 N.W.2d at 449 (1978). *See also* notes 94-95 *supra* and accompanying text.

156. 569 S.W.2d 822 (Tenn. 1978).

157. TENN. CODE ANN. § 23-3415(a) (Cum. Supp. 1978). This section provides:

> The statute of limitations in malpractice actions shall be one (1) year as set forth in § 28-304; provided, however, that in the event the alleged injury is not discovered within the said one (1) year period, the period of limitation shall be one (1) year from the date of such discovery; provided further, however, that in no event shall any such action be brought more than three (3) years after the date on which the negligent act or omission occurred except where there is fraudulent concealment on the part of the defendant in which case the action shall be commenced within one (1) year after discovery that the cause of action exists; and provided still further that the time limitation herein set forth shall not apply in cases where a foreign object has been negligently left in a patient's body in which case the action shall be commenced within one (1) year after the alleged injury or wrongful act is discovered or should have been discovered.

158. The *Harrison* court apparently construed the Act's language as adopting (subject to the three-year maximum, fraudulent concealment, and foreign objects rules of the provision) the rule of Teeters v. Currey, 518 S.W.2d 512 (Tenn. 1974). *See* 569 S.W.2d at 824. This rule was interpreted by the

provision contains three additional provisions that set a three-year maximum period of limitations and create special rules for cases involving fraudulent concealment and foreign objects left in the body. The three-year maximum period (subject to the fraudulent concealment and foreign object exceptions) begins to run on the date of the negligent act or omission and is designed to operate as a maximum, outer limit to the tolling (suspending) of the one-year period under the above-described discovery rule.[159] Plaintiffs in *Harrison* challenged the constitutionality of the three-year maximum provision. In *Harrison*, plaintiff-patient, who underwent a vasectomy performed by defendant doctor in 1972, brought suit, along with his wife, against the doctor in 1976, less than one year after plaintiff-patient had discovered that his wife was pregnant. Defendant doctor moved to dismiss the action on the ground that it had been filed more than three years after the alleged negligent act or omission. The trial court held that the three-year limitation period was constitutional and, therefore, dismissed the case. On appeal, plaintiffs did not challenge the constitutionality of the screening panel provisions of the Act but did rely upon the equal protection and free access arguments in their unsuccessful challenge to the three-year limitation provision. Plaintiffs asserted that this three-year limitation period, which applies to medical malpractice but no other tort actions, violates the equal protection clause of the fourteenth amendment to the United States Constitution, and article XI, section 8, of the Tennessee Constitution because it serves to offer to "health care providers" a "favored status under the law and [to create] an arbitrary and unreasonable classification."[160] In analyzing plain-

Harrison court as requiring "that in malpractice actions the statute of limitations begins to run from the date the injury is, or should have been, discovered." *Id.* The actual language of section 23-3415(a) on this point, however, is quite ambiguous.

159. *See* TENN. CODE ANN. § 23-3415(a) (Cum. Supp. 1978).

160. 569 S.W.2d at 825. Note, however, that the court, on petition to rehear, expressly refused to address the question of the retroactive application of the statute because the issue was raised for the first time on appeal and also because it was not at issue in the original hearing before the supreme court. *Id.* at 828.

In a more recent decision dealing with another section of the Act the Tennessee Supreme Court held that certain language of § 23-3403(g) violated both due process guarantees of the fourteenth amendment to the United States Consitution and the law of the land clause of article I, section 8 of the Tennessee

tiff's equal protection challenge, the court first undertook to determine "what standard of review must be utilized in ascertaining the statute's constitutionality."[161]

In refusing to adopt the strict scrutiny test in its analysis of plaintiffs' equal protection challenge under the fourteenth amendment, the court declared that "[a] classification will be subject to strict scrutiny only when it impermissibly interferes with the exercise of a fundamental right (e.g., voting, interstate travel) or operates to the peculiar disadvantage of a suspect class (e.g., alienage, race). Neither of these factors is present here."[162] The court then adopted the rational basis test, without mention of the existence or possible application of an intermediate standard of review, in these terms: "[T]he classification will be upheld if it 'rationally furthers the purpose identified by the State.' "[163] The court also adopted a similar test for the analysis

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Constitution as well as article I, section 20, of the Tennessee Constitution " 'that no retrospective law, or law impairing the obligation of contracts, shall be made.' " Morris v. Gross, 572 S.W.2d 902, 905 (Tenn. 1978) (quoting TENN. CONST. art. I, § 20). Section 23-3403(g) was one part of a 1976 amendment to the Act requiring that malpractice actions be filed with the court before they would be referred to the Board. The challenged language of § 23-3403(g) had the effect of terminating the jurisdiction of the Board over claims pending before it (but not yet filed in court) on May 1, 1976, and required that such claims be filed in court within sixty days of May 1, 1976, or be forever barred. 572 S.W.2d at 904. The court explained:

> Although the legislature ordinarily may reduce the statute of limitations and make the reduced period of limitations applicable to the rights of action which have already accrued, provided the new period of limitations accords to claimants a reasonable time within which to file suit, it cannot, by legislative fiat, dismiss an action already pending in the appropriate tribunal, in this case, the Medical Malpractice Review Board, and provide that such action must be filed in court within sixty days of such dismissal or be forever barred, without notice to the owners of claims thus affected.

Id. at 906-07.

161. 569 S.W.2d at 825.

162. *Id.* (citations omitted).

163. *Id.* (citing Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 314 (1976)). In a footnote the court referred to the case of Jones v. State Bd. of Med., 97 Idaho 859, 555 P.2d 399 (1976), as providing a good "discussion of the standard of review to be applied in equal protection challenges to medical malpractice legislation." 569 S.W.2d at 825 n.4. Yet in that case the Idaho Supreme Court adopted the intermediate "means-focus" test and remanded the case to the trial court for analysis of the statute under that tougher standard. *See* notes 64-73 *supra* and accompanying text.

of the statute under article XI, section 8, of the Tennessee Constitution. The court stated that "[t]he classification must rest upon a reasonable basis. If it has a reasonable basis, it is not unconstitutional merely because it results in some inequality."[164] The court clearly enunciated the burden a plaintiff undertakes in his attempt to overturn a statute on equal protection grounds when the rational basis test is the applicable standard of review:

> The burden of showing that a classification is unreasonable and arbitrary is placed upon the individual challenging the statute; and if any state of facts can reasonably be conceived to justify the classification or if the reasonableness of the class is fairly debatable, the statute must be upheld.[165]
>
> Before the classification will be held to violate the equal protection guaranty, it must be shown that it has no reasonable or natural relation to the legislative objective.[166] In addition, the statute must apply alike to all who fall within, or can reasonably be brought within, the classification.[167]

In applying this formulation of the rational basis test to the three-year maximum provision of the statute of limitations in medical malpractice cases, the court held that the provision was rationally related to several state interests because the legislature could have based the legislation upon many different legitimate factors such as the "medical malpractice insurance crisis," the practice of "defensive medicine," and the difficulties suffered by insurance companies in attempting to achieve actuarial certainty.[168] The court cited nothing in the statute itself, however, that would indicate what motivated the General Assembly to adopt this three-year maximum limitation period. Rather, in almost complete deference to legislative action, the court concludes that "[t]he considerations may or may not have been valid; however, it is apparent that they were accepted by the

164. 569 S.W.2d at 825-26 (citing City of Chattanooga v. Harris, 223 Tenn. 51, 56-57, 442 S.W.2d 602, 604 (1969); Estrin v. Moss, 221 Tenn. 657, 430 S.W.2d 345 (1968); Motlow v. State, 125 Tenn. 547, 145 S.W. 177 (1912)).

165. *Id.* at 826 (citing Swain v. State, 527 S.W.2d 119 (Tenn. 1975); Estrin v. Moss, 221 Tenn. 657, 430 S.W.2d 345 (1968); Phillips v. State, 202 Tenn. 402, 304 S.W.2d 614 (1957)).

166. *Id.* (citing City of Chattanooga v. Harris, 223 Tenn. 51, 442 S.W.2d 602 (1969); Phillips v. State, 202 Tenn. 402, 304 S.W.2d 614 (1957)).

167. *Id.* (citing Massachusetts Mut. Life Ins. Co. v. Vogue, Inc., 54 Tenn. App. 624, 393 S.W.2d 164 (1965)).

168. *Id.*

legislature and formed the predicate for its action."[169] Thus, that the court found that certain "legitimate" state interests do exist with which the legislature might have been concerned when it enacted the legislation was seemingly sufficient to justify a finding that the three-year limitation provision does not violate the equal protection clause.

Plaintiff also challenged the constitutionality of the three-year limitation provision on the basis of article I, section 17, of the Tennessee Constitution, essentially a "free access" provision, which reads in part: "*Open Courts—Redress of Injuries—Suits against the State.* That all courts shall be open; and every man, for an injury done him in his lands, goods, person or reputation, shall have remedy by due course of law, and right and justice administered without sale, denial or delay."[170] Plaintiff argued that the three-year limitation provision violated this constitutional provision in that it " 'deprives persons such as plaintiff of an opportunity of redress of an injury done his person.' "[171] In rejecting this argument the court declared that the constitutional provision in question "has been interpreted by [the Tennessee Supreme Court] as a mandate to the judiciary and not as a limitation upon the legislature."[172] Apparently, the court viewed this constitutional provision merely as a requirement that the courts of the state entertain those suits that are authorized by the legislature and not as a requirement either that the legislature authorize any particular lawsuits or causes of action or that the legislature provide access to the courts, equal or otherwise, to persons who suffer injury to their "lands, goods, person or reputation."[173]

III. Conclusion

An important factual element evident in virtually every court opinion concerning the constitutionality of medical malpractice screening panel legislation is the state legislature's determination that a public welfare crisis in the particular state in the form of high premium rates for medical liability coverage exists.

169. *Id.*
170. *Id.* at 827 (quoting Tenn. Const. art. I, § 17).
171. *Id.* (quoting from appellant's assignment of errors).
172. *Id.*
173. Tenn. Const. art. I, § 17.

Such rates pose a serious threat to continued availability of medical care at reasonable and stable prices. The acceptance by most state courts of this basic crisis proposition has been the underlying rationale for the courts' refusal to reject the malpractice screening panel provisions, and medical malpractice legislation in general, when confronted with a challenge based upon the equal protection clause of the fourteenth amendment. The basic legislative justification is that a crisis exists only in the area of medical malpractice and not in other tort areas; thus, for state legislatures to adopt alternatives to the traditional court remedies only in that area of tort litigation becomes rational. As a result, the credibility of these various state legislative approaches to the medical malpractice crisis rests almost entirely upon the legislature's ability to substantiate the actual existence of such a crisis. Most state courts give considerable deference to the state legislatures' specific declarations in statutes that such a crisis does exist and that the substantive portions of the statute are intended to alleviate that crisis.[174] A better approach for those courts that have yet to decide the issue would be, however, to take a more skeptical attitude toward the evidence presented by the medical profession and the insurance industry and toward the conclusion reached by the state legislature regarding the existence of a crisis.

State courts that have swept aside the equal protection argument have seriously shirked their judicial responsibilities. Proper scrutiny of the constitutional validity of state legislation demands more than a perfunctory deferral to the legislature's conclusions regarding the existence of a health care crisis in the particular state. The courts also discredit themselves in their analysis of constitutional issues, especially the issue of equal protection, when they so characteristically state at the beginning of their opinions that "the constitutionality of state legislation must be presumed" or that "courts should be hesitant in their rejection of state legislation on constitutional grounds."

Regrettably, future state court opinions will likely conclude that the equal protection argument has insufficient merit, especially in view of the overwhelming trend toward that result nationwide. Additionally, as discussed above, this trend toward upholding malpractice legislation in the face of the other three

174. *See, e.g.*, Wisconsin *ex rel.* Strykowski v. Wilkie, 261 N.W.2d 434, 442 (Wis. 1978). *See also* note 6 *supra* and accompanying text.

constitutional challenges[175] will not likely be reversed.

In the face of judicial reluctance, state legislatures must assume the responsibility for conducting a continuous reexamination and investigation to ensure that significant progress is being made toward attaining the goals that the legislation was designed to meet. This continuous examination is crucial in view of the significant effect that this legislation has upon several freedoms that many consider to be fundamental to our system of justice. The Florida Supreme Court, although upholding its state screening panel legislation, recognized this danger in concluding that "[e]ven though the pre-litigation burden cast upon the claimant *reaches the outer limits of constitutional tolerance,* we do not deem it sufficient to void the medical malpractice law."[176]

For the members of each state legislature in their collective wisdom to recognize such dangers and vow to scrutinize the legislation to ensure that it is succeeding in lowering, or at least stabilizing, the cost of health care and in making medical liability insurance more available will not be enough. Rather, to carry out their responsibilities the state legislatures should amend their statutes to provide for an annual report or accounting to be made to the legislature on the cost of medical liability insurance in the state, the percentage of rise or decline in health care costs over the past year, and the effect that the medical malpractice legislation had on medical liability insurance premiums in the state. Only if such amendments are made can the public expect that a comprehensive, annual evaluation will be made of this legislation.[177] This constant reevaluation by the legislature seems espe-

175. Access to courts, right to trial by jury, and separation of powers

176. Carter v. Sparkman, 335 So. 2d 802, 806 (Fla. 1976).

177. The Ohio legislature has taken an approach very much like the one this author has suggested toward resolving this problem in the form of an amendment to its original health care package. In 1975 the legislature adopted the following provision:

> Annually on the first day of August the Superintendent of Insurance shall report to the General Assembly his evaluation of the effectiveness of the amendment or enactment under Am. Sub. HB 682 of this General Assembly of each of the following sections of the Revised Code in reducing medical malpractice insurance premiums in this state for the period commencing on the first day of April of the prior calendar year and ending on the last day of March of the current year: sections 1335.05, 2305.25, 2305.251, 2307.42, 2317.02, 2317.54, 2711.01, 2711.21, 2711.22, 2711.23, 2711.24, 2743.43, 4705.09, 4731.01, 4731.22, and 4731.281.

cially mandated when the legislative provisions have the effect of infringing upon such fundamental freedoms as free access to the courts, equal protection of the laws, and the right to trial by jury.

The burden, however, should not and cannot be completely shifted to the legislature even though the courts may have taken significant strides toward settling the constitutional questions. Even in upholding the constitutionality of this legislation the courts have freely admitted that the constitutional questions are not easily answered. With this background the courts must analyze closely the screening panel provision when procedural questions and questions of administration of the statutes are presented. In these cases the courts must not forget the fundamental constitutional issues raised by these statutes and, accordingly, must construe them strictly so as to minimize to the greatest extent possible the impact these statutes have upon such freedoms.[178]

If investigation demonstrates that these statutes help make medical malpractice insurance more available and lower its cost and help stabilize health care costs, their continued existence will be justified. Benefits derived from these statutes must be weighed against detriments to determine their usefulness. Seemingly, the detriments of the restrictions upon equal protection, free access to the courts, right to trial by jury, and separation of powers, which have usually been held to be too slight to be deemed viola-

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OHIO REV. CODE ANN. § 2711.01 (Page Supp. 1977)(quoting 1975 H.B. 682, § 5). Section 2711.21 is the Ohio version of the medical malpractice screening panel; thus, in accordance with the above provision, the screening panel is examined every year to determine if it is accomplishing the goal for which it was established.

178. At least one state appellate court has adopted this view. In Mercy Hosp., Inc. v. Badia, 348 So. 2d 631 (Fla. App. 1977), the court, when faced with a procedural question concerning Florida's medical malpractice screening panel legislation, stated:

> The statutes enacted as Part II to Ch. 768 place an impediment to a claimant's right to seek legal redress in the courts of this State, notwithstanding the provisions of Article I, Section 21, Constitution of the State of Florida (1968). And, the statute *should be strictly construed against those seeking the benefits of it*, the statute being in derogation of the normal right of a claimant to seek immediate redress in the courts. This pre-litigation burden was recognized by the Supreme Court of Florida in Carter v. Sparkman, 335 So. 2d 802 (Fla. 1976), which upheld the constitutionality of these statutes.

348 So. 2d at 632 (emphasis added).

tive of the applicable constitutional provisions, may be far outweighed by the benefits of the statutes. These benefits include the lowering of medical malpractice insurance premiums and the renewed availability of such coverage, both of which have the effect of lowering or stabilizing health care costs and making health care more accessible for the general public. However, if the screening panel legislation does not have the above-described effect, then absolutely no justification exists for the continued existence of such legislation that serves to restrict fundamental principles of justice.[179]

ROBERT L. LOCKABY, JR.

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179. An examination of the question whether the screening panels are succeeding in achieving a reduction of medical malpractice insurance premium rates is beyond the scope of this comment. However, several commentators have noted that such rates have at least stabilized within the last year or so although what has caused this stabilization is unclear. *See, e.g.*, King, *supra* note 1, at 226 n.3; Knepper, *Review of 1977 Tort Trends*, 27 DEF. L.J. 1, 9 (1978). In his article, Knepper observes:

> Before the middle of the year, according to an article in The Wall Street Journal, the "medical-malpractice-insurance malaise, which not long ago seemed incurable [was] getting better." In Cook County, Illinois, jury verdicts in medical malpractice cases were down sharply, and the number of new malpractice actions being filed there was about 45 a month, down from more than 100 a month in late 1975.
>
> Nonetheless, professional liability insurance premiums are still high, although the rate of increase may be somewhat less than a year or two ago . . . .

Id. at 9 (citations omitted).

Great optimism has been expressed about the potential success of screening panels in reducing medical malpractice insurance rates and in turn reducing or stabilizing health care costs. For example, Roth notes:

> In terms of insurance costs, the screening panel presents a distinct advantage. Senator Ribicoff reported that one insurance company official told the Senator's subcommittee that insurance premiums could be cut in half if screening devices were to be implemented. The savings would result from the reduction in costs connected with the pretrial investigation, the trial itself, and obviously lawyers' fees. Although this officials [*sic*] estimate may be too high, when the time expended on a malpractice suit is substantially curtailed the costs have to be reduced. This savings would be reflected in lower insurance premiums which must be considered as one of the most important goals of any solution to the malpractice crisis.

Roth, *supra* note 1, at 496-97.

RECENT DEVELOPMENTS

Constitutional Law—Due Process—Indigent Parents' Right to Counsel in Child Neglect Cases

Defendants, parents of four minor children, appeared before the Memphis and Shelby County Juvenile Court in response to a petition[1] filed by the Tennessee Department of Human Services alleging that defendants had neglected their children. The juvenile court found that the children were neglected[2] and committed them to the custody of the Department of Human Services.[3] De-

1. TENN. CODE ANN. § 37-1206 (1977) delegates the burden of investigating child abuse and neglect complaints to the Department of Human Services. The Department of Human Services, upon determination that the complaint is valid, files a petition pursuant to *id.* § 37-219.

2. TENN. CODE ANN. § 37-202(6) (1977) provides:

"Dependent and neglected child" means a child

(i) Who is without proper guardianship;

(ii) Whose parent, guardian, or person with whom the child lives, by reason of cruelty, mental incapacity, immorality, or depravity is unfit to properly care for such child;

(iii) Who is under unlawful or improper care, supervision, custody or restraint by any person, corporation, agency, association, institution, society or other organization or who is unlawfully kept out of school;

(iv) Whose parent, guardian or custodian neglects or refuses to provide necessary medical, surgical, institutional, or hospital care for such child;

(v) Who because of lack of proper supervision, is found in any place the existence of which is in violation of law;

(vi) Who is in such condition of want or suffering or is under such improper guardianship or control as to injure or endanger the morals, or health of himself or others; or

(vii) Who is suffering from or has sustained a wound, injury, disability or physical or mental condition caused by brutality, abuse, or neglect.

3. Smith v. Edmiston, 431 F. Supp. 941 (W.D. Tenn. 1977). Dependency-neglect proceedings should be distinguished from termination of parental rights. In neglect proceedings the court may allow the children to remain with the parents or may commit them to the custody of a private or state agency that is a licensed child-care provider or to an approved individual (usually a relative). The parents are permitted visitation with the children. In termination of parental rights, parents lose all custody rights, visitation rights, and all other rights associated with parent-child relationships. *See* TENN. CODE ANN. §§ 37-230, -246 (1977).

fendants filed a petition for a writ of habeas corpus in the Tennessee state courts seeking release of the children, but the petition was denied.[4] Defendants then sought relief in federal district court on the ground that their fourteenth amendment due process rights had been violated since they had not been afforded the right to court-appointed counsel.[5] On petition for writ of habeas corpus and declaratory relief to the United States District Court, Western District of Tennessee, *held*, petition for writ of habeas corpus granted, and custody of the children returned to the parents unless another neglect hearing was held within sixty days. Juvenile courts must advise parents of their right to be represented by counsel, and if the parents are indigent, the court must appoint counsel unless the parents waive that right.[6] *Smith v. Edmiston*, 431 F. Supp. 941 (W.D. Tenn. 1977).

Indigents have been granted the right to court-appointed counsel in criminal proceedings in which the loss of physical liberty may result.[7] Indigents have generally been denied the right to court-appointed counsel in civil litigation when other liberties have been threatened.[8] Although juvenile courts are technically civil courts, the actual results of juvenile court proceedings are comparable to criminal proceedings because both

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4. 431 F. Supp. at 941.

5. 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.

U.S. CONST. amend. XIV, § 1.

Defendants also complained of other due process violations: 1) defendants were not afforded the opportunity to confront and cross-examine the witnesses against them and 2) the findings of the court were determined largely on the basis of hearsay evidence contained in a report prepared by plaintiffs the contents of which were not disclosed to them. Only the right to court-appointed counsel will be discussed in this Note.

6. On the other due process questions, the court ruled that 1) a neglect hearing is not a criminal hearing and the sixth amendment right to confront and cross-examine adverse witnesses does not attach and 2) minimal due process standards are not met when the trier of fact relies upon adverse contents of an investigator's report without disclosing the contents of the report to the parents of the child. *See* note 102 *infra*.

7. *See* Powell v. Alabama, 287 U.S. 45, 69 (1932).

8. *See* 76 YALE L.J. 545 (1967).

may result in the loss of liberty.[9] In the absence of specific statutory provisions for court-appointed counsel in child neglect cases,[10] a growing minority of states have expanded due process rights to include the right to court-appointed counsel for indigent parents in child neglect cases.[11] In this case of first impression in Tennessee, the federal district court adopted this expansion.

Both the right to court-appointed counsel in criminal and juvenile delinquency proceedings and the right to the care and custody of one's children are considered fundamental rights protected by the Constitution. The treatment of these two fundamental rights by the courts is different, however.[12]

The constitutional basis for the right to counsel to protect one's liberty in criminal cases is, of course, the sixth amendment.[13] The first case construing this right was *Powell v. Alabama*.[14] In *Powell* the Supreme Court held that counsel must be appointed for indigent defendants charged with capital offenses since the defendant is faced not only with the potential loss

9. *See* TENN. CODE ANN. § 37-230 (1977). Although not mandatory, institutionalization is a possible result under this section as it is under the delinquency sections. In neglect cases the removal of the child is considered an infringement on the parents' liberty. *See* text accompanying note 105 *infra*.

10. To date thirty states have specifically provided for the appointment of counsel for the parents in child neglect proceedings. *See* ARIZ. REV. STAT. § 8-225 (1956); CAL. CIV. CODE § 237.5 (West Supp. 1979); CONN. GEN. STAT. ANN. § 466-135 (West Supp. 1979); GA. CODE ANN. § 24A-20 (1976); HAW. REV. STAT. § 571-41 (1976); ILL. ANN. STAT. ch. 37, § 701-20 (Smith-Hurd Supp. 1979); IOWA CODE ANN. § 232.28 (West 1969); KY. REV. STAT. § 208.060(3)(a) (1977); LA. REV. STAT. ANN. § 13-1579 (West Supp. 1978); MASS. GEN. LAWS ANN. ch. 19, § 29 (West Supp. 1979); MICH. COMP. LAWS ANN. § 712A.17 (1968); MINN. STAT. ANN. § 260.155(a) (West 1971); MONT. REV. CODES ANN. § 10-1310(12) (Cum. Supp. 1977); NEB. REV. STAT. § 43-205.06(1) (Cum. Supp. 1978); N.J. STAT. ANN. § 9:6-8.43(a) (West Supp. 1978-1979); N.M. STAT. ANN. § 13-14-25(F) (1976); N.Y. JUD. LAW § 262 (McKinney 1975); N.D. CENT. CODE § 27-70-26 (1974); OHIO REV. CODE ANN. § 2151.352 (Page 1976); OR. REV. STAT. § 419.498 (1971); PA. STAT. ANN. tit. 11, § 50-317 (Purdon Supp. 1978-1979); R.I. GEN. LAWS § 14-1-31 (1970); S.C. CODE § 20-10-180 (Supp. 1978); S.D. COMPILED LAWS ANN. § 26-8-22.2 (1976); UTAH CODE ANN. § 78-3a-35 (1977); VT. STAT. ANN. tit. 33, § 647 (1978); VA. CODE § 16.1-266 (Supp. 1978); W. VA. CODE § 49-6-2 (Supp. 1978); WIS. STAT. ANN. § 48.25 (Supp. 1978-1979); WYO. STAT. § 14-3-211 (1977).

11. *See* note 83 *infra*.

12. *See* notes 47 & 48 *infra* and accompanying text.

13. "In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense." U.S. CONST. amend. VI.

14. 287 U.S. 45 (1932).

of liberty but also the potential loss of life.[15] The Court specifically limited its holding to capital offenses. In writing for the majority, Justice Sutherland focused on the need for counsel to help a defendant in criminal cases since usually the defendant lacks the skills of advocacy and the knowledge of the law that would enable him to prepare his case or to prove his innocence.[16] Moreover, the decision in *Powell* was based not only on the sixth amendment, which was expressly made applicable to the states by the fourteenth amendment, but also on the due process clause of the fourteenth amendment as an independent basis for guaranteeing this fundamental safeguard of liberty.[17]

Ten years later in *Betts v. Brady*[18] an indigent was charged with a noncapital felony and requested court-appointed counsel. The Supreme Court refused to recognize the right to court-appointed counsel as so fundamental and essential to a fair trial that the right should be made obligatory on the states in noncapital cases.[19]

The Court reconsidered the indigent's sixth amendment right to court-appointed counsel in *Gideon v. Wainwright*[20] and extended the right to counsel to all noncapital felony offenses. The *Betts* decision was expressly overruled, and the Court, citing *Powell,* reaffirmed the conclusion that the sixth amendment right to counsel was a fundamental right protected against state invasion by the fourteenth amendment.[21] The Court observed "[t]hat the government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the widespread belief that lawyers in criminal courts are necessities, not luxuries."[22]

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15. *Id.* at 71. Prior to this case, the right of a criminal defendant in federal court to retain his own counsel was certain.

16. *Id.* at 68-69. Even though the holding was limited to capital cases, the rationale of the Court was applied in right-to-counsel cases that did not involve capital offenses.

17. "[T]he necessity of counsel was so vital and imperative that the failure of the trial court to make an effective appointment of counsel was likewise a denial of due process within the meaning of the Fourteenth Amendment." *Id.* at 71.

18. 316 U.S. 455 (1942).

19. *Id.* at 471.

20. 372 U.S. 335 (1963).

21. *Id.* at 341, 343-44.

22. *Id.* at 344. The Court also said, "[I]n our adversary system of criminal

In *Argersinger v. Hamlin*[23] the Supreme Court extended the indigent's right to court-appointed counsel to nonfelony criminal cases.[24] The holding was limited, however, to those cases in which incarceration might result.[25] Since the *Argersinger* decision, all indigent criminal defendants faced with potential loss of liberty, regardless of the duration of incarceration, have the fundamental right to court-appointed counsel under the sixth amendment made applicable to the states by the fourteenth amendment due process clause. In the absence of competent waiver,[26] this right is absolute in criminal cases at the trial level.[27]

The constitutional right to counsel in civil litigation is not as certain as in the criminal cases. While the right to counsel in criminal cases is expressly protected by the sixth amendment, there is no comparable express protection for civil cases. Moreover, the constitutional basis for protection in civil cases is generally the due process clause of the fourteenth amendment that is usually more flexibly applied than the "absolute" protection of the sixth amendment right to counsel. Most of the noncriminal right-to-counsel cases to reach the United States Supreme Court are quasi-judicial administrative law cases that do not provide a clear rule.[28]

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justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him." *Id.*

23. 407 U.S. 25 (1972).

24. *Id.* at 37. The Court said, absent "a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony unless he was represented by counsel at the time." *Id.*

25. *Id.* at 40.

26. A defendant may waive his right to counsel "if he knows what he is doing and his choice is made with eyes open." Adams v. United States, 317 U.S. 269, 279 (1942), and "the right to be furnished counsel does not depend on a request." Carnley v. Cochran, 369 U.S. 506, 513 (1967). *See generally* J. COOK, CONSTITUTIONAL RIGHTS OF THE ACCUSED, TRIAL RIGHTS §§ 20-50 (1974).

27. Johnson v. Zerbst, 304 U.S. 458, 463 (1938). This principle was reaffirmed in Johnson v. United States, 352 U.S. 565 (1957). Although the right to appointed counsel in criminal cases is absolute at the trial level, this right has been limited at the appellate level. *See, e.g.*, Gilpin v. United States, 265 F.2d 203 (6th Cir. 1959) (no constitutional right to appointed counsel on motion attacking the judgment of the trial court).

28. In Goldberg v. Kelly, 297 U.S. 254 (1970), the Court said that the right to retain counsel could not be denied in an administrative hearing for loss of welfare benefits. However, the right to retain counsel was denied in a prison disciplinary proceeding in Wolff v. McDonnell, 418 U.S. 539 (1974), because the

The juvenile court delinquency hearing is the intermediate level between criminal and civil trials. Because the juvenile court is deemed a civil court, the hearings are necessarily civil in name, but the consequences of the hearing are often criminal in nature. In Tennessee, after a finding of delinquency, the juvenile court may place a delinquent child on probation; place the child in an institution, camp, or other facility; commit the child to the department of corrections; or assess a fine up to fifty dollars.[29] Although the length of incarceration may be extended until the child reaches twenty-one years of age, it is typically much shorter in practice for juveniles than for adults because juvenile courts were molded to achieve treatment and rehabilitation rather than punishment.[30]

In recognizing that the distinction between civil and criminal hearings has little connection with the ultimate consequences in juvenile delinquency hearings, the Court in *In re Gault*[31] mandated counsel for the child who may be deprived of his liberty. The ruling was based upon the fourteenth amendment's general guarantee of procedural due process through a fair hearing.[32] Although the right to court-appointed counsel in the criminal cases preceding *Gault* had been based primarily on the sixth amendment right to counsel, the *Gault* Court departed from this reasoning.[33] The Court emphasized that the civil-criminal distinction was not a proper basis for determining what process was due.[34] "To hold [that juvenile behavior was not 'criminal' for purposes of constitutional protection] would be to disregard substance

Court felt the presence of counsel would make the proceedings more adversary. The right to retain counsel in actual court proceedings may be quite different. In civil cases, due process is a flexible standard, and the procedure required to meet the due process requirements varies with the circumstances. *See* note 48 and text accompanying notes 49-57 *infra*.

29. TENN. CODE ANN. § 37-231 (1977).

30. *In re* Gault, 387 U.S. 1, 15-16 (1967).

31. *Id.*

32. *Id.* at 30.

33. *Id.* at 31. Justice Black in his concurring opinion, however, disagreed with the Court's basis for the holding and said, "Appellants are entitled to these rights, not because 'fairness, impartiality or orderliness—in short, the essentials of due process'—require them . . . but because they are specifically and unequivocally granted by provisions of the Fifth and Sixth Amendments which the Fourteenth Amendment makes applicable to the States." *Id.* at 61. (Black, J., concurring) (quoting the majority opinion, 387 U.S. at 26).

34. *Id.* at 29-31.

because of the feeble enticement of the 'civil' label-of-convenience which has been attached to juvenile proceedings."[35] The Court decided that despite the "civil" labeling of the juvenile court, the juvenile had a right to "the essentials of due process and fair treatment," including the right to appointed counsel under the fourteenth amendment because his liberty was threatened.[36] Similarly, if the liberty of the indigent parents were threatened, the *Argersinger* decision would extend the right to appointed counsel to the parents in hearings on criminal charges filed against the parents for neglect.[37]

Both the right to court-appointed counsel in criminal and juvenile delinquency cases and the rights to procreate and to maintain the custody and control of one's children are fundamental rights and may serve as alternate bases for determining a parent's right to court-appointed counsel in child neglect cases. The particular constitutional basis for the rights to procreate and to maintain custody and control of one's children is uncertain since these rights are not specifically mentioned in the text of the Constitution. The Court has variously held that the first, fourth, fifth, ninth,[38] and fourteenth[39] amendments give rise to these fundamental rights.[40] The right to procreate was established in *Skinner v. Oklahoma*[41] as "one of the basic civil rights of man."[42]

35. *Id.* at 49-50. The child's best interests are not always the same as the parents' interests, either in delinquency hearings or in neglect hearings. *See* text accompanying notes 104 & 105 *infra*.

36. 387 U.S. at 30-31.

37. The result would be that for an accusation of neglect, counsel would be appointed at the parents' criminal trial but not at the civil trial although the evidence presented would be the same. In addition, some states provide for counsel even when no loss of liberty is threatened. *See, e.g.*, Evans v. Rives, 126 F.2d 633 (D.C. Cir. 1942) (in juvenile court proceeding parent charged with failure to support was entitled to court-appointed counsel).

38. Griswold v. Connecticut, 381 U.S. 479 (1965).

39. Stanley v. Illinois, 405 U.S. 645 (1972).

40. Although the protection of personal privacy and the right to due process when this right is threatened is not mentioned specifically in the Constitution, the "right to privacy [is] no less important than any other right carefully and particularly reserved to the people." Mapp v. Ohio, 367 U.S. 643, 656 (1961).

41. 316 U.S. 535 (1942). The right to prevent procreation as an aspect of marital privacy was established in Griswold v. Connecticut, 381 U.S. 479 (1965). The Supreme Court struck down a Connecticut birth control statute because it infringed upon domestic rights, the basis of which rests in the penumbra of the

Basing its decision on the equal protection clause of the fourteenth amendment, the Court struck down an Oklahoma statute that provided for sterilization of habitual criminals. The right to direct the upbringing of one's children was first determined in *Meyer v. Nebraska*,[43] in which the Court struck down a statute forbidding the teaching of German in the schools. The liberty right embodied in the fourteenth amendment was interpreted to include not only physical liberty but also the liberty "to marry, establish a home and bring up children . . . ."[44] Building on the rights to procreate and to control the upbringing of one's children, the Court recognized a right to maintain the integrity of the family unit in *Stanley v. Illinois*.[45] The Court held that an unwed father was entitled to the custody of his children in the absence of a hearing establishing his unfitness. The Court emphasized that all parents were constitutionally entitled to this hearing on their fitness, before their children could be taken by the state.[46]

Although the specific constitutional basis for holding that the rights to procreate and to maintain custody of one's children are fundamental is unclear, the Supreme Court has laid to rest any doubt that these rights exist. Unlike the fundamental right to counsel, however, these rights are not absolute and, therefore, may be abridged by a showing of compelling state interest.[47] In addition to the showing of a compelling state interest, the state must also meet the requirements of procedural due process in order to abridge these rights. Since the procedural due process

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first, fourth, fifth, and ninth amendments. *Id.* at 483-85. The Court in Roe v. Wade, 410 U.S. 113 (1973), upheld a pregnant woman's qualified right to an abortion based upon the fourteenth amendment's protection of personal liberty. *Id.* at 153.

42. 316 U.S. at 541.

43. 262 U.S. 390 (1923).

44. *Id.* at 399. This concept of parents' right to control the education of their children was affirmed in Pierce v. Society of Sisters, 268 U.S. 510 (1925). The Court struck down a statute that required parents to send their children to public schools.

45. 405 U.S. 645 (1972).

46. *Id.* at 658.

47. Roe v. Wade, 410 U.S. 113, 155 (1973); Griswold v. Connecticut, 381 U.S. 479, 485 (1965). That the state may abridge a fundamental right of an individual has been clearly established. *See* 410 U.S. at 154; Barenblatt v. United States, 360 U.S. 109, 126 (1959). *See generally* J. NOWAK, R. ROTUNDA & J. YOUNG, HANDBOOK ON CONSTITUTIONAL LAW 380-84 (1978).

requirements vary widely in the noncriminal context,[48] the requirements must be examined to determine what specific procedures must be used in child neglect proceedings to ensure a fair hearing.

The Supreme Court has traditionally used a balancing process to determine what safeguards are necessary to protect an individual's interests.[49] In *Mathews v. Eldridge*[50] the Court set forth three considerations to be used to determine the process due: (1) the private interest to be protected, (2) the margin of error entailed in using various procedures, and (3) the government's functional and financial interests in summary adjudication.[51]

In *Goldberg v. Kelly*[52] a welfare recipient challenged the sufficiency of the procedures used by the state prior to termination of benefits. The state procedure provided for notice of the termination of benefits and provided the recipient with a review of the written record if the recipient requested it. In balancing the state's interest in protecting public funds and the additional expense incurred by using the proposed evidentiary procedures against the individual's need not to be deprived of her means of sustenance, the Court held that the individual's substantial interest outweighed the government's interest in summary adjudication.[53] The Court determined that the recipient had the right to prior notice and a fair hearing; the hearing must provide for the right to present evidence orally, the opportunity to confront and cross-examine witnesses, and the right to have an attorney present.[54]

48. Cafeteria Workers Local 473 v. McElroy, 367 U.S. 886 (1961), held: "The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation." *Id.* at 895.

49. *See, e.g.*, Goldberg v. Kelly, 397 U.S. 254, 261-63 (1970).

50. 424 U.S. 319 (1976).

51. *Id.* at 335.

52. 397 U.S. 254 (1970).

53. *Id.* at 263-64.

54. *Id.* at 267, 268. In other administrative hearings, however, the procedural safeguards required have not been so great. For example, in Mathews v. Eldridge, 424 U.S. 319 (1976), benefits received under the Social Security Act, 42 U.S.C. § 423 (1974), were held to be terminable without a prior hearing if the termination was based on a medical decision. In Ingraham v. Wright, 430 U.S. 651 (1977), injuries from paddling junior high students did not give rise to a due process claim for prior notice and a hearing because that punishment

While the weight the Court might assign to a substantial interest of an individual in a particular case is difficult to predict, a greater weight apparently is assigned to the individual's interest if the integrity of the family is threatened. In *Moore v. City of East Cleveland*,[55] a recent case testing the right to maintain an extended family in a single dwelling unit, the Court struck down a city ordinance that regulated the number of collateral relatives allowed in the dwelling unit.[56] The Court held that the city's objectives of avoiding overcrowding, minimizing parking congestion, and avoiding a financial burden on the schools were served only marginally by the ordinance, and, thus, a compelling state interest was not shown.[57]

The integrity of the family is obviously threatened by state action that takes a child away from his parents to protect him from abuse and neglect. The *Gault* decision extended the right to appointed counsel to juvenile delinquency cases because of the concern for a fair trial when liberty was threatened. Since juvenile delinquency cases have been deemed "civil" cases, the concern for a fair hearing has led the courts to consider extending the right to appointed counsel to other "civil" cases when liberty is threatened. One year after the decision in *Gault*, two state courts considered the question of appointed counsel in child neglect and termination of parental rights cases.[58] Both cases applied the *Gault* standard requiring "fair treatment"[59] but reached different

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was authorized and limited by common law that provided a remedy in tort. *Cf.* Bell v. Burson, 402 U.S. 535 (1971) (before revocation of a driver's license the license-holder must be afforded notice and a hearing appropriate to the nature of the case).

55. 431 U.S. 494 (1977).

56. The Court recognized the constitutional right to privacy embodied in *Griswold*, the right to maintain the family integrity in *Stanley*, and family rights recognized in a variety of other cases.

57. Whenever private individuals threaten the integrity of the family, a different result may obtain. In Quilloin v. Walcott, 434 U.S. 246 (1978), an unmarried father who had not legitimated his child sought to prevent the adoption of the child by the child's stepfather. The Court ruled that the unwed father's due process rights were not violated by the Georgia statute that provided for adoption of an illegitimate child by the mother's consent only. *Id.* at 256. The Court did indicate, however, that if the state had been a party to the action, due process would have been violated absent some showing of unfitness. *Id.* at 255.

58. *See* note 3 *supra*.

59. 387 U.S. 1, 30 (1967).

results. In *State v. Jamison*[60] the Oregon Supreme Court determined that an indigent mother had a right to court-appointed counsel in termination proceedings[61] because the magnitude of the harm warranted this procedural due process safeguard. The Maryland Court of Appeals in *In re Cager*[62] held that notice and the right to be heard satisfied the *Gault* standard of "fair treatment" required in neglect cases and that court-appointed counsel as a matter of constitutional right was not required.[63]

Two years later in a leading case denying the right to court-appointed counsel, the California Court of Appeals in *In re Robinson*[64] held that no federal constitutional or California statutory right to court-appointed counsel applied to neglect or termination proceedings.[65] The court reasoned that the *Gault* decision required "counsel only in cases denominated 'civil' which are basically criminal in nature" and that child neglect cases were basically civil in nature.[66] In the dissenting opinions for the denial of certiorari to the United States Supreme Court, Justices Black and Douglas set the tone for the cases that were to follow by strongly indicating that they believed the right to court-appointed counsel in this context was of a compelling and fundamental character because the state sought to deprive the parent of the liberty of keeping his child and the state charged the parent with neglect. Therefore, the parent's liberty interest should be recognized under the due process and equal protection clauses of

60. 251 Or. 114, 444 P.2d 15 (1968). Although the court did not specifically state that a parent's right to custody of his child was a fundamental constitutional right, the court treated this right as fundamental. "The permanent termination of parental rights is one of the most drastic actions the state can take against its inhabitants." *Id.* at 117, 444 P.2d at 17.

61. *Id.*, 444 P.2d at 17.

62. 251 Md. 473, 248 A.2d 384 (1968). Both *Cager* and *Jamison* were decided before *Stanley v. Illinois*, which conclusively determined that the right of a parent to his child was a fundamental right worthy of constitutional protection. Despite the trend toward recognizing this right prior to *Stanley*, the *Cager* court determined that "[t]he fact that parents may be deprived of the custody of their own children presents no constitutional problem." *Id.* at 480, 248 A.2d at 388 (quoting *Ex parte* Cromwell, 232 Md. 305, 308, 192 A.2d 775, 777 (1963)).

63. *Id.* at 484, 248 A.2d at 391.

64. 8 Cal. App. 3d 783, 87 Cal. Rptr. 678 (1970), *cert. denied sub nom.* Kaufman v. Carter, 402 U.S. 964 (1971) (overruled on statutory grounds by *In re* Simeth, 40 Cal. App. 3d 982, 115 Cal. Rptr. 617 (1974)).

65. 8 Cal. App. 3d at 785, 87 Cal. Rptr. at 679.

66. *Id.* at 786, 87 Cal. Rptr. at 680.

the fourteenth amendment.[67] *In re Robinson* was subsequently overruled by the California Court of Appeals in *In re Simeth*[68] on the ground that changes in the California Welfare and Institutions Code, enacted after the *Robinson* decision, authorized the appointment of counsel for indigent parents in neglect cases. The California court reached this decision without considering the federal constitutional due process requirements or the court's inherent power to appoint counsel to indigent parents in neglect hearings.

After the *Robinson* decision, with few exceptions,[69] courts that considered the question of a parent's right to appointed counsel in the absence of specific statute[70] held that due process dictates the right to court-appointed counsel in neglect or termination cases, presumably because of the fundamental nature of a parent's rights to his child and the likelihood that this right cannot adequately be protected without the assistance of counsel.[71] The few courts that categorically rejected the right to appointed counsel followed the reasoning in *Robinson* that the *Gault* decision required counsel only in those cases that were criminal in nature. Like the court in *Robinson*, these courts found either that neglect and termination cases were basically civil in nature and consequently did not require court-appointed counsel or that a fair trial could be held without the assistance of counsel.[72] These courts also failed to discuss whether the right of a

67. Meltzer v. C. Buck LeCraw & Co., 402 U.S. 954 (1971) (Black, J., dissenting from *Meltzer* and from Kaufman v. Carter, 402 U.S. 964 (1971)); *id.* at 960 (Douglas, J., dissenting from *Meltzer* and *Kaufman*).

68. 40 Cal. App. 3d 982, 115 Cal. Rptr. 617 (1974). Prior to *In re* Robinson, California provided for the right to appointed counsel in delinquency proceedings under CAL. WELFARE AND INSTITUTIONS CODE §§ 634, 679, & 700. These sections were held inapplicable to neglect proceedings in the *Robinson* decision because § 27706(e) of the California Government Code required a public defender to represent indigent persons only in delinquency proceedings.

69. *See* note 71 *infra*.

70. Several cases have been decided in favor of parents' right to counsel based on statutory provisions. *E.g.*, *In re* Rodriguez, 34 Cal. App. 3d 510, 110 Cal. Rptr. 56 (1973); *In re* Chambers, 261 Iowa 31, 152 N.W.2d 818 (1967); Reist v. Bay Cir. Judge, 396 Mich. 326, 241 N.W.2d 55 (1976); People v. Brown, 49 Mich. App. 358, 212 N.W.2d 55 (1973); *In re* Palmer, 100 R.I. 170, 212 A.2d 61 (1965).

71. *See* cases cited at note 83 *infra*.

72. *In re* T., 25 Cal. App. 3d 120, 101 Cal. Rptr. 606 (1972) (implicitly overruled by *In re* Simeth, 40 Cal. App. 3d 982, 115 Cal. Rptr. 617 (1974)); *In*

parent to his child is fundamental and deserving of procedural protection.

The child neglect and termination cases decided after *Robinson* fell into three main categories: (1) right to court-appointed counsel as determined on a case-by-case basis at the discretion of the juvenile judge, (2) right to court-appointed counsel as a constitutionally based due process requirement when parental rights might be terminated, and (3) right to court-appointed counsel for indigent parents as a matter of constitutionally based due process in all child neglect cases.

The narrowest approach to determining the right to court-appointed counsel was taken by the group of cases that determined this right on a case-by-case basis at the discretion of the juvenile judge.[73] The Court of Appeals for the Ninth Circuit in *Cleaver v. Wilcox*[74] recognized that the parent had a fundamental right to his child but stated that the due process standards were determined not by the fundamental nature of the interest but by such factors as the length of potential separation from the child, the probability of removal, the presence or absence of disputed facts, and the parent's ability to cope with the relevant documents and the examination of witnesses.[75] The *Cleaver* court also recognized a greater need for counsel in termination proceedings

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re Cager, 251 Md. 473, 248 A.2d 384 (1968). In response to the denial of certiorari in *In re* Robinson, 8 Cal. App. 3d 783, 87 Cal. Rptr. 678 (1970), *cert. denied sub nom.* Kaufman v. Carter, 402 U.S. 954 (1971) (overruled on statutory grounds by *In re* Simeth, 40 Cal. App. 3d 982, 115 Cal. Rptr. 617 (1974)), the California court in *In re* T., commented that "we must conclude from the dissents of Justices Black and Douglas . . . that the due process and equal protection points were both considered, and rejected, by the Supreme Court of the United States." 25 Cal. App. 3d at 126, 101 Cal. Rptr. at 611. Although there is some doubt about the significance of denial of certiorari, the majority of cases appear to hold that the denial has no precedential value with regard to the merits of the cause of action. In Maryland v. Baltimore Radio Show, 338 U.S. 912 (1951), Justice Frankfurter said, "The sole significance of such denial of a petition for writ of certiorari . . . simply means that fewer than four members of the Court deemed it desirable to review a decision of the lower court as a matter of 'sound judicial discretion.'" *Id.* at 917. *Accord,* Crist v. Division of Youth & Family Servs., 128 N.J. Super. 402, 408, 320 A.2d 203, 206 (1974). *See also* text accompanying note 108 *infra.*

73. Cleaver v. Wilcox, 499 F.2d 940 (9th Cir. 1974); White v. Green, 70 Misc. 2d 28, 332 N.Y.S.2d 300 (Fam. Ct. 1972).

74. 499 F.2d 940 (9th Cir. 1974).

75. *Id.* at 945.

than in neglect proceedings.[76]

Another group of cases has taken a broader approach by extending the right to appointed counsel to all cases in which termination of parental rights is sought.[77] The Nebraska court in *In re Friesz*[78] based its holding on the recognition that a parent's concern for the liberty of the child was too fundamental an interest to be relinquished to the state without an opportunity to be represented by counsel.[79] The difference between the approach of this group of cases and those represented by *Cleaver* seems to be that this group recognizes that the liberty interest in the ultimate consequences of permanent deprivation are always severe and are similar to the ultimate consequences in *Gault*.[80] In a prior hearing on child neglect in *In re Myricks*,[81] the child was removed from the custody of his father. A supplemental petition was subsequently filed to terminate the father's rights. In neither case was the father represented by counsel despite the fact that he requested counsel. In stating the question before the Washington Supreme Court, Justice Wright said, "[T]he issue before us is whether the rule . . . should be extended to temporary deprivation proceedings *where the likelihood of eventual permanent deprivation is substantial.*"[82] In stating the holding, however, the court decided that due process included the right to court-appointed counsel for indigent parents in cases that "*could* result in the child being permanently taken from the parent."[83] This discrepancy in the standard for determining when counsel should be appointed illuminates the court's difficulty in deciding how far to extend this rule. The magnitude of potential harm apparently influenced the court's decision to grant the right to counsel in

76. *Id.*

77. *In re* Rodriguez, 34 Cal. App. 3d 510, 110 Cal. Rptr. 56 (1973); *In re* Friesz, 190 Neb. 347, 208 N.W.2d 259 (1973); State v. Jamison, 251 Or. 114, 444 P.2d 15 (1968); *In re* Adoption of R.I., 455 Pa. 29, 312 A.2d 601 (1973); *In re* Myricks, 85 Wash. 2d 252, 533 P.2d 841 (1975); *In re* Luscier, 84 Wash. 2d 135, 524 P.2d 906 (1974); Lemaster v. Oakley, 203 S.E.2d 140 (W. Va. 1974).

78. 190 Neb. 347, 208 N.W.2d 259 (1973).

79. *Id.* at 350, 208 N.W.2d at 260.

80. Perhaps this group of cases recognizes a greater potential for error in judgment than the previous group of cases. *See* text accompanying notes 96 & 97 *infra*.

81. 85 Wash. 2d 252, 533 P.2d 841 (1975).

82. *Id.* at 253, 553 P.2d at 841 (emphasis added).

83. *Id.* at 254-55, 533 P.2d at 842 (emphasis added).

termination proceedings.

The broadest approach to the right to appointed counsel was taken by a group of cases that extended this right to all child neglect cases.[84] In *In re B.*[85] the highest court of New York adopted the view that the right to court-appointed counsel for indigent parents in child neglect cases is a requirement of due process. The court recognized that not only does the parent risk losing the fundamental right to custody of the child but the parent may also face criminal charges for his act or omission.[86] In addition, the court found that since there was an express statutory provision granting the right to retain counsel in child neglect cases, the indigent parent was denied equal protection of the law.[87] Similarly, *Danforth v. State Department of Health and Welfare*[88] recognized that the right to the custody and control of one's children was protected by the Maine Constitution as well as the United States Constitution. Due process in this case included the right to appointed counsel for an indigent parent because of the fundamental nature of the right.[89] In a neglect hearing in *Crist v. Division of Youth and Family Services,*[90] a New Jersey superior court also held that because the right to one's child is a fundamental right, the fourteenth amendment due process clause requires the appointment of counsel for indigent defendants.[91] The *Crist* court extended the right to counsel for indigent parents in child neglect cases "[s]ince the proceeding for temporary custody is frequently a prelude to a petition to terminate parental rights, or failure in a temporary custody proceeding may permanently discourage further interest [by the parents] in a final termination proceeding."[92]

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84. Davis v. Page, 442 F. Supp. 258 (S.D. Fla. 1977); Smith v. Edmiston, 431 F. Supp. 941 (W.D. Tenn. 1977); Danforth v. State Dep't of Health and Welfare, 303 A.2d 794 (Me. 1973); Crist v. New Jersey Div. of Youth and Family Serv., 128 N.J. Super. 402, 320 A.2d 203 (1974).

85. 30 N.Y.2d 352, 285 N.E.2d 288, 334 N.Y.S.2d 133 (1972).

86. In thirty-two states there are either civil or criminal penalties that may be imposed against the parents in addition to removing custody of the child from the parents. *See generally* Katz, *Child Neglect Laws in America*, 9 FAM. L.Q. 3, 63 (1975).

87. 30 N.Y.2d at 357, 285 N.E.2d at 290, 334 N.Y.S.2d at 136.

88. 303 A.2d 794 (Me. 1974).

89. *Id.* at 800.

90. 128 N.J. Super. 402, 320 A.2d 203 (1974).

91. *Id.* at 414, 416, 320 A.2d at 210, 211.

92. *Id.* at 416, 320 A.2d at 211.

The federal district court's approach in *Smith v. Edmiston*[93] approximates the approach taken in *In re B.*, *Danforth*, and *Crist*. The court used the fourteenth amendment due process clause as a basis for holding that indigent parents had the right to court-appointed counsel and recognized the parents' interest in their children as a fundamental right protected by the federal constitution.

In adopting the broadest rule for right to appointed counsel in child neglect cases, the *Smith* court avoided the inherent problems in the two narrower rules. The first problem with requiring appointed counsel only when the hearing is for termination of parental rights is that the task of predicting which neglect proceedings will lead to termination proceedings is difficult if not impossible. The finding of neglect is usually a preliminary step in terminating parental rights. The grounds for termination of parental rights are often the same as the grounds for a finding of neglect. The only difference is that for an involuntary termination of rights, a greater degree of abuse or longer abandonment or greater neglect, for example, must be proved.[94] Consequently, extending the right to appointed counsel to child neglect cases seems only logical.

Second, the true source of the right to counsel as set forth in *Gault*[95] is the right to the "essentials of due process and fair treatment"[96] when the fundamental right to liberty is threatened. Although courts that have extended the right to appointed counsel in termination cases have recognized that the right to the care

93. 431 F. Supp. 941, 945 (W.D. Tenn. 1977).

94. In the area of neglect, TENN. CODE ANN. § 37-202(6)(i)(1977) provides that a dependant and neglected child is one "[w]ho is without proper guardianship." This broad phrase can be interpreted to include cases in which a parent leaves a young child alone for an unreasonable period of time or leaves a child with someone else without excuse or justification. *Id.* § 37-203(a)(2) provides for termination of rights when a child has been abandoned for four consecutive months immediately preceding the action. In child abuse cases, the statute provides for an adjudication of neglect when the child "is suffering from or has sustained a wound, injury, disability, or physical or mental condition caused by brutality, abuse, or neglect." *Id.* § 37-202(6)(vii)(1977). However, if the parent has been found to have committed severe child abuse two or more times, the parent is subject to termination of rights under *id.* § 37-246(d)(2) (Supp. 1978).

95. *See* text accompanying notes 31-37 *supra*.

96. 387 U.S. 1, 30 (1967) (quoting Kent v. United States, 383 U.S. 541, 562 (1961)).

and custody of one's children are rights of constitutional magnitude, these courts have largely ignored the fact that in neglect hearings these fundamental parental rights may also be abridged. Whether custody of the child is removed for one year, eighteen years, or forever, the fundamental right to the custody and care of one's children has been withdrawn.

Third, even if the courts reject the reasoning that fundamental rights deserve greater procedural protection, if they apply the traditional balancing process for civil cases as set forth in *Mathews v. Eldridge*[97] counsel should still be appointed since the incidence of error is likely to be higher in cases in which the parents were unrepresented than in cases in which the parents were represented. One widely quoted study showed that in neglect cases in which the parents were unrepresented the court made a finding of neglect in 81.5% of the cases as opposed to 55.6% of the cases in which the parents were represented and that neglect actions were dismissed entirely in 5.4% of the cases in which the parents were unrepresented while 33.3% of the cases in which the parents were represented were dismissed.[98]

The argument for appointing counsel on a case-by-case basis also has its flaws. The greatest difficulty is the application of an uncertain standard to determine which cases require counsel. The court in *Cleaver v. Wilcox* exemplified this problem when it said:

> Without undertaking to write a manual for state judges on when to appoint counsel in particular cases we note some of the general factors which should be considered . . . the length of the separation . . . the presence or absence of parental consent . . . the parent's ability to cope with relevant documents and the examination of witnesses.[99]

Another difficulty with this approach is that when a parent requests counsel as the parent did in *Cleaver*, the parent's belief that his rights cannot be adequately protected without the aid of counsel seems obvious. As noted earlier, statistics bear out this belief.[100]

Several arguments have been advanced for denying the right to court-appointed counsel in all neglect and termination cases.

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97. *See* notes 50 & 51 *supra* and accompanying text.
98. 4 COLUM. J. OF LAW AND SOC. PROB. 230, 241 (1968).
99. 499 F.2d 940, 945 (9th Cir. 1974).
100. *See* text accompanying note 97 *supra*.

First, proponents of this view argue that a fair trial could be held without the assistance of counsel since the hearings are informal and the rules of evidence are relaxed.[101] This argument is inconsistent with the reasoning in *Gault*. The *Gault* Court pointed out that procedural rules "are our best instruments for the distillation and evaluation of essential facts . . . ."[102] The state has many advantages over the parents in neglect and termination proceedings, including access to counsel who are experienced and knowledgeable about the proceedings, subpoena powers that may be used to secure expert witnesses, and the services of social workers who have investigative powers and often turn up other witnesses. Even if witnesses are not presented, the state generally has the duty to present to the court written reports summarizing the results of the social worker's investigation. These reports generally contain some hearsay evidence, and if they are to be considered by the court in the place of or in addition to testimony of witnesses, the court must weigh this professional opinion against the word of the parent, who is most likely not articulate enough to explain away the "professional findings."[103] In addition, if a parent is concurrently or subsequently faced with a criminal or civil charge against him for neglect, the state can take away not only his child but also his constitutional privilege against self-incrimination since his testimony may be used against him in a subsequent trial.[104] Because the positions of the parties are unequal, the informality of the hearings and the relaxed rules of evidence serve to inhibit a fair trial rather than to promote it.

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101. *In re* Cager, 251 Md. 473, 484, 248 A.2d 384, 391 (1968). *See generally* 9 DUQ L. REV. 651 (1971).

102. 387 U.S. 1, 21 (1967).

103. In Smith v. Edmiston, 431 F. Supp. 941 (W.D. Tenn. 1977), the court permitted the judge to consider the social worker's report that summarized the alleged circumstances of neglect, that detailed the circumstances of the children and parents, and that recommended that the children be placed in foster care. The court held that the use of hearsay in the report did not violate minimal due process but limited the use of the report by holding that the contents of the report must be disclosed to the parents to give them an opportunity to refute the findings contained in the report. *Id.* at 946. *See also* TENN. CODE ANN. § 37-229(d)(1977) (provision for disclosure to the parents).

104. If testimony at a prior trial is given without asserting the privilege against self-incrimination, the privilege is deemed to have been waived and the testimony may be used against the person so testifying in a subsequent trial. *See* London v. Patterson, 463 F.2d 95 (9th Cir. 1972), *cert. denied*, 411 U.S. 906 (1973).

Second, some courts contend that counsel should not be appointed because the parents' interests are not the principal interests at stake in the proceeding.[105] While the protection of the child is properly given primary consideration, the implication that the parents' fundamental right to their child should be given no protection is illogical. Indeed, traditional due process analysis requires that the private interests be put on the scale along with the state's interest in minimizing administrative burdens, and, in addition, the opportunity for error entailed in using alternate procedures should be considered. The private interests in neglect hearings include not only the child's interest in being protected but also the child's interest in his own liberty, the parents' right to custody of the child, and the parents' vicarious interest in protecting the liberty of the child.[106] Adequate protection of all of these private interests requires appointing counsel for the parents and the child rather than weakening the protection of the parents' interests by withholding counsel.

A third argument advanced against the appointment of counsel is that a strict analysis of *Gault* makes the procedural safeguard of appointing counsel unnecessary in child neglect cases since the *Gault* decision required "counsel only in cases denominated 'civil' which are basically criminal in nature"[107] and child neglect cases are basically civil in nature.[108] None of the courts that hold this view have defined "civil in nature" or "criminal in nature." Generally, the peculiar characteristics of a criminal trial are that (1) the state (2) proceeds against an individual (3) to deprive him of his liberty or assess a fine (4) because of a crime he allegedly committed. In child neglect cases the state as the acting party seeks to deprive the parent of the liberty of keeping his child and charges the parent with neglect. Although a charge of neglect is in many cases a civil charge, many states have enacted statutes that make child neglect a crime.[109] While the neglect hearing is not strictly a criminal hearing, it certainly

105. *See, e.g.*, 431 F. Supp. 941, 945 (W.D. Tenn. 1977).

106. *See In re* Friesz, 190 Neb. 347, 208 N.W.2d 259 (1973), wherein the court indicated that an independent parental interest in the liberty of the child exists apart from the child's interest in liberty or the parent's interest in custody of the child. *Id.* at 350, 208 N.W.2d at 260.

107. *In re* Robinson, 8 Cal. App. 3d 783, 786, 87 Cal. Rptr. 678, 680 (1970).

108. *Id.*, 87 Cal. Rptr. at 680.

109. *See* note 86 *supra*.

seems to be "criminal in nature."[110] Since neglect and termination hearings are "criminal in nature," these courts are, in effect, perpetuating the civil/criminal distinction that was denounced in *Gault*.

Clearly the parents and the child have fundamental interests at stake in the neglect proceedings. The state's resources are such that the absence of counsel may be determinative of the outcome. Because of the unequal positions of the parties, the parents' right to be heard generally may be vindicated only by the assistance of counsel. Perhaps the need for counsel is best demonstrated by Justice Sutherland's oft-quoted statement:

> The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. . . . Without [counsel], though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.[111]

Although *Smith v. Edmiston* did not discuss the alternative rules available, perhaps the omission is significant. The recognition that deprivation of the fundamental right to the custody of one's child necessarily requires the procedural safeguard of court-appointed counsel is congruous with the *Gault* decision that emphasized the inadequacy of the civil/criminal distinction as a basis for determining the right to appointed counsel and indeed with the whole idea of the right to a fair trial.[112]

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110. In his dissenting opinion for the denial of certiorari in *Kaufman* Justice Black said, "[t]he case by its very nature resembles a criminal prosecution." 402 U.S. at 959 (Black, J., dissenting from *Meltzer* and from Kaufman v. Carter, 402 U.S. 964 (1971)).

111. Powell v. Alabama, 287 U.S. 45, 68-69 (1932).

112. In addition to the right to counsel, another component of the right to a fair trial is the right to confront and to cross-examine adverse witnesses. The *Smith* court dismissed the due process claim of the right to confront and cross-examine adverse witnesses, however, on the basis that this claim "suggests that the plaintiffs are contending that the procedures followed . . . violate the plaintiff's constitutional rights to confrontation as set forth in the Sixth Amendment to the Constitution." 431 F. Supp. at 945. This reasoning is inconsistent since the claim was clearly based on the fair trial through fair procedures concept of the due process clause of the fourteenth amendment as was the claim of right to appointed counsel, and the right to appointed counsel was granted in the same case. *Id.* at 943. Although TENN. CODE ANN. § 37-229(d)(1977) gives the parents a statutory right to cross-examine the individuals making the court

Prior to *Smith v. Edmiston* neglect hearings in Tennessee did not provide for the right to retain counsel or the right to court-appointed counsel. Although the Tennessee legislature had enacted some good child abuse and neglect laws,[113] the legislature had omitted to enact a law protecting the parents' due process rights. *Smith v. Edmiston* remedied that omission. This decision in conjunction with the other four cases[114] that have extended the right to court-appointed counsel for indigents in child neglect cases may be part of a new trend that recognizes that the parents' fundamental interest in their children requires the same due process protection as other fundamental liberties. Since this decision is a single-judge district court decision, its precedential value is limited, but it serves as valuable persuasive authority for Tennessee courts and other state and federal courts.[115]

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report, surprisingly enough, the court did not discuss that right. The statutory right is limited since the parts of the report that are hearsay are not subject to cross-examination. In effect, the only "witness" who may be cross-examined is the social worker who may not be a witness to the acts. A split of authority apparently exists on the right to confront and cross-examine witnesses. Several decisions have made that right available in civil cases in the interest of a fair trial. *See, e.g.*, Goldberg v. Kelly, 397 U.S. 254 (1970); Willner v. Committee on Character, 373 U.S. 96 (1963); Reilly v. Pinkus, 338 U.S. 269 (1949). The main argument advanced for denying confrontation and cross-examination in juvenile hearings is that they are nonadversarial and that the state proceeds as parens patriae. The *Gault* Court remarked that "Juvenile Court history has again demonstrated that unbridled discretion, however benevolently motivated, is frequently a poor substitute for principle and procedure." 387 U.S. 1, 18 (1967). At least two decisions have eliminated the problems of the admissibility of hearsay reports and not being able to confront and cross-examine witnesses, *see* text accompanying note 95 *supra*, by refusing the report altogether. *See In re* Cromwell, 232 Md. 409, 194 A.2d 88 (1963); *In re* Baum, 8 Wash. App. 337, 506 P.2d 323 (1973).

113. *E.g.*, TENN. CODE ANN. § 37-1207 (Supp. 1978) provides for a multi-disciplinary team composed of a physician, a psychologist or psychiatrist, a social worker, and a representative of the Department of Human Services. This team reviews and recommends treatment for the abused child. *Id.* § 37-1502 (Supp. 1978) provides for a foster care plan to be submitted to the juvenile court thirty days after placement of the child. This plan is an agreement between the parents and the Department of Human Services embodying the goals for the child (adoption, return to parents, etc.) and for the parents (specific behavior that should be changed). In addition, the plan is reviewed at least annually to ensure that the parents stay informed of the requirements for the return of the child or of the alternative plans for the child.

114. *See* note 83 *supra*.

115. In Davis v. Page, 442 F. Supp. 258 (S.D. Fla. 1977), the Florida

One question remains unanswered by the *Smith* decision. Since custody of the children was originally vested in the parents in this case, the decision does not indicate whether the right to appointed counsel would attach if the custodians were other relatives or nonrelatives.[116]

Those instances in which there is a threat of loss of a fundamental liberty such as a parent's right to his children coupled with the substantial likelihood that this right cannot be protected adequately by existing procedure make a strong case for the appointment of counsel. Since child neglect and termination cases are quasi-criminal proceedings and since the parent may also be subject to independent criminal charges that would require appointment of counsel, the expansion of due process rights is not very great. Further, the expansion of procedural due process rights in this complicated area will not necessarily lead to the expansion of procedural due process rights in other areas because the lack of procedural protection in the courts and the fundamental nature of the liberty rights are rarely present together in other contexts outside of juvenile proceedings and criminal cases. Even though this expansion of procedural due process is small, without the right to court-appointed counsel for indigents in child neglect cases the constitutional right to a fair hearing is a misnomer.

BARBARA A. DRIVER

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district court, citing *Smith*, adopted the right to counsel requirement in all child neglect hearings and explicitly rejected the case-by-case approach as being unworkable.

116. The Supreme Court has recently ruled that foster parents do not have a right to the full range of due process requirements when the state seeks to remove a foster child from their home. Smith v. Organization of Foster Families, 431 U.S. 816 (1977).

Constitutional Law—Due Process—Procedural Safeguards in the Foster Care System

Plaintiffs,[1] and the Organization of Foster Families for Equality and Reform (OFFER), brought a class action[2] in federal

1. Three foster families, the Smiths, Lhotans, and Goldbergs, joined in this action for themselves and on behalf of the seven foster children living with them.

The children in the Smith foster home had lived there since 1970 and were legally free for adoption, but they considered Mrs. Smith to be their mother. The foster care agency attempted to remove the children on the ground that the foster mother's arthritis prevented her from properly caring for the children. Organization of Foster Families for Equality and Reform [hereinafter OFFER] v. Dumpson, 418 F. Supp. 277, 279-80 (S.D.N.Y. 1976).

Two of the four sisters in the Lhotan home had lived there since 1970 and the other two since 1972. The agency notified the Lhotans that the girls would be moved to another foster home because the girls' attachment to the foster family complicated the agency's efforts to return the girls to their mother. *Id.* at 280.

The fourteen year-old boy had lived in the Goldberg home for five and one-half years when the Goldbergs received unofficial information he would be removed from their home. The Goldbergs joined in the class action to ensure that they would be entitled to a preremoval hearing if such a decision were made. *Id.*

Plaintiff foster parents also sought to represent, as next friend, the interests of their foster children. To prevent any conflict of interest, the court appointed independent counsel for the children. Independent counsel argued throughout the hearing that the "foster parents have no constitutionally cognizable interest independent of those of the foster children and that an adversary hearing is not the proper forum to determine the 'best interest of the child.' " *Id.* at 278. Mr. Justice Stewart's concurring opinion stated that the appointment of independent counsel should not have left the children without an advocate advancing the proposition that they are entitled to due process hearings. That position, claimed Stewart, should have been advanced by the counsel who originally brought the suit for the children (attorneys for OFFER). Smith v. OFFER, 431 U.S. 816, 857 n.1 (1977) (Stewart, J., concurring).

2. Five biological mothers of children currently in foster care were granted leave to intervene in these proceedings on behalf of themselves and all others similarly situated. In a separate order filed concurrently with its decision, the federal district court granted motions for class certification. The following parties were represented in the litigation: all foster parents who had a foster child living with them continuously for over a year; all foster children who had lived continuously with their foster parents for over a year; and all natural parents who had voluntarily placed children in foster care. 418 F. Supp. at 278 n.3. On appeal to the Supreme Court the intervenors challenged without success the lower court's class certification of the children. 431 U.S. at 822 n.7.

district court seeking declaratory and injunctive relief against defendants, officials of New York State and New York City child welfare agencies.[3] Plaintiffs alleged that the statutes[4] and administrative procedures[5] governing the removal of foster children

3. In the original action defendants included government officials at the state and local level and the Executive Director of the Catholic Guardian Society, a private child-care agency. The intervenors and the appointed representative of the foster children joined in the appeal.

4. N.Y. Soc. Serv. Law § 383(2) (McKinney 1976) provides:

> The custody of a child placed out or boarded out and not legally adopted or for whom legal guardianship has not been granted shall be vested during his minority, or until discharged by such authorized agency from its care and supervision . . . any such authorized agency may in its discretion remove such child from the home where placed or boarded.

Id. § 400 (McKinney 1976) provides:

> 1. When any child shall have been placed in an institution or in a family home by a commissioner of public welfare or a city public welfare officer, the commissioner or city public welfare officer may remove such child from such institution or family home and make such disposition of such child as is provided by law.
>
> 2. Any person aggrieved by such decision . . . may appeal to the department, which upon receipt of the appeal shall review the case, shall give the person making the appeal an opportunity for a fair hearing thereon and within thirty days render its decision . . . .
>
> 5. (a) Whenever a social services official or another authorized agency acting on his behalf proposes to remove a child in foster family care from the foster family home, he or such other authorized agency . . . shall notify the foster family parents in writing of the intention to remove such child at least ten days prior to the proposed effective date of such removal . . . . Such notification shall further advise the foster family parents that they may request a conference with the social services official . . . at which time they may appear, with or without a representative to have the proposed action reviewed . . . .
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> (b) Upon the receipt of a request for such conference, the social services official shall set a time and place for such conference to be held within 10 days of receipt of such request and shall send written notice of such conference to the foster family parents . . . at least five days prior to the date of such conference.
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> (c) [N]ot later than five days after the conference . . . [the social services official] shall send a written notice of his decision to the foster family parents . . . . Such decision shall advise the foster family parents of their right to appeal to the department and request a fair hearing in accordance with section 400 of the Social Services Law.
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> (d) In the event there is a request for a conference, the child shall not be removed from the foster home until at least three days after the notice of decision is sent . . . .

from foster homes[6] violated the equal protection and due process clauses of the fourteenth amendment. By statute the appropriate agency had complete discretion to remove foster children from their foster homes. Neither the foster parents nor the child were given an automatic hearing prior to removal, but the foster parent could *request* a hearing prior to removal.[7] The district court held that denying the child or the foster parents an automatic prior hearing "unduly infringed" upon the constitutional rights of foster children.[8] Foster care placement agencies were ordered to grant an automatic preremoval hearing that would provide a forum in which foster parents, natural parents, and the child or child's representative could present relevant information concerning the necessity of the planned removal.[9] On appeal to the United States Supreme Court, *held*, reversed. Any liberty interest a child might have in remaining with the foster family is protected by the availability of a preremoval hearing upon request by the foster parents. *Smith v. Organization of Foster Families for Equality and Reform*, 431 U.S. 816 (1977).

The Supreme Court has consistently ruled that fourteenth amendment due process guarantees necessitate some kind of hearing if one is deprived of life, liberty, or property interests.[10] The Court has found a liberty interest in familial privacy,[11] but

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(e) In any agreement for foster care . . . there shall be contained therein a statement of a foster parent's rights under this section.

431 U.S. at 820 n.3 (quoting Title 18 N.Y.C.R.R. § 450.14, which was renumbered § 450.20 as of Sept. 18, 1974).

6. Foster care has been defined as a service of a child welfare agency that provides substitute family care for a planned period of time—either short-term or long-term—on a temporary basis, rather than a permanent legal substitution of one home for another as in adoption. CHILD WELFARE LEAGUE OF AMERICA, STANDARDS FOR FOSTER FAMILY SERVICE 1 (1975). Although foster care can refer to institutional care, group home care, care by nonagency custodians, or adoption, *OFFER* concerns children in state-licensed family foster homes. *See generally* N. Littner, *The Art of Being a Foster Parent*, 57 CHILD WELFARE 3 (Jan. 1978); Note, 36 U. PITT. L. REV. 715, 717-18 (1975).

7. N.Y. SOC. SERV. LAW §§ 383(2), 400 (McKinney 1976). *See* note 5 *supra*.

8. OFFER v. Dumpson, 418 F. Supp. 277, 286 (S.D.N.Y. 1976). The district court found no existing liberty interest in the foster parents but based its decision on the liberty interest of the child. *See* 5 FORDHAM URBAN L.J. 155 (1976).

9. 418 F. Supp. at 285-86.

10. *See* Goss v. Lopez, 419 U.S. 565, 581-84 (1975); Wolff v. McDonnell, 418 U.S. 539, 557-58 (1974); Goldberg v. Kelly, 397 U.S. 254, 261 (1970). *See also* Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267 (1975).

11. Griswold v. Connecticut, 381 U.S. 479, 487 (1965) (Goldberg, J., con-

this interest has been articulated in the context of the biological family unit, in which the Court has recognized that the right to familial privacy requires due process safeguards for both parent and child.[12] The question presented in *OFFER* was whether the presence of a psychological bond between foster parent and foster child creates a "liberty interest" that is sufficient to require the agency charged with administering foster care to provide similar due process safeguards for this de facto family.

To determine the degree of protection to afford a foster family, a court first must decide whether a foster family should be considered a "family" in the sense of other family units that have guaranteed due process safeguards. Although the Supreme Court has not previously dealt with the concept of the foster care relationship, recent decisions indicate a willingness to include persons outside the traditionally recognized parental unit in the definition of the family. In *Stanley v. Illinois*[13] the putative father of three illegitimate children challenged a statute that made the children of unwed fathers wards of the state upon the death of the mother. There was no determination prior to the children's removal from Stanley's custody that he was an unfit father.[14] The Court held that Stanley had a constitutional right to a hearing on the question of fitness prior to removal of the children because of his legal status as a parent. All parents, either married, divorced, or unmarried, have a constitutionally protected right to a hearing prior to removal of a child from their custody.[15]

The traditional definition of the family was expanded further in *Moore v. City of East Cleveland.*[16] In *Moore* the Court examined a statute that permitted only specified relatives to live to-

curring); May v. Anderson, 345 U.S. 528, 533 (1953); Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925); Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

12. Moore v. City of East Cleveland, 431 U.S. 494, 500-06 (1977); Planned Parenthood v. Danforth, 428 U.S. 52, 75 (1976); Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 639-40 (1974); Roe v. Wade, 410 U.S. 113, 152-56 (1973).

13. 405 U.S. 645 (1972).

14. *Id.* at 646.

15. *Id.* at 658. *See also* Rothstein v. Lutheran Soc. Serv. of Wis., 405 U.S. 1051 (1972) (unwed father must be given opportunity to oppose an adoption of his child regardless of state statute); *In re* Adoption of Lathrop, 2 Kan. App.2d 90, 575 P.2d 894 (1978) (absent a finding of unfitness, the natural father of an illegitimate child has a paramount right over nonparents to custody of the child).

16. 431 U.S. 494 (1977).

gether.[17] Under the ordinance a grandmother and her grandsons were not permitted to maintain a single household. The Court rejected the city's contention that the constitutional right to live together comprehends only the nuclear family.[18] Finding the statute invalid, the Court refused to approve *any* arbitrary definition that would limit the composition of a household to the nuclear family.[19]

Although *Stanley* and *Moore* involved biological relationships, they do illustrate the willingness of the Court to expand the concept of what type of family is constitutionally protected. Arguably, therefore, given the psychological bond between long-term foster parents and children, foster families would be included within the Court's definition of the protected family unit.[20]

Liberty interests in the foster family context are not clearly defined because of the courts' position that in custody disputes between a parent and a third person, the parent has a right to custody unless proven unfit.[21] Some recent decisions, however, have indicated that the right of the natural parents to custody of the child is not absolute but must yield to the best interest of the child.[22] This philosophy appears directly tied to the concept of a

17. *Id.* at 496, 500. The challenged city zoning statute prevented a grandmother from living in her own home with her son and her two grandsons. Since the grandsons were first cousins instead of brothers, the statute prohibited this type of family composition and provided for a criminal conviction of the violator. The objectives of the ordinance set out by the city were avoiding overcrowding, traffic congestion, and the prevention of an undue financial burden on the school system.

18. *Id.* at 500.

19. *Id.* at 503-06.

20. *See* text accompanying notes 22-34 *infra* (discussion of psychological bond) and text accompanying notes 13-19 *supra* (definition of the family unit).

21. *See* Turner v. Pannick, 540 P.2d 1051 (Alaska 1975); *In re* Denlow, 87 Misc. 2d 410, 384 N.Y.S.2d 621 (1976); People *ex rel.* Scarpetta v. Spence-Chapin Adoption Serv., 28 N.Y.2d 185, 269 N.E.2d 787 (1971), *appeal dismissed and cert. denied sub nom.* DeMartino v. Scarpetta, 404 U.S. 805 (1971); *In re* Custody of Hernandez, 249 Pa. Super Ct. 274, 376 A.2d 648 (1977); *In re* N.H., 135 Vt. 230, 373 A.2d 851 (1977). *Contra* Painter v. Bannister, 258 Iowa 1390, 140 N.W.2d 152, *cert. denied*, 385 U.S. 949 (1966). *See generally* Katz, *Legal Aspects of Foster Care*, 4 FAM. L.Q. 209 (1970); Note, *The Rights of Foster Parents to the Children in Their Care*, 50 CHI.-KENT L. REV. 86 (1973); 36 U. PITT. L. REV. 715 (1975).

22. *See* People *ex rel.* Edwards v. Livingston, 42 Ill. 2d 201, 247 N.E.2d 417 (1969); *In re* Sanjivini K., 4 FAM. L. REP. (BNA) 2586 (N.Y. App. Div. 1978); Commonwealth *ex rel.* Bankert v. Children's Servs., 224 Pa. Super. Ct. 556, 307

psychological parent-child bond as described by authorities in the fields of law and child psychology.[23] This theory rejects biology as the basis of the parent-child relationship and instead focuses on the daily transactions occurring between the child and the parent figure. The consistency and quality of these interactions create an attachment that causes the parent figure to be identified in the child's mind as the psychological parent.[24] There has been a growing recognition by the courts that a child's interest in stability requires a consideration of the psychological parent's claim.[25]

Despite acknowledgement of the importance of the psychological bond, most courts have until recently found that the length and emotional depth of the foster parent-child relationship is not a sufficient interest to give rise to due process protection.[26] Even though many children have lived for years in the same foster home,[27] many jurisdictions routinely permit agencies to remove

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A.2d 411 (1973).

23. *See* J. GOLDSTEIN, A FREUD & A. SOLNIT, BEYOND THE BEST INTERESTS OF THE CHILD (1973); N. LITTNER, SOME TRAUMATIC EFFECTS OF SEPARATION AND PLACEMENT (1973); Derdeyn, *A Case For Permanent Foster Placement of Dependent, Neglected and Abused Children*, 47 AM. J. OF ORTHOPSYCHIATRY 604 (1977); Michaels, *The Dangers of a Change of Parentage in Custody and Adoption Cases*, 83 L.Q. REV. 547, 548-49 (1967).

24. J. GOLDSTEIN, A. FREUD & A. SOLNIT, *supra* note 23, at 18-20, 39.

25. *See In re* Alexander, 206 So. 2d 452 (Fla. Dist. Ct. App. 1968); Bennett v. Jeffreys, 40 N.Y.2d 543, 356 N.E.2d 277, 387 N.Y.S.2d 821 (1976); *In re* Amy S., 89 Misc. 2d 42, 390 N.Y.S.2d 530 (Fam. Ct. 1976).

26. *See* Eason v. Welfare Comm'n, 171 Conn. 630, 370 A.2d 1082 (1976) (foster mother who had cared for the child for the first six years of the child's life was denied standing to question the return of custody to the natural mother without notice of a hearing); Roussel v. State, 274 A.2d 909 (Me. 1971) (child had been with the foster parents for four-and-one-half years and was removed by the agency without prior notice or opportunity for the foster parents to present relevant information).

27. OFFER v. Dumpson, 418 F. Supp. 277 (S.D.N.Y. 1976) (the median time spent in foster care in New York was over four years). The longer a child remains in foster care, the more likely that he will never leave since after the first year in foster care the probability of return to the biological parents declines markedly. *Id.* at 279 n.6. A study of parental contacts in New York City found that 57.4% of all foster children had had no contact with their natural parents in the preceding six months. Smith v. OFFER, 431 U.S. 816, 836 n. 39 (1977) (citing Child Welfare Information Services, Parental Visiting Information, New York City Reports, Table No. 1 (Dec. 31, 1976)). *See generally* Fanshel, *Status Changes of Children in Foster Care: Final Results of the Columbia University Longitudinal Study*, 55 CHILD WELFARE 143 (1976); Geiser,

children without notice or a hearing.[28]

Other jurisdictions, cognizant of the psychological ties between foster parents and children and to a limited degree the foster parents' special interest in the foster relationship,[29] have permitted foster parents to assert a constitutionally protected interest in their foster child.[30] Three jurisdictions have recently acted in accordance with the psychological-bond theory, giving foster parents an opportunity to be heard or granting them status as de facto parents. In New York, an appellate court ordered the family court to consider the foster parents to be the psychological parents in determining the custody of an eight-year-old child.[31] In

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The Shuffled Child and Foster Care, 10 TRIAL 27, 29 (May-June 1974); 9 CONN. L. REV. 496, 502-05 (1977).

28. *See, e.g., In re* Jewish Child Care Ass'n, 5 N.Y.2d 222, 156 N.E.2d 700, 183 N.Y.S.2d 65 (1959). This agency felt their organization could not function properly if the foster family was in a position to question the judgment of the agency. The move of this five-and-one-half-year-old child who had been in the foster homes for four-and-one-half years was justified by stating that the foster parents and child were too attached and their shared emotional relationship was a potential danger to the return of the child to her natural mother. The mother did not appear in court nor request a return of the child. *Contra, In re* W., 77 Misc. 2d 374, 355 N.Y.S.2d 245 (Fam. Ct. 1974) (removal of child from foster home stayed until internal and judicial remedies exhausted). *See also* Spence-Chapin Adoption Serv. v. Polk, 29 N.Y.2d 196, 274 N.E.2d 431, 324 N.Y.S.2d 937 (1971) (role of foster parents defined by court as simply custodians with no rights to the child who had been in their home for over two years).

29. *See* Cennami v. Department of Pub. Welfare, 3 FAM. L. REP. (BNA) 2542 (Mass. App. Ct. 1977); Bennett v. Marrow, 59 App. Div. 2d 492, 399 N.Y.S.2d 697 (1977), *on remand from* Bennett v. Jeffreys, 40 N.Y.2d 543, 356 N.E.2d 277, 387 N.Y.S.2d 821 (1976); Stapleton v. Dauphin County Child Care Serv., 228 Pa. Super. Ct. 371, 324 A.2d 562 (1974). *Contra*, State *ex rel.* Wallace v. Lhotan, 51 App. Div. 2d 252, 380 N.Y.S.2d 250 (1976), *appeal dismissed and leave to appeal denied*, 39 N.Y.2d 705, 743, 384 N.Y.S.2d 1027, 1030 (1976). Foster parents in most states have no rights with respect to their foster children since generally they are not made parties or given notice of proceedings concerning their foster children. Note, *supra* note 21, at 88-89. Some states have adopted statutes that allow the foster parents the right to be heard by the courts but often still refuse to give standing. *See, e.g.*, ILL. ANN. STAT. ch. 37, § 701-20(2) (Smith-Hurd Cum. Supp. 1978); PA. STAT. ANN. tit. 11, §§ 50-302, -314, -317 to 320 (Cum. Supp. 1978-79).

30. *See* text accompanying notes 22-24 *supra*.

31. Bennett v. Marrow, 59 App. Div. 2d 492, 399 N.Y.S.2d 697 (1977) (custody awarded to foster mother on the basis of psychological-bond theory), *on remand from* Bennett v. Jeffreys, 40 N.Y.2d 543, 356 N.E.2d 277, 387 N.Y.S.2d 821 (1976) (application of the best-interests-of-the-child test after

California foster parents were given standing to contest the removal of their foster child from their home, indicating a classification of the foster parents as de facto parents.[32] A Pennsylvania court also recognized the deep emotional relationship between foster parents and a foster child and refused to disrupt the family relationship by returning the child to the natural mother.[33] Other jurisdictions have conceded the realities of the psychological-bond concept but have refused to apply the theory as an absolute standard, preferring instead a case-by-case evaluation of the foster parent-child relationship.[34] Admittedly, recent decisions are split over the proper application of the psychological-bond theory as the underpinning for a constitutionally protected liberty interest, but there is a recognizable trend toward some type of due process protection for foster families.[35]

If a court finds that a foster parent has a protected interest in maintaining the family, it must determine whether the child can also assert that interest.[36] The Supreme Court did not accept that a child has a protected interest in even his biological family until 1967 in *In re Gault*.[37] In *Gault* a juvenile court sentenced a fifteen-year-old boy to the state training school for an indefinite period for making an obscene phone call. In holding that certain due process protections were required before a delinquency adjudication,[38] the Court stated that the child has a liberty interest

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the court has found "extraordinary circumstances" requiring intervention in the natural family unit).

32. Katzoff v. Superior Ct., 54 Cal. App. 2d 1079, 127 Cal. Rptr. 178 (1976).

33. *In re* David E., 4 FAM. L. REP. (BNA) 2214 (Pa. C.P., Allegheny County 1978).

34. *See* Montgomery County Dep't of Social Servs. v. Sanders, 38 Md. App. 406, 381 A.2d 1154 (1977); *In re* E.G., 4 FAM. L. REP. (BNA) 2641 (Minn. 1978).

35. *See generally* J. GOLDSTEIN, A. FREUD & A. SOLNIT, *supra* note 23 at 31-35; Katz, *Foster Parents versus Agencies: A Case Study in the Judicial Application of "The Best Interests of the Child Doctrine,"* in THE RIGHTS OF CHILDREN—EMERGENT CONCEPTS IN LAW AND SOCIETY 244, 271 n.76 (A. Wilkerson ed. 1973); 20 ARIZ. L. REV. 279 (1978)(due process rights of foster children); 15 HOUSTON L. REV. 948 (1978); 36 PITT. L. REV. 715 (1975).

36. *See* Wisconsin v. Yoder, 406 U.S. 205 (1972); *In re* Gault, 387 U.S. 1 (1967). *See generally* Burt, *Developing Constitutional Rights Of, In, and For Children*, 39(3) LAW AND CONTEMP. PROB. 118-43 (1975).

37. 387 U.S. 1 (1967).

38. These protections included adequate notice of the charges, *id.* at 33;

in remaining with his family sufficient to merit due process protection.[39] The Court admonished the state that its authority to act in a parens patriae relationship to the child was not an award of unlimited exercise of that power via procedural arbitrariness.[40]

Since *Gault* the Court has continued to recognize the existence of the child's liberty interest in maintaining his family but has been sensitive to competing state interests.[41] In *Goss v. Lopez*[42] the Court found that school children have a liberty interest in an uninterrupted education and that most suspensions from school must be preceded by notice and a hearing.[43] Because the state had a significant interest in avoiding cumbersome procedure, however, the Court allowed state and school authorities broad discretion in defining the form and timing of the hearing.[44]

When the constitutionally protected interest resides in the parents and the child, there is some indication that the rights of the parents supersede the rights of the child. In *Wisconsin v. Yoder*[45] Amish parents were successful in their attempt to exempt their children from the secondary education otherwise required by state law. The Court weighed the state interest in compulsory education against the parental interest in educating their children in accordance with the parents' religious beliefs.[46] Because it was the parents who were threatened by criminal prosecution for not educating their children,[47] the Court was unwilling to de-

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advisement of right to counsel, *id.* at 36, 41; and opportunity to confront and cross-examine witnesses, *id.* at 55.

39. *Id.* at 27-31, 41, 50.

40. *Id.* at 30.

41. *See, e.g.*, H. CLARK, LAW OF DOMESTIC RELATIONS 573-75 (1968); Singleman, *A Case of Neglect: Parens Patriae Versus Due Process in Child Neglect Proceedings*, 17 ARIZ. L. REV. 1055, 1062-65 (1975). The state's interest in interfering with the family unit must always be included in the equation that determines the scope of the familial interest and the due process safeguards required.

42. 419 U.S. 565 (1975).

43. *Id.* at 581-84.

44. *Id.* at 579-80. A student must be given oral or written notification of the charges provoking the suspension. The school authorities are required to present the evidence and to allow the student an opportunity to present his version of the incident. The Court found no requirement, however, for a delay between the time notice is given and the time of the hearing. *Id.* at 582. *See* 21 N.Y.L.F. 633, 643 (1976).

45. 406 U.S. 205 (1972).

46. *Id.* at 230-34.

47. *Id.* at 230-31.

termine the relative position of the child's interest in a secondary education when that interest conflicted with the parents' interest in limiting the child's education.

The Court took a different approach to the rights of parents and children in *Planned Parenthood v. Danforth*,[48] in which it invalidated a requirement that parents give consent prior to a minor's abortion. The Court stated that a pregnant minor had a constitutional right of privacy that cannot be denied because of any parental right.[49] The Court was particularly concerned about the state granting a third party (the parent) an "absolute, and possibly arbitrary, veto" over the decision of the child and the physician.[50] "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 become pregnant."[51]

While the Supreme Court recognizes not only a liberty interest in family privacy and maintenance of the family unit that can be asserted by parents and children, questions remain over the degree to which that interest will be protected, to whom the right belongs, and whether the foster family relationship could be disturbed prior to a hearing.

OFFER v. Dumpson,[52] the district court decision in the instant case, emphasized the independent interest of the foster child rather than the interest of the foster parents.[53] The court stated that the right of a foster child to a full administrative hearing prior to removal from a foster home could not depend upon the foster parents asserting that right for that child.[54] The right threatened was defined by the lower court as the child's right to avoid the "grievous loss" resulting from the trauma of separation suffered when a child is moved from a familiar environment.[55] The court reasoned that a hearing prior to the child's removal would minimize "the possibility of arbitrary or misin-

48. 428 U.S. 52 (1976).
49. *Id.* at 74.
50. *Id.*
51. *Id.* at 75.
52. 418 F. Supp. 277 (S.D.N.Y. 1976).
53. *Id.* at 284-85.
54. New York law gave the foster parents the right to request the preremoval hearing. *Id.* at 285.
55. *Id.* at 282.

formed action."[56] The decision assured the foster parents' right to be heard, but the right to the hearing belonged to the child rather than to the parents.[57] Because the decision was based on the "grievous loss" suffered by the child, the court declined to answer the question whether a liberty interest existed in the psychological family unit.[58]

In *Smith v. OFFER*[59] the Supreme Court reversed *Dumpson* on the ground that New York's statutes and procedures were constitutionally adequate.[60] This narrow decision was limited to New York foster care procedures that provide more protection than the systems in most states.[61] The Court rejected the lower court's finding that the risk of "grievous loss" to the child resulting from improvident removal from a foster home required preremoval due process safeguards.[62] The Court held that a finding of grievous loss does not in and of itself require due process protection.[63] The important consideration in determining whether due process is guaranteed is the nature of the interest affected rather than the weight of that interest.[64] That is, if the child has no protected liberty interest in remaining with his foster family, he has no right to any due process safeguard either before or after removal. The *OFFER* Court, however, found at least a limited liberty interest in the child remaining with his foster family, indicating that the psychological bond between parent and child re-

56. *Id.* at 282-83. Quoting from a Supreme Court decision, the *Dumpson* court stated that one of the protected fourteenth amendment rights is the "right to be heard before being condemned to suffer grievous loss." *Id.* at 282 (quoting Joint Anti-Fascist Comm. v. McGrath, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring)).

57. *Id.* at 284-85.

58. *Id.* at 282.

59. 431 U.S. 816 (1977).

60. *Id.* at 856. The Court systematically discounted each of the procedural requirements set out by the *Dumpson* court, which are summarized as follows: (1) automatic preremoval hearing regardless of whether the foster parent requested the hearing; (2) impartial hearing officer presiding who has had no previous contact with the decision to remove the child and who has the authority to order the child to remain with the foster parents; (3) agency personnel, foster parents, natural parents, child or independent representative be present and permitted to introduce relevant evidence. *See id.* at 847-48.

61. *See generally* 9 CONN. L. REV. 496, 509 (1977).

62. 431 U.S. at 840.

63. *Id.*

64. *Id.* at 841.

quires that the foster family receive some due process protection.[65]

It is important to analyze the Court's use of the psychological-bond theory to support the presence of a liberty interest and to examine the standard applied to find the New York procedures adequate. First, the Court in recognizing the limited liberty interest of the foster family conceded that the psychological bond between a foster parent and child may be as important to the child as the biological bond between a natural parent and child.[66] However, the Court emphasized the difficulty of reconciling the liberty interest in the foster family relationship with the rights of the natural parents. "Whatever liberty interest might otherwise exist in the foster family as an institution, that interest must be substantially attenuated where the proposed removal from the foster family is to return the child to his natural parents."[67] The Court stressed that the foster family's interest, unlike the natural parent's interest, is state-created.[68] The rights and expectations of the parties, therefore, must be derived from state law and the foster parent's contractual arrangement, which typically reserves to the placement agency the right to remove the child on request.[69] The *OFFER* Court concluded that the foster

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65. *Id.* at 847.

66. *Id.* at 844, 845 n.52.

> But this case turns, not on the disputed validity of any particular psychological theory, but on the legal consequences of the undisputed fact that the emotional ties between foster parents and foster child are in many cases quite close, and undoubtedly in some as close as those existing in biological families.

Id.

Since *OFFER*, the Court has reaffirmed the importance of the existing family unit whether biological or not. In Quilloin v. Walcott, 434 U.S. 246 (1978), the Court recognized the unwed father as part of the natural family receiving constitutional protection but determined he could not veto the adoption of his child by the child's stepfather since the result of the adoption would be to give recognition to an existing family unit. The Court did cite Justice Stewart's concurring opinion in *OFFER* emphasizing the difference in due process considerations when the relocation of the child was with a natural parent rather than another foster parent. *Id.* at 255 (citing Smith v. OFFER, 431 U.S. 816, 862-63 (1977)).

67. *Id.* at 846-47.

68. *Id.* at 845-46.

69. *Id.* at 826 & n.14. Under most agency contractual arrangements, the foster parents have no right to question the agency decision. Some state courts

parent/agency contracts and the New York statutes proved a limited constitutional liberty interest but that the interest resided in the foster family rather than the child.[70] In refusing to acknowledge the child's independent right to due process, the Court apparently felt that the interests of the foster parent and child were so intimately related that a removal procedure granting the right to a hearing to the foster parent necessarily protected the child.[71] This approach is consistent with previous decisions allowing the natural parent to assert the rights of the child because there was

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have refused, however, to apply contract principles to the custody and care of children. *See* Stapleton v. Dauphin County Child Care Serv., 228 Pa. Super. Ct. 371, 324 A.2d 562 (1974). The child placement agency attempted to rely on the foster care contract to prevent a preremoval hearing. The Pennsylvania Superior Court relied on RESTATEMENT OF CONTRACTS § 583 (1932) to determine that a contract is voidable by the courts when the best interests of the child conflict with the contract. *Cf.* RESTATEMENT (SECOND) OF CONTRACTS § 333 (Tent. Draft No. 12, 1977) (Reporter's note states: "[t]he requirement of the former section [§ 583] that the transfer of custody be from one parent to another has been dropped in favor of a general requirement that the transfer be consistent with the best interest of the child.") The court relied on three Pennsylvania cases to point out that such an agency contract treats the child as a chattel without any concern for the child's right to happiness. The court stated that the law has long been established that "a child cannot be the subject of a contract with the same force and effect as if it were a mere chattel . . . ." 228 Pa. Super. Ct. at 382, 324 A.2d at 568 (quoting Commonwealth *ex rel.* Children's Aid Soc'y v. Gard, 362 Pa. 85, 92, 66 A.2d 300, 304 (1949)). *Contra* Marchese v. New York Foundling Hosp., 53 Misc. 2d 234, 278 N.Y.S.2d 512 (1967); *In re* Jewish Child Assoc., 5 N.Y.2d 222, 156 N.E.2d 700, 183 N.Y.S.2d 65 (1959). In reviewing the former case, family law authorities state: "It is shocking to find modern courts applying the conceptualistic principles of commercial law to the human problems involved in placement cases. There should be no covenant running with the child and the child's actual best interests ordinarily should be decisive." Foster & Freed, *Family Law*, 19 SYRACUSE L. REV. 478, 490 (1968).

70. 431 U.S. at 846. The Court failed to mention that relevant New York statutes negate the Court's statement that there is limited recognition in state law of the rights of foster families. Foster parents are given priority in the adoption of a foster child in their home and are given the right to question administratively and judicially any decisions regarding the child in their home. N.Y. SOC. SERV. LAW § 374(1-a) (McKinney Supp. 1976) (foster parent has preference in adoption when child in home over two years); *id.* § 383(3) (McKinney Supp. 1978) (foster parents' right to intervene in "any proceeding" concerning custody of long-term foster child); *id.* § 392.2 (McKinney Supp. 1978) (petition by foster parent to review foster care status); *id.* § 400.02 (McKinney Supp. 1978) (appeal as a matter of right).

71. 431 U.S. at 850.

commonality of interests.[72]

Once the Court agreed that some sort of liberty interest existed giving rise to procedural protection, an evaluation of the New York procedural statutes and regulations became necessary. In *Mathews v. Eldridge*[73] the Court developed a standard for determining the necessary due process safeguards based upon the nature of the affected interest[74] and a consideration of the degree of potential deprivation and the adequacy of a retroactive remedy.[75] Applying the *Mathews* standard to the situation in *OFFER*, the Court concluded that New York procedures adequately protected the liberty interest of the foster family since the increased financial and administrative burdens of automatic hearings outweighed the private interest of the child in the security of his family life.[76] The possible "erroneous deprivation" that a child

72. *See generally* Pierce v. Society of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923). Commentators have noted that the Court has not yet abandoned the presumption put forth in *Pierce* and *Meyer* that the interests of the child are identical with those of the parents. The concurrence of Mr. Justice Brennan in Rowan v. Post Office Dep't, 397 U.S. 728, 741 (1972) (Brennan, J., concurring) (upholding a statute permitting parents to request the deletion of the names of their minor children from mail order lists), and the dissent of Mr. Justice Douglas in Wisconsin v. Yoder, 406 U.S. 205, 241-49 (1972) (Douglas, J., dissenting), are cited as the only indications that the Court is willing to consider parent and child as "separate individuals with potentially distinct interests." J. Genden, *Separate Legal Representation for Children: Protecting the Rights and Interests of Minors in Judicial Proceedings*, 11 HARV. C.R.-C.L. L. REV. 565, 581 n.64 (1976).

73. 424 U.S. 319 (1976).

74. *Id.* at 335. To determine the nature of the interest affected, the *Mathews* Court set up a formula that weighed (1) the private interest that will be affected by the official action, (2) the risk of erroneous deprivation through the procedures already used and the probable value of additional safeguards, and (3) the fiscal and administrative burdens that additional procedural requirements would entail. *Id.*

75. *Id.* at 340-43. Applying the criteria necessary to define the nature of the interest, the *Mathews* Court found that an evidentiary hearing prior to termination of social security disability benefits was not required since any deprivation suffered by the recipient could be adequately remedied by a post-determination hearing. *Id.*

76. 431 U.S. at 848-56. Although the *OFFER* Court did not articulate a definition for each part of the formula, the interests weighed appeared to be as follows: (1) the private interest is the long-term foster child's need for stability and continuity of care without arbitrary removals; (2) the governmental interest is two-fold (a) the provision of the best possible environment for the child and (b) the efficient operation of the administrative agency; and (3) the financial or

might suffer from the improvident move was not enough to tip the scales; this private interest was outweighed by the government's interests in avoiding financial losses and administrative inconvenience.

The fact that New York procedures for foster families were fairly complex and provided comparatively broad protections certainly influenced the Court. The Court examined each procedural inadequacy found by the lower court and responded by pointing to a provision in the statute or regulations that provided some due process protection.[77] To the lower court's requirement for automatic preremoval hearings, the Court responded that the foster parent's right to request the hearing protected the interests of the child.[78] Since the removal of the child is a threat to the family unit and not to the child alone, the foster parent's desire to continue his de facto parent role is central to the need for a hearing.[79] However, the Court did not deal with the fact that making one person's due process rights dependent upon a third party's assertion of those rights does not provide adequate protection.[80] The lower court expressed a valid concern for the child who is in a foster home where external factors, such as educational level, finances, or social ineptness may prevent the foster parent from requesting the hearing. The child under the New York statute cannot request the hearing and has no legal right to be present.[81] The Court rejected the lower court's concern that without all parties present at the hearing valuable and necessary information might be overlooked. Independent representation for the child would guarantee a complete review of the facts. If the foster placement has been harmful to the child, only an automatic hearing with all parties represented would guarantee a forum for a considered, well-planned decision regarding removal and replacement.

The Court minimized the lower court's requirement that an impartial hearing officer be present by expressing confidence in

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administrative burden is the additional staff time and perhaps cost for automatic preremoval hearings or independent representatives.

77. *Id.*

78. *Id.* at 850.

79. *Id.*

80. *See* OFFER v. Dumpson, 418 F. Supp. 277, 285 (S.D.N.Y. 1976).

81. *Id.* at 282 n.13. *But see* Smith v. OFFER, 431 U.S. at 857 n.1 (Stewart, J., concurring).

the experience and knowledge of New York social work personnel.[82] For similar reasons the Court found no need to require that the child be present at the hearing or have an independent representative.[83] The lower court had ordered that the agency, the foster parents, the natural parents, and the child all be represented and be permitted to introduce relevant evidence.[84] While the *OFFER* Court expressed confidence in the child placement agency's ability to represent fairly all parties,[85] state courts and authorities in the child care field have recognized that the interests of the child may not be coextensive with those of the agency, the foster parents, or the natural parents.[86] In ruling out the necessity for the presence of either the child or the child's representative at the hearing, the *OFFER* Court assumed that the agency's information is adequate and that the agency representative in conjunction with the foster parent necessarily represents the best interest of the child. Numerous decisions in New York alone, however, have documented the resulting injustices when the agency purports to be the sole representative of the child.[87] The child is not adequately protected because of the bureaucratic structure of the agency, which often results in inefficiency, poor administration, inadequate staffing, and rapid turnover of staff.[88] Not only would an automatic hearing and independent representation provide an opportunity to discuss the effects of the child's removal from the harmonious foster family relationship, but the hearing would also force agency examination of the abusing or

82. 431 U.S. at 850 n.58, 851.

83. *Id.* at 852 n.59.

84. 418 F. Supp. at 285-86.

85. 431 U.S. at 851-52.

86. *See* Bennett v. Jeffreys, 40 N.Y.2d 543, 356 N.E.2d 277, 387 N.Y.S.2d 821 (1976); *In re* David E., 4 FAM. L. REP. (BNA) 2214, 2216 (Pa. C.P. Allegheny County 1978); J. GOLDSTEIN, A. FREUD & A. SOLNIT, *supra* note 23, at 43.

87. *See generally In re* Orlando F., 40 N.Y.2d 103, 351 N.E.2d 711, 386 N.Y.S.2d 64 (1976); *In re* Tyease J., 83 Misc. 2d 1044, 373 N.Y.S.2d 447 (1975); Festinger, *The Impact of the New York Court Review of Children in Foster Care: A Follow-up Report*, 55 CHILD WELFARE 515 (1976).

88. *See* Geiser, *The Shuffled Child and Foster Care*, 10 TRIAL 27, 29 (1974). In a California study related to long-term foster care, information concerning the child's placement was neither recorded in his records nor known by the social worker involved. Comment, *The Foster Parents Dilemma: Who Can I Turn to When Somebody Needs Me?*, 11 SAN DIEGO L. REV. 376, 390 (1974) (reprinted from CALIFORNIA STATE SOCIAL WELFARE BOARD, REPORT ON FOSTER CARE, CHILDREN WAITING 7-9 (Sept. 1972)).

neglectful foster family relationship. The process that is guaranteed by the presence of the liberty interest must be adequate for the particular facts of the situation. Whether the family is continuing or breaking down, all information and parties need to be involved in the resulting decision regarding the proposed removal. Ironically, the Court devoted much of its opinion to describing the horrors of the foster care system and problems with agency structure only to rely on the effectiveness of that same delivery system as the basis for overturning the lower court's holding.

Although both the district court and Supreme Court applied the *Mathews* standard, the district court viewed arbitrary removals of children from long-term placements as a procedure requiring maximum procedural protection with all possible safeguards.[89] The Supreme Court reasoned that the state of the art in the child welfare field was still so imprecise that it would prefer to err on the side of too little procedure rather than to be overly restrictive.[90] It is certainly not clear what type of hearing may be required to meet due process requirements.

The Court's failure to deal precisely with *Mathews*' emphasis on the availability of an effective retroactive remedy[91] is disturbing. The availability of such a remedy is a central ingredient in determining the adequacy of any procedure.[92] No retroactive remedy could compensate the foster child for the psychological injury involved in an arbitrary move from a long-term foster home where he has attained a sense of security.[93] The resulting emotional trauma is not lessened by a postremoval determination that he

89. 418 F. Supp. at 283-84.

90. 431 U.S. at 855-56.

91. *See* 424 U.S. at 340-43; 418 F. Supp. at 284.

92. *See* Stanley v. Illinois, 405 U.S. 645, 647 (1972); Goldberg v. Kelly, 397 U.S. 254, 261 (1971). As stated in Stanley v. Illinois,

> [t]his Court has not, however, embraced the general proposition that a wrong may be done if it can be undone. . . . Surely, in the case before us, if there is delay between the doing and the undoing petitioner suffers from the deprivation of his children, and the children suffer from uncertainty and dislocation.

405 U.S. at 647 (citation omitted).

93. *See* Areen, *Intervention Between Parent and Child: A Reappraisal of the State's Role in Child Neglect and Abuse Cases*, 63 GEO. L.J. 887, 918 (1975); Michels, *The Dangers of a Change of Parentage in Custody and Adoption Cases*, 83 L.Q. REV. 547, 548-49 (1967).

can return to the original foster home. Due process demands a hearing in which his views are represented.[94] As the New York federal district court pointed out, an automatic preremoval hearing with all parties present would lessen the possibility of arbitrary action, thus increasing the chances of all facts being fairly presented.[95] A judicial review of the administrative decision occurring long after the fact is far from satisfactory.

Since *OFFER* only evaluated the adequacy of New York procedure, the impact of *OFFER* on existing law is difficult to gauge. The Court did not hold that all states must have procedures identical to the New York statute. The Court found at least a limited liberty interest in the foster family, but what minimum procedural safeguards might be required by *OFFER* is unclear. New York's procedures for review of foster care removal decisions are far more elaborate than those required in most states.[96] In

94. *See* Morrissey v. Brewer, 408 U.S. 471 (1972); Boddie v. Connecticut, 401 U.S. 371 (1971). "[E]ven a conditional liberty interest, such as that of a minor, is entitled to the protections of due process when the state is involved to any significant degree in its diminution." *In re* Roger S., 19 Cal. 3d 35, 566 P.2d 997, 139 Cal. Rptr. 861 (1977) (withdrawn from publication at request of court); 9 JUV. CT. DIG. 291, 293 (1977).

95. 418 F. Supp. at 283.

96. For a discussion of the New York statutes and procedures, see notes 4 & 5 *supra*. In Tennessee there are no statutes requiring any procedural protection for the foster child or the foster parent. Agency regulations and policies do not provide for any type of mandatory notice or hearing, or even consultation, prior to a child's removal. In Tennessee the permanent long-term care contract provided for foster parents specifies only that the foster parents should be advised in advance, when possible, of removal plans. Interview with Rose Harris, Supervisor of Foster Care Services, State Office, Tenn. Dep't of Human Services (June 28, 1977); *see* Form 950, Child Placement Contract, Tennessee Dep't of Human Services (June 1, 1976). A recently enacted Tennessee statute dealing with foster care plans does provide that "[a]ny interested person, at any time while the child is under the jurisdiction of the court, may file a petition, in writing and under oath for a rehearing" on matters related to the foster care plan. TENN. CODE ANN. § 37-1509 (1977). In North Carolina the only statute pertaining to foster care relates to monetary appropriations. N.C. GEN. STAT. § 108-66 (1978).

A Memphis attorney recently has filed a class action in federal district court on behalf of foster parents who desired to adopt a foster child living in their home for over two years. Intervenors have been allowed to enter the suit, with representation for all natural parents with children in foster care and for potential adoptive parents. The child in question was moved to an adoptive home with less than twenty-four hours notice to the foster parents. The challenge is

those states that have no statutory or administrative procedures to protect the interests of the foster family, *OFFER*'s finding of a limited liberty interest may serve as a restraint on the almost unlimited discretion of the child-care agency to remove arbitrarily, without notice or hearing, children from long-term foster home placements. However, the right to a hearing may well be meaningless without the accompanying procedures and privileges that guarantee a fair and open hearing.

The difficulty that lower courts will have in following the "limited liberty interest" language of *OFFER* is demonstrated by a recent conflict within the Fifth Circuit. A few months prior to the Supreme Court's opinion in *OFFER*, a Fifth Circuit three judge panel held in *Drummond v. Fulton County Department of Family and Children's Services*[97] that foster parents seeking to adopt the foster child who had lived in their home for almost two years had a liberty interest in the continuation of that family, which could not be terminated by the state without a due process hearing.[98] The court also recognized the child's liberty interest that required independent counsel present at the hearing.[99] However, in an en banc decision[100] decided after *OFFER*, the court reversed the panel's ruling, finding that there was no protected liberty interest in the family and that the child had no independent due process right.[101] The court followed the lead of the *OFFER* Court by emphasizing the temporary, transitional nature of the foster care system and stated that the statutorily created rights of the foster relationship provided no expectation that the relationship would be left undisturbed.[102] The court, however, did note that the decision did not control every foster care situation but only those instances in which the child was placed for temporary care.[103] In dealing with the *OFFER* Court's assumption that some liberty interest existed in the foster family, the *Drummond* court also recognized the possibility of a constitutional interest

based on *OFFER*. *See* Stanford v. Tenn. Dep't of Human Serv., Docket No. 78-2587 (W.D. Tenn. Nov. 7, 1978).

97. 547 F.2d 835 (5th Cir. 1977).

98. *Id.* at 851-53.

99. *Id.* at 855-57.

100. 563 F.2d 1200 (5th Cir. 1977).

101. *Id.* at 1208-09.

102. *Id.* at 1207.

103. *Id.* at 1209.

that could not be arbitrarily affected by the agency.[104] The court then proceeded to endorse the Georgia adoption agency's procedures, noting that a due process hearing dealing only with bare facts would not be helpful in the subjective decisions involved in child placements. "Child placing is an art, not a science that can be computerized to follow rigid rules."[105] Judge Tuttle in his dissenting opinion in *Drummond* stated that *OFFER* "strongly supports the conclusion" that the foster family and the child have a " 'liberty right' in their foster family relationship which cannot be destroyed by the state without a due process hearing."[106] The dissent pointed to the language of *OFFER* that recognized that biological relationships are not an exclusive method for determining the existence of a family, citing *OFFER*'s discussion of deep emotional attachments existing in nonblood relationships.[107] Absent the elaborate New York due process procedures, the dissent was confident that the *OFFER* Court would have based the decision more clearly on the liberty interest present rather than choosing the narrow procedural route.[108] The Fifth Circuit's dilemma in interpreting the "limited liberty interest" language of *OFFER* is indicative of the problems state legislatures, agencies, and courts will have in deciding what the Supreme Court has said about the due process safeguards that are necessary in the foster family relationship.[109]

The *OFFER* Court's extended treatment of the realities and complexities of the foster care system, along with the well-documented discussion of the psychological parent-child bond, can be interpreted as a continuation of the Supreme Court's ongoing concern about state intervention in the family, whether it is a legally defined family or a de facto family. The Supreme Court's endorsement, however limited, of the existence of a protected

104. *Id.*

105. *Id.* at 1210.

106. *Id.* at 1212 (Tuttle, J., dissenting).

107. *Id.* at 1213 (Tuttle, J., dissenting).

108. *Id.* (Tuttle, J., dissenting).

109. *Compare* W.C. v. P.M., 4 FAM. L. REP. (BNA) 2333 (N.J. App. Div. 1978) (relying on *OFFER*, the court ruled foster parents had no standing to insist upon a plenary hearing as a precondition to an agency decision to remove children from their home to the natural parents) *with In re* David E., 4 FAM. L. REP. (BNA) 2214 (Pa. C.P. Allegheny County 1978) (no requirement for the state agency to restore the natural family if the child's close emotional ties with the foster parents dictate his staying in their home).

liberty interest sets the stage for new approaches to difficult custody problems in foster care, adoption, or third-party relationships. The recognition of a psychological parent-child relationship provides added protection for the child in the state custodial system, increasing the likelihood that permanent, binding relationships receive consideration by the state agencies and courts.[110] *OFFER* defines the dilemma present in balancing the legal rights of the natural parents, long-term foster parents, and the child. In its lengthy discussion of these issues, the Court has, even by the narrowest reading, endorsed the notion that children involved in ongoing meaningful relationships, whether biological or de facto, have due process rights that cannot be denied. The legislatures and the courts must further define what processes are required. When a long-term placement is involved, the only prudent course would be to require notice to the affected parties and an informal hearing prior to removal.

MARY ELIZABETH WALKER

110. The complexity of the issues in *OFFER* is highlighted by the sharp division among legal and child psychology experts as demonstrated by the various amicus briefs filed. The May 1977 issue of the American Civil Liberties Union's CHILDREN'S RIGHTS REPORT features the positions of the experts. One side wants to gain legal recognition for the rights of foster parents to form binding relationships with the children in their care, freeing the foster parents from arbitrary agency action in terminating the relationships (psychological-bond theory). The other side supports the rights of natural parents and the need for less state intervention in family relationships. 3 FAM. L. REP. (BNA) 2462 (1977).

Constitutional Law—Equal Protection—Aliens—State Restrictions on Employment

Plaintiff, an alien[1] lawfully admitted[2] to the United States as a permanent resident, challenged a New York statute that excluded noncitizens from employment on the state police force.[3] Openings for state trooper positions were filled on the basis of a competitive examination, which plaintiff was not allowed to take. Plaintiff argued that the statute denied aliens the equal protection of the laws guaranteed by the fourteenth amendment.[4] The

1. Aliens admitted to the United States are classified by residency status. Examples of classes of nonimmigrant aliens are tourists, students, diplomats, and crews of foreign vessels. *See* 8 U.S.C. § 1101 (15) (1970). The term "immigrant" applies to all classes not excluded as nonimmigrants. *Id.* Permanent resident alien status is accorded only to immigrants who have been granted the privilege of living permanently in the United States and of being naturalized. *Id.* § 1101 (20). For limitations on immigration by number and by nationality, see *id.* §§ 1151-1152 (1970); for excludable aliens, see *id.* § 1182 (1970).

Congress has exclusive power to regulate immigration as an inherent sovereign power, Fong Yue Ting v. United States, 149 U.S. 698, 712-16 (1893); Chinese Exclusion Case, 130 U.S. 581, 600 (1889), and is vested with exclusive authority "to establish a Uniform Rule of Naturalization." U.S. CONST. art. I, § 8, cl. 4. Congressional actions pursuant to its immigration and naturalization powers are political matters usually not reviewable by the judiciary. J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 589-92 (1978) [hereinafter cited as CONSTITUTIONAL LAW]. Prior to admission into the territory of the United States, aliens are unprotected by any constitutional guarantees. *Id.* at 591. After entry, aliens are protected by all constitutional provisions that refer to *persons* rather than to *citizens*, including the due process clause of the fifth amendment, Wong Wing v. United States, 163 U.S. 228, 237-38 (1896), and the equal protection clause of the fourteenth amendment. Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886).

2. The special problems of illegal aliens are outside the scope of this Note. "Even [an alien] whose presence in this country is unlawful . . . is entitled to . . . constitutional protection." Matthews v. Diaz, 426 U.S. 67, 77 (1976). The protection appears to be limited. *See* DeCanis v. Bica, 424 U.S. 351 (1976) (illegal aliens have no right to work, and states may constitutionally prohibit their employment).

3. The statute, which was enacted in 1928 and never amended, reads in pertinent part: "No person shall be appointed to the New York state police force unless he shall be a citizen of the United States . . . ." N.Y. EXEC. LAW § 215 (3) (McKinney Supp. 1972-1978).

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

United States District Court for the Southern District of New York found the statute constitutional.[5] On appeal to the United States Supreme Court, *held*, affirmed. A state's statutory exclusion of aliens from its police force does not violate the equal protection clause of the fourteenth amendment since citizenship bears a rational relationship to the special qualifications necessary for performing the police function. *Foley v. Connelie*, 435 U.S. 291 (1978).

When testing discrimination on the basis of alienage,[6] the Supreme Court must both determine the proper standard of review and apply the chosen standard to the government action alleged to be discriminatory. In reviewing state legislation involving aliens, the Court has evolved an exacting standard[7] and has consistently found invalid state statutes that exclude aliens from occupations over which the state exercises control.[8] Although the Court has several times intimated that a relaxation of judicial

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person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

5. 419 F. Supp. 889 (S.D.N.Y. 1976), *aff'd*, 435 U.S. 291 (1978). Relying on dictum in Sugarman v. Dougall, 413 U.S. 634 (1973), see text accompanying notes 41-49 *infra*, the district court held that strict scrutiny did not apply to this statute because the police function is an important executive position from which states are permitted to exclude noncitizens upon a showing of a rational basis for the exclusion. 419 F. Supp. at 895. The lower court also found that the statute would be upheld under the strict scrutiny test if that standard were used since in the court's opinion the state interest identified was compelling, no less drastic means were available for achieving the state's purpose, and the language of the statute was sufficiently precise. *Id.* *See* note 14 *infra*.

6. Alienage should not be confused with national origin although both are suspect classifications for equal protection purposes. National origin is encompassed by race and ancestry in the Court's analyses, see, for example, Korematsu v. United States, 323 U.S. 214 (1944), while alienage refers only to noncitizenship. For a case distinguishing alienage and national origin as bases for discrimination, see Espinoza v. Farah Mfg. Co., 414 U.S. 86, 88-91 (1973).

7. In the area of federal regulation, on the other hand, the standard of review is minimal. "Congress, as an aspect of its broad power over immigration and naturalization, enjoys rights to distinguish among aliens that are not shared by the States." Nyquist v. Mauclet, 432 U.S. 1, 7 n.8 (1977). "[W]e are especially reluctant to question the exercise of congressional judgment," Matthews v. Diaz, 426 U.S. 67, 84 (1976), "there may be overriding national interests which justify selective federal legislation that would be unacceptable for an individual State." Hampton v. Mow Sun Wong, 426 U.S. 88, 100 (1974). *See generally* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 1053-54 (1978).

8. *See* text accompanying notes 35-47 *infra*.

scrutiny might be appropriate when state legislation excludes aliens from certain nonelective occupations closely connected with the state's political process,[9] the instant case is the first that applies the rational basis test to uphold a discriminatory employment statute. In holding that a state need demonstrate only a rational basis for a total exclusion of aliens from positions in law enforcement, the Court departs significantly from its previously well-settled standards and attitudes concerning the rights of aliens.

As early as 1886 in *Yick Wo v. Hopkins*,[10] the Supreme Court recognized that the protections of the fourteenth amendment extended to all persons within the territorial jurisdiction of the United States, including aliens permanently ineligible for citizenship. The latitude permitted for state regulation consistent with equal protection has not been so easy to determine.[11] In any case in which discrimination in the operation of the law is suspected, a court should examine the relationship between the government purpose asserted and the statutory classification created. Depending upon the identity of the group affected and the importance of the right or interest restricted, a court will evaluate the constitutionality of a statute by one of three tests: the rational basis test,[12] the intermediate test,[13] or the strict scrutiny test.[14]

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9. *See* text accompanying notes 47-50 *infra*.

10. 118 U.S. 356 (1886) (overturning municipal regulation that discriminated invidiously against alien Chinese laundry owners).

11. The concept of equal protection has not been thought to require absolutely equal treatment: "[t]he Constitution does not require things which are different . . . to be treated in law as though they were the same." Tigner v. Texas, 310 U.S. 141, 147 (1940). At the very least, however, members of an identifiable group may not be subjected to arbitrary, capricious, or unreasonable discrimination. Reed v. Reed, 404 U.S. 71, 75-76 (1971).

12. The rational basis test requires that the government interest be legitimate and that the relationship between the purpose served by the statute and the discriminatory classification be a reasonable one. Renaldi v. Yeager, 384 U.S. 305, 308-09 (1966). Under the rational basis test, which applies primarily to general economic legislation, CONSTITUTIONAL LAW, *supra* note 1, at 524, and is used when a more exacting standard is inappropriate, *see* notes 13-14 *infra*, "a statutory classification will not be set aside if any state of facts reasonably may be conceived to justify it." McGowan v. Maryland, 366 U.S. 420, 426 (1961). *See, e.g.*, Dandridge v. Williams, 397 U.S. 471 (1970); Tigner v. Texas, 310 U.S. 141 (1940); F.S. Royster Guano Co. v. Virginia, 253 U.S. 412 (1920); Lindsley v. Natural Carbolic Gas Co., 220 U.S. 61 (1911); *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1077-87 (1969); Note,

Legislative Purpose, Rationality, and Equal Protection, 82 YALE L.J. 123 (1972). *See generally* L. TRIBE, *supra* note 7, at 994-1000.

Although the rational basis test is the most lenient standard of review under which "[s]tate legislatures are presumed to have acted within their constitutional power," McGowan v. Maryland, 366 U.S. at 425, statutes are occasionally struck down when the test is used. *See, e.g.*, United States v. Moreno, 413 U.S. 528 (1973) (government interest not legitimate when motivation is to harm an unpopular minority); Takahashi v. Fish and Game Comm'n, 334 U.S. 410 (1948) (state interest not legitimate when preempted by federal government) (discussed in text accompanying notes 19-25 *infra*); *see* text accompanying notes 23 & 26-28 *infra*. *See also* Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205 (1970).

13. More exacting than the rational basis test but less likely to be fatal to the challenged statute than the strict scrutiny test, the intermediate test, *see* Craig v. Boren, 429 U.S. 190, 218 (1976) (Rehnquist, J., dissenting), requires that the discriminatory classification created by a statute "serve important governmental objectives and . . . be substantially related to the achievement of those objectives." *Id.* at 197. Most clearly enunciated in *Craig*, the intermediate standard of review has been developed since 1971, with some hesitancy and disagreement among the members of the Court, primarily to evaluate 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 7, at 1082-98; Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972); Wilkinson, *The Supreme Court, the Equal Protection Clause, and the Three Faces of Constitutional Equality*, 61 VA. L. REV. 945 (1975).

14. First suggested in a famous footnote in 1938, United States v. Carolene Prod. Co., 304 U.S. 144, 152-53 n.4 (1938), strict scrutiny, the most rigid standard of equal protection review, has been defined in a number of cases since 1944. The test requires the government to show that the purpose of a statute is to advance a constitutionally compelling state interest in a manner least restrictive to the group against whom the statute discriminates. Dunn v. Blumstein, 405 U.S. 330, 342-43 (1971); Shelton v. Tucker, 364 U.S. 479, 488 (1960). In addition, "legislative enactments must be narrowly drawn to express only the legitimate state interests at stake." Roe v. Wade, 410 U.S. 113, 155 (1973). A statute subject to strict scrutiny is almost always struck down; it is said to be presumptively unconstitutional and to bear a heavy burden of justification. *See* Dunn v. Blumstein, 405 U.S. 330, 343 (1971). *See also* Shapiro v. Thompson, 394 U.S. 618, 637 (1969); Loving v. Virginia, 388 U.S. 1, 11 (1967). *See generally Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1087-1132 (1969); CONSTITUTIONAL LAW, *supra* note 1, at 524-25; L. TRIBE, *supra* note 7, at 1000-12.

Strict scrutiny is triggered when a statute creates a "suspect" classification involving easily identifiable "discrete and insular minorities" and reflects a history of prejudice and unequal treatment to which the political process has been unresponsive. United States v. Carolene Prod. Co., 304 U.S. 144, 152-53 n.4 (1938). *See, e.g.*, McLaughlin v. Florida, 379 U.S. 184, 191 (1964) (race); Hernandez v. Texas, 347 U.S. 475, 477-79 (1954) (national origin); Korematsu

For more than half a century after the ratification of the fourteenth amendment in 1868, the Supreme Court applied the rational basis test to classifications based upon race or national origin.[15] After 1944, when *Korematsu v. United States* declared such classifications to be "immediately suspect,"[16] the Court swiftly shifted to the more exacting strict scrutiny standard whenever a state statute was challenged as a denial of equal protection to a racial minority.[17] The Court did not apply the new standard to statutory classifications based upon citizenship until 1971.

The Court's failure to apply strict scrutiny standards to alienage cases heard between 1944[18] and 1971 stems partly from the

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v. United States, 323 U.S. 214, 216-17 (1944) (national origin). *Cf.* Trimble v. Gordon, 430 U.S. 762, 767 (1977) (classifications based on legitimacy are not, although such classifications may require more elevated scrutiny than the rational basis test); Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 312-13 (1976) (classifications based on age are not suspect); James v. Valtierra, 402 U.S. 137 (1971) (implicit holding that classifications based on wealth are not suspect). Strict scrutiny is also applied when the legislation interferes with a fundamental right. In addition to first amendment guarantees, rights that the Court has held fundamental include rights to interstate travel, Shapiro v. Thompson, 394 U.S. 618, 630-31 (1969); to vote, Harper v. Virginia Bd. of Elections, 383 U.S. 663, 670 (1966); to associate, N.A.A.C.P. v. Alabama *ex rel.* Paterson, 357 U.S. 449, 460-61 (1958); to procreate, Skinner v. Oklahoma, 316 U.S. 535, 541 (1942). *Cf., e.g.*, Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 313 (1976) (no right to government employment); San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 36-37 (1973) (no right to education); Lindsey v. Normet, 405 U.S. 56, 74 (1972) (no right to decent housing); Dandridge v. Williams, 397 U.S. 471, 485 (1970) (no right to welfare benefits).

15. *See, e.g.*, Gong Lum v. Rice, 275 U.S. 78 (1927) (upholding school segregation by national origin); Berea College v. Kentucky, 211 U.S. 45 (1908) (upholding a fine imposed upon an integrated private college); Cummings v. Board of Educ., 175 U.S. 528 (1899) (permitting closing of a black high school for economic reasons alone); Plessy v. Ferguson, 163 U.S. 537 (1896) (upholding state statute requiring racially segregated railway passenger cars).

16. 323 U.S. 214, 216 (1944).

17. "[N]o such classification has been upheld since 1945 when there was any likelihood that it would burden racial minorities." CONSTITUTIONAL LAW, *supra* note 1, at 535. *See, e.g.*, cases cited in note 28 *infra*.

18. After the *Yick Wo* decision in 1886, *see* note 10 *supra* and accompanying text, and until 1948, aliens were afforded only minimal equal protection under the rational basis test. Truax v. Raich, 239 U.S. 33 (1915), invalidated a state statute requiring employers of more than five workers to employ citizens in at least 80% of their positions and held that states were prohibited from encroaching on the exclusive federal power to admit and to exclude aliens by

fact that the doctrine of federal preemption was adequate to invalidate state statutes that discriminated against foreign nationals. In *Takahashi v. Fish and Game Commission,*[19] for example, a California statute prohibited issuance of a commercial fishing license to any person ineligible for citizenship. The classification was directed primarily against alien Japanese. The federal immigration and naturalization laws in force in 1948, which classified immigrants on a racial basis,[20] permitted Japanese aliens to reside in the United States but made them permanently ineligible for citizenship.[21] Thus the issue before the Court was whether

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denying them employment in "the common occupations of the community." *Id.* at 43. *See also* note 22 *infra.* However, the Court permitted alienage classifications related to a recognized special public interest. 239 U.S. at 39-40. The areas of special public interest were the control of state property and resources, regulation of the distribution of real property, and employment in the public sector. *Id.* Thus, aliens were forbidden to operate pool halls, Ohio *ex rel.* Clark v. Deckebach, 274 U.S. 392 (1927); to own land for agricultural purposes, Terrace v. Thompson, 263 U.S. 197 (1923); to be employed by public contractors, Crane v. New York, 239 U.S. 195 (1915); to kill wild game, Patsone v. Pennsylvania, 232 U.S. 138 (1914).

The same historical period saw minimal protection for other minority groups as Roberts v. City of Boston, 59 Mass. (5 Cush.) 198 (1849), upheld a statute creating racial segregation in public schools and Plessy v. Ferguson, 163 U.S. 537 (1896), inaugurated the separate but equal doctrine in upholding a state statute requiring racially segregated railway accommodations. *See also* note 15 *supra.* Like the separate but equal doctrine, the special public interest doctrine was gradually eroded and finally abandoned as equal protection challenges to discriminatory legislation became the primary vehicle for enforcing minority rights at a time when the country's conscience became more sensitive to them.

19. 334 U.S. 410 (1948).

20. The first congressional classification of immigrants on the basis of race or national origin was the Chinese Exclusion Act of 1882, ch. 126, 22 Stat. 58 (1882). The Act was upheld in the Chinese Exclusion Case, 130 U.S. 581 (1889), and was not repealed until 1943. *See* note 21 *infra.* From 1924 until 1965, immigration was regulated by a quota system based on national origin. Immigration Act of 1924, ch. 190, 43 Stat. 153 (1925). Enacted in 1965, 8 U.S.C. § 1152 (a) (1970), currently prohibits discrimination based upon race, sex, nationality, place of birth, or place of residence. For a comprehensive history of immigration law, see F. AUERBACH, IMMIGRATION LAWS OF THE UNITED STATES (3d ed. 1975).

21. Act of Mar. 26, 1790, ch. 3, 1 Stat. 103, made only "free white persons" eligible for citizenship. Eligibility for citizenship was slowly extended to include other aliens. Act of July 14, 1870, ch. CCLIV, § 7, 16 Stat. 254 (aliens "of African descent"); Nationality Act of 1940, ch. 876, § 303, 54 Stat. 1137 ("races indigenous to the Western Hemisphere"); Act of Dec. 17, 1943, Pub. L. No.

California had a legitimate interest in adopting a federal racial classification in order to restrict the employment opportunities of lawfully admitted aliens. In spite of a paragraph of equal protection language, the majority opinion rested its finding that the statute was unconstitutional primarily on the absence of state power to regulate in the area of immigration, holding that "[s]tate laws which impose discriminatory burdens upon the entrance or residence of aliens lawfully within the United States conflict with [the] constitutionally derived federal power to regulate immigration."[22]

Although the *Takahashi* decision was based on the exclusive nature of the federal power over immigration, in a concurring opinion Justice Murphy suggested that when a statutory classification is demonstrably motivated by popular hostility toward a minority group, the legislation is unreasonable and invalid as a denial of equal protection even under a minimal test.[23] The Justice pointed out that the California statute was "the direct outgrowth of antagonism toward persons of Japanese ancestry"[24] during World War II and declared that "[t]his discrimination, patently hostile, is not based on a reasonable ground of classification and, to that extent, . . . is in violation of . . . the Fourteenth Amendment."[25] In *Oyama v. California*,[26] decided the same year,

199, § 3, 57 Stat. 600 (the Chinese); Act of July 2, 1943, Pub. L. No. 483, § 303(a), 60 Stat. 416 (1946) ("Filipinos and persons and races indigenous to India"). The Immigration and Nationality Act of 1952, 8 U.S.C. § 1422 (1970), eliminated all racial bars to naturalization.

22. 334 U.S. at 419. *See also* Truax v. Raich, 239 U.S. 33, 42 (1915). "The authority to control immigration—to admit or exclude aliens—is vested solely in the Federal Government. The assertion of an authority to deny to aliens the opportunity of earning a livelihood when lawfully admitted to the State would be tantamount to the assertion of the right to deny them entrance and abode, for in ordinary cases they cannot live where they cannot work." *Id.* (citation omitted).

23. 334 U.S. at 422 (Murphy, J., concurring). *Accord*, United States v. Moreno, 413 U.S. 528 (1973), which struck down a federal regulation making unrelated members of the same household ineligible for food stamps. The *Moreno* Court held that "a congressional desire to harm a politically unpopular group cannot constitute a *legitimate* state interest." *Id.* at 534 (emphasis in original).

24. 334 U.S. at 422 (Murphy, J., concurring).

25. *Id.* at 427 (Murphy, J., concurring).

26. 332 U.S. 633 (1948). *Oyama* was an alienage case only by indirection, but it is nevertheless important. The Court recognized that California's Alien

two concurring justices argued that California's Alien Land Law was unconstitutional under the rational basis test because of the obviously anti-Japanese animus of the legislature.[27]

Between 1949 and 1971 the state supreme courts used the patent-hostility doctrine to invalidate anti-Oriental legislation.[28] During this period the Supreme Court fashioned the strict scrutiny standard in equal protection cases involving race,[29] but had no occasion to consider alienage. Thus until the present decade, state legislation that discriminated against aliens was permitted unless preempted by federal law or clearly motivated by hostility to immigrants of minority races.

The Supreme Court's practice of evaluating state statutes by

Land Law prohibited aliens ineligible for citizenship from owning or transferring agricultural land; any property acquired in violation of the statute was to escheat at the date of acquisition or transfer. *Id.* at 636. Property recorded in the name of minor plaintiff, an American citizen, escheated because paid for by his father, a Japanese alien permanently ineligible for citizenship under the naturalization laws. *See* note 21 *supra* and accompanying text. Plaintiff asserted that the escheat was a denial of equal protection to an American citizen on the basis of his national origin, and the Court agreed. The statute itself was not found unconstitutional since the issue was not before the Court, but the decision effectively crippled the statute's discriminatory operation since it permitted an alien to buy land in the name of his native-born children.

27. 332 U.S. at 647 (Black, J., concurring); *id.* at 650 (Murphy, J., concurring). Both opinions also cited international law and policy as justifications for overturning the statute. Justice Black observed that America's ratification of the United Nations charter required that the laws of this country make no distinction on the basis of sex, religion, race, or language and pointed out that the statute contradicted the international charter. *Id.* at 649-50. Justice Murphy traced the international consequences of the legislation, which had caused diplomatic protest from the Japanese government and furious resentment against America among the Japanese people. *Id.* at 655-56.

28. Between 1949 and 1970 the Supreme Court decided such landmark cases in the race area as Loving v. Virginia, 388 U.S. 1 (1967) (overturning antimiscegenation statute on equal protection grounds); Bolling v. Sharpe, 347 U.S. 497 (1954) (prohibiting racial segregation in schools in the District of Columbia under the fifth amendment); Brown v. Board of Educ., 347 U.S. 483 (1954) (prohibiting racial segregation in schools under the fourteenth amendment).

29. *See, e.g.*, Fujii v. State, 38 Cal. 2d 718, 242 P.2d 617 (1952) (invalidating California's Alien Land Law); State v. Oakland, 129 Mont. 347, 287 P.2d 39 (1955) (invalidating state statute denying aliens the right to own land); Namba v. McCourt, 185 Or. 579, 204 P.2d 569 (1949) (invalidating state statute denying aliens ineligible for citizenship—primarily Japanese—the right to own land).

a minimal standard in alienage cases changed dramatically in 1971. In *Graham v. Richardson*[30] the Court invalidated as a denial of equal protection to aliens state welfare statutes that conditioned benefits upon citizenship or upon a fifteen-year residence in the United States. The Court held that "classifications based upon alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny. Aliens as a class are a prime example of a 'discrete and insular' minority . . . for whom such heightened judicial solicitude is appropriate."[31] The Court found that the justifications advanced by the state for excluding aliens—limiting expenses and saving welfare costs—could not survive the strict scrutiny test.[32]

Two years after the *Graham* Court held alienage to be a suspect classification, the Court defined more precisely the application of the strict scrutiny test to alienage classifications in two cases involving state restrictions on employment. Connecticut's exclusion of noncitizens from admission to the bar was challenged in *In re Griffiths*.[33] In discussing the appropriate standard of review, the Court said, "[t]o justify the use of a suspect classification, a State must show that its purpose or interest is both constitutionally permissible and substantial and that its use of the classification is necessary . . . to the accomplishment of its purpose or the safeguarding of its interest."[34] While recognizing the

30. 403 U.S. 365 (1971).

31. *Id.* at 372 (citations and footnotes omitted). Recognizing alienage as a suspect classification was not strictly necessary in *Graham*; as in *Takahashi* federal preemption was sufficiently dispositive without strict scrutiny. The Court also held that "[s]tate laws that restrict the eligibility of aliens for welfare benefits merely because of their alienage conflict with . . . overriding national policies in an area constitutionally entrusted to the Federal Government." *Id.* at 378. Nevertheless, all the justices except Justice Harlan (who, without comment, joined only the section of the opinion dealing with preemption) agreed that classification based upon alienage was suspect.

32. *Id.* at 376. Administrative convenience is not considered sufficient justification for a statute subject to elevated scrutiny. "[A]s the Court's assessment of the weight and value of the individual interest escalates, the less likely it is that mere administrative convenience . . . will be sufficient to justify what otherwise would appear to be irrational discriminations." Vlandis v. Kline, 412 U.S. 441, 459 (1973) (White, J., concurring). "[T]he Constitution recognizes higher values than speed and efficiency." Stanley v. Illinois, 405 U.S. 645, 656 (1972).

33. 413 U.S. 717 (1973).

34. *Id.* at 721-22 (footnotes omitted).

state's "constitutionally permissible and substantial interest" in maintaining high professional standards among its lawyers,[35] the Court found the total exclusion of aliens unnecessary. The Court determined that the individualized procedures for admission to the bar and the continuing post-admission scrutiny and discipline to which lawyers may be subjected were sufficient to safeguard the state's interest in high professional standards and individual loyalty without the exclusion of all noncitizens.[36] In answer to Connecticut's argument that as an officer of the court a lawyer is "entrusted with the 'exercise of actual government power,' "[37] the Court observed that "the status of holding a license to practice law [does not] place one so close to the core of the political process as to make him a formulator of government policy."[38]

Sugarman v. Dougall,[39] decided the same day as *Griffiths*, added a further requirement to the strict scrutiny test defined in *Griffiths*: "the means the state employs [to advance its substantial interest] must be precisely drawn in light of the acknowledged purpose."[40] The Court held unconstitutional a New York statute that excluded aliens from the state competitive civil service. As in *Griffiths* the Court found a substantial interest, this time in limiting participation in the state "government to those who are within 'the basic conception of a political community.' "[41] But since New York's competitive civil service included a broad range of occupations (garbage collectors, for example), the Court found little merit in the state's contention that all its civil servants were direct participants " 'in the formulation and execution of [broad] government policy.' "[42] Without denying the state's right to disqualify individual aliens either because of their personal characteristics or because of the requirements of a particular position,[43] the Court found the total exclusion of aliens too broad and imprecise to achieve the state's purpose by means

35. *Id.* at 722-23.

36. *Id.* at 725-27.

37. *Id.* at 728 (citation omitted). The state had argued that because a lawyer is an officer of the court, he participates directly in government in much the same sense as any other office holder.

38. *Id.* at 729.

39. 413 U.S. 634 (1973).

40. *Id.* at 643.

41. *Id.* at 642 (quoting Dunn v. Blumstein, 405 U.S. 330, 344 (1972)).

42. *Id.* at 641 (quoting Brief for Appellants at 17).

43. *Id.* at 646-47.

consistent with the Constitution.[44]

Griffiths hinted at possible exceptions to the strict scrutiny rule in alienage cases;[45] *Sugarman* went farther in defining the exception:

> [O]ur scrutiny will not be so demanding where we deal with matters resting firmly within a State's constitutional prerogatives. This is no more than a recognition of a State's historical power to exclude aliens from participation in its democratic political institutions, and a recognition of a State's constitutional responsibility for the establishment and operation of its own government, as well as the qualifications of an appropriately designated class of public office holders.[46]

The Court also stated:

> [T]his power and responsibility of the State applies, not only to the qualifications of voters, but also to persons holding state elective or important non-elective executive, legislative, and judicial positions, for officers who participate directly in the formulation, execution, or review of broad public policy perform functions that go to the heart of representative government. There [query] is "where citizenship bears some rational relationship to the special demands of the particular position."[47]

The *Sugarman* dictum affirmed state constitutional prerogatives under article IV and the tenth amendment.[48] Implicit in the Court's concession, however, that "[a] restriction on the employment of noncitizens, narrowly confined, could have particular relevance to . . . important state responsibility"[49] is the more fundamental principle that only citizens should govern citizens. Perhaps unfortunately, *Sugarman* left unidentified the nonelective positions involving sufficient political power to constitute an aspect of government.

Three years after *Sugarman*,[50] in *Nyquist v. Mauclet*,[51] New

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44. *Id.* at 647. The Court recognized but did not decide the issue of federal preemption. *Id.* at 646. *See* text accompanying note 22 *supra*.

45. 413 U.S. at 729 n.21.

46. 413 U.S. at 648 (citations and footnotes omitted).

47. *Id.* at 647 (citation omitted) (quoting Dougall v. Sugarman, 339 F. Supp. 906, 911 (1971)).

48. 413 U.S. at 648.

49. *Id.* at 649.

50. Examining Bd. v. Flores de Otero, 426 U.S. 572 (1976), overturned a Puerto Rican statute that prevented certain classes of aliens from practicing as

York unsuccessfully invoked the *Sugarman* exception to the strict scrutiny test.[52] New York's tuition assistance program for students in higher education programs was restricted to United States citizens and to aliens who had declared their intention to become citizens.[53] New York claimed that its purpose in excluding aliens was to encourage naturalization and to increase "the educational level of the electorate."[54] The state contended that both justifications were related to New York's power to define its "political community."[55] The Court found that the interest in encouraging naturalization was preempted by the federal government's exclusive control over immigration and naturalization.[56] As for the education of the electorate, the Court observed that the *Sugarman* dictum constituted only a narrow exception to the strict scrutiny rule and that if education were included within the state's power to control its political processes, "[t]he exception would swallow the rule."[57] The Court found the state's interest insubstantial under the strict scrutiny test and overturned the exclusionary statute.[58]

The alienage cases decided since 1948 demonstrate that the Court closely restricted the circumstances under which a state could discriminate against permanent residents in favor of American citizens. The decisions rested both upon the exclusive power of the federal government to regulate immigration and naturalization under article I of the Constitution and upon the equal protection clause of the fourteenth amendment. While allowing the states to exclude noncitizens from voting, running for elective

civil engineers. The Court applied the strict scrutiny test and found the exclusion unnecessary to further any asserted state interest.

51. 432 U.S. 1 (1977).

52. *Id.* at 10.

53. The Court has treated classifications that discriminate among aliens in the same manner as those that discriminate against all aliens. *See, e.g.*, Examining Bd. v. Flores de Otero, 426 U.S. 572 (1976) (only aliens who had not taken a prescribed course of instruction ineligible for civil engineering license); Graham v. Richardson, 403 U.S. 365 (1971) (only aliens who had not lived in the United States a total of fifteen years ineligible for state welfare assistance); Takahashi v. Fish and Game Comm'n, 334 U.S. 410 (1948) (only aliens ineligible for citizenship prohibited from commercial fishing).

54. 432 U.S. at 10.

55. *Id.* (citations omitted); *see* text accompanying note 48 *supra*.

56. *Id.* at 10. *See* note 1 *supra*; note 22 *supra* and accompanying text.

57. 432 U.S. at 11.

58. *Id.* at 10-12.

office, and serving as jurors,[59] the Court consistently overturned statutes that discriminated either openly or invidiously against aliens in education, welfare, and employment. With respect to restrictions on employment, the Court noted that "the States have had the greatest difficulty in persuading this Court that their interests are substantial and constitutionally permissible, and that the discrimination is necessary for the safeguarding of those interests."[60] In spite of dictum in *Sugarman v. Dougall* indicating that restrictions on certain occupations might not be subject to strict judicial review,[61] between 1971 and 1978 the Court held alienage to be a suspect classification, applied the strictest standard of constitutional review, and overturned every alienage-based state restriction on employment that it reviewed.

In *Foley v. Connelie*,[62] the instant case, the Court for the first time recognized an occupation to be within the *Sugarman* exception to the strict scrutiny test. In upholding New York's statutory exclusion of all aliens from the state police force, the Court found that state troopers are " 'important nonelective . . . officers who participate directly in the . . . execution . . . of broad public policy' "[63] and applied the rational basis standard of review. In support of their finding, the majority[64] reasoned that the pervasiveness of the police presence in modern society, the broad and varied discretionary powers of officers, and the "high degree of

59. Exclusion of aliens from holding elective federal office is mandated by U.S. CONST. art. I, § 2, cl.2; *id.* § 3, cl.3; *id.* art. II, § 5. Exclusion of aliens from voting is implicitly authorized by *id.* amend. XV, § 1. Exclusion of aliens from federal juries was allowed under the strict scrutiny test in Perkins v. Smith, 370 F. Supp. 134 (D. Md. 1974), *aff'd*, 426 U.S. 913 (1976), *followed*, United States v. Gordon-Nikkar, 518 F.2d 972 (5th Cir. 1975). Although restrictions on alien suffrage and election to federal office have not been questioned at the Supreme Court level, the Court in *Foley* clearly indicates that these exclusions are permitted and that exclusion of aliens from juries is not only constitutional but subject only to the rational basis test. 435 U.S. 291, 296 (1978).

60. Examining Bd. v. Flores de Otero, 426 U.S. 572, 603 (1976).

61. 413 U.S. at 647-48. *See* text accompanying notes 48-49 *supra*.

62. 435 U.S. 291 (1978).

63. *Id.* at 300 (citation omitted).

64. Chief Justice Burger wrote the opinion in which Justices Stewart, White, Powell, and Rehnquist joined. Justices Stewart and Blackmun filed concurrences; Justices Marshall and Stevens filed dissenting opinions in both of which Justice Brennan joined. Justice Stevens also joined in Justice Marshall's dissent.

judgment and discretion"[65] required of policemen indicate that the occupation of state trooper fulfills "one of the basic functions of government."[66] Given the nature of the police function, the Court stated,

> it would be as anomalous to conclude that citizens may be subjected to the broad discretionary powers of noncitizen police officers as it would be to say that judicial officers and jurors with power to judge citizens can be aliens. . . . In the enforcement and execution of the laws the police function is one where citizenship bears a rational relationship to the special demands of the particular position.[67]

The Court did not overrule any alienage case of the past three decades. As Justice Stewart pointed out in his concurring opinion, however, the decision is difficult to reconcile with such cases as *In re Griffiths*[68] and *Sugarman v. Dougall.*[69] In *Foley*, as in other cases, the state maintained an individualized screening process for all applicants.[70] *Sugarman* as well as *Foley* involved employment in the public sector;[71] *Griffiths* as well as *Foley* concerned an occupation in which judgment and discretion are important elements, even though lawyers do not exercise their judgment on behalf of the state.[72] Had the statute in *Foley* been subjected to strict judicial scrutiny, it almost certainly would have been invalidated on the authority of *Griffiths* and *Sugarman*, not because the state's interest in the quality of its police force is insubstantial but because the classification is unnecessary to advance that interest.[73] The screening procedures and continued

65. 435 U.S. at 298.

66. *Id.* at 297.

67. *Id.* at 299-300.

68. 413 U.S. 717 (1973). *See* text accompanying notes 35-40 *supra.*

69. 413 U.S. 634 (1973). *See* text accompanying notes 41-50 *supra. Foley* is also difficult to reconcile with Examining Bd. v. Flores de Otero, 426 U.S. 572 (1976); *see* note 50 *supra.* Justice Stewart explained that he concurred, "only because I have become increasingly doubtful about the validity of those decisions." 435 U.S. at 300 (Stewart, J., concurring).

70. *See* Examining Bd. v. Flores de Otero, 426 U.S. 572 (1976) (examination); *In re* Griffiths, 413 U.S. 717 (1973) (bar examination); Sugarman v. Dougall, 413 U.S. 634 (1973) (competitive examination).

71. 413 U.S. 634 (1973) (New York civil service).

72. 413 U.S. 717 (1973) (practice of law).

73. *See* text accompanying note 43 *supra.* The district court thought that the statute could withstand strict scrutiny, but the analysis failed to explore the

supervision of its officers available to the state probably would have been found sufficient to ensure that only the most highly qualified applicants, as the state defines those qualifications, entered and remained on the police force.[74] The justification for lowering the standard of review and sustaining an admittedly discriminatory statute must be found, if at all, in a characteristic of the police profession so significant that it distinguishes policemen from lawyers, civil servants, and workers practicing the common occupations of the community.[75]

The police profession is not denigrated by the suggestion that the majority's elevation of the state police to the level of "important nonelective officials" who execute "broad public policy" is unjustified. As Justice Marshall observed in dissent, garbage collectors and firemen also execute the public policy,[76] and the analogy between policemen and firemen is clearly more apt than the analogy between policemen and governors. Dissenting, Justice Stevens pointed out that the judiciary should not tolerate, and certainly should not advance, the argument that the police presence is so pervasive and powerful that it functions at " 'the heart of representative government' ";[77] he observed that "in our representative democracy neither the constabulary nor the military is vested with broad policymaking responsibility."[78]

The Court's determination that the police profession is an occupation that justifies relaxation of the strict scrutiny standard is not persuasive. Even if the rational basis standard were the proper test, however, the application of the relaxed standard in this case does not compel the conclusion that excluding aliens from a state police force is rationally related to the state's purpose. The Court did not clearly identify either the specific duties of a state trooper or the specific objectionable characteristic of all permanent residents that makes them unsuitable candidates for

necessity for the sweeping exclusion. Foley v. Connelie, 419 F. Supp. 889, 899 (S.D.N.Y. 1976), *affd*, 435 U.S. 291 (1978); *see* note 5 *supra*.

74. *See In re* Griffiths, 413 U.S. 717 (1973); text accompanying note 38 *supra*. *See also* 419 F. Supp. at 904 (Mansfield, J., dissenting).

75. *See* note 18 *supra*.

76. 435 U.S. at 303-04 (Marshall, J., dissenting).

77. *Id.* at 310 (Stevens, J., dissenting) (quoting Sugarman v. Dougall, 413 U.S. 634, 647 (1973)).

78. *Id.* (Stevens, J., dissenting).

employment as policemen. In a footnote the Supreme Court said that the disqualification of aliens is rational because

> [p]olice powers in many countries are exercised in ways that we would find intolerable and indeed violative of constitutional rights. To take only one example, a large number of nations do not share our belief in the freedom of movement and travel, requiring persons to carry identification cards at all times.[79]

The district court, advancing a broader rationale, identified the disqualifying characteristic as "a limbo of loyalty."[80] As Judge Mansfield observed in dissenting from the lower court opinion, however, no evidence indicates that permanent residents as a group are any less law-abiding than citizens.[81] *Foley* allows the state to create an irrebuttable presumption[82] that aliens as a class have no allegiance to the principles incorporated in the Constitution.[83] Moreover, the Court does not establish why alliegence to constitutional principles per se is a more relevant criterion for selecting police officers than willingness and ability to perform police duties as instructed.

In addition to the specific logical objection to ranking policemen with elected government officials and holding that citizenship bears a rational relationship to the qualifications of the former, the recognition of any state-administered exception to the strict scrutiny standard in alienage cases could have an adverse impact on this country's foreign relations. A state's treatment of aliens is an international as well as a constitutional issue. Foreign governments may be affronted by this country's treatment of

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79. *Id.* at 300 n.9. In his concurrence, Justice Blackmun agreed that the opportunity to work as a policeman may properly "be limited to persons who can be presumed to share in the values of [the state's] political community." *Id.* at 302 (Blackmun, J., concurring).

80. 419 F. Supp. at 898.

81. *Id.* at 899 (Mansfield, J., dissenting); *see* 435 U.S. at 312 (Stevens, J., dissenting).

82. *See* 435 U.S. at 308 (Stevens, J., dissenting). Particularly when applying an elevated form of scrutiny, the Court seldom permits the use of irrebuttable presumptions. *See, e.g.*, Sugarman v. Dougall, 413 U.S. 634 (1973) (alien refused public employment must be allowed an individualized determination that his lack of citizenship renders him unsuitable for the particular employment sought); Stanley v. Illinois, 405 U.S. 645 (1972) (unwed father must be allowed to show fitness as parent in custody proceeding); *see also*, L. TRIBE, *supra* note 7, at 1092-96.

83. 419 F. Supp. at 900.

their nationals.[84] Moreover, restrictions upon alien access to economic opportunity may adversely affect the employment opportunities of Americans who live in countries where the principle of reciprocity governs the treatment of foreign nationals. The application of the strict scrutiny standard in alienage cases has served a dual purpose. In striking down state statutes that exclude aliens from employment, the Court has not only insulated foreign nationals from discrimination but has also effectively reserved to Congress the complete control of national immigrant employment policy, even in areas "firmly within a State's constitutional prerogatives"[85] to which the doctrine of federal preemption does not reach. *Foley*, however, permits the states to adopt discriminatory legislation. While *Foley* itself may not have great international impact, any expansion of the decision would entail the risk of damaging America's reputation abroad.

Clearly the extent of the constitutional and international repercussions of *Foley*, as well as its possible impact upon other areas of law,[86] depends upon the scope ultimately assigned to the

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84. At other times, the Court has been more sensitive to the impact of its alienage decisions in the international arena. *See, e.g.*, Ashakura v. City of Seattle, 265 U.S. 332 (1924) (overturning state employment statute prohibiting aliens from pawnbroking because the statute violated treaty provisions); note 28 *supra*.

85. 413 U.S. 634, 648 (1973). *See* text accompanying notes 48-49 *supra*. The Court's failure to identify any convincing disqualifying characteristic is the subject of most of Justice Stevens' thoughtful dissent. 435 U.S. at 308, 311-12. (Stevens, J., dissenting). "[The Court] should not uphold a statutory discrimination against aliens . . . without expressly identifying the group characteristic that justifies the discrimination." *Id.* (Stevens, J., dissenting). Justice Stevens was able to articulate the characteristic upon which the majority rested its finding that exclusion of all aliens was permissible only as "concern about possible disloyalty," *id.* at 312 (Stevens, J., dissenting), and pointed out that disloyalty had been expressly rejected as a disqualifying characteristic in *In re* Griffiths. 413 U.S. 717, 725-27 (1973).

86. The decision may have an effect on areas of law in which the delimitation of official immunity and the definition of policymaking positions are judicial concerns. Justice Marshall criticized the holding as inconsistent with Scheuer v. Rhodes, 416 U.S. 232 (1974), which in the context of immunity from liability under 42 U.S.C. § 1983 (1970) held that police officers have far less discretionary power than state governors. 435 U.S. at 305 (Marshall, J., dissenting). While admitting that immunity granted to the police is "qualified," the majority relied on an earlier case than *Scheuer*, Pierson v. Ray, 386 U.S. 547, 555-57 (1967), for its assertion that police immunity is justified because of the discretionary power exercised by police officers. 435 U.S. at 298-99. The majority

decision. The reasoning of the *Foley* opinion is elastic enough to allow the *Sugarman* exception to swallow the strict scrutiny rule.[87] Indeed, the exception of employees who are directly involved in the political process might logically extend to immunize from strict scrutiny any state employment restriction that the Court has reviewed since 1973.[88] No doubt the Court will have ample opportunity to refine its holding. The Court has heard, on the average, one major alienage case each year since 1971. Surely in any future litigation the states will assert that the exclusion of aliens from employment lies within their constitutional prerogative to define their political communities.

Foley v. Connelie recognized that exceptional occupations may be so inextricably bound up in the execution of government policy and involve the exercise of such broad discretionary power that the state's determination to exclude foreign nationals is justified if reasonably related to the state's legitimate purposes. The logic of finding police officers to be executors of political policy in the same sense as cabinet officers is questionable and unpersuasive. The opinion does not identify a universal characteristic of all permanent residents that would make any permanent resi-

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cited comparatively but did not reconcile Scheuer v. Rhodes, nor did the Court answer Justice Marshall's objection. *Id.*

Justice Stevens urged that "[t]he Court should draw the line between policymaking and nonpolicymaking positions in as consistent and intelligible a fashion as possible." *Id.* at 310 (Stevens, J., dissenting). He pointed out that in Elrod v. Burns, 427 U.S. 347 (1976), policemen had been protected from political-patronage discharges on the grounds that they did *not* hold policymaking positions. *Id.* at 367. "Yet, inexplicably, every state trooper is transformed into a high ranking, policymaking official when the question presented is whether persons may be excluded from all positions in the police force simply because they are aliens." 435 U.S. at 310 (Stevens, J., dissenting).

87. Between 1886 and 1948 when the Court held that areas of "special public interest" were beyond the reach of the federal preemption doctrine, the exception certainly swallowed that rule as aliens were prohibited from "selling intoxicating liquors, hawking and peddling, selling and manufacturing soft drinks, opening a pool room, acting as pawnbrokers, selling lightning rods, serving as chauffeurs, being employed by corporations, or holding stock in, or forming corporations." Note, *Constitutionality of Restrictions on Aliens' Right to Work*, 57 COLUM. L. REV. 1012, 1021-22. *See* M. KONVITZ, THE ALIEN AND THE ASIATIC IN AMERICAN LAW 190-211 (1946); note 18 *supra*. The danger of expandable exceptions has thus been amply demonstrated at least once in the history of equal protection of aliens.

88. *See* 435 U.S. 300 (Stewart, J., concurring); text accompanying notes 35-51 *supra*.

dent alien[89] who has successfully competed for the position of state trooper incapable of carrying out his police duties as scrupulously or with as much regard for our constitutional principles as an American citizen.[90] Nor does the decision seem necessary since New York would surely have no more difficulty disqualifying an individual alien on the basis of disloyalty or poor performance than an individual citizen.[91] In its narrow preoccupation with state constitutional prerogatives, the Court seemed peculiarly insensitive to the international implications of this decision, nor did it appear to be troubled by the fact that *Foley* must inevitably result in a series of ad hoc decisions until the limits of this new exception are settled.

The preferable course in *Foley* would have been to apply the strict scrutiny test. However, the underlying rationale of this decision may be the desirability of extending greater deference to state legislatures than the Court has done in the past; if so, the intermediate standard[92] would accomplish such a purpose and would nevertheless require the state to frame discriminatory statutes with the sensitivity and precision that the concept of equal protection demands. The judicial intervention in the protection of civil liberties and minority rights that strict scrutiny occasions was a response to the poor record of the states in heeding the commands of the fourteenth amendment.[93] The equal protection cases clearly reveal the political majority's inordinate capacity for callous and unreasoning mistreatment of minority groups.[94]

89. Permanent residence status may not be granted to aliens who have serious physical, mental, or emotional disability, 8 U.S.C. § 1182 (a)(1)-(7) (1970); who are addicted to drugs or alcohol, *id.* (5); who have been convicted of crimes involving moral turpitude, *id.* (9); or traffic in narcotics, *id.* (23); who are sexually immoral, *id.* (11)-(13); who are anarchists, *id.* (28)(A), totalitarians or communists, *id.* (B), or advocates of the unconstitutional overthrow of government, *id.* (F)-(H).

90. *See* note 85 *supra.*

91. *See* 435 U.S. at 308 (Stevens, J., dissenting).

92. *See* note 13 *supra.*

93. Strict scrutiny is invoked when a class has been "subjected to such a history of purposeful unequal treatment or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 28 (1973). *See also* United States v. Carolene Prod. Co., 304 U.S. 144, 152 n.4 (1938).

94. *See, e.g.*, notes 18 & 30 *supra.*

America's history of discrimination against foreign nationals argues against a complete relaxation of judicial vigilance in any area where the treatment of aliens becomes a matter of state law. If *Foley v. Connelie* is not to be undone, it should, at least, not be extended.[95]

HELEN HICKEY DE HAVEN

95. On April 17, 1979, the Supreme Court did extend the government-function exception to strict scrutiny in alienage cases. Ambach v. Norwick, 47 U.S.L.W. 4387 (1979). The Court held that the state need demonstrate only a rational basis for its refusal to certify as a primary or secondary school teacher any alien who has not declared his intention to become a citizen. Using the analysis developed in *Foley*, the Court looked to the role of public education in the political process and to the degree of discretion and responsibility vested in teachers. Ironically, the Court cited Brown v. Board of Education, 347 U.S. 483 (1954), in support of the proposition that public education is the foundation of representative democracy and that public school teachers "[perform] a task 'that go[es] to the heart of representative government.' " 47 U.S.L.W. at 4389 (quoting Sugarman v. Dougall, 413 U.S. 634, 647 (1973)).

The Supreme Court found that the close daily contact between teachers and students, the wide discretion in the method of communicating subject matter, and the function teachers perform as role models for students establish a sufficient relationship between the teaching profession and the political processes of the state to justify including public school teachers within the government-function exception of *Foley* and *Sugarman*, 47 U.S.L.W. at 4390. The Court held that the statute bore a rational relationship to the state's purpose because it excluded only aliens who "have chosen to classify themselves" by not applying for citizenship. *Id.*

The significance of *Ambach v. Norwick* is that the Court apparently intends to limit the government-function exception to public employment rather than extend it to the broad range of occupations over which the state exercises control. *Id.* at 4839 n.6 (distinguishing *In re* Griffiths, 413 U.S. 717 (1973)). In addition, *Ambach* permits the state to classify among aliens based upon their intention to become citizens. *Cf.* Nyquist v. Mauclet, 432 U.S. 1 (1977) (intention to become citizen not legitimate state concern, *see* text accompanying notes 53-57 *supra*). For the first time since alienage was declared a suspect classification, Graham v. Richardson, 403 U.S. 365 (1971), the Court has explicitly recognized that citizenship has constitutional significance in the employment context, and the conclusion seems inescapable that aliens are no longer entitled to the vigilant protection of the courts when the states, as employers, deny them the opportunity to seek government jobs.

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CHARLES H. MILLER LECTURE—LAWYERS AND THEIR PUBLIC RESPONSIBILITIES

THOMAS EHRLICH*

I am delighted to have been asked to give the first Charles H. Miller Lecture on Professional Responsibility.[1] This is a special privilege because of the excellence of the University of Tennessee and its School of Law, and particularly because of the man whom we honor today—Charles H. Miller.

Long before clinical legal education became fashionable, Professor Miller had a vision of what could be done to help students learn to grapple with complex legal concerns in an environment that includes real people and their real problems as well as rigorous academic standards. He saw the dangers and the weaknesses of abstracting legal issues from the real-life situations in which they arise, and he expanded the bounds of legal training in response. All of us who care about legal education and the legal profession are deeply in his debt, and I am grateful for this opportunity to join in the first annual celebration of his unique contributions.

My focus, of course, is the professional responsibilities of lawyers. I should state at the outset that I am a member of an

* Director, International Development Cooperation Agency; former President, Legal Services Corporation; former Dean, Stanford Law School. This paper was delivered as the first *Charles H. Miller Lecture* at the University of Tennessee College of Law on October 25, 1978. My special thanks are due to Alice Daniel, General Counsel of the Legal Services Corporation, who suggested a number of the concepts in this paper and collaborated in developing them. Professor Abram Chayes of Harvard Law School was also of great assistance in raising some of the issues reflected here.

1. Professor Emeritus Charles H. Miller founded the University of Tennessee Legal Clinic in 1947 and served as its director until his retirement in 1975. The new bienniel lecture series, established to honor Professor Miller was endowed by contributions from his friends and colleagues.

American Bar Association Commission established to develop a new code of professional responsibility, and none of my remarks today should be interpreted as indicating views other than my own. Further, if I have learned anything over the past two decades as a lawyer, it is that my views are constantly changing. You should not, therefore, take my thoughts as more than tentative reactions to difficult problems.

Some have suggested that the current Code of Professional Responsibility should be declared void for vagueness. They complain that it provides no guidance on scores of the hardest questions faced by lawyers in their everyday practice.

Let me tell a true story, told to me by Professor Barbara Babcock, as one example. Imagine that you are a lawyer in a public defender's office in a large urban area. You have been assigned to defend a man accused of robbing a small variety store. The sole witness to the robbery, the storeowner, identified your client in a police line-up. A few days before the trial is to begin you go to check the recollections of the storeowner; you find that the store has closed and that the owner has left no forwarding address. After pondering the situation for a time, you go to the local Post Office and find a new address for the owner. You show the owner a picture of your client, and he reaffirms that your client robbed his store.

The night before the trial is to begin, however, an Assistant District Attorney calls you to say that in all likelihood the case against your client will be dismissed because the District Attorney's office has been unable to locate the storeowner—the only witness to the robbery. Question: Should you tell the prosecutor the whereabouts of the witness? Over the course of a long night, you and your colleagues in the public defender's office debate the issue and finally reach a judgment.

I use the tale simply to illustrate how little guidance is given by the current Code of Professional Responsibility on a number of tough problems.[2] Most of them are in two broad catego-

2. With respect to contact with witnesses, the Code of Professional Responsibility directs that "[a] lawyer shall not suppress any evidence that he or his client has a legal obligation to reveal or produce." ABA CODE OF PROFESSIONAL RESPONSIBILITY [hereinafter cited as CODE], Disciplinary Rule [hereinafter cited as DR] 7-109(A) (1975), and that "[a] lawyer shall not advise or cause a person to secrete himself . . . for the purpose of making himself unavailable as a witness . . . ." *id.* DR 7-109(B). Ethical Consideration [hereinafter cited as EC] 7-23 suggests disclosure to the judge of adverse law

ries—issues concerning disclosure of matters adverse to a client on one hand[3] and conflicts of interest on the other.[4]

Remember, however, that the Code of Professional Responsibility is not designed merely to give guidance. It establishes enforceable rules,[5] and violations of those rules lead to sanc-

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if the opposing counsel has not discovered it, *see* ABA OPINION No. 280 (1949), but the rule is generally viewed as not extending to disclosure of adverse facts. *See* Brosnahan & Brosnahan, *The Attorney's Ethical Conduct During Adversary Proceedings*, PROFESSIONAL RESPONSIBILITY: A GUIDE FOR ATTORNEYS 165 (1978). Further, "a lawyer shall not knowingly . . . [r]eveal a confidence or secret of his client." CODE, *supra*, DR 4-101(B).

All requirements and ethical considerations are qualified by the general rule that defines misconduct. "A lawyer shall not . . . [c]ircumvent a Disciplinary Rule through actions of another [or] engage in conduct that is prejudicial to the administration of justice." *Id.* DR 1-102(A).

3. For rules concerning disclosure, see CODE, *supra* note 2, DR 4-101 (preservation of confidences and secrets of a client); *id.* DR 7-102(A)(3) (revelation when required by law); *id.* DR 7-102(B)(1) (revelation of client's fraud upon the court except when privileged); *id.* DR 7-106(B)(2) (revelation of client's or employer's identity unless privileged or irrelevant); *id.* EC 4-1 (obligation to hold confidences and secrets inviolate); *id.* EC 4-2 (permissible disclosures); *id.* EC 4-3 (permissible disclosures); *id.* EC 4-4 (obligation to advise client of attorney-client evidentiary privilege); *id.* EC 4-5 (obligation not to use confidential information and to prevent misuse by others); *id.* EC 4-6 (continuation of obligation not to reveal after termination of relationship).

4. For rules concerning conflicts of interests, see *id.* DR 5-101 "Refusing Employment When the Interests of the Lawyer May Impair His Independent Professional Judgment"; *id.* DR 5-102 "Withdrawal as Counsel When the Lawyer Becomes a Witness"; *id.* DR 5-103 "Avoiding Acquisition of Interest in Litigation"; *id.* DR 5-104 "Limiting Business Relations with a Client"; *id.* DR 5-105 "Refusing to Accept or Continue Employment if the Interests of Another Client May Impair the Independent Professional Judgment of the Lawyer"; *id.* DR 5-106 "Settling Similar Claims of Clients"; *id.* DR 5-107 "Avoiding Influence by Others than the Client"; *id.* DR 8-101 "Action as a Public Official"; *id.* DR 9-101 "Avoiding Even the Appearance of Impropriety"; *id.* EC 5-14 to 5-20 "Interests of Multiple Clients."

5. The Ethical Considerations are aspirational in character and represent the objectives toward which every member of the profession should strive. They constitute a body of principles upon which the lawyer can rely for guidance in many specific situations.

The Disciplinary Rules, unlike the Ethical Considerations, are mandatory in character. The Disciplinary Rules state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action. Within the framework of fair trial, the Disciplinary Rules should be uniformly applied to all lawyers, regardless of the nature of their professional activities.

tions—censure, suspension, and sometimes even disbarment. Perhaps it is not surprising, therefore, that some matters are left to the individual lawyer's conscience.

What ethical issues are so basic to the lawyer's role in our society, however, that wrong judgments on those issues—or wrong actions involving them—should invoke sanctions? In other words, what ethical imperatives are necessarily implied by the very status of being a lawyer?

Lawyers, of course, have a monopoly on the delivery of legal services. It is unlawful by statute in many states to provide legal counsel unless you are a lawyer,[6] and judicial rules in other states preclude so-called unauthorized practice of law. Why is this? If the lawyer is just a hired gun, the tough guy in the adversary process, why not allow lay representation? Is it that laymen will not be familiar with the legal process—that they will not play by the rules? If so, it would seem reasonable to narrow unauthorized practice rules and allow lay advocacy at least until it runs afoul of the legal process.

Is it a matter of competency? Of adequate representation of a party? Why then is an individual allowed to represent herself or himself?[7] Further, once a lawyer is admitted to the bar, there

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CODE, *supra* note 2, *Preliminary Statement* (footnotes omitted).

> The Code derives its legal force, however, from the effect given to it by disciplinary bodies in the various states . . . . The new Code . . . has been formally adopted in all states and the District of Columbia, albeit with a variety of omissions and alterations, sometimes substantial, that must be examined with respect to any particular jurisdiction.

A. KAUFMAN, PROBLEMS IN PROFESSIONAL RESPONSIBILITY 29 (1976).

6. *See, e.g.*, TENN. CODE ANN. § 29-303 (Cum. Supp. 1978): "No person shall engage in the 'practice of law' . . . unless he shall have been duly licensed therefore, and while his license therefore is in full force and effect . . . ."

7. *E.g.*, U.S.C. § 1654 (1977) ("In all courts of the United States the parties may plead and conduct their own cases personally or by counsel as by the rules of such courts, respectively, are permitted to manage and conduct cases therein."); TENN. CODE ANN. § 29-109 (1955) ("Any person may conduct and manage his own case in any court of this state."). See Faretta v. California, 422 U.S. 806 (1975), in which the Court held that "a defendant in a state criminal trial has a constitutional right to proceed *without* counsel when he voluntarily and intelligently elects to do so," *id.* at 807 (emphasis in original); Carter v. Illinois, 329 U.S. 173, 174-75 (1946), in which the Court held that self-representation is implicit in the sixth amendment right to defense and to assistance of counsel; and, Adams v. United States *ex rel.* McCann, 317 U.S. 269 (1942), in which the Court said that the sixth amendment right to counsel

is generally no control or review of competency short of the grossest kind of malpractice. Apart from *Martindale-Hubbell* there is usually only word-of-mouth among lawyers, and neither could be called a discriminating guide.

Obviously, concerns about the adverse impact of unauthorized practice and about competency are part of the basis for the lawyers' monopoly of the provision of legal services. But the heart of the matter, in my view, is this: lawyers have that monopoly because they are an integral part of the justice system. As officers of the court, they are a key component of the justice system as are courts, administrative agencies, and legislatures. It follows, I believe, that with the lawyers' monopoly come substantial obligations to that system.

Our justice system is one that the residents of this country have no choice about. They must use it. They must live under the law. Society as a whole, through government, requires that commitment of everyone. In turn, it seems to me, the opportunity to use the legal system is an inherent right of citizenship. If political liberty means anything at all, it must mean that. For the vast majority of people, this right, this aspect of liberty, can be realized only with access to a lawyer. Lawyers make the justice system work; they are a vital component of the system.

This rationale for the lawyers' monopoly seems frequently overlooked. Most of our legal tradition and rhetoric emphasizes the lawyer's role in the adversary system rather than in the justice system. The current Code of Professional Responsibility retains that focus. The Code makes defense of the paying client against an adversary in a private dispute the starting place for considering almost any ethical issue. It assumes that since the lawyer would not be involved in a matter without the client, the client is key.[8] The role of a court is to resolve the dispute before it, and that resolution can best be achieved if each lawyer represents his or her client with utmost zeal.[9]

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includes a "correlative right to dispense with a lawyer's help. . . . [T]he Constitution does not force a lawyer upon a defendant," *id.* at 279.

8. "The professional responsibility of a lawyer derives from his membership in a profession which has the duty of assisting members of the public to secure and protect available legal rights and benefits." CODE, *supra* note 2, EC 7-1.

9. Canon 7 of the CODE, *supra* note 2, requires that "a lawyer should represent a client zealously within the bounds of the law."

In my view, this is a mistaken overemphasis on the adversary aspects of the justice sytem. Remember, a courtroom is a substitute for jousting, not itself a battlefield.[10] At the very least, the tension between the lawyer's duty to the client and his duty to the justice system needs to be more clearly acknowledged in any new code. By focusing almost exclusively on the relationship between a lawyer and a paying client in a courtroom context, the current Code fails to deal with many of the most difficult problems.

Two interrelated developments in the justice system intensify this failing. The first is that the two-party dispute before a court involving a private transaction is no longer the prototype of the lawyer's task—if, indeed, it ever was. Most evident, much of what most lawyers do is outside any tribunal. They give advice and counsel on how best to design arrangements furthering their clients' interests. They are, in essence, private lawmakers. Further, the individual lawyer often assumes the role of intermediary between individuals or groups and acts quite apart from any formal institutional setting. She or he may help several parties to a prospective arrangement work out the details of that arrangement so that it serves all their interests, while recognizing that those interests are far from identical. A code built solely around an adversary system is inadequate to cover the range of those responsibilities.

Even when a tribunal is the forum for a lawyer's efforts, it is less often a court than one of a variety of other lawmaking institutions. The adversary process, in the classic sense, is rarely involved.

This is most obvious when the appearance is before a legislature. Legislative bodies seek to provide democratic resolution of complex political issues. Is it adequate to say that the lawyer's ethical responsibilities in such situations are no different from those in the courtroom? Legislative hearings are designed to help shape public policy. Do private lawyers at those hearings have any special obligations, particularly when only a limited range of interests is represented?

10. "The adversary system has deep roots in the Anglo-American legal tradition. Its antecedent is often said to be the Norman trial by battle, wherein issues in doubt were resolved by the outcome of a duel." G. HAZARD, ETHICS IN THE PRACTICE OF LAW 120 (1978).

When a lawyer is involved in an administrative proceeding, the situation may be equally far removed from the prototype two-party private dispute before a court. The role of many administrative agencies in their procedures is to protect a variety of public interests. A number of those agencies have concluded that private lawyers must help to provide this protection, even when their clients' interests are adversely affected. The recent efforts by the Securities and Exchange Commission to require private lawyers to reveal misdealings by their clients are a prime example.[11] Lawyers must, says the SEC, blow the whistle on their clients.

Even in judicial proceedings, it is no longer possible to view a two-party dispute involving a private transaction as the norm. The federal courts in particular are increasingly at centerstage in the resolution of basic social policies. Whether one views the trend as wise or otherwise, it is a reality, as Professor Abram Chayes of Harvard has explored at some length.[12]

What do these developments mean for the lawyer's ethical responsibilities? I am by no means sure of all the implications, but I am clear that it is no longer satisfactory, if it ever was, to view the lawyer's role solely in terms of the adversary process and the zealous representation of a client's interests.

The problem is also intensified because of shifts in the roles of lawyers in relation to their clients. In the traditional litigation context, the lawyer may have to make a variety of tactical judgments concerning various courses of action. But the basic decisions are made by the client, and the lawyer's role is to advance the interests of that client.[13] The lawyer is seen as one with expertise in making the adversary system work.

Under this approach, the client is assumed to be fully able to define his or her best interests and to communicate those interests to the lawyer. The role of the Code of Professional Responsi-

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11. *See* Daley & Karmel, *Attorneys' Responsibilities: Adversaries at the Bar of the SEC*, 24 EMORY L.J. 747 (1975); Johnson, *The Dynamics of SEC Rule 2(e): A Crisis for the Bar*, 1975 UTAH L. REV. 629.

12. Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976).

13. *See* CODE, *supra* note 2, EC 7-7: [Except in certain areas that do not affect the merits or prejudice the rights of the client] "the authority to make decisions is exclusively that of the client and . . . such decisions are binding on his lawyer."

bility is primarily to ensure that the lawyer does not use personal expertise to further personal ends or to disadvantage a client.[14] At the same time, of course, absent malpractice the lawyer is relieved from any responsibility for the substantive outcome of a matter.[15]

This traditional relationship between client and attorney does not fit many lawyering situations today. The point is most obvious in terms of public-interest law firms that are organized to further particular public causes—some by environmental groups, some by business organizations, some around other causes. These firms generally have a wide range of potential cases within their fields of interest, and the choice of which matters to pursue is usually made in terms of fundamental long-term goals.[16]

The key issue is often which potential plaintiff's case will best further those goals. Once that decision is made, the firm can easily attract willing clients. As a result, the ordinary client-lawyer relationship is inevitably altered.

This approach is obviously not without problems. As every law student knows, courts bound by article III of the United States Constitution are prohibited from giving advisory opinions.[17] The law requires that there be a real case or controversy, and the rule that every litigant must have "standing" is one of the ways to ensure that this requirement is met.[18] The Supreme

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14. *See, e.g.*, CODE, *supra* note 2, EC 5-1, which provides:

> The professional judgment of a lawyer should be exercised, within the bounds of the law, solely for the benefit of his client and free of compromising influences and loyalties. Neither his personal interests, the interests of other clients, nor the desires of third persons, should be permitted to dilute his loyalty to his client.

15. ABA INFORMAL OPINION No. 1273 (1973) indicates that "[n]eglect cannot be found if the acts or omissions complained of were . . . the result of an error of judgment made in good faith." *See* CODE, *supra* note 2, DR 6-101(A).

16. *See* Bellow & Kettleson, *The Mirror of Public Interest Ethics: Problems and Paradoxes*, PROFESSIONAL RESPONSIBILITY: A GUIDE FOR ATTORNEYS 234-35 (1978).

17. Muskrat v. United States, 219 U.S. 346 (1911) (Congress cannot grant jurisdiction to the Supreme Court to render an advisory opinion, since U.S. CONST. art. III, § 2, cl. 1, requires that there be an actual case or controversy before the Court before it can render an opinion).

18. *See, e.g.*, United States v. SCRAP, 412 U.S. 669 (1973); Sierra Club v. Morton, 405 U.S. 727 (1972); Flast v. Cohen, 392 U.S. 83 (1968); Rescue Army v. Municipal Ct., 331 U.S. 549 (1947).

Court has stated that even when organizations such as the Sierra Club are involved, the normal rules of standing apply and such institutions must establish their own unique relationship to the situation at issue; otherwise, the case will be dismissed for lack of standing.[19]

The Supreme Court has also, without indicating any possible inconsistency, recognized the special nature of public-interest lawyers and their footing, if not their standing, in the courts. *In Re Primus,*[20] for example, made clear that the first amendment prohibits application of solicitation rules against an organization that seeks a client not to obtain private gain but to advance a political purpose. In other words, such an organization may seek out a client as a means to force a court to decide an issue that otherwise would not come before it.

One may ask why it should be necessary to have a client at all, if it is the cause for which the organization is established that is to be furthered. But my point here is that when an ideology of an institutional law firm, rather than the interests of an individual client, is dominant, the responsibilities of lawyers working for the institution are obviously different, and some effort to think through the ethical implications of the differences is necessary in preparing a new code.

In many matters brought by public-interest firms, of course, individual or group plaintiffs play significant roles in the development of litigation. The firms' boards of directors and sponsoring organizations may also have an important voice in decisions. But the litigation is often conceived and carried out with relatively little involvement by the clients and, more basically, without the constraints of particular clients' interests at stake.

A monetary or other settlement offer late in the litigation process, for example, may be extremely attractive to an individual party but not to the public-interest firm that represents the party. School desegregation cases are one example. May the firm ethically require the party to agree in advance not to accept such a settlement, as a condition to taking the case?[21]

Some have argued that these problems are a reason for op-

19. Sierra Club v. Morton, 405 U.S. 727 (1972).

20. 436 U.S. 412 (1978).

21. *See, e.g,* Bell, *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation,* 85 YALE L.J. 470 (1976).

posing public-interest law firms.[22] My own view is quite the reverse. Once it is recognized that courts, like legislatures and administrative agencies, are inevitably instruments of social change, it should not make "a fundamental difference that the motive force of the process is a lawyer rather than a layman,"[23] as Professor Chayes has stressed. There is a more basic point, as Professor Chayes has also suggested. The question "who is the client?" is difficult to answer in a wide range of situations, seemingly far removed from public-interest litigation. The problem is not simply a quirk in the justice system that results from foundations funding public-interst law firms around the country. The same basic problems arise over and over again in the general counsel's office of every government agency, and in private companies as well. Professor Geoffrey Hazard chronicles many of them in his new book on legal ethics in representing large commercial organizations.[24]

Assume, for example, you are counsel for a major corporation and discover evidence of possible illegal conduct by the president of the company. What do you do? And when you do it, are you acting as counsel for the company president, the other officers, the board of directors, the present stockholders, the future stockholders, or some or all of those groups? In fact, their interests often conflict sharply, and no easy resolution of those conflicts will be possible. One SEC official has suggested that corporation counsel should be hired by a committee representing the various interests involved in a corporation—stockholders, directors, officers, and others. Under this approach, counsel for a corporation could take positions at odds with that of any one of those interests. This procedural approach has much to recommend it. But in the interim, the question "who's the client?" remains.

The problems of a code premised on the lawyer as part of an adversary system instead of the lawyer as part of a justice system are multiplied when we look at the extraordinary range of respon-

22. For conflicting assessments of the value of public interest law firms, see Halpern & Cunningham, *Reflections on the New Public Interest Law: Theory and Practice at the Center for Law and Social Policy*, 59 GEO. L.J. 1095 (1971) and Hegland, *Beyond Enthusiasm and Commitment*, 13 ARIZ. L. REV. 805 (1971).

23. Lecture by Professor Abram Chayes at Georgetown University Law School in 1978 (unpublished).

24. G. HAZARD, *supra* note 10.

sibilities that lawyers assume. Lawyers are everywhere—to the consternation of many outside the bar. Should a new code apply to their activities whatever the context, or only when they are acting in some dominantly lawyering role?

What of the lawyer-administrator, for example? Most people would agree that the felons in the Nixon Administration were properly precluded from further law practice, but how far should the principle behind that judgment be carried? Once a lawyer, always a lawyer? Or should the reach of the code be limited to the work of lawyers acting as lawyers, except only if they actually violate the law by a crime involving moral turpitude? Should an administrator who is also a lawyer, for example, be subject to bar discipline for failing to carry out his or her administrative responsibilities when those responsibilities do not require membership in the legal profession? These are among the hard questions we are wrestling with in the ABA Commission charged with producing a new code.

Only when we shift to the individual client does the traditional lawyer-client relationship in an adversary context seem to have some semblance of utility. And, in terms of the total number of lawyers and their legal work, the share here involved is a relatively small one. Even in this situation, the picture is clouded. The clouds are obvious when the competency of the client is limited; a child or someone in a mental institution is an example. Some special problems also exist for legal services lawyers who are paid with public funds. A private client decides whether the potential benefit of a favorable outcome is great enough to warrant the cost of carrying a case forward at any particular point. But for legal services clients, like the clients of the public-interest lawyer, generally no costs are involved. For the public-interest lawyer, the issue usually is whether the benefits from a particular case are outweighed by its costs, in terms of the cause that is being pursued by the firm.[25] Although as a formality the consent of the client is required, as a practical matter the lawyer can end a matter if he or she decides that the benefits in a particular case are offset by the costs.

A legal services lawyer faces a more difficult problem. If the

25. *See* Bellow & Kettleson, *supra* note 16, at 224-37.

will of the client is to prevail, as it does with the private lawyer, the client will almost always want to proceed since nothing is at risk. Is the legal services lawyer entitled to weigh the possible benefits to the clients against the costs that may result to other potential legal services clients who cannot be served?

This is only one of scores of matters for which the current Code of Professional Responsibility provides no answers. It fails to provide answers, I suggest, because the situation at issue was simply not considered by the drafters of the Code who made the lawyer in the adversary setting the focus of ethical attention.

Even when a single, fee-paying client is involved, of course, serious ethical issues may arise, and many are not covered by the current Code. Assume, for example, that your client is involved in a complex business proceeding in which the tax consequences of the transaction are paramount. You advise the client that in your judgment, the course of action that she is planning would violate the tax laws. Your client then asks about the likelihood of getting caught. May you ethically respond, giving your own judgment based on your own experience? Or are you, as an officer of the court, charged with promoting solely law enforcement and not law evasion? What if your client is a trucking company that seeks your help concerning the purchase of CB's for all the company trucks, with the apparent purpose of ensuring that its drivers violate the speeding laws only when there is little likelihood that they will be caught? What are your ethical responsibilities?

These and scores of other tough issues are unclear under the present Code. I am by no means certain that the new ABA Commission will do better. I am, however, clear about one point, although it may not be covered in any code. Countless lawyers, I believe, engage in conduct on behalf of their clients that they would never countenance on behalf of themselves.[26] "I am only doing my client's bidding," they say. "That is what lawyering in the adversary system is all about." In my view, that approach is totally wrong—a dangerous consequence of the focus on the lawyer's role in the adversary system rather than in the justice system. It is dangerous to the legal profession, and, most of all, dangerous to the public.

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26. *Compare* Curtis, *The Ethics of Advocacy*, 4 STAN. L. REV. 3 (1951) *with* Drinker, *Some Remarks on Mr. Curtis' "The Ethics of Advocacy,"* 4 STAN. L. REV. 349 (1952).

Until now I have been considering the professional responsibilities of lawyers when they have agreed to provide representation on the basis of an individually negotiated fee for a private client or a salary from a public source. But there is an equally important cluster of professional responsibilities; it also arises from the role of the lawyer as part of the justice system. These responsibilities concern the provision of representation to the otherwise unrepresented.

For some time, I have been urging upon the organized (and disorganized) bar the idea that lawyers have an obligation to provide some of their time and talents *pro bono publico*. This claim can be based on Canon Two of the current Code of Professional Responsibility, which provides that a lawyer should "assist the legal profession in fulfilling its duty to make legal counsel available." But I admit the Code now sets no standards for how a lawyer should meet that responsibility or what happens if she or he fails to do so.[27]

My convictions about this responsibility of lawyers are rooted in my view that every lawyer is part of the justice system with an obligation to help make that system work. We have a monopoly of legal services, and with the monopoly comes an obligation to serve the public. In my view, the operational consequences of that obligation are a requirement to provide some representation to those who would be otherwise unrepresented.

Equally important, society as a whole has an interest in the sound workings of the legal system. Society as a whole has an interest in ensuring that the law is followed by all persons and entities, regardless of their economic resources. If this does not happen—if some people, including those in government, are effectively outside the law because others do not have the economic resources to bring them to account—then the whole system is skewed.

These are the reasons why the legal profession has an obligation to ensure that legal services for the poor are available. These are the reasons why legal services are different from other necessary services provided by government—services for which one might argue that the poor should be able to take the equivalent value in cash.

27. Although the CODE suggests that lawyers should support efforts to provide legal services to persons unable to pay, CODE, *supra* note 2, EC 2-16, no Disciplinary Rule makes that obligation mandatory.

Much more federal funding is needed for legal assistance to the poor. It is my hope and expectation that over future years that funding will increase substantially. Legal assistance will never be available to all who need it, however, unless private lawyers provide some of their time and talents *pro bono* to that end. Many do so now, but a minimum amount of *pro bono* service is needed from all private lawyers.

In my own view, unless private lawyers take the lead—and it is a moral lead that is required—the government will do it for us. Lawyers *are* part of the justice system, not merely the adversary system. Their roles in the justice system require, above all, a sensitivity to the needs of our citizenry, who must live under that system.

This, I believe, was Charles H. Miller's message and his aim when he led in establishing clinical legal education here. He deserves our deep gratitude for the lasting monument that he has created for generations of law students at this school, and for the public they serve so well.

AN UPDATE OF THE NEW TENNESSEE RULES OF APPELLATE PROCEDURE

JOHN L. SOBIESKI, JR.*

The four-year effort to simplify and modernize the law of appellate procedure in Tennessee reached fruition on July 1, 1979, the effective date of the new Tennessee Rules of Appellate Procedure.[1] Most of the law set forth in the new rules has been discussed in two previous articles concerning the then-proposed rules.[2] However, shortly before the rules were submitted for approval to the General Assembly by the Tennessee Supreme Court, a number of significant changes were made in them. Some of these changes originated with the Tennessee Supreme Court's Advisory Commission on Civil Rules and others with the state

* B.S., Loyola University (Chicago); J.D., University of Michigan; Associate Professor of Law, University of Tennessee; Reporter, Tennessee Supreme Court Advisory Commission on Civil Rules.

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Although the author served as Reporter to the Tennessee Supreme Court Advisory Commission on Civil Rules in the preparation of the appellate rules, the views expressed in this article are personal and enjoy no other status.

1. In addition to the appellate rules, the state supreme court submitted to the General Assembly a repealer statute that would have eliminated or amended those portions of the Tennessee Code superseded or modified by the new rules. While the senate passed the repealer statute, the House Judiciary Committee deferred action on the statute. The rules by their own force, however, repeal all statutes in conflict therewith under the terms of the rulemaking statute pursuant to which the new rules were fashioned. *See* TENN. CODE ANN. § 16-116 (Cum. Supp. 1978) ("After such rules shall have become effective, all laws in conflict therewith shall have no further force or effect."). The repealer statute would simply have made explicit what is implicit in the approval of the rules. For a tabular portrayal of the repealer statute, see Sobieski, *New Rules of Appellate Procedure Became Effective July 1*, 15 TENN. B.J. 11, 13-20 (Aug. 1979).

2. *See* Sobieski, *The Procedural Details of the Proposed Tennessee Rules of Appellate Procedure*, 46 TENN. L. REV. 1 (1978) [hereinafter cited as *Procedural Details*]; Sobieski, *The Theoretical Foundations of the Proposed Tennessee Rules of Appellate Procedure*, 45 TENN. L. REV. 161 (1978) [hereinafter cited as *Theoretical Foundations*]. These earlier articles were published prior to the amendments that were made in the rules shortly before as well as after their submission to the General Assembly. Except with regard to those amendments discussed in this article, the earlier discussions remain a relevant source of information concerning the appellate rules.

supreme court itself. In addition, the supreme court made one final change after the rules had been submitted to the legislature. The purpose of this discussion is to supplement the earlier articles concerning the rules by highlighting the changes made in them shortly before their submission and approval.

One of the most significant changes in the rules made by the state supreme court is an amendment to rule 3(e), which preserves the requirement that the appellant move for a new trial in jury cases in order to raise on appeal alleged errors occurring during trial.[3] The amendment incorporated into rule 3(e) by the supreme court provides:

> [I]n all cases tried by a jury, no assignment of error shall be predicated upon alleged error in the admission or exclusion of testimony, jury instructions granted or refused, misconduct of jurors, parties or counsel, or other action committed or occurring during the trial of the case, or other ground upon which a new trial is sought, unless the same was specifically stated in a motion for a new trial in the lower court and decided adversely to the appellant; otherwise such assignments will be treated as waived.[4]

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3. *See* Tenn. Sup. Ct. R. 14(5), 218 Tenn. 816 (1967); Tenn. Ct. App. R. 12(6), 227 Tenn. Decs. xvi (1972)(as amended 235 Tenn. Decs. xxxiv (1975)).

4. This language is substantially the same as that of Tenn. Sup. Ct. R. 14(5), 218 Tenn. 816 (1967), which provided:

> Error in the admission or exclusion of testimony, in charging a jury, or refusing further instructions, misconduct of jurors, parties or counsel, or other action occurring or committed on the trial of the case, civil or criminal, or other grounds upon which a new trial is sought, will not constitute a ground for reversal, and a new trial, unless it affirmatively appears that the same was specifically stated in the motion made for a new trial in the lower court, and decided adversely to the plaintiff in error, but will be treated as waived, in all cases in which motions for a new trial are permitted . . . .

Former rule 12(6) of the Court of Appeals was identical to Tenn. Sup. Ct. R. 14(5) in all material respects.

The reference to assignments of error in the court's amendment of rule 3(e) should not create any problems even though assignments of error are explicitly abolished in rule 3(h). Assignments of error are abolished in the new rules because

> as a part of a modern system of appellate review assignments of error serve no jurisdictional purpose, and are useful only for giving notice of the points to be raised before the appellate court. When used simply for this purpose, there is a definite advantage in dropping the term

The thrust of this language is unmistakable. As a prerequisite to obtaining review on appeal in a jury action of any error relating to what occurred during trial or of any error upon which a new trial is sought in the appellate court, the appellant must make a new-trial motion in the trial court that specifically sets forth the error appellant seeks to present for appellate review. If the appellant does not specifically set forth the error in a new-trial motion, he may not obtain appellate review.[5] Given the unmistakable thrust of the court's amendment to rule 3(e), it seems certain that the reference to the admission or exclusion of "testimony" is not restrictive and that errors concerning the admission or exclusion of any evidence, including documentary evidence and other phys-

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"assignment of error," since it carries with it common-law implications which merely confuse and obstruct . . . .

Sunderland, *A Simplified System of Appellate Procedure*, 17 TENN. L. REV. 651, 660 (1943). The state supreme court's use of the term "assignment of error" in its amendment to rule 3(e) is intended simply to refer to the method by which the appellate court is notified of the points to be raised before it and is not intended to revive the common-law "notion that assignments of error constitute the jurisdictional foundation for the appeal in the same sense that pleadings constitute the jurisdictional basis of the proceedings below." *Id.* For assignments of error, the new rules substitute the term "issues presented for review." The supreme court's reference in rule 3(e) to assignments of error should be construed as referring to the issues presented for review.

5. This statement of the general rule is subject to the qualification that under TENN. R. APP. P. 2 the appellate courts may suspend for good cause the requirement of a new-trial motion as a prerequisite of review in jury actions. The burden would rest on the appellant, however, to demonstrate good cause for relief from his failure to move for a new trial.

The appellate court also has the power under TENN. R. APP. P. 13(b) to consider on its own motion issues not presented for review by the parties. *See Theoretical Foundations, supra* note 2, at 194-200. That power should be wholly unaffected by the failure of an appellant either to move for a new trial in a jury case or to include in his motion the issue the court wishes to consider. While an appellate court generally should consider only those issues presented for review by the parties, rule 13(b) recognizes that in some circumstances important interests other than those of the immediate parties require or permit an appellate court to consider issues not presented for review. In most cases, the issue an appellate court wishes to consider on its own motion will not have been presented for consideration at the trial level. Vestal, *Sua Sponte Consideration in Appellate Review*, 27 FORDHAM L. REV. 477, 490 (1959). Therefore, if rule 13(b) is to serve its intended purpose, the power of an appellate court to invoke that rule should not depend on whether the appellant moves for a new trial in a jury case or on whether the appellant includes the issue in his motion.

ical exhibits, must be set forth in a new-trial motion.[6]

The extent to which the errors that may be raised on appeal will be limited by the formulation of the errors in the new-trial motion will hinge upon the interpretation the appellate courts give to the requirement of rule 3(e) that the error be "specifically stated" in the new-trial motion.[7] That interpretation in turn may depend on the reasons for the supreme court's decision to retain the new-trial motion as a prerequisite to review in jury cases. In amending rule 3(e) the supreme court did not explicitly set forth the interests it thought would be served by requiring a new-trial motion. Apparently, however, some members of the court thought that requiring appellant to move for a new trial results in better appeals. What is meant by this justification for retention of new-trial motions in jury cases is not entirely clear. Perhaps the idea is that requiring the appellant to move for a new trial forces him to articulate in writing which errors he believes justify relief from the judgment.[8] In so doing the appellant may discover that his tentative objections will not jell in the writing[9] and that he has no reasonable prospect for success either with regard to the new-trial motion itself or on a later appeal. Requiring new-trial motions thus might be considered a means of deterring appeals that have little likelihood of success and a way of preserving appellate resources for more deserving appeals. Moreover, the thinking occasioned by the making of a new-trial motion may lead to an even more thoughtful and refined argument on appeal. Thus, new-trial motions would also serve to promote better-argued cases on appeal. Finally, retention of the new-trial motion may reflect a desire on the part of the supreme court to

6. Errors concerning the admission or exclusion of evidence other than testimony would seem within the scope of the language of rule 3(e) concerning "other action committed or occurring during the trial of the case, or other ground upon which a new trial is sought."

7. In interpreting the same requirement in its prior rule, *see* note 4 *supra*, the supreme court has held that "the grounds set out in the [new-trial] motion should be as specific and certain as the nature of the error complained of will permit." Memphis St. R.R. v. Johnson, 114 Tenn. 632, 643, 88 S.W. 169, 171 (1905); *see, e.g.*, Ferguson v. State, 166 Tenn. 308, 61 S.W.2d 467 (1933).

8. Motions generally must be made in writing. *See* TENN. R. CIV. P. 7.02; TENN. R. CRIM. P. 47.

9. *Cf.* Traynor, *Some Open Questions on the Work of State Appellate Courts*, 24 U. CHI. L. REV. 211, 218 (1957) (writing is "thinking at its hardest").

afford the trial court a final opportunity, which in fairness it arguably should have, to correct on its own any harmful error.

The persuasiveness of these reasons for requiring a new-trial motion as a prerequisite to review in jury actions is another matter. In the first place, whether the decision to appeal is based solely or even principally upon an assessment of the probability of success on appeal is certainly debatable, even assuming that assessment will not be distorted by partisan zeal. Certainly in criminal cases and in jury-tried civil cases as well, appeals that have no prospect of success are taken. Also, it seems open to question whether in fact the quality of argument on appeal in jury cases is substantially better than that in nonjury actions in which a new-trial motion is not required. Moreover, whatever the advantages of requiring new-trial motions, there are also disadvantages. The experience of the members of the Advisory Commission is that new-trial motions are so seldom granted that they typically only increase the cost and delay final disposition of litigation.[10] Fairness to the trial court would seem to require only that the matters to be urged on appeal be brought to the trial court's attention at some appropriate time during the proceedings, not that such matters necessarily be incorporated in a new-trial motion.[11] But the reasons for retaining the new-trial motion as a prerequisite to review in jury cases have an even more fundamental flaw in that they fail to offer an explanation of why a comparable post-trial motion is not required in actions tried with-

10. *See* D. MEADOR, APPELLATE COURTS: STAFF AND PROCESS IN THE CRISIS OF VOLUME 143-46 (1974); D. MEADOR, CRIMINAL APPEALS: ENGLISH PRACTICES AND AMERICAN REFORMS 85-86 (1973); Wicker, *A Comparison of Appellate Procedure in Tennessee and in the Federal Courts*, 17 TENN. L. REV. 668, 674 (1943).

11. The Advisory Commission, in recommending that a new-trial motion no longer be a prerequisite of review in jury cases, nonetheless cautioned that "[f]ailure to present an issue to the trial court . . . will typically not merit appellate relief." TENN. R. APP. P. 3(e), Advisory Comm'n comment. Under rule 36(a) relief on appeal need not "be granted to a party responsible for an error or who failed to take whatever action was reasonably available to prevent or nullify the harmful effect of an error." Even if new-trial motions were no longer required in jury cases, therefore, appellant would still have to make a timely objection during the proceedings in the trial court to obtain appellate relief. But elimination of the new-trial motion as a prerequisite of review would mean that any errors at the trial to which objection was duly made could be raised on appeal without a new-trial motion raising the objection a second time. *See Procedural Details*, *supra* note 2, at 11-13.

out a jury.[12] Indeed, given the trial court's added responsibility of finding the facts and applying the law to the facts,[13] the concern of treating the trial court fairly would seem more appropriate in nonjury actions.

Regardless of the merits of the supreme court's decision to retain the new-trial motion as a prerequisite to review in jury cases, the specifically stated language of rule 3(e) should not be given an overly restrictive interpretation. It is important to keep in mind that the new-trial motion must be made shortly after trial, without much time for legal research and reflection, and oftentimes without a transcript.[14] As a result, to expect the new-trial motion to be formulated with the care and precision of the brief on appeal is simply not realistic. A new-trial motion, therefore, should be found to satisfy the specifically stated criterion of amended rule 3(e) as long as it makes known to the trial court the act, event, or default that the appellant urges as harmful error on appeal.

The requirement of a new-trial motion as a prerequisite to review in jury cases may also give rise to some difficulties if the appellee also seeks appellate review and relief. Under rule 13(a), any question of law may be brought up for review and relief by any party. One purpose of this rule is to eliminate any requirement that an appellee also appeal in order to obtain appellate review and relief.[15] "[I]t is not unreasonable that the appellee, without the necessity of also appealing, should be able to enlarge his rights, when forced into the appellate court."[16] But will the

12. In addition to a new-trial motion, the disappointed litigant in a nonjury case may make a motion under TENN. R. CIV. P. 52.02 to amend or to make additional findings of fact. A motion to alter or to amend the judgment under TENN. R. CIV. P. 59.03 may also be made in both jury and nonjury actions.

13. *See* TENN. R. CIV. P. 52.01.

14. New-trial motions must be filed and served within 30 days after entry of the judgment in civil actions, *see id.* R. 59.01, and must be "made" within 30 days after verdict in criminal actions. *See* TENN. R. CRIM. P. 33(b). Criminal rule 47 requires motions other than those made during a trial or hearing to be in writing, and criminal rule 49 requires written motions to be served and filed. A new-trial motion will probably be considered timely made in criminal cases only if it is filed and served within 30 days after verdict.

15. *See generally Theoretical Foundations, supra* note 2, at 187-94.

16. 51 HARV. L. REV. 1058, 1067 (1938); *see* 15 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3904 (1976); Stern, *When to Cross-Appeal or Cross-Petition—Certainty or Confusion?*, 87 HARV. L. REV. 763 (1974).

appellee be able to obtain review and relief in jury cases if he has not made a new-trial motion? The rules do not provide an explicit answer to this question, but certainly if the appellee is completely satisfied with the judgment in the trial court a new-trial motion should not be required. An appellee should always be permitted to urge any ground supported by the record to uphold the judgment as entered below.[17] Nor should the appellee be required to make a new-trial motion calling attention to those matters he may urge on appeal that would enlarge his rights or that would lessen the rights of the appellant under the judgment entered in the trial court.[18] A putative appellee, though not entirely satisfied with the judgment, may nonetheless be willing to abide by it as long as the other parties are also willing to do so. Yet, if the appellee is unable to obtain appellate review or relief absent his own new-trial motion, he may be forced to file a motion for a new trial—one he has no genuine desire of obtaining—solely to protect his opportunity to obtain review and relief in the event another party to the action takes an appeal. The appellee will be alerted to the possibility of an appeal as soon as another party to the action moves for a new trial. But he may be served with the motion at or near the end of the thirty-day period for moving for a new trial so that as a practical matter he cannot file and serve a new-trial motion that specifically sets forth all the errors he may seek to raise on appeal.[19] An appellee could protect himself,

17. This is the rule followed in federal practice with regard to issues the appellee may urge on appeal if he has not filed his own notice of appeal. *See* Massachusetts Mut. Life Ins. Co. v. Ludwig, 426 U.S. 479 (1976) (per curiam); Langnes v. Green, 282 U.S. 531, 535-39 (1931); United States v. American Ry. Express Co., 265 U.S. 425, 435 (1924). *See generally* 9 MOORE'S FEDERAL PRACTICE ¶ 204.11[3] (2d ed. 1975); C. WRIGHT, THE LAW OF FEDERAL COURTS 523 (3d ed. 1976); 15 C. WRIGHT, A. MILLER & E. COOPER, *supra* note 16, § 3904.

18. In federal practice an appellee must file his own notice of appeal if he seeks to enlarge his own rights or lessen the rights of the appellant under the judgment of the district court. *See* note 17 *supra*. Federal as well as state experience has demonstrated the difficulty of formulating and applying a test concerning the situations in which an appellee must appeal or cross-appeal. *See* 9 MOORE'S FEDERAL PRACTICE ¶¶ 204.11[3]-[5] (2d ed. 1975); Stern, *supra* note 16; 25 ME. L. REV. 105 (1973). Similar difficulties might attend an effort to delineate the circumstances in which appellee must move for a new trial.

19. To eliminate an analogous problem in federal appellate practice, FED. R. APP. P. 4(a) allows a party 14 days to file notice of appeal after any other party appeals. *See* 9 MOORE'S FEDERAL PRACTICE ¶ 204.11[1] (2d ed. 1975). No

therefore, only by filing a protective new-trial motion,[20] and that procedure would frustrate the purposes of the new rules, which seek to simplify the law and to eliminate needless technicalities.[21] Under no circumstances, therefore, should an appellee be required to move for a new trial in order to obtain appellate review and relief.[22]

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comparable extension is permitted in TENN. R. CIV. P. 59.01 for filing a new-trial motion after any other party has moved for a new trial.

Any requirement that appellee file his own new-trial motion should not depend upon the time that remains available to him to so move after being served with appellant's new-trial motion. Any such line-drawing would be essentially arbitrary.

20. *Cf.* Stern, *supra* note 16, at 766-67 (discussing an analogous problem in federal practice).

Failure of an appellee to move for a new trial could be excused by the appellate court for good cause shown. *See* TENN. R. APP. P. 2 ("For good cause . . . the Supreme Court, Court of Appeals, or Court of Criminal Appeals may suspend the requirements or provisions of any of these rules . . . ."). *See generally Theoretical Foundations, supra* note 2, at 174-79. Appellate rule 3(e) itself also makes clear that the requirement of a new-trial motion is merely a rule of practice and not a jurisdictional limit that cannot be ignored. The last sentence of rule 3(e) states in unmistakably clear terms that "[f]ailure of an appellant to take any step other than the timely filing and service of a notice of appeal does not affect the validity of the appeal but is grounds only for such action as the appellate court deems appropriate." While the rule refers explicitly only to an appellant, no sensible basis exists for construing rule 3(e) to permit the appellate court to excuse an appellant's failure to move for a new trial but not to permit the court to excuse the same omission by an appellee. As urged in the text, however, the better approach is not to require the appellee to move for a new trial, thus eliminating any need to invoke the appellate court's power to excuse noncompliance.

21. *See Theoretical Foundations, supra* note 2, at 168-70.

22. If the trial court grants the new-trial motion, the party who originally prevailed should not be required to make any sort of motion in order to urge on a later appeal that the trial court erred in granting the new trial. Also, under appellate rule 24(g), the party in whose favor judgment was originally entered need not, although he may, prepare and file a transcript or statement of the evidence or proceedings prior to the entry of an appealable judgment or order. *See Procedural Details, supra* note 2, at 52-53. The grant of a new trial is an interlocutory order, and an appeal as of right lies only after entry of judgment after the second trial, although an interlocutory appeal by permission may be sought from the order granting the new trial. For a discussion of the circumstances in which an interlocutory appeal by permission lies, see *Theoretical Foundations, supra* note 2, at 216-27. For a discussion of the details of how to take an interlocutory appeal, see *Procedural Details, supra* note 2, at 15-18.

Although under amended rule 3(e) a new-trial motion is a prerequisite to review on the merits of the issues presented for review in jury actions, reviewability should be distinguished from the procedural requirements that must be satisfied to initiate a valid appeal as of right. Under the rules the filing and service of a notice of appeal are the only prerequisites to a valid appeal as of right.[23] Generally speaking, the notice of appeal must be filed with the clerk of the trial court within thirty days after entry of the judgment from which the appeal is taken.[24] Based on a recommendation of the Advisory Commission, rule 4(a) was redrafted to provide in unambiguous terms that a notice of appeal is timely filed only if it is actually received by the clerk of the trial court within the thirty days allowed for filing.[25] While filing of the notice may be accomplished by mail, under the revised rule the day of mailing is not deemed the day of filing.[26] The notice must be received by the clerk within the specified thirty-day period; if the

23. TENN. R. APP. P. 3(e). If, for example, appellant in a jury case fails to move for a new trial but timely files and serves notice of appeal, the appeal is valid even though review on the merits of the issues presented for review will generally be denied on the ground that the failure to incorporate the issues in a new-trial motion constitutes a waiver of appellate review. The distinction is important because the rule that appellant must file his notice of appeal on time is jurisdictional and noncompliance cannot be excused, although in some circumstances an otherwise untimely appeal may be taken by first securing relief from the judgment in the trial court. *See Procedural Details, supra* note 2, at 8-9. The requirement that appellant move for a new trial is merely a rule of practice, and noncompliance may be excused in appropriate circumstances under appellate rule 2. *See* note 20 *supra*.

24. TENN. R. APP. P. 4(a). *See generally Procedural Details, supra* note 2, at 4-9.

25. As amended, TENN. R. APP. P. 4(a) provides that "the notice of appeal . . . shall be filed with *and received by* the clerk of the trial court within 30 days after the date of entry of the judgment appealed from" (emphasis added).

26. Prior to the amendment of rule 4(a), none of the appellate rules explicitly stated whether actual receipt or the mere posting of a notice of appeal constituted timely filing with the clerk of the trial court. While rule 20(a) originally provided that papers filed with the clerk shall be considered filed as of the postmark, that rule is applicable only to the clerk of the appellate court, not to the clerk of the trial court. Filing with the clerk of the trial court also is considered timely under the civil and criminal trial rules only if the papers are actually received by the clerk within the allotted time. *See* TENN. R. CIV. P. 5.06; TENN. R. CRIM. P. 49(c).

notice is not received on time, the appeal is invalid and will be dismissed.[27]

In a related vein, rule 20(a) was amended to make clear that a filing of any paper with the clerk of the appellate court "shall not be timely unless the papers are received by the clerk within the time fixed for filing."[28] The original draft of rule 20(a) provided that filing may be accomplished by mail and that the day of mailing, "which may be evidenced by a postmark affixed in and by a United States Post Office, shall be deemed the day of filing if first class mail is utilized." The advantage of measuring the date of filing from the postmark date would have been to afford all parties, and not merely those conveniently located near the office of the clerk of the appellate court, the maximum time required or permitted for the preparation of papers. The disadvantage of the original draft stemmed from fact that, because postmarks are often illegibile and because some items are lost in the mail or misdelivered, disputes might have arisen concerning whether a paper was filed on time. Such disputes would have been relatively unimportant since for good cause shown the appellate court, in most instances, may enlarge the time prescribed in the rules for doing an act or may permit an act to be done after the expiration of such time.[29] Good cause would probably have been found if a postmark were illegible or an item were lost in the mail or misdelivered since a party should not be penalized for the errors or omissions of those over whom he has no effective control.[30] In some situations, however, disputes over whether certain

27. If notice of appeal is mailed sufficiently in advance of its due date but the notice is lost or misdelivered through no fault of the appellant, he may attempt to secure relief from the judgment under TENN. R. CIV. P. 60.02 or the Post-Conviction Procedure Act. *See* TENN. CODE ANN. § 40-3820 (1975). However, since appellant has no guarantee such relief will be granted, prudent counsel should ensure that the notice of appeal is actually received by the clerk of the trial court on time.

28. This is in accord with prior law. *See* Lambert v. Home Fed. Sav. & Loan Ass'n, 481 S.W.2d 770, 773 (Tenn. 1972).

29. TENN. R. APP. P. 21(b) provides: "For good cause shown the appellate court may enlarge the time prescribed by these rules or by its order for doing any act, or may permit an act to be done after the expiration of such time . . . ." TENN. R. APP. P. 2 is a more general provision and permits the appellate courts for good cause to "suspend the requirements or provisions of *any* of these rules in a particular case" (emphasis added).

30. *See, e.g.*, General Elec. Supply Co. v. Arlen Realty & Dev. Corp., 546

papers were timely filed could have been vitally important since the time for filing cannot be enlarged. Times that cannot be enlarged include the time within which a party must file a notice of appeal and the time for filing a petition for review of administrative proceedings in the court of appeals.[31] Similarly, while the time for filing an application for permission to appeal from an intermediate appellate court to the state supreme court may be extended an additional thirty days as a result of an amendment made in the rules after their submission to the legislature, the request for an extension must be made within the original thirty-day period and the extension cannot exceed thirty days.[32] Even

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S.W.2d 210, 214 (Tenn. 1977).

31. While appellate rules 2 and 21(b) generally empower the appellate courts to permit the late filing of any paper, *see* note 29 *supra*, both rules expressly prohibit the appellate courts from extending the time prescribed in rule 4 for filing a notice of appeal, the time prescribed in rule 11 for filing an application for permission to appeal, or the time prescribed in rule 12 for filing a petition for review.

32. As amended and approved, TENN. R. APP. P. 11(b) provides:

> The application for permission to appeal shall be filed with the clerk of the Supreme Court within 30 days after the entry of the judgment of the Court of Appeals or Court of Criminal Appeals if no petition for rehearing is filed or, if a petition for rehearing is filed, within 30 days after the denial of the petition or entry of the judgment on rehearing; provided, however, that an extension of not more than an additional 30 days may be granted by the court, or a justice thereof, upon motion and for good cause shown. No extension beyond said additional 30 day period shall be permitted, and any motion for an extension must be made before expiration of the initial 30 day period.

In addition to permitting a 30-day extension, TENN. R. APP. P. 11(b) establishes a uniform 30-day period for filing an application for permission to appeal with the state supreme court. The unamended version of the rule allowed only 15 days for filing the application if a petition for rehearing was filed in the intermediate appellate court. *See Procedural Details, supra* note 2, at 18. Although the amended rule does not specify which court may grant the extension, the new rule is probably to be read as following the prior law, under which extensions for filing for certiorari were sought in the supreme court. *See* TENN. CODE ANN. § 16-452 (Cum. Supp. 1978); *id.* § 27-820 (1955).

TENN. R. APP. P. 49 provides that the new rules govern all appellate proceedings brought after July 1, 1979, and also all further procedure in proceedings then pending except to the extent that in the opinion of the appellate court application of the new rules in a particular proceeding would not be feasible or would work an injustice. In such an instance the procedure followed before the effective date of the new rules applies. Since the new rules are generally less

with regard to these peculiarly significant time periods, most of the anticipated problems of making the postmark date the date of filing could have been alleviated by requiring that envelopes be postmarked by hand and by requiring that certified or registered, return-receipt mail be utilized. Perhaps a better approach would have been to fashion a rule similar to Federal Rule of Appellate Procedure 25(a), which requires that some papers be received by the clerk within the time fixed for filing while others need only be mailed within the allotted time.[33] For example, the rules could have required actual receipt of those papers for which the time for filing cannot be enlarged or for which an extension must be sought within the period normally provided for filing, while permitting other papers to be considered filed as of the postmark date.[34] Be that as it may, under the amended version of appellate rule 20(a) all papers must be received by the clerk of the appellate court within the time fixed in order to be considered filed on time, although late filing may be excused by the appellate court in all but three situations.[35]

While the appellate rules make no step other than the timely

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restrictive than prior law, they will in most cases govern further procedure in pending appellate proceedings without working an injustice. TENN. R. APP. P. 11(b), however, is more restrictive than prior law. New rule 11 allows only 30 days for filing an application for permission to appeal (the counterpart under the new rules to the petition for certiorari) and allows only a 30-day extension if the extension is sought within the original 30-day period. Prior law allowed 45 days for filing a petition for certiorari and allowed a 45-day extension. *See* TENN. CODE ANN. § 16-452 (Cum. Supp. 1978); *id.* § 27-820 (1955). Thus the maximum time for filing under rule 11 is 60 days as compared to the maximum time of 90 days previously permitted for filing for certiorari. Presumably all appeals to the supreme court in which judgments are entered by the intermediate appellate courts after July 1 are governed by new rule 11. The shorter period for filing specified in rule 11 should therefore be strictly adhered to in order to ensure the possibility of supreme court review of the final decision of an intermediate appellate court.

33. FED. R. APP. P. 25(a) provides that "filing shall not be timely unless the papers are received by the clerk within the time fixed for filing, except that briefs and appendices shall be deemed filed on the day of mailing if the most expeditious form of delivery by mail, excepting special delivery, is utilized."

34. Permitting any paper to be filed according to its postmark may cause some practical difficulties for the clerks of the appellate courts. Letter from John A. Parker to Mr. Justice William J. Harbison (Dec. 14, 1978) (on file with the author).

35. *See* note 31 *supra*.

filing and service of a notice of appeal a prerequisite to a valid appeal as of right, under an amendment to civil trial rule 62 an appellant may obtain a stay of execution in actions for money or property only by giving security for the judgment in full, interest, damages for delay, and costs on appeal.[36] The trial court, however, is given a substantial amount of discretion in rule 62 to require less than the full amount of security or to require no security at all depending upon the circumstances of the particular case.[37] Based on a recommendation of the Advisory Commission, appellate rule 7(a) was amended to provide that any party, and not just the party seeking entry of the stay order, may obtain summary review of an order entered pursuant to rule 62.[38] The procedure for seeking review under appellate rule 7(a) is by way of a simple motion for review made in the appellate court to which the appeal has been taken. As a prerequisite to review, a written motion for the relief sought on review must first be presented to the trial court unless such a motion is not practicable.[39]

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36. *See Procedural Details, supra* note 2, at 25-31; *Theoretical Foundations, supra* note 2, at 235-41.

37. TENN. R. CIV. P. 62.05 provides:

> A party may obtain a stay without giving any security or without giving the full amount of the security required by this Rule upon motion and, if not previously presented, upon presentation of an itemized and verified statement of his financial condition. If the motion is granted, the party may obtain a stay by giving such security as the court deems proper based upon the party's financial condition.

38. Before amendment, appellate rule 7(a) provided that application for a stay pending appeal, or for approval of a bond staying execution, or for an order suspending relief or granting additional or modified relief pending appeal may be reviewed by motion in the appellate court to which the appeal has been taken. As amended, TENN. R. APP. P. 7(a) provides that "[a]ny party may obtain review of an order entered pursuant to rule 62 of the Tennessee Rules of Civil Procedure."

Orders other than those entered pursuant to rule 62 that may result in irreparable injury or otherwise prevent the appellate court from granting complete relief on appeal after entry of a final judgment may be reviewed by means of an interlocutory appeal taken pursuant to appellate rules 9 or 10. For a discussion of the details of taking an interlocutory appeal, see *Procedural Details, supra* note 2, at 15-18.

39. *See* 9 MOORE'S FEDERAL PRACTICE ¶ 208.07, at 1424 (2d ed. 1975): "[A] showing of impracticability would normally require a showing that the [trial] judge is unavailable, or that relief to be effective must be immediate and that in the nature of what occurred in the [trial] court relief from it is improbable."

The motion for review in the appellate court is to be accompanied by a copy of the motion filed in the trial court, any answer in opposition thereto, and any written statement of reasons given by the trial court for its action. The motion for review itself must identify the court that entered the order and must state the date of the order, the substance of the order (including the amount of bond or other conditions of the stay of execution), the facts relied on (including the facts showing relief in the trial court is not practicable if a motion for the relief sought on review has not been presented to the trial court), the arguments supporting the motion, and the relief sought. If the facts relied on are subject to dispute, the motion is to be supported by affidavits or other sworn statements. Review is had without briefs and after reasonable notice to the other parties,[40] who are to be served with a copy of the motion for review. The other parties may promptly file an answer. The appellate court, either on its own motion or on motion of a party, may order preparation of a transcript of all proceedings had in the trial court on the question of stay of execution. According to the concluding sentence of appellate rule 7(a), review by the appellate court shall be completed promptly.

Civil trial rule 62, which pertains to stays, was itself amended in one noteworthy respect. Before amendment, rule 62.05 simply provided that security for a stay of execution shall be conditioned to secure "the judgment in full" plus interest, damages for delay, and costs on appeal. Some judgments do not direct the payment of a lump sum of money but direct the payment of money in periodic installments.[41] The question therefore arises concerning the amount of security required by the "judgment in full" language. To cover this situation, the state supreme court revised rule 62.05(1) to provide that in cases directing the payment of money in periodic installments, the security required to stay execution "shall be fixed in such manner as the [trial] court shall deem sufficient." In determining the amount of security that should be considered sufficient in any

40. TENN. R. APP. P. 7(a) neither expressly requires nor prohibits oral argument on the motion. On the other hand, rule 8, dealing with review of release decisions in criminal cases, states that "[n]o oral argument shall be permitted except when ordered on the court's own motion."

41. Examples are alimony and child support payments as well as certain benefits payable under the worker's compensation statute.

particular case, the court should keep in mind that one purpose of the security requirement is to give the appellee some assurance that the judgment will be expeditiously satisfied and that he will be made whole for any damages caused by the delay on appeal.[42] Accordingly, the security ought to be conditioned to secure the payment of such installments as become due during the pendency of the appeal as well as interest, damages for delay, and costs on appeal. The amount of security should not be entirely open-ended, however, and a maximum figure of recovery on the bond should be specified so that the surety knows the possible extent of his liability at the time security is provided.[43] If the trial court's estimate of the number of installments that will become due before the appellate process is brought to a conclusion is too high, then the surety would be liable only for such amounts as actually become due. If, however, the trial court's estimate is too low, then the surety would be liable only for the maximum figure set by the court.[44]

In criminal cases, the concern that parallels the problem of stay of execution in civil cases is release of the defendant pending appeal after conviction. The Release from Custody and Bail Reform Act of 1977[45] governs the availability and conditions of release in all but a few situations.[46] The appellate rules are relevant

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42. *See generally Theoretical Foundations*, *supra* note 2, at 240-41.

43. *Cf.* 73 HARV. L. REV. 333, 343 (1959) (court should specify maximum amount recoverable on interlocutory injunction bond so plaintiff may know possible extent of his liability). *See also* Dobbs, *Should Security Be Required as a Pre-Condition to Provisional Injunctive Relief?*, 52 N.C.L. REV. 1091 (1974).

44. If the trial court's estimate proves to be so low as to imperil the security to which appellee is entitled, he should be permitted to move for an order requiring appellant to post additional security. Alternatively, if the trial court's estimate proves to be unreasonably high, appellant should also be permitted to move for a reduction in the required security. TENN. R. CIV. P. 62.08 would seem sufficient to empower the appellate court to increase or decrease the required security during the pendency of the appeal. That rule provides:

> Nothing in this Rule [62] shall be construed to limit the power of an appellate court or a judge thereof to stay proceedings or to suspend relief or grant whatever additional or modified relief is deemed appropriate during the pendency of an appeal or to make any order appropriate to preserve the status quo or the effectiveness of any judgment that may subsequently be entered.

45. TENN. CODE ANN. §§ 40-1201 to 1244 (Cum. Supp. 1978), *as amended by* 1979 Tenn. Pub. Acts ch. 318, § 16.

46. Additional provisions governing release are TENN. CODE ANN. §§ 40-1245 to 1247, -3406 to 3407, -3408 (1975). TENN. R. CRIM. P. 32(c) is also relevant.

to the release problem only insofar as they establish the procedural framework for the assertion of those rights detailed by statute.[47] To fill a gap that existed in the earlier version of the appellate rules, the state supreme court added rule 8(c) to cover the situation in which a defendant's conviction has been affirmed by the court of criminal appeals but a further review of the conviction is to be sought in the state supreme court. Under rule 8(c), upon affirmance of the conviction of a defendant in the court of criminal appeals and pending both the filing and disposition of an application for permission to appeal to the state supreme court under rule 11, "the defendant may be admitted to bail on bond . . . upon such terms and under such conditions as shall be fixed by the Court of Criminal Appeals."[48] Since review by the supreme court will rarely be available, the court of criminal appeals can be expected to increase the required bond.[49] The bond should be conditioned on a requirement that the defendant file his application for permission to appeal within the time specified in rule 11 and on a requirement that he surrender himself if the application is not filed on time or if it is denied.[50] Although rule 8(c) speaks only of release to bail "on bond," the rule probably should not be read to preclude release on any other conditions of release that are deemed satisfactory by the court of criminal appeals.[51]

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47. *See Procedural Details, supra* note 2, at 31-35.

48. TENN. CODE ANN. § 40-1213 (Cum. Supp. 1978) provides: "In the cases in which defendant may be admitted to bail . . . the order admitting him to bail may be made either by the court wherein the judgment was rendered, or the judge thereof, by the Court of Criminal Appeals, or by the Supreme Court."

49. TENN. CODE ANN. § 40-1213 (Cum. Supp. 1978) provides:

> [I]n any case in which any person has been admitted to bail following his arrest or indictment such bail bond, security or cash deposit shall continue and be valid and binding pending any appellate review, and no additional or new bail shall be required unless ordered by the court wherein the judgment of the conviction was rendered, or the judge thereof, or by the Court of Criminal Appeals or by the Supreme Court.

50. Rule 8(c) explicitly provides that release may be ordered by the court of criminal appeals "pending the filing" of an application for permission to appeal to the state supreme court under rule 11. The defendant, therefore, need not be incarcerated until an application for permission to appeal is filed. In one grand division the current practice of incarcerating the defendant until his counsel has filed a petition for certiorari only encourages counsel to file hastily drawn petitions.

51. *See* TENN. CODE ANN. § 40-1216 (Cum. Supp. 1978).

Three other amendments to the rules involving appeals in criminal cases may be conveniently discussed at this point. First, in response to a recommendation of the court of criminal appeals, the Advisory Commission deleted a provision from rule 3(b) that permitted a defendant to appeal as of right from any order modifying the conditions of probation. As amended, rule 3(b) permits the defendant an appeal as of right only with regard to those probation orders that either deny probation or revoke it. Although the amended rule will certainly achieve its desired objective of eliminating appeals of orders modifying the conditions of probation, the desirability of that objective is itself questionable. Foreclosure of appellate review seems to accord insufficient consideration to a defendant's vital liberty interest.[52]

The rules relating to criminal appeals were also amended with regard to the motions that terminate the time for filing notice of appeal. While notice of appeal must generally be filed within thirty days after entry of judgment,[53] certain specified timely motions in the trial court terminate the running of the time within which notice of appeal must be filed.[54] As noted in the Advisory Commission comment to rule 4, "it would be unde-

52. In addition to appeals as of right, the rules permit an appellant in some circumstances to take an appeal by permission. *See generally Procedural Details*, *supra* note 2, at 15-21; *Theoretical Foundations*, *supra* note 2, at 216-27. As the name implies, an appeal by permission, unlike an appeal as of right, is available only if permission to appeal is granted by the trial or appellate court. Under rule 9, one reason for permitting an appeal by permission is "the need to prevent irreparable injury, giving consideration to the severity of the potential injury, the probability of its occurrence, and the probability that review upon entry of a final judgment will be ineffective." Also, under rule 10 an appeal by permission may be taken "if the lower court has so far departed from the accepted and usual course of judicial proceedings as to require immediate review." The principal difference between these rules is that an appeal by permission under rule 9 requires the permission of both the trial and appellate courts, while an appeal under rule 10 may be taken on the permission of the appellate court alone. Although the matter is not free from doubt, a defendant arguably may appeal an order of the trial court modifying the conditions of his probation under rule 9 if he will suffer irreparable injury if an appeal is not allowed, or under rule 10 if he can demonstrate that the trial court acted in an arbitrary fashion in modifying his probation. The availability of review under rules 9 or 10 would have the advantage of permitting appellate review when it is most needed without making review routinely available.

53. TENN. R. APP. P. 4(a).

54. *Id.* R. 4(b)-4(c).

sirable to proceed with the appeal while the trial court has before it a motion the granting of which would vacate or alter the judgment appealed from, and which might affect either the availability of or the decision whether to seek appellate review." Before amendment of the rules, the only motions in criminal actions that terminated the running of the time for filing notice of appeal were a motion under Tennessee Rule of Criminal Procedure 33(a) for a new trial and a motion under rule 34 for arrest of judgment, as well as a timely petition under rule 32(f)(1) for a suspended sentence. Motions for a judgment of acquittal were not initially included among those motions that terminate the running of the time for filing notice of appeal. In light of the purpose of delaying appellate review until the trial court has disposed of motions pending before it, rule 4(c) was amended to provide that the making of a timely motion for a judgment of acquittal under criminal rule 29(c) also terminates the running of the time for filing notice of appeal.[55]

Finally, the state supreme court amended rule 13(e), which sets forth the standard of review for findings of guilt in criminal actions. In its earliest version, rule 13(e) simply adopted the traditional rule in Tennessee that findings of guilt are set aside on appeal only if the evidence preponderates against the finding.[56] As a result of some recent decisions by the United States Supreme Court,[57] rule 13(e) was initially amended to provide that

55. A motion for judgment of acquittal under criminal rule 29(c) is made after the jury returns a verdict of guilty or is discharged without having returned a verdict. The motion may also be made at the close of the evidence offered by the state or at the close of all the evidence. *See* TENN. R. CRIM. P. 29(a)-29(b).

56. *See* Tenn. Sup. Ct. R. 14(7), 218 Tenn. 817 (1967): "No assignments or [*sic*] error can be based on the facts, in criminal cases, unless the testimony preponderates in favor of the innocence of the plaintiff in error, and against the verdict of guilty found by the jury . . . ."

57. *See* Burks v. United States, 437 U.S. 1 (1978); Greene v. Massey, 437 U.S. 19 (1978). The Supreme Court in *Burks* held that under the double jeopardy clause an accused may not be subjected to a second trial if his conviction is reversed by an appellate court solely for lack of sufficient evidence to sustain the jury's verdict. This holding was applied to a state-court conviction in *Greene*. As noted in the Advisory Commission comment to rule 13(e), the Court did not expressly address the standard governing appellate reversal on the ground of insufficient evidence. Due process, however, would seem to require that an appellate court review the whole record to ascertain whether the trier of fact could reasonably find the defendant guilty beyond a reasonable doubt.

"[f]indings of guilt in criminal actions whether by the trial court or jury shall be set aside if, considering the whole record, the evidence fails to establish guilt beyond a reasonable doubt." Apparently the court of criminal appeals considered this standard of review too exacting and likely to result in the setting aside of an excessive number of convictions. Accordingly, the state supreme court amended rule 13(e) again, so that it now provides that "[f]indings of guilt in criminal actions whether by the trial court or jury shall be set aside if the evidence is insufficient to support the finding by the trier of fact of guilt beyond a reasonable doubt."

One clear difference between the current version of rule 13(e) and its immediate predecessor is that the rule no longer expressly requires consideration of the whole record. That difference may well be more accidental than intentional. The criticism by the court of criminal appeals was not directed at the requirement that the whole record be considered but rather at the standard of review. Moreover, for an appellate court to consider only the evidence supporting the finding of guilt would be undesirable. As Justice Traynor has observed in a more general context:

> Occasionally an appellate court affirms the trier of facts on isolated evidence torn from the context of the whole record. Such a court leaps from an acceptable premise, that a trier of fact could reasonably believe the isolated evidence, to the dubious conclusion that the trier of fact reasonably rejected everything that controverted the isolated evidence. Had the appellate court examined the whole record, it might have found that a reasonable trier of fact could not have made the finding in issue. One of the very purposes of review is to uncover just such irrational findings and thus preclude the risk of affirming a finding that should be disaffirmed as a matter of law.[58]

The only other difference between the current version of rule 13(e) and its immediate predecessor is that the former requires a finding of guilt to be set aside "if the evidence is insufficient to

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See Theoretical Foundations, supra note 2, at 216 n.299; *cf.* Jackson v. Virginia, 99 S. Ct. 2781 (1979) (federal court in habeas corpus proceeding must consider whether there is sufficient evidence to justify a rational trier of fact to find guilt beyond a reasonable doubt).

58. R. TRAYNOR, THE RIDDLE OF HARMLESS ERROR 27 (1970) (footnote omitted).

support the finding by the trier of fact of guilt beyond a reasonable doubt," whereas the latter required that a finding of guilt be set aside "if . . . the evidence fails to establish guilt beyond a reasonable doubt." This difference is not merely semantic, but is intended to make clear that "it is not for an appellate court to retry cases on appeal or to substitute its judgment of the probabilities for that of the trier of fact, whatever it may find in the record."[59] Reversal is appropriate, at least when the finding of guilt is based on the opportunity of the trier of fact to assess the credibility of witnesses who appeared personally before it,[60] only if, considering the whole record, no trier of fact could reasonably find the defendant guilty beyond a reasonable doubt.[61] If rule 13(e) is so construed, it will require reversal of convictions only infrequently, while at the same time assuring that measure of appellate scrutiny that is properly the province of an appellate court and to which the defendant is fairly entitled.[62]

The most significant changes in the rules that remain to be discussed, and by far the most numerous of all the amendments, relate to the record on appeal.[63] The rules concerning the record as formulated by the Advisory Commission were designed to work without judicial supervision unless the parties were unable to agree concerning the content of the record on appeal.[64] Under the Advisory Commission's proposal, it was not necessary for the re-

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59. *Id.*

60. *See* ABA COMMISSION ON STANDARDS OF JUDICIAL ADMINISTRATION, STANDARDS RELATING TO APPELLATE COURTS § 3.11, at 23 (1977); R. TRAYNOR, *supra* note 58, at 20-21; Chestnut, *Analysis of Proposed New Federal Rules of Civil Procedure*, 22 A.B.A.J. 533, 540 (1936); Rosenberg, *Judicial Discretion of the Trial Court, Viewed from Above*, 22 SYRACUSE L. REV. 635, 663-65 (1971); Wright, *The Doubtful Omniscience of Appellate Courts*, 41 MINN. L. REV. 751, 781-82 (1957).

61. *See generally Theoretical Foundations*, *supra* note 2, at 203-16.

62. Such a construction of rule 13(e) would also accord the defendant the measure of review due process ought to require. *See* note 57 *supra*.

63. *See generally Procedural Details*, *supra* note 2, at 35-69; *Theoretical Foundations*, *supra* note 2, at 242-51.

64. One author has observed that, if the attorneys on both sides agree that the bill of exceptions correctly states the proceedings and the evidence, the requirement that the trial court approve the bill "is ordinarily only a waste of the time, the energy . . . or whatever else is needed to get the paper to the judge, as his signature follows in such a case as a matter of course." Wicker, *supra* note 10, at 677.

cord on appeal to be approved by the trial court. The state supreme court rejected the Commission's recommendation in this regard. As revised by the supreme court, rule 24(e) preserves the requirement[65] that the trial court approve the transcript or statement of the evidence and authenticate the exhibits.[66] The rule directs the trial judge to approve the transcript or statement and to authenticate the exhibits "as soon as practicable after the filing thereof,"[67] and, in any event, no later than forty-five days after filing of the transcript or statement.[68] In a commendable attempt to honor the Advisory Commission's purpose in eliminating any requirement of approval of the record, the supreme court provided in rule 24(e) that if the trial court fails to approve and authenticate the specified portions of the record on appeal within the forty-five day period, "the transcript or statement of the evidence and the exhibits shall be deemed to have been approved

65. *But see* TENN. CODE ANN. § 27-109 (Cum. Supp. 1978). While the bill of exceptions had to be filed within the statutorily prescribed period of time, the trial court could approve the bill any time thereafter. *See id.* § 27-111, *construed in* Arnold v. Carter, 555 S.W.2d 721 (Tenn. 1977). For a discussion of *Arnold* and a related case, see Sobieski, *A Survey of Civil Procedure in Tennessee—1977*, 46 TENN. L. REV. 271, 375-78 (1979).

66. As a result of its decision to retain the requirement that the trial court approve the transcript or statement of the evidence and authenticate the exhibits, the state supreme court also deleted a provision from rule 24 that permitted the parties to file an agreed statement as the record on appeal. For a discussion of the agreed statement, see *Procedural Details*, *supra* note 2, at 47-48. Deletion of this provision is not particularly significant since the comparable provision in the Federal Rules of Appellate Procedure is rarely utilized and the same would probably have been true under the new rules. *See* 9 MOORE'S FEDERAL PRACTICE ¶ 210.07, at 1635 (2d ed. 1975); Godbold, *Twenty Pages and Twenty-Minutes—Effective Advocacy on Appeal*, 30 SW. L.J. 801, 806 (1976).

67. This is in accord with prior law. *See* TENN. CODE ANN. § 27-111 (Cum. Supp. 1978). The current statute does not set a maximum time within which the trial court must act, as does the revised version of rule 24(e).

68. The rule states that the record should be approved "as soon as practicable after the filing thereof or after the expiration of the 15-day period for objections by appellee, as the case may be." Normally, the trial court should not approve the record prior to expiration of the 15 days appellee is granted for filing objections to the transcript or statement of the evidence filed by appellant. *See* TENN. R. APP. P. 24(b)-24(c); *Procedural Details*, *supra* note 2, at 45-47. If, however, appellant has secured appellee's approval of the transcript or statement prior to filing it, the trial court may appropriately approve the record within the 15-day period for objections by appellee.

and shall be so considered by the appellate court, except in cases where such approval did not occur by reason of the death or inability to act of the trial judge." Although the phrase "inability to act" is not defined, it would seem to include any physical or mental illness or infirmity or other prolonged absence for any reason. In cases in which the trial judge, because of death or inability to act, does not approve the record, rule 24(e) provides that "a successor or replacement judge of the court in which the case was tried shall perform the duties of the trial judge, including approval of the record or the granting of any other appropriate relief, or the ordering of a new trial."[69] The de-emphasis of the importance of approval of the record by the trial judge reflected in revised rule 24(e) suggests that if the parties agree concerning the content of the record on appeal, it should be approved by a successor or replacement judge as a matter of course.[70]

Another significant change concerning the record on appeal originated with the Advisory Commission. In its original form, rule 25 provided that the record on appeal would remain in the trial court until the parties completed their briefs.[71] The purpose of retaining the record in the trial court was to serve the convenience of parties who may be far removed from the office of the clerk of the appellate court. However, largely because of a realistic assessment of the heavier workload of the trial court clerks and a desire to promote centralized control of appellate records, rule 25 was revised to conform to the longstanding practice, under which the record on appeal is transmitted to the clerk of the appellate court as soon as it is complete for purposes of the appeal.[72] To accommodate this change, rule 29(a) was amended to provide that the appellant's thirty-day period for filing and serving his brief runs from the date on which the record is filed with the appellate court, and not from the date on which the record is

69. This is in accord with prior law. *See* TENN. CODE ANN. § 17-118 (1955). Rule 24 does not address the distinguishable problem of the appropriate relief if the trial judge dies or is unable to act prior to ruling on a motion for a new trial or other similar post-trial motion. *See id.* § 17-117.

70. Even if the parties are unable to agree, the trial judge should approve the record "if, after hearing, he shall find that it fairly states the truth of the case." *Id.* § 17-118.

71. *See Procedural Details, supra* note 2, at 55-57.

72. *See* TENN. CODE ANN. § 27-322 (Cum. Supp. 1978); Tenn. Sup. Ct. R. 6, 218 Tenn. 809 (1967); Tenn. Ct. App. R. 7, 57 Tenn. App. 807 (1967).

completed as the rule originally provided. Under rule 26(a), the clerk of the appellate court must, as soon as the record is filed, notify the parties of the date the record was filed.

The final significant change concerning the record on appeal is found in rule 25(d). Before amendment, rule 25 put the burden on the appellant to seek an extension of time if the clerk of the trial court is unable to complete the record on appeal within the allotted thirty-day period after the filing of the transcript or statement of the evidence.[73] Current rule 25(d) places the burden for seeking an extension on the clerk of the trial court, who seeks the extension from the appellate court to which the appeal has been taken.[74] The practical effect of this amendment is to relieve the appellant of the burden of ensuring that the record is completed on time.[75] The appellant simply needs to file the transcript or statement of the evidence on time and take whatever other action is necessary to enable the clerk to complete the record.[76]

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73. *See Procedural Details, supra* note 2, at 55.

74. A proposed amendment to FED. R. APP. P. 11(b) would effect a similar change in federal practice with regard to preparation and filing of the transcript. As amended, FED. R. APP. P. 11(b) would provide:

> Upon receipt of an order for a transcript, the reporter shall acknowledge at the foot of the order the fact that he has received it and the date on which he expects to have the transcript completed and shall transmit the order, so endorsed, to the clerk of the court of appeals. If the transcript cannot be completed within 30 days of receipt of the order the reporter shall request an extension of time from the clerk of the court of appeals and the action of the clerk of the court of appeals shall be entered on the docket and the parties notified. In the event of the failure of the reporter to file the transcript within the time allowed, the clerk of the court of appeals shall notify the district judge and take such other steps as may be directed by the court of appeals. Upon completion of the transcript the reporter shall file the transcript with the clerk of the district court and shall notify the clerk of the court of appeals that he has done so.

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF APPELLATE PROCEDURE 12-13 (1977).

75. The burden of ensuring that the record is completed on time is appropriately that of the clerk of the trial court since the appellant has no control over the time within which the record will be completed. Placing the burden for seeking an extension on the clerk and lodging the decision whether to grant the extension with the appellate court may also have the desirable effect of prompting the clerk to complete the record within the period specified in rule 25(a).

76. *See Procedural Details, supra* note 2, at 53-54.

Dismissal of the appeal under revised rule 26(d) is permitted only if the appellant fails to file the transcript or statement within the ninety-day period specified in rules 24(b) and 24(b).[77] Virtually all steps after filing of the transcript or statement are now the responsibility of the clerk of the trial court,[78] and rule 26(b) empha-

77. Prior to amendment, rule 26(b) permitted dismissal of an appeal if appellant failed to discharge his responsibility to cause timely completion or transmission of the record. Since under the revised rules transmission of the record occurs as soon as it is complete for purposes of the appeal, that portion of the earlier version of rule 26 was no longer needed. Similarly, placing the burden on the clerk of the trial court to see that the record is completed on time rendered the remaining portion of the original rule unnecessary.

While rule 26(b) as revised permits dismissal of an appeal only if appellant fails to file the transcript or statement of the evidence on time, dismissal might also be urged on the ground appellant has failed to file proof of service of the notice of appeal with the clerk of the trial court. Rule 25(a) provides that the clerk will not assemble, number, or complete the record if proof of service of the notice of appeal has not been filed. Although rule 2 permits an appellate court to excuse the failure to file proof of service of the notice of appeal, that rule requires a showing of good cause. Yet, the only effect of a delay in completion and transmission of the record is that appellant gains some additional time for serving and filing his brief. As previously urged:

> Perhaps the most desirable solution is to extend the time for completing the record but also to abridge the time within which the appellant must file and serve his brief. This solution seems consistent with the spirit of rule 3(e), which provides that failure of an appellant to take any step other than the timely filing and service of a notice of appeal does not affect its validity but is ground only for such action as is appropriate.

Procedural Details, supra note 2, at 60. Noncompliance with the service requirement itself, as opposed to the requirement of filing proof of service, is also excusable. *See id.* at 10-11; *Theoretical Foundations, supra* note 2, at 190-91.

78. Under rule 2 even the failure to file the transcript or statement of the evidence on time may be excused for good cause. Good cause would almost always seem to be present if noncompliance with the rules is no fault of the appellant but results instead from the inadvertence of those over whom the appellant has no control. *See, e.g.*, General Elec. Supply Co. v. Arlen Realty & Dev. Corp., 546 S.W.2d 210, 214 (Tenn. 1977). If, for example, the court reporter died or were otherwise unable to complete the transcript on time, appellant would have good cause to seek an extension of time for filing the transcript, at least if the transcript was ordered promptly after filing notice of appeal. *See Procedural Details, supra* note 2, at 45. Under prior law, the appellate court could not permit the bill of exceptions in a civil case to be filed beyond the time specified in TENN. CODE ANN. § 27-111 (Cum. Supp. 1978). In criminal cases the court of criminal appeals and the supreme court could for good cause at any time

sizes the principle that dismissal of an appeal is not authorized for the errors or omissions of the clerk of the trial court.[79]

In addition to the changes already noted, a number of other miscellaneous and largely technical amendments were incorporated into the appellate rules. These matters have been relegated to the accompanying footnote.[80] Of greater significance are three

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order the filing of the bill of exceptions "so as to give the appellate court jurisdiction to consider the same." *Id.*

79. TENN. R. APP. P. 26(b) provides: "Nothing in this subdivision shall be construed to authorize dismissal of an appeal due to the errors or omissions of the clerk of the trial court." This provision is of lesser significance under the approved version of the rules, which require the clerk of the trial court to seek an extension if he is unable to complete the record on time. Under the earlier version the appellant was required to seek the extension, and rule 26(b) was designed to ensure that the appellant would not be penalized for the derelictions of the clerk. *See Procedural Details, supra* note 2, at 65-66.

80. Rule 4(b) deals in part with the problem that arises if notice of appeal is filed prematurely. One such situation arises if notice is filed after entry of judgment but prior to the filing of a later timely motion in the trial court that terminates the time for filing notice of appeal. *See Procedural Details, supra* note 2, at 5-8. Originally rule 4(b) provided that "[a] notice of appeal filed before the filing of any of the [enumerated] motions shall have no effect." The amended version of the rule provides that a notice of appeal filed before the filing "or disposition" of the enumerated motions shall have no effect.

Rules 9, 10, and 11 were amended to specify when the clerk of the appellate court should docket appeals taken under those rules. The earlier versions did not treat the question. As amended, rule 9(e) provides that the clerk shall docket an appeal under that rule upon entry of the order granting permission to appeal; rule 10(b) provides that the appeal shall be docketed upon the filing of the application for an extraordinary appeal with the clerk of the appellate court; and rule 11(e) provides that the clerk shall docket the appeal under that rule upon entry of the order granting permission to appeal.

Rule 14(a) was amended in one minor respect. That rule permits the appellate courts to consider post-judgment facts in certain enumerated circumstances. *See Procedural Details, supra* note 2, at 66-67; *Theoretical Foundations, supra* note 2, at 200-02. To emphasize that the enumerated circumstances are not an exclusive listing of facts that may be considered, rule 14(a) now provides that consideration "generally" will extend only to those facts mentioned in the rule. The Advisory Commission comment still clearly indicates, however, that rule 14 "is not intended to permit a retrial in the appellate court."

Rule 15(b), which governs voluntary dismissals in the appellate court, was amended by adding an introductory phrase to emphasize that the filing of the record in the appellate court activates that court's authority to enter an order voluntarily dismissing an appeal. Also, the penultimate sentence was amended by deleting a phrase referring to voluntary dismissals on motion of the appellant

provisions the state supreme court deleted from the rules. One of

"or moving party." The moving party will invariably be the appellant as that term is used and defined in the rules.

Rule 19(b), which deals with substitution for causes other than death, originally referred to "substitution of a party in the appellate court by reason of . . . death." However, substitution rendered necessary by reason of death is treated explicitly in rule 19(a), and the redundant inclusion of death in rule 19(b) was eliminated.

A grammatical error was eliminated from rule 24(a) by changing the singular of the word "summons" to the plural "summonses."

The duty of the clerk to make the record available to the parties so that they may prepare appellate papers is treated in rule 25(c), which was amended in three respects. As a result of the decision to transmit the record to the clerk of the appellate court as soon as it is complete for purposes of the appeal, the rule was amended to impose the duty to make the record available on the clerk of the appellate court, not the clerk of the trial court as the rule originally provided. A provision stating that the record may be made available to a party by the clerk "without the necessity of obtaining an order of the . . . court" was deleted as not having been necessary. Finally, the rule was amended by adding a provision permitting the clerk and the parties to send the record, one to another, "by prepaid mail or parcel delivery service." Before the addition of the quoted language the clerk was directed to send the record to a party, charges collect, and this method of delivery remains permissible under the amended rule. Personal delivery is also authorized by rule 25(c).

No substantive change was made in rule 28, which deals with preparation of an optional appendix to the briefs, but the sentence originally appearing as the second sentence of subdivision (a) was moved to subdivision (d), where it now appears as the third sentence.

Rule 38, which deals with the responsibility of the clerk of the appellate court to notify the parties of entry of judgment, was amended to make it conform with prior practice. That rule originally required the clerk, on the day judgment is entered, to mail to the parties the judgment itself as well as the opinion of the appellate court and notice of the date of entry of the judgment. The current rule simply requires the clerk to mail the opinion and notice of the date of entry of the judgment; the judgment itself will not be sent to the parties.

Rule 39(a), which deals with rehearings, was amended by substituting the word "opinion" for the word "decision" in the four places it appears in that rule. The same change was made in rule 38.

Subdivisions (c), (d), and (f) of rule 40 were all amended in the same fashion. In their original form those subdivisions included among the recoverable costs on appeal "the cost of producing" briefs and certain other papers. As amended, the rule expresses the intention of the original rule more clearly by stating that a party may recover "the cost of producing necessary copies of" the designated papers.

A new last sentence added to rule 42(a) provides that the clerk of the appellate court is responsible for collecting his fees. In all other respects, however, execution issues not from the appellate court but from the trial court in which the action was brought. *See Procedural Details*, *supra* note 2, at 100-01.

Rule 42(a) was also extensively amended with respect to the time the clerk transmits the mandate from the appellate court to the trial court. The rule

the rules would have altered the current practice of calling civil appeals for argument on a county-by-county basis;[81] deletion of the Commission's recommendation leaves the county-by-county rule intact. The supreme court also deleted a rule that would have permitted the court to amend the appellate rules without legislative approval.[82] Finally, the court deleted proposed rule 37, which

originally provided that the mandate is transmitted 31 days after entry of judgment unless the court orders otherwise. That remains true with regard to the mandates of the intermediate appellate courts, but under the amended version of rule 42(a) mandates of the supreme court are transmitted 11 days after entry of judgment unless the court orders otherwise. The principle of amended rule 42(a) is that the mandate of an intermediate court should not issue until the time for applying to the supreme court for review has expired and the mandate of the supreme court should not issue until the time for petitioning for rehearing has expired. *See Procedural Details, supra* note 2, at 101. Since TENN. R. APP. P. 39(b) requires a petition for rehearing to be filed within 10 days after entry of judgment, the original rule provided an excessive amount of time before a mandate would issue from the state supreme court. In cases in which still further review may be sought in the Supreme Court of the United States, either the appellate court whose decision is sought to be reviewed or a judge thereof or the Supreme Court of Tennessee or a justice thereof may stay the mandate. TENN. R. APP. P. 42(c); *see Procedural Details, supra* note 2, at 101-02.

Finally, the revision of civil trial rule 62.05 was itself amended to state more clearly the procedure to be utilized if a party seeks a reduction in the amount of security required to stay execution. For a discussion of the amended rule, see *Procedural Details, supra* note 2, at 27-28.

81. *See Procedural Details, supra* note 2, at 86-87.

82. The purpose of the rule was to facilitate amendment of the appellate rules. Apparently the state supreme court concluded that the Advisory Commission's recommendation might needlessly jeopardize legislative approval of the rules. Serious consideration should be given, however, to amending the current rulemaking statute, TENN. CODE ANN. §§ 16-112 to 118 (Cum. Supp. 1978), to conform with the recommendation made in Levin & Amsterdam, *Legislative Control over Judicial Rule-Making: A Problem in Constitutional Revision*, 107 U. PA. L. REV. 1 (1958). The authors propose that to ensure flexibility in a procedural system rules of procedure be made by the supreme court, *id.* at 38, and that to provide a representative voice on matters that might touch on policy and substantive law court-made rules should be subject to legislative review. *Id.* at 39. Such review, however, should not unduly burden the flexibility of court-made rules. The legislature should be able to amend or repeal a rule only after the chief justice has been given an opportunity to be heard on the bill and only if the bill passes by a two-thirds vote of both houses; the legislative action should remain in force for a limited time only, after which the supreme court should have the power to rescind it. *Id.* at 39-47.

dealt with publication of opinions.[83] Deletion of this rule means that current law remains in force.[84]

Of the rules deleted by the court, the deletion of rule 37 on the publication of opinions is particularly deserving of some discussion. The principal impact of rule 37 would have been to increase significantly the number of published opinions of the intermediate appellate courts. Under current law, the opinions of the intermediate appellate courts are generally published only if certiorari has been denied by the state supreme court.[85] If the denial of certiorari were an indication that the supreme court concurred in the opinion of the intermediate appellate court, then the current law would make some sense. The supreme court, however, has repeatedly stated that the denial of certiorari does not indicate the court's agreement with the reasons given in the opinion of the intermediate appellate court, but only its agreement with the result.[86] That the denial of certiorari should indicate anything beyond the fact that the supreme court will not review the case is questionable.[87] Moreover, the current practice of not publishing

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83. *See Theoretical Foundations, supra* note 2, at 262-68.

84. For a discussion of the current law, see Sobieski, *supra* note 65, at 398-99.

85. *See* TENN. CODE ANN. § 8-612(c) (Cum. Supp. 1978).

86. *See, e.g.*, Adams v. State, 547 S.W.2d 553 (Tenn. 1977). Greater difficulty has been experienced defining the effect of the denial of certiorari accompanied by an opinion. *See* Pairamore v. Pairamore, 547 S.W.2d 545 (Tenn. 1977), *noted in*, Sobieski, *supra* note 65, at 385-87. Absent the issuance of an opinion upon the denial of certiorari, it is impossible to know why the state supreme court thought the intermediate appellate court reached the correct result. Accordingly, it is difficult to attach any particular significance to the opinion of the intermediate appellate court.

87. This will be particularly so under the new rules. TENN. R. APP. P. 11(a) sets forth the character of reasons that typically will be considered sufficient to justify review by the supreme court of final decisions of the intermediate appellate courts. The fundamental purpose of rule 11(a) is to identify those cases that are of such extraordinary importance that they justify the burdens of time, expense, and effort associated with successive appeals. *See Theoretical Foundations, supra* note 2, at 231-35. The important point for present purposes is that rule 11(a) expresses the policy that the supreme court should not exercise its discretionary review power to hear cases of interest only to the parties. In light of that policy,

> the application for permission to appeal filed in the Supreme Court serves the purpose of demonstrating to that court that the case is an appropriate one for the exercise of the court's discretion in favor of

the vast majority of opinions of the intermediate appellate courts ignores the fact that a good deal of law is made, and made authoritatively, by the intermediate appellate courts.[88] Since unpublished opinions are not generally available,[89] nonpublication is a violation "of a fundamental presupposition of our legal order, that the law be knowable and readily and equally accessible to all."[90] Given the importance of the matter, deletion of rule 37 on publication of opinions ought not be the final word on this difficult question.

Most of the amendments to the rules, however, seem consistent with the overall purposes of reforming the law of appellate procedure.[91] To be sure, some of the amendments may cause some new problems,[92] and still further amendments may be desirable,[93]

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permitting an appeal. The application is not designed to serve the office of arguing the merits of the decision of the intermediate appellate court.

TENN. R. APP. P. 11, Advisory Comm'n comment; *see Procedural Details*, *supra* note 2, at 18-20. In practice, the supreme court may refuse review under rule 11 only when at least four members of the court are convinced that the intermediate appellate court reached the right result for the right reason. *See* Traynor, *supra* note 9, at 213-14. (Under TENN. R. APP. P. 11(e), an application for permission to appeal will be granted only if two members of the court vote in favor of review.) If so, the denial of review will be significant. But if the volume of appeals or other reasons preclude the supreme court from righting every wrong of the intermediate appellate courts, the denial of review should have little independent significance.

88. This may be true for the simple reason that, because of the disproportionate expense of seeking review or other reasons, recourse to the state supreme court either has not been attempted or has been precluded, thus rendering the decision of the intermediate appellate court the authoritative last word. Indeed, it has even been suggested that some disappointed litigants will refrain from seeking supreme court review for the very purpose of avoiding publication of the opinion of an intermediate appellate court if their petition for certiorari is unavailing.

89. Alternatively, if unpublished opinions are made generally available by unofficial reporting services, "that in turn frustrates the objective of a nonpublication policy, namely, reducing the quantity of printed material that lawyers must read and use." P. CARRINGTON, D. MEADOR & M. ROSENBERG, JUSTICE ON APPEAL 36 (1976).

90. *Id.*

91. *See Theoretical Foundations*, *supra* note 2, at 168-70.

92. One of the most obvious difficulties likely to arise involves the state supreme court's decision to retain the requirement that the trial court approve the transcript or statement of the evidence and authenticate the exhibits. Be-

particularly in light of experience as the rules are tested in practice.[94] For a time at least, however, the new rules should prove to be a desirable simplification and modernization of the Tennessee law of appellate procedure.

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cause the Advisory Commission's proposal did not generally require approval of the record by the trial court, rule 25(a) measures the 30-day period the clerk of the trial court is allotted to assemble, number, and complete the record from the date the transcript or statement of the evidence is filed. Rule 25(a) was not amended when the state supreme court reinstated the requirement of trial court approval of the record, and under rule 24(e) the trial court may take up to 45 days after its filing to approve the transcript or statement. Thus, rule 25(a) directs the clerk to complete and transmit the record to the appellate court before the trial court must act to approve it. Of course, the trial court may approve the record shortly after it is filed so that the clerk may complete and transmit the record on time, and the clerk may seek an extension of time for completion of the record. *See* TENN. R. APP. P. 25(d). Still, some problems are likely to arise and should be remedied by an amendment to the new rules.

93. For example, rule 25(a) does not explicitly establish the procedure that the clerk of the trial court should follow if no transcript or statement of the evidence or proceedings is to be filed. The grant of a motion for summary judgment is but one example of such a case. The best approach in these cases would seem to be to require the appellant to notify the clerk of the trial court within some reasonable time, perhaps 15 days after notice of appeal is filed, that no transcript or statement is to be filed. The clerk could then be required to discharge his obligations concerning completion and transmission of the record within 30 days after receipt of appellant's notice.

Similarly, rule 42(a) on the issuance of the mandates of the appellate courts should probably be amended to address the issuance of mandates from the state supreme court to the intermediate appellate courts, an area not treated in the current version of the rule. Rule 42(a) also needs to be amended to include a phrase providing that if a petition for rehearing is filed with an intermediate appellate court, the mandate of that court will issue 31 days after entry of the order denying the petition or entry of the judgment on rehearing. *See Procedural Details*, *supra* note 2, at 101. The further amendments mentioned in this note are by no means the only ones that should be considered.

94. *See Theoretical Foundations*, *supra* note 2, at 179-80.

THE UNCERTAIN POWER OF THE PRESIDENT TO EXECUTE THE LAWS

BRUCE LEDEWITZ*

I. INTRODUCTION 757
II. THE ACTIVE THEORY OF THE EXECUTIVE POWER 763
A. *The President Executes the Laws* 763
B. *Constitutional Language* 768
C. *The Logical Implications of Presidential Execution of the Laws: The Active Theory* 770
D. *Theoretical Limitations on the Power of the President Under the Active Theory* 773
III. PRACTICE: INDEPENDENT EXECUTION OF THE LAWS 776
A. *Law Enforcement* 777
B. *Independent Interpretation* 784
C. *Ministerial Functions* 787
D. *Discretionary Functions* 788
E. *Appointment and Removal* 793
IV. THE PASSIVE THEORY OF THE EXECUTIVE POWER 796
A. *The President Supervises Execution of the Laws* 796
B. *The Scope of Supervision* 797
C. *Implications of the Passive Theory* 801
V. CONCLUSION 804

I. INTRODUCTION

Among the many grants of power to the President, none is more significant nor more controversial than the power of the President over execution of the laws.[1] Constitutional battles have

* B.S.F.S., Georgetown University; J.D., Yale Law School.

1. For purposes of this article, a rough definition of the concept "execution of a law" is sufficient. Justice Fortas has described the President as "the sole and ultimate repository of power to carry out the laws of the United States." Fortas, *The Constitution and the Presidency*, 49 WASH. L. REV. 987, 991 (1974). Executing a law will be defined herein as implementing a statutory scheme or carrying it into effect. The definition is derived from cases that arose in a variety of administrative contexts. "The Executive Department, with all its branches, is charged with the true and faithful administration of the acts of Congress . . . . The Executive Department carries the acts of the Congress into effect, administers them, secures their due performance and enforces them." *In re*

taken place over the extent to which the power to execute the laws implies power to go beyond statutes enacted by Congress.[2] While

Texas Co., 27 F. Supp. 847, 849-50 (E.D. Ill. 1939). "It requires little to demonstrate that the Tennessee Valley Authority exercises predominantly an executive or administrative function. To it has been entrusted the carrying out of the dictates of the statute to construct dams, generate electricity, manage and develop government property." Morgan v. T.V.A., 115 F.2d 990, 993-94 (6th Cir. 1940), *cert. denied*, 312 U.S. 701 (1941). *See also* Buttfield v. Stranahan, 192 U.S. 470 (1904).

A more precise definition of execution would be useful but would involve major analytical work far beyond the scope of this article. Several controversies have led to confusion over the concept of execution of the laws. The dispute with the most practical significance involves the relationship between quasi-legislative and quasi-judicial acts, on one hand, and acts of execution of law on the other. Since Humphrey's Executor v. United States, 295 U.S. 602 (1935), the extent of the President's removal power has turned in large part upon the characterization of the administrative body at issue as either executing the laws or interpreting them. Although highly significant, the distinction between the two is not clear since all acts of discretion require decisionmaking and clearly also carry out a statutory program. *See* note 55 *infra*. An earlier controversy, never really resolved, raged over the extent to which *scientific* administration could or should be divorced from *political* execution. *See generally* Grudstein, *Presidential Power, Administration and Administrative Law*, 18 GEO. WASH. L. REV. 285 (1950).

2. Other constitutional powers of the President are to some extent independent of Congress. The determination of foreign policy is one such independent power. *See* United States v. Pink, 315 U.S. 203, 229 (1942); United States v. Curtiss-Wright Corp., 299 U.S. 304, 320 (1936).

When the President is acting to execute a statute, however, he is limited by the terms of the statute. *See* Myers v. United States, 272 U.S. 52 (1926). "The duty of the President to see that the laws are executed is a duty that does not go beyond the laws or require him to achieve more than Congress sees fit to leave within his power." *Id.* at 177 (Holmes, J., dissenting). A question about execution can arise, however, in circumstances of congressional silence or ambiguity. *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).

The last serious challenge to congressional authority to control the means of execution was President Nixon's position that impoundment of allocated funds is an aspect of the executive power. *See* 9 WEEKLY COMP. OF PRES. DOC. 333-34 (Apr. 9, 1973) (message vetoing H.R. 3298, a bill to revive federal grants for certain water projects). This Presidential challenge ultimately led to the enactment of the Congressional Budget and Impoundment Control Act of 1974, 31 U.S.C. §§ 1301-1407 (1976). The failure of the Supreme Court even to consider constitutional ramifications in rejecting Presidentially ordered impoundment in Train v. City of New York, 420 U.S. 35 (1974), suggests that the Court did not think that any serious constitutional issue was presented by Presidential impoundment. The lower courts had also rejected the constitutional argument

arguments over the definition and scope of the power to execute the laws will continue, a potentially more significant question is being ignored. Under the Constitution, who executes the laws?

The purpose of this article is to examine an unacknowledged dispute concerning the power of the President over execution of the laws. On one hand, a firm tradition suggests that the President, under the executive power granted in article II, executes the laws. In contrast to this view, most of our administrative practices suggest that the President possesses no special constitutional authority to execute the laws, but is instead limited to *supervising* execution of the laws by officers selected by Congress.

Part I of this article sets out in some detail the view of maximum Presidential power over execution of the laws. Chief Justice Taft maintained, and it has never been expressly disputed, that as part of the executive power the President executes the laws.[3] Since the executive power belongs exclusively to the President,[4] it should follow, as it did for Justice Taft, that only the President, or someone acting as his agent, could execute a law. These two

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prior to *Train*. *E.g.*, Community Action Prog. Exec. Dir. Ass'n v. Ash, 365 F. Supp. 1355 (D.N.J. 1973); Pennsylvania v. Lynn, 362 F. Supp. 1363 (D.D.C. 1973), *rev'd on other grounds*, 501 F.2d 848 (D.C. Cir. 1974) (court of appeals found statutory authority for action of executive branch). The post-*Train* cases have followed the same pattern. *E.g.*, Iowa *ex rel.* State Hy. Comm'n v. Brinegar, 512 F.2d 722 (8th Cir. 1975); Minnesota v. Coleman, 391 F. Supp. 330 (D. Minn. 1975).

While there is no general domestic executive authority to impound funds, a stronger constitutional argument justifying impoundment exists when the impoundment is for the stated purpose of avoiding violation of an existing debt limit, *see* Stanton, *History and Practice of Executive Impoundment of Appropriated Funds*, 53 NEB. L. REV. 1, 13 n.79 (1974), or is based upon implied statutory discretion, *see* Pennsylvania v. Lynn, 501 F.2d 848 (D.C. Cir. 1974). In both instances, impoundment may be seen as an attempt to execute the will of Congress. In military matters, the President may rely upon the Commander-in-Chief power to justify impoundment. *See* 1975 WIS. L. REV. 203, 206-08.

3. Myers v. United States, 272 U.S. 52, 117 (1926). *See* text accompanying notes 11-18 *infra*.

4. "The executive power shall be vested in a President of the United States of America." U.S. CONST. art. II, § 1, cl. 1. *See* Myers v. United States, 272 U.S. 52, 116 (1952) (executive power vested in one person). *But see* E. CORWIN, THE PRESIDENT: OFFICE AND POWERS 69 (1957) (arguing that the grant to Congress of the power "[t]o make all laws which shall be necessary and proper for carrying into execution the foregoing Powers," U.S. CONST. art. I, § 8, cl. 18, implies a residue of executive powers in the Congress).

ideas are referred to in this article as the active theory of the executive power. Under the active theory, no act of execution could be accomplished except under the direction and control of the President.

Part II explores the inconsistencies between the active theory and actual administrative practices. These practices indicate that any executive officer may be directed by Congress to execute a law and that any discretion which may ensue in the course of execution can be exercised independently of Presidential control.

Part III outlines an alternative theory of the executive power. This theory, called the passive theory, is premised upon the view that the President has authority under the Constitution to supervise execution of the laws but that actual execution may be carried out by other executive officers. The passive theory, while preserving for the President a limited role in oversight of the executive branch, permits Congress to effect independent execution of the laws through independent agencies or by formally independent executive officers.

The choice between the active and passive theories poses the question whether the Constitution mandates Presidential control over the policymaking that inevitably flows from execution of the laws. If Congress could pass legislation that required no discretion on the part of administrators, the issue of control of administrative decisionmaking would not be significant. Because Congress does legislate by delegating discretion to administrators, however, the bureaucracy is necessarily involved in controlling the distribution of national resources.[5] Because of its require-

5. The decline of the delegation doctrine can be traced to the recognition by the courts that in certain areas Congress needed to utilize the flexibility of grants of discretion to the executive branch. *See* Panama Refining Co. v. Ryan, 293 U.S. 388, 421 (1935); Field v. Clark, 143 U.S. 649, 691 (1891). The present practice of delegating broad authority to administrators has been said to arise out of the incapacity of Congress to foresee all possible contingencies and to make provisions therefor, MacIntyre, *The Status of Regulatory Independence*, 29 FED. BAR. J. 1 (1969), and out of the unwillingness of Congress to make policy decisions, T. LOWI, THE END OF LIBERALISM 126 (1969). Whatever the reason, delegation of discretion to administrators transforms them into the actors who make key policy decisions. Even if delegation were reduced, a degree of policymaking would inevitably remain in almost any administration of a statutory program. *See* Leiserson, *Political Limitations on Executive Reorganization*, 41 AM. POL. SCI. REV. 68 (1947).

ment that only agents of the President may perform acts of execution, the active theory places all administrative discretion in the hands of the President by constitutional mandate. The active theory thus threatens congressional control over national resources and their distribution.[6]

The passive theory, on the other hand, permits Congress to create a bureaucracy that is relatively independent of the President and that is subject to the direct influence of Congress.[7] Congress would be free under the passive theory to utilize the President as administrative chief to coordinate policymaking,[8] but Presidential control over bureaucratic decisionmaking, and thus over domestic policy, would be subject to congressional control and could be greatly restricted or revoked entirely.[9] The choice,

6. Debate over administrative control by the President is often put in terms of management goals such as efficiency. *See, e.g.*, THE PRESIDENT'S COMMITTEE ON ADMINISTRATIVE MANAGEMENT, ADMINISTRATIVE MANAGEMENT IN THE GOVERNMENT OF THE UNITED STATES (1937) [hereinafter cited as BROWNLOW COMMITTEE REPORT]. Such terms appear to be neutral, but increased Presidential control over administrative activity means that the President will have increased influence over administrative policy determinations, which in turn could lead to a decline in the responsiveness of the bureaucracy to Congress. *See* Karl, *Executive Reorganization and Presidential Power*, 1977 S. CT. REV. 1.

7. Congress' ability to control the federal bureaucracy is open to serious doubt. The hierarchy, which a system of congressional control undermines, is a necessary element in the formulation of any policy, regardless of whose policy preferences are expressed. *See* Zamir, *Administrative Control of Administrative Action*, 57 CAL. L. REV. 866, 868 (1969). *See also* Brown, *The President and the Bureaus: Time for a Renewal of Relationships?*, 26 PUB. AD. REV. 174 (1966). There is certainly a feeling at the present time that the bureaucracy is not sufficiently responsive and that policy is not coherent. *See* Bruff, *Presidential Power and Administrative Rulemaking*, 88 YALE L.J. 451 (1979); 35 GEO. WASH. L. REV. 1056, 1056 & n.7 (1967).

8. In evaluating the practical effects of Presidential control over execution of the laws, it is important to note that the President as well as Congress has been criticized for ineffectiveness in controlling administration. *See* Brown, *supra* note 7, at 178; Bruff, *supra* note 7, at 469; Frug, *Does the Constitution Prevent the Discharge of Civil Service Employees?*, 124 U. PA. L. REV. 942, 949-50 (1976).

9. For the effect of such dependence on Congress see Black, *The Working Balance of the American Political Departments*, 1 HASTINGS CONST. L.Q. 13 (1974). "But all know, in full consciousness or in the back of their minds, who originally had this power and who can take it back if the pressure to do so increases sufficiently." *Id.* at 18. "The one fundamental error is that of supposing that the modern expansion of presidential power is based on the Constitu-

then, between the active and passive theories, leads to significant consequences for the balance of power between Congress and the President over domestic policy.

This article does not recommend either the active or the passive theory, but rather addresses a present lack of understanding of the power of the President with respect to execution of the laws. Each of the theories advanced has some support either in precedent, constitutional language, or administrative practice, but each is subject to serious practical objections. That a conscious decision be made between these theories or that new approaches to the executive power be formulated is necessary. If we do not do so expressly, we will ultimately define Presidential power, as we do at present, implicitly, through a series of ad hoc decisions about specific practices. The power of the President is too important to be left to this kind of drift. What is lacking is formal analysis of Presidential power.[10] At this late point in constitutional history, we should not have to guess whether the Constitution grants to the President the power to execute the laws.

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tion by itself, and is hence inaccessible as a matter of law to congressional correction." *Id.* at 20.

10. Of course the Government would probably cease to function if each branch sought to press its powers to their fullest constitutional limits. Lawyers no doubt overemphasize formal relationships and neglect actual processes of administration. *See* Bernstein, *The Regulatory Process: A Framework for Analysis*, 26 LAW & CONTEMP. PROB. 329, 330 (1961). The actual process of administration is greatly influenced by the President quite apart from his formal powers. *See* Zamir, *supra* note 7, at 873.

When there is a desire to change administrative practice, however, the issue of the proper role of the President cannot properly be avoided in favor of practical considerations. For example, Professor Bruff has argued that the courts should accord only "relatively slight," Bruff, *supra* note 7, at 499 n.236, deference to "congressional intent to insulate an independent agency," *id.* at 499, because Congress in this context is simply seeking "to protect its own power at the expense of the President," *id.* at 499 n.236. But if the decision to create independent administration is properly that of Congress, the courts should not inquire into motivation once such a congressional intent is found. Professor Karl has argued that Presidential control over bureaucracy must be constitutional because congressional control is impractical. Karl, *supra* note 6, at 20-21. But again, if the Constitution vests control over administration in Congress, then Congress, rather than the courts, should decide whether the President must be utilized as administrative chief.

II. The Active Theory of the Executive Power

A. *The President Executes the Laws*

In the context of a challenge to the President's power to remove inferior executive officers, *Myers v. United States*[11] established that article II grants to the President "the power to execute the laws."[12] Congress had provided by statute a term of office for a postmaster. The question presented was whether the President could remove the postmaster, without cause, before his term of office had expired. The Court held that removal was within the President's constitutional authority and that the statute was unconstitutional. In support of the President's right of removal Chief Justice Taft reasoned in part from precedent.[13] The heart of the opinion, however, lay not in the law of removal but in Chief Justice Taft's theory of bureaucratic control under the Constitution:[14] that the President executes the laws;[15] that because the President executes the laws, executive officers act for the President as aids to him in execution;[16] therefore, an absolute removal

11. 272 U.S. 52 (1926).

12. *Id.* at 117.

13. Chief Justice Taft looked first to the Act of July 27, 1789, ch. 4, 1 Stat. 28 (1789), in which the First Congress decided that the President should have an unrestricted power of removal over the Secretary of War. *Id.* at 111-15. *See generally* E. Corwin, *supra* note 4, at chs. I, III. Chief Justice Taft was greatly influenced by the congressional determination because it "was the decision of the First Congress, on a question of primary importance in the organization of the Government . . . [and] because that Congress numbered among its leaders those who had been members of the [constitutional] convention." 272 U.S. at 136. Taft regarded the general acceptance the decision received during the ensuing seventy-four years as strong support for his contention that the President possessed an absolute removal power, *id.* at 136-63, and considered the enactment of the Tenure of Office Act of 1867, ch. 154, 14 Stat. 430 (1867), and similar measures, a constitutional aberration arising out of the political crisis of reconstruction, 272 U.S. at 164-74. These later actions did not compare to the decision of the First Congress, "a Congress whose constitutional decisions have always been regarded . . . as of the greatest weight in the interpretation of [the Constitution]." *Id.* at 174-75.

14. The bulk of the opinion is devoted to Mr. Chief Justice Taft's views of the reasoning behind the decision of 1789. 272 U.S. at 115-36. Most of the reasons given involved the role of the removal power in enforcing Presidential control over subordinates in the executive branch.

15. "The vesting of the executive power in the President was essentially a grant of the power to execute the laws." *Id.* at 117.

16. [T]he President alone and unaided could not execute the

power is necessary to ensure the constitutionally mandated Presidential policy control over the decisions of lower officers.[17] Thus, Presidential control over executive officers stems from their role as Presidential agents. The role of agents in turn stems from the President's constitutional authority to execute the laws.[18] The

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laws. He must execute them by the assistance of subordinates. . . . As he is charged specifically to take care that they be faithfully executed, the reasonable implication, even in the absence of express words, was that as part of his executive power he should select those who were to act for him under his direction in the execution of the laws. The further implication must be, in the absence of any express limitation respecting removals, that as his selection of administrative officers is essential to the execution of the laws by him, so must be his power of removing those for whom he can not continue to be responsible.

Id. at 117.

Chief Justice Taft also argued that the functions of the three branches should be kept separate and certainly felt that Congress could not perform executive tasks, *id.* at 116, including, presumably, execution of the laws. Of course, Congress does execute the laws in some sense by providing by statute for their execution. *See* McCulloch v. Maryland, 17 U.S. 415, 422-23, 4 Wheat. 316, 407-09 (1819).

17. Chief Justice Taft linked two control devices, removal and appointment, to his conclusion that the President must have control over executive officers commensurate with his total responsibility for them. 272 U.S. at 117. The lack of absolute removal power would frustrate valid Presidential authority "by fastening upon him, as subordinate executive officers, men who by their inefficient service under him, by their lack of loyalty to the service, or by their different views of policy, might make his taking care that the laws be faithfully executed most difficult or impossible." *Id.* at 131.

18. Chief Justice Taft did waiver from straightforward exposition of the executive power and the relationship of executive officers to the President. He tried to deal with the argument that "executive officers appointed by the President . . . are bound by the statutory law and are not his servants to do his will." *Id.* at 132. In response, Taft appeared to concede that it is only in the political field that executive officers act for the President, exercising presidential discretion rather than their own. *Id.* The political field, although broad, does not seem to include all execution of the laws, but deals with activities such as foreign affairs, protection of federal interests, and military activities. *Id.* at 133-34. Having made this concession, Chief Justice Taft then rescinded it.

But this is not to say that there are not strong reasons why the President should have a like power to remove his appointees charged with other duties than those above described. The ordinary duties of officers prescribed by statute come under the general administrative control of the President by virtue of the general grant to him of the executive power, and he may properly supervise and guide their construction of

necessary implication of the Executive power, as characterized in *Myers*, is that if an action constitutes execution of law, the President may be said to have, under article II, the sole responsibility to perform it.

The assertion that the President executes the laws has never been formally challenged in the courts,[19] nor has it received much attention since *Myers*. An important, though unlikely, source of support for Chief Justice Taft's view of the Presidential power of execution is *Youngstown Sheet & Tube Co. v. Sawyer*.[20] The case arose out of a threatened steel strike in the midst of the Korean war. President Truman ordered the Secretary of Commerce to seize and operate the steel mills. The Supreme Court affirmed the district court's issuance of a preliminary injunction against the seizure.[21] Justice Black first found no statutory authority for the

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> the statutes under which they act in order to secure that unitary and uniform execution of the laws which Article II of the Constitution evidently contemplated in vesting general executive power in the President alone.

Id. at 135. Except with respect to quasi-judicial duties, Taft never clearly acknowledged that discretion can be vested in executive officers. "[T]here may be duties so peculiarly and specifically committed to the discretion of a particular officer as to raise a question whether the President may overrule or revise the officer's interpretation of his statutory duty in a particular instance." *Id.* Even if he cannot act directly, the President can, according to Taft, at least maintain control by removing the officer after the fact.

The idea that the President cannot interfere with the activities of executive officers outside the political area is not consistent with Taft's view that general "executive power" is vested in the President alone, *id.* at 117, and that this grant represents the power to execute the laws. While Taft did not directly challenge the tradition of *eo nomine* discretion by executive officers, which was not at issue in *Myers*, his overall reasoning certainly undermines any legitimate basis for such a tradition.

19. The President's removal power has, however, been restricted, first in Humphrey's Executor v. United States, 295 U.S. 602 (1935), *see* note 87 *infra* and accompanying text, and later in Wiener v. United States, 357 U.S. 349 (1958). In those cases members of independent agencies performing quasi-legislative and quasi-judicial acts were held to be outside the President's removal powers. In both cases the Court distinguished agency interpretive powers from execution of the laws, over which the President's removal power remained as a control device. 357 U.S. at 353-56; 295 U.S. at 628.

20. 343 U.S. 579 (1952).

21. *Id.* at 580, 589. The court of appeals had stayed the district court's injunction. Sawyer v. United States, 197 F.2d 582, 585 (D.C. Cir. 1952).

seizure, either express or implied.[22] Rejecting the argument that the President had inherent power to prevent the strike, Justice Black also found that neither the President's role as Commander-in-Chief nor his authority under the executive power justified the seizure.[23]

Justice Black did not deny that the President has responsibility to execute the laws. He thought, however, that Congress' authority to make the laws that the President is to execute included power to prescribe the means of execution.[24] Both concurrences and dissent appeared to agree that the key issue in the case concerned the extent to which Congress had granted flexibility to the President in the execution of congressional policies.[25] This

22. 343 U.S. at 585-86. In fact, Justice Black noted that Congress had recently rejected just such emergency authority for the President. *Id.* at 586.

23. *Id.* at 587-89.

24. Thus, the seizure was invalid because it represented Presidential policy carried out in accordance with Presidential means, rather than congressional goals carried out by congressionally approved means. *Id.* at 588. Justice Black did not deal with the situation in which the President executes congressional policies through means about which Congress has not expressed any view.

25. Justice Jackson found that Congress had implicitly rejected emergency seizure authority, *id.* at 639 (Jackson, J., concurring), and refused to allow general emergency authority in light of such disapproval, *id.* at 653-55 (Jackson, J., concurring). Justice Burton also noted the decision of Congress to retain control over property seizures, *id.* at 660 (Burton, J., concurring), but implied that seizure authority might be valid in the absence of such congressional action, *id.* at 659 (Burton, J., concurring). Justice Clark expressly accepted the theory that the President could act in a crisis, but only if Congress had not set out procedures to be followed as he found it had in *Youngstown*. *Id.* at 662 (Clark, J., concurring). Justice Douglas, though noting the power of the President to execute the laws, *id.* at 633 (Douglas, J., concurring) (quoting U.S. CONST. art. II, § 3) apparently agreed with Justice Black that some congressional authorization would be required to justify a Presidential order to seize private property, *id.* at 630-32 (Douglas, J., concurring). Justice Frankfurter agreed with all concurrences that Congress had implicitly decided to withhold authority for the seizure at hand, *id.* at 602-03 (Frankfurter, J., concurring), and for him this was the decisive determination.

Chief Justice Vinson's premises in dissent did not differ much from those of the majority. He was careful to point out that Congress had not prohibited seizures. "There is no statute prohibiting seizures as a method of enforcing legislative programs." *Id.* at 702 (Vinson, C.J., dissenting). He apparently believed that in an emergency Congress would prefer to allow the President to hold a situation in status quo until it had time to act if a particular program or a series of programs were threatened by unexpected developments. *Id.* at 702-04

question presupposed that the President had responsibility to execute the laws. The opinions in *Youngstown* discussed the question whether the steel mills could be seized. All sides assumed without discussion that the President would be the one who could seize the mills were such an act warranted.[26]

Further support for Taft's assumption that the President executes the laws, though not necessarily for his theory of Presidential administrative control, comes from political theory,[27] case law,[28] and commentators.[29] In addition, there was general agreement at the federal convention "that a national executive ought to be instituted with power to carry into effect the national laws."[30] Roger Sherman, generally an opponent of a strong and independent President,[31] "considered the Executive magistracy as nothing more than an institution for carrying the will of the Legislature into effect . . . ."[32]

(Vinson, C.J., dissenting). The authority of Congress to control execution is not theoretically threatened by this position.

26. Thus no Justice remarked upon the act of the President in ordering the Secretary of Commerce to seize the mills. There was no suggestion in *Youngstown* that the power of some other officer might be relevant to the outcome of the case.

27. C. MONTESQUIEU, SPIRIT OF LAW XI, ch. 3 (executive power includes power to execute the laws).

28. *E.g., In re* Neagle, 135 U.S. 1, 63-64 (1890) (President has duty to enforce acts of Congress); Consumers Union v. Rogers, 352 F. Supp. 1319, 1323 (D.D.C. 1973) (President must faithfully execute the laws).

29. *See* Berger, *Executive Privilege v. Constitutional Inquiry*, 12 U.C.L.A. L. REV. 1044, 1069 (1965); Parker, *The President as Head of the Executive Administration Hierarchy*, 8 J. PUB. L. 437 (1959); Note, *Removing Politics from the Justice Department: Constitutional Problems with Institutional Reform*, 50 N.Y.U.L. REV. 366, 410 (1975). *See also* Corwin, *The Steel Seizure Case: A Judicial Brick Without a Straw*, 53 COLUM. L. REV. 53 (1953); 83 YALE L.J. 130 (1973).

Raoul Berger, for one, would not be likely to agree that the President must control all executive officer decisionmaking. *See* Berger, *The President and the Constitution*, 28 OKLA. L. REV. 97 (1975).

30. 1 THE RECORDS OF THE FEDERAL CONVENTION 67 (M. Ferrand ed. 1911) [hereinafter cited as FEDERAL CONVENTION]. This part of Madison's resolution passed the convention with Connecticut's divided vote the only negative vote cast. *Id.*

31. Roger Sherman supported appointment of the Executive by the Legislature and felt that the number should not be fixed. *Id.* at 65.

32. *Id.* at 65. "Mr. Wilson preferred a single magistrate . . . . The only powers he conceived [as] strictly executive were those of executing the

B. *Constitutional Language*

No language in the Constitution establishes, unambiguously, a Presidential power to execute the laws. While three textual sources suggest that power, none is conclusive. Chief Justice Taft in *Myers* looked to article II, section 1, which provides in part that "[t]he executive power shall be vested in a President." The problem with considering section 1 a grant of the power to execute the laws is that its language does not describe the content of the executive power,[33] but rather places the power, whatever its content, in the hands of a single officer, the President.[34] Justice Jackson noted that if article II, section 1, had been intended as a general, substantive grant of power to the President, "it is difficult to see why the forefathers bothered to add several specific items, including some trifling ones."[35]

Chief Justice Taft also looked to article II, section 3, which provides in part that the President "shall take care that the laws be faithfully executed."[36] This section is regarded as the basis for the President's direct, and almost complete, control over federal law enforcement.[37] Because enforcement and execution have been

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laws . . . ." *Id.* at 65-66. These comments were part of a series of mini-debates on the powers, form, and term of the Office of the Chief Executive that took place during the early part of the Convention. *Id.* at 20-114. *See generally* Berger, *supra* note 29, at 1069-71.

The convention did not address the question whether such execution is exclusive to the Presidency. The convention was primarily concerned with the issue of excessive executive power. *See, e.g.*, FEDERAL CONVENTION, *supra* note 30, at 65, 106-14. Sherman, for example, was defining a maximum of Presidential power rather than an irreducible minimum. *Id.* at 65. The convention did not seriously consider the relationship between executive officers and the President.

33. *See* C. WARREN, THE MAKING OF THE CONSTITUTION (1967); Berger, *The President and the Constitution*, 28 OKLA. L. REV. 97, 103 (1975); Hebe, *Executive Orders and the Development of Presidential Power*, 17 VILL. L. REV. 688, 695 (1972).

34. Berger, *supra* note 29, at 1073.

35. 343 U.S. at 640-41 (Jackson, J., concurring) (footnote omitted). *See also* Myers v. United States, 272 U.S. 52, 228-29 (1926) (McReynolds, J., dissenting).

36. Chief Justice Taft utilized section 1, clause 1 and section 3 almost interchangeably, 272 U.S. at 117, although he never specifically stated that section 3 of article II represented a grant of power to execute the laws.

37. Enforcement of the law is generally recognized as an executive func-

used interchangeably,[38] section 3 could be considered the foundation for Presidential control over execution as well. The difficulty with relying on section 3 is that this provision does not say that the President shall execute the laws. The actual wording suggests supervision over execution by other parties rather than direct execution by the President.[39]

A third possible source of a Presidential power to execute the laws is not found in any express language of the Constitution but rather is either implicit in the President's constitutional role as head of the executive branch[40] or inherent in the very nature of the executive power.[41] The institutional argument for a Presiden-

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tion. *See, e.g.*, United States v. Nixon, 418 U.S. 683, 693 (1974); Newman v. United States, 382 F.2d 479, 480 (D.C. Cir. 1967); United States v. Cox, 342 F.2d 167, 171 (5th Cir.) (en banc), *cert. denied*, 381 U.S. 935 (1965). While the basis for enforcement power has been found in the general grant of executive power to the President, *see* 87 YALE L.J. 1692 (1978), the Supreme Court has emphatically placed the locus of this power in the grant to the President of the responsibility to take care that the laws be faithfully executed.

> The Commission's enforcement power, exemplified by its discretionary power to seek judicial relief, is authority that cannot possibly be regarded as merely in aid of the legislative function of Congress. A lawsuit is the ultimate remedy for a breach of the law, and it is to the President, and not to the Congress, that the Constitution entrusts the responsibility to "take Care that the Laws be faithfully executed."

Buckley v. Valeo, 424 U.S. 1, 138 (1976) (quoting U.S. CONST. art. II, § 3). Thus the Court concluded that the President personally controls enforcement.

38. *See* note 70 *infra*.

39. Chief Justice Taney wrote that the President "is not authorized to execute [the laws] himself, or through agents or officers, civil or military, appointed by himself, but he is to take care that they be faithfully carried into execution . . . ." *Ex parte* Merryman, 17 F. Cas. 144, 149 (C.C.D. Md. 1861) (No. 9487).

The apparent weakness of a constitutional foundation for the President's power to execute the laws leads to doubt that there is a clear constitutional basis for Presidential control over law enforcement. The Court in *Buckley* did not explain precisely how the power to take care that the laws be faithfully executed leads to personal control by the President over law enforcement. If the President executes the law, the answer is plain. If, however, other executive officers may execute the laws, it is difficult to see why they could not enforce the laws as well, since execution and enforcement are equivalent.

40. *See* note 194 *infra*.

41. This argument is a variant of the argument pressed by the Government in *Youngstown* that certain powers inhere in the Presidency without express constitutional delineation. 343 U.S. at 646 (Jackson, J., concurring). Of

tial power of execution is unpersuasive because, even if the President is the head of the executive branch, that role need not imply a power of execution.[42] The theory of inherent power is also not an acceptable basis for a power of execution. Inherent executive power is incompatible with the very purpose of a limiting, written Constitution.[43]

The lack of any obvious foundation in constitutional language for Presidential execution apparently has not weakened the view that the President executes the laws. The question thus becomes, what are the implications of this view?

C. *The Logical Implications of Presidential Execution of the Laws: The Active Theory*

The logical implications of Presidential execution of the laws arise from the assumption that, since the grant of power to the President to execute the laws is said to arise out of article II, only the President should be able to execute the laws. Neither Congress nor the judiciary could execute the laws.[44] Such exclusivity over execution does not necessarily lead to Presidential dominance because execution, as illustrated in *Youngstown*, is a derivative power only.[45] Congress would retain ultimate authority to define the means and manner of execution even under the active theory.

With respect to Congress and the judiciary, the assertion that the President alone executes laws does not seem extraordinary, but the prohibition on execution of the laws by Congress would logically extend to all executive officers also, except insofar as they are acting for the President. Such officers are not granted

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course, in *Youngstown*, the argument of inherent power was based upon alleged congressional acceptance and emergency conditions, which are factors not present in the context of general execution.

42. As head of the executive department, the President might be limited to supervisory power. *See* text accompanying notes 174-93 *infra*.

43. Justice Jackson considered and rejected the argument that the power of the Chief Executive is inherent. 343 U.S. at 646-47 (Jackson, J., concurring).

44. *See* Buckley v. Valeo, 424 U.S. 1, 123-25 (1976) (unconstitutional for legislature to exercise appointment power); Springer v. Government of Phil. Is., 277 U.S. 189, 201-02 (1928) (unconstitutional for legislature to exercise executive power); Hayburn's Case, 2 U.S. (2 Dall.) 409, 410 n.1 (1792) (unconstitutional to assign the judiciary nonjudicial duties).

45. *See* note 58 *infra*.

any part of the executive power in article II.[46] Therefore, under the active theory executive officers could not independently execute the laws. Lower officers could, of course, aid the President in his duties of execution, but only as his agents. Chief Justice Taft, in *Myers*, illustrated the limited role that executive officers occupy in a system in which the President is acknowledged to execute the laws: "The vesting of the executive power in the President was essentially a grant of the power to execute the laws. But the President alone and unaided could not execute the laws. He must execute them by the assistance of subordinates."[47] Taft here assumed that only the President executes the laws and that therefore, whenever an executive officer can be said to be executing the laws, the officer must be conceptualized as an agent of the President. Regardless of how actual practice differs from this theoretical construction, Chief Justice Taft's description is logically compelling. Whether acknowledged or not, demands for greater Presidential control over administrative decisionmaking are based on the premise that the President does execute the laws.[48]

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46. At the Constitutional Convention the role of a bureaucratic apparatus was not much discussed, though the President's responsibility for execution of the laws was acknowledged. *See* notes 30-32 *supra* and accompanying text. The administrative powers specifically granted to the President in article II, such as appointment and the right of solicitation, are a clear recognition that a bureaucracy will exist, but the anticipated relationship between the President and administrative officers is not defined. *See* Zamir, *supra* note 7, at 869-70.

The First Congress apparently recognized that subordinates would execute the laws. Justice Taft's interpretation of the congressional debate over removal was that such subordinates would execute the laws as Presidential aides subject to removal without cause. 272 U.S. at 131-34 (comments of Mr. Madison). While the dissents read the debate as ambiguous concerning constitutional authority in the President to control execution, *id.* at 193-99 (McReynolds, J., dissenting); *id.* at 283-85 (Brandeis, J., dissenting), no Justice suggested that executive officers share in the executive power.

47. 272 U.S. at 117.

48. *See* BROWNLOW COMMITTEE REPORT, *supra* note 6; COMMISSION ON ORGANIZATION OF THE EXECUTIVE BRANCH OF THE GOVERNMENT REPORT, 3-4 (1949) [hereinafter cited as HOOVER COMMISSION REPORT]. Insofar as these reports bear on the independence of agencies engaged in interpretive rather than executive functions, they raise considerably different constitutional and statutory issues. *See* E. MacIntyre, *supra* note 5, at 13-15. The Hoover Commission in particular attempted to distinguish between executive functions exercised by the independent agencies and their role in resolving controversies. HOOVER COMMISSION REPORT, *supra* note 427-40.

Full recognition that the President alone executes the laws would lead to a variety of new administrative practices. Congress would legislate but would not execute. Directions would be given by Congress to the President, who in turn would instruct his subordinates to carry out these directions on his behalf. Such a system would require Presidential control over appointment, removal, and organization,[49] as well as formal direction and review.[50] Furthermore, except as a matter of convenience, Congress would not deal directly with executive officers, but instead would rely upon the President to carry out execution of statutory commands and programs. The President would not actually acquire power over expenditures; he would, however, decide how to utilize administrative resources allocated by Congress.[51] Furthermore, the President also would be responsible for the coordination of execution of all statutes,[52] as well as for support of the machinery

49. Direction and control are accepted elements of agency relationships. *See* RESTATEMENT (SECOND) OF AGENCY §§ 1, 14 (1958). These formal powers of review are the key elements to clear Presidential execution of the laws. *See* notes 152-69 *infra* and accompanying text. Removal, even at will, is not the same as a recognition that it is always the President who is in fact acting. *See* Zamir, *supra* note 7, at 877-79.

50. The power to select agents is generally reserved to the principal. *See* RESTATEMENT (SECOND) OF AGENCY § 79 (1958). The President would be expected to decide who would serve as his agent and which agent would carry out what function. Attorney General Cushing, who supported the President's power to direct execution, *see* notes 127-30 *infra* and accompanying text, admitted that Congress possessed authority to delegate tasks to named executive officers. 7 OP. ATT'Y GEN. 453, 468 (1855). Cushing rationalized this congressional power by asserting that the President's approval of a statute represented the exercise of the President's constitutional discretion. *Id.* This view implies that a bill passed over the President's veto could not name the executive officer who is to act, an outcome that has not and is not likely to receive judicial approval.

51. Nothing in the active theory implies that Congress would be bound to provide sufficient tools and resources to the President to allow him to execute the law effectively. The theory does suggest, however, that once administrative resources are provided, the President, as the responsible actor, would retain discretion over how best to utilize these resources. If dissatisfied with the manner of execution, Congress would remain free to limit the President's discretion and translate execution into ministerial actions. Congress would also be free to prescribe the means of execution. *See* note 25 *supra* and accompanying text. Congress could not, however, decide who would perform the executive act. *See* notes 57-61 *infra* and accompanying text.

52. *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 702 (1952) (Vinson, J., dissenting) (President charged with executing the "mass of legisla-

of Government itself.[53] Because all administrative actions would be actions of the President, this system is potentially one of great Presidential power.

D. *Theoretical Limitations on the Power of the President Under the Active Theory*

The potential of Presidential power under the active theory need not be realized fully. Three significant limitations upon Presidential power inhere in the active theory.

First, although the President would execute the laws, he would not control interpretive activities that arguably do not constitute execution. Independent agencies that exercise quasi-legislative and quasi-judicial power are not now considered to be exercising any part of the executive power and are said to be outside the President's reach.[54] While the difference between execution and these interpretive functions is by no means clear,[55] the

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tion," *id.*, unlike a commission limited to the enforcement of specific enabling legislation, *id.*).

53. The President has a constitutional responsibility to defend the Constitution by protecting the Government against unlawful subversion or overthrow. United States v. United States Dist. Ct., 407 U.S. 297, 310 (1971); *In re* Neagle, 135 U.S. 1 (1889). The President has also been considered to possess "inherent or implied powers" to set terms and conditions of federal contracts, Savannah Printing Specialties Local 604 v. Union Camp Corp., 350 F.Supp. 632, 635 (S.D. Ga. 1972), as well as authority to ensure the efficient operation of the executive branch, Letter Carriers v. Austin, 418 U.S. 264, 273 n.5 (1974); Manhattan-Bronx Postal Union v. Gronouski, 350 F.2d 451 (D.C. Cir. 1965); Brookhaven Hous. Coalition v. Kunzig, 341 F.Supp. 1026, 1029-30 (E.D.N.Y. 1972). Surely none of these powers would be upheld today in the face of determined congressional opposition. *See* Contractors Ass'n v. Secretary of Labor, 442 F.2d 159 (3rd Cir. 1971).

54. *See* Wiener v. United States, 357 U.S. 349, 355-56 (1958); Humphrey's Executor v. United States, 295 U.S. 602, 627-29 (1935).

55. The distinction between execution and interpretation has proven difficult to apply. *Compare* Morgan v. TVA, 115 F.2d 990, 993-94 (6th Cir. 1940), *cert. denied*, 312 U.S. 701 (1941) *with* Drumheller v. Berks County Local Board No. 1, 130 F.2d 610 (3rd Cir. 1942) *and* ICC v. Chatsworth Coop. Mktg. Ass'n, 347 F.2d 821 (7th Cir.), *cert. denied*, 382 U.S. 938 (1965).

There does not appear to be any persuasive reason why interpretive activities must be independent while execution need not be. The Court in *Humphrey's Executor* emphasized that Congress intended to render the FTC independent. 295 U.S. at 628. While important for purposes of statutory construction, Congress' will does not enlarge its constitutional powers. General

practical effect of recognizing such a distinction would be to eliminate Presidential control in interpretive activity in which administrative discretion is likely to be greatest. Congressional authority to retain independent agencies as an independent policy resource would be particularly significant under the active theory because all administration that arguably constitutes execution would be controlled by the President.

The second limitation on Presidential power under the active theory is that Congress, by virtue of its legislative power, would decide how much discretion the President would have in executing a particular statute. That is to say, the power to execute a law begins and ends with the law itself.[56] Thus, Congress would possess a reliable means of checking policy outcomes that it did not approve.

The presumption that the President has the sole power to execute the laws would not conflict with Congress' power to control the means of that execution. Although the *Youngstown*[57] Court allowed Congress to decide *how* a statute is to be executed, it did not go so far as to suggest that Congress has the power to decide *who* is to execute a statute.[58] Congress can reduce administrative discretion or even eliminate it, but Congress could not, under the active theory, transfer the administrative discretion that it creates away from the President.

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powers of interpretation can no longer be said to operate merely in aid of legislative authority. Buckley v. Valeo, 424 U.S. 1, 141 (1976). The fact that interpretive functions must be carried out in accordance with statutory standards, 295 U.S. at 628, does not seem to distinguish interpretive functions from acts of execution involving discretion.

56. "The President performs his full constitutional duty, if with the means and instruments provided by Congress and within the limitations prescribed by it, he uses his best endeavors to secure the faithful execution of the laws enacted." Myers v. United States, 272 U.S. 52, 292 (1926) (Brandeis, J., dissenting). "The duty of the President to see that the laws be executed is a duty that does not go beyond the laws or require him to achieve more than Congress sees fit to leave within his power." *Id.* at 177 (Holmes, J., dissenting). This rule reached majority status in Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 610 (Frankfurter, J., concurring) (quoting Myers v. United States, 272 U.S. 52, 177 (1926) (Holmes, J., dissenting)); *id.* at 633 (Douglas, J., concurring). *See* note 25 *supra*. After *Youngstown*, the means of execution were clearly within the exclusive control of Congress if Congress desired to specify particular procedures and outcomes.

57. 343 U.S. 579 (1952).

58. *See* notes 20-26 *supra* and accompanying text.

Thus, the one exception to Congress' authority to control the means of execution would be that Congress could not grant independent authority to an executive officer to execute a statute. Congress could not, for example, authorize the Secretary of the Interior to construct a series of dams at a site of his own choosing and deny to the President the formal power to reverse the Secretary's decision.[59]

While Justice Fortas has argued that Congress may legitimately pass such a statute and that the President's only recourse would be to remove the Secretary if he were dissatisfied,[60] independent execution is logically inconsistent with the assumption of the active theory that the Constitution gives to the President the power to execute each law.[61] In effect, passing such a statute would amount to a congressional order to the President not to execute. If Congress were free to act in this manner, it could pass legislation placing all acts of execution in the hands of one subordinate executive officer and could thereby eliminate the article II grant of power to the President to execute the laws.

The third limitation upon Presidential power under the active theory consists of a subcategory of Congress' legislative power. General enforcement policy, including the priorities of enforcement, the resources to be committed to enforcement, and the limitations upon enforcement, determines the substantive scope of a statute.[62] The scope and meaning of a statute are

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59. The HOOVER COMMISSION REPORT, *supra* note 48, noted critically the independent power of execution granted to the Corps of Engineers and the Secretary of the Interior. Though removal would be available in such a case, the President would lack the power, for example, to forbid execution of a contract entered into against his wishes.

60. "In short, the President has the responsibility for the faithful execution of the laws, but he can bear this responsibility only within the terms and through the officials and agencies prescribed by the Congress. He cannot take over the powers of an agency without congressional authorization." Fortas, *supra* note 1, at 1002.

61. Justice Fortas admitted that the President is, under the Constitution, "the sole and ultimate repository of the power to carry out the laws of the United States." Fortas, *supra* note 1, at 991.

62. "The prosecutor's discretion . . . embraces an ability to determine the scope and meaning of existing statutes." Note, *Perfecting the Partnership: Structuring the Judicial Control of Administrative Determinations of Questions of Law*, 31 VAND. L. REV. 91, 97 (1978) (footnote omitted). *See generally* Wright, *Beyond Discretionary Justice*, 81 YALE L.J. 575 (1972).

clearly legitimate legislative concerns,[63] and under the active theory Congress would retain a degree of authority over enforcement policy.[64]

III. PRACTICE: INDEPENDENT EXECUTION OF THE LAWS

Many present administrative policies appear to be fully consistent with the active theory. For example, the President has exercised authority in the areas of federal procurement contracts,[65] personnel loyalty,[66] and even substantive regulations concerning policy.[67] Undoubtedly, many view Presidential direction over the executive branch as a valid exercise of Presidential authority.[68] Yet, in all these areas, it is often not clear whether the President is acting pursuant to an independent constitutional

63. *See* Newman & Keaton, *Congress and the Faithful Execution of Laws—Should Legislators Supervise Administrators?*, 41 CAL. L. REV. 565 (1953).

64. Congress has a great deal of authority to define enforcement policy. *See, e.g.*, McGrain v. Daugherty, 273 U.S. 135 (1927); Adams v. Richardson, 480 F.2d 1159 (D.C. Cir. 1973). Such authority is normally not regarded as extending to specific enforcement decisions. *See, e.g.*, United States v. Nixon, 418 U.S. 683, 693 (1974). *But see* La Abra Silver Mining Co. v. United States, 175 U.S. 423 (1899).

65. For example, Executive Order No. 11246, 3 C.F.R. 339 (1964-1965 Compilation), required contractors to take affirmative action to achieve nondiscrimination in Government contracts. *See* Savannah Printing Specialties, Local 604 v. Union Camp Corp., 350 F. Supp. 632, 635 (S.D. Ga. 1972); Werner v. United States, 233 F.2d 52, 55 n.1 (9th Cir.), *cert. denied*, 352 U.S. 842 (1956); Van Cleve, *The Use of Federal Procurement to Achieve National Goals*, 1961 WIS. L. REV. 566, 594-600.

66. President Truman acted unilaterally to ensure the loyalty of public employees by issuing Executive Order No. 9835, 3 C.F.R. 129 (Supp. 1947). President Eisenhower's loyalty program was instituted pursuant to statutory authority. *See* Cole v. Young, 351 U.S. 536, 557 (1956); 17 VILL. L. REV. 688, 689-93 (1972).

67. President Kennedy acted to elimiate racial discrimination in federally funded housing. *See* 17 VILL. L. REV., *supra* note 66, at 693 n.37. Even procedural interventions may have substantive impact. *See* Independent Meat Packers Ass'n v. Butz, 526 F.2d 228 (8th Cir. 1975), *cert. denied*, 424 U.S. 966 (1976) (inflation impact statements). *See also* note 53 *supra* and accompanying text.

68. The Government claimed, for instance, in United States v. Nixon, 418 U.S. 683 (1974), that, under the Constitution, "a President's decision is final in determining what evidence is to be used in a given criminal case," thereby implying a Presidential power of direction over federal prosecution. *Id.* at 693. *See* BROWNLOW COMMITTEE REPORT, *supra* note 6.

power or under an implied or express congressional grant of authority.[69] Furthermore, no form of Presidential authority appears to reach the vast majority of practices constituting execution of the laws. An examination of key administrative practices demonstrates that executive officers can and do execute the laws themselves. These officers, as a formal matter, are independent of the President, and, in practice, executive officers are not mere agents confined to policy choices of the President.

A. Law Enforcement

The most surprising area of Presidential incapacity is the area of law enforcement. On the one hand, this accepted aspect of execution[70] is probably the area of greatest Presidential domes-

69. *See* Chrysler Corp. v. Brown, 99 S.Ct. 1705, 1719-20 (1979) (nondiscrimination by federal contractors).

70. The phrases "execution of law" and "enforcement of law" have been utilized almost interchangeably. For example, in Springer v. Government of Phil. Is., 277 U.S. 189 (1928), the Court stated, "Legislative power, as distinguished from executive power, is the authority to make laws, but not to *enforce* them or appoint the agents charged with the duty of such *enforcement*." *Id.* at 202 (emphasis added). In Buckley v. Valeo, 424 U.S. 1 (1976), the Court substituted the word "execute" for the word "enforce" in paraphrasing this quote from *Springer*. The Court referred to the "principle enunciated in Springer v. Philippine Islands . . . that the Legislative Branch may not exercise executive authority by retaining the power to appoint those who will *execute* its laws." *Id.* at 119 (citation omitted) (emphasis added). Thus executing law and enforcing law appear to have been viewed by the Court as equivalent activities.

Of course the individuals appointed in *Springer* were not to enforce law in the sense of bringing civil enforcement suits. The Court in *Buckley*, however, appeared specifically to have included civil enforcement suits as a part of execution of the laws. In discussing the Appointments Clause in order to determine what, if any, powers the Election Commission could exercise, the Court stated, "Appellants' argument is that [the Appointments Clause] is the exclusive method by which those charged with executing the laws of the United States may be chosen." 424 U.S. at 118. The Court accepted this formulation and ultimately decided that civil enforcement suits could not be brought by the Commission because its members were not chosen in accordance with the Appointments Clause. *Id.* at 138-40. Presumably this meant that civil enforcement suits amount to execution of law. At another point in its opinion, the Court did substitute for the phrase "execution of law" the phrase "administration and enforcement of the public law" in describing the sort of task only one appointed by means of the Appointments Clause could perform. *Id.* at 139. Nothing in the opinion, however, indicates that this change in terminology was intended to

tic authority.[71] On the other hand, independent law enforcement is a common practice.

Buckley v. Valeo[72] illustrates the magnitude of supposed Presidential power over enforcement. While the case is noted primarily for its treatment of congressional power over campaign financing,[73] *Buckley* also involved a challenge to the authority of the Federal Election Commission on the ground that its members

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imply that enforcement is not a part of executing the law. In fact, the tendency of the Court to interchange the phrase *administer and enforce* for the word *execute*, and to do so without comment, reinforces the conclusion that civil enforcement suits, and presumably criminal suits as well, are a part of the execution of the law.

The essential congruence between execution of law and enforcement of law was also emphasized in Foley v. Connelie, 435 U.S. 291 (1978). The Supreme Court held that the State of New York could exclude aliens from employment as state troopers. Writing for the majority, Chief Justice Burger equated enforcement of the law (the role he ascribed to state troopers) and " '*execution* . . . of broad public policy.' " *Id.* at 300 (quoting Sugarman v. Dougall, 413 U.S. 634, 647 (1973) (emphasis added by the Court).

71. The prosecutorial function is considered an executive responsibility. *See* United States v. Nixon, 418 U.S. 683 (1974); United States v. Alessio, 528 F.2d 1079, 1081 (9th Cir. 1976); Smith v. United States, 375 F.2d 243 (5th Cir.), *cert. denied*, 389 U.S. 841 (1967). Authority over this executive duty is usually ascribed to the President. *See* United States v. Cox, 342 F.2d 167, 171 (5th Cir.) (en banc), *cert. denied*, 381 U.S. 935 (1965); E. CORWIN, *supra* note 4, at ch. IV. While Presidential control over prosecution seems secure, criticism has been directed at the related proposition that all law enforcement decisions necessarily entail unreviewable executive discretion. *See* Nader v. Saxbe, 497 F.2d 676 (D.C. Cir. 1974); Note, *The Proposed Court-Appointed Special Prosecutor: In Quest of a Constitutional Justification*, 87 YALE L.J. 1692 (1978); Note, *Judicial Control of Systematic Inadequacies in Federal Administration Enforcement*, 88 YALE L.J. 407, 430-31 (1978).

72. 424 U.S. 1 (1976).

73. *Buckley* involved a challenge to the constitutionality of the Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3, as amended by the Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263 (current version codified at 2 U.S.C. § 431 (1976)), as well as related provisions of the Internal Revenue Code of 1954 as amended in 1974, I.R.C. §§ 6096, 9001-9013, 9031-9042. *See, e.g.*, Clagett & Bolton, *Buckley v. Valeo, Its Aftermath, and Its Prospects: The Constitutionality of Government Restraints on Political Campaign Financing*, 29 VAND. L. REV. 1327 (1976); Polsby, *Buckley v. Valeo: The Special Nature of Political Speech*, 1976 SUP. CT. REV. 1; Comment, *Buckley v. Valeo, The Supreme Court and Federal Campaign Reform*, 76 COLUM. L. REV. 852 (1976).

were not officers of the United States, appointed in accordance with the Appointments Clause.[74] The Court held that because the members of the Commission were not so appointed, they could not administer statutory provisions that "[vest] in the Commission primary responsibility for conducting civil litigation in the courts of the United States for vindicating public rights."[75] The Court also prohibited the members of the Commission from exercising interpretive functions, such as rulemaking and the issuing of advisory opinions,[76] and limited their responsibilities to investigative and informational tasks.[77]

The Court distinguished sharply between investigation and enforcement. Members of the Commission were permitted to conduct investigations because this function falls "in the same general category as those powers which Congress might delegate to one of its own committees."[78] A civil enforcement action, on the other hand, could not

> possibly be regarded as merely in aid of the legislative function of Congress [because a] lawsuit is the ultimate remedy for a breach of the law, and it is to the President, and not to the Congress, that the Constitution entrusts the responsibility to "take Care that the Laws be faithfully executed."[79]

Enforcement of the laws, as an executive act, was not to be performed by legislative officers.[80]

The Court's treatment of the role of the President in law

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74. 424 U.S. at 118-43. U.S. CONST. art. II, § 2, cl. 2 provides:
[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law; but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

75. 424 U.S. at 140.

76. *Id.* at 140-41.

77. *Id.* at 137-38.

78. *Id.* at 137.

79. *Id.* at 138 (quoting U.S. CONST. art. II, § 3).

80. *Cf.* Eltra Corp. v. Ringer, 579 F.2d 294, 300-01 (4th Cir. 1978) (executive officer appointed in accordance with Appointments Clause could exercise executive function of issuing regulations in copyright office).

enforcement demonstrates that civil enforcement actions were seen, as a constitutional matter, to be the exclusive responsibility of the President. This view was by no means necessary to the decision in the case,[81] but it is a considered and plainly stated dictum.[82] Insofar as *Buckley* may be regarded as suggesting that the President alone must control all enforcement of the laws, the case parallels the mandates of the active theory.[83]

In contrast to the exclusive Presidential enforcement power suggested in *Buckley* and mandated under the principles of the active theory, is the 1935 Supreme Court opinion in *Humphrey's Executor v. United States.*[84] The Court in *Humphrey's Executor* appeared to recognize a power in independent regulatory agencies to bring civil enforcement actions independently of Presidential direction. The estate of a member of the Federal Trade Commission (FTC) brought suit to recover the decedent's salary for the period between his removal by the President and his death. The Court held that Congress had authority to restrict the President's removal power over a member of the FTC.[85] The President's claim

81. The Court could have decided that enforcement functions had to be performed by persons appointed in accordance with the Appointments Clause because enforcement is "a significant governmental duty exercised pursuant to a public law." 424 U.S. 141. This is the standard the Court used in deciding that the interpretive functions could not be performed by the Commission as appointed. Just as this holding did not entail a finding that the President controls quasi-legislative activity, the Court could have decided the enforcement question without a reference to Presidential control.

82. The Second Circuit has recognized a distinction between "obiter dictum and "considered or 'judicial dictum' " by which the Supreme Court intends to give guidelines for future decisions. United States v. Bell, 524 F.2d 202, 206 (2nd Cir. 1975).

83. The Court apparently did recognize by a reference to the Confiscation Cases, 74 U.S. (7 Wall.) 454 (1868), that the Attorney General could control enforcement litigation, 424 U.S. at 139. In the *Confiscation Cases* the Supreme Court decided that the Attorney General had authority to dismiss a confiscation prosecution. This decision did not imply, however, that the President lacked exclusive responsibility for enforcement of the laws. The Attorney General is normally regarded as the agent of the President in law enforcement, *see* Ponzi v. Fessenden, 258 U.S. 254, 262 (1922), and there was no hint in the *Confisication Cases* that the Attorney General was acting against the wishes of the President.

84. 295 U.S. 602 (1935).

85. *Id.* at 626-32. The Commissioner was removed by President Roosevelt on the sole ground that the President desired personnel who shared his views on policy. *Id.* at 618-19. By statute, removal was permitted for "inefficiency,

of an unlimited constitutional power of removal was thereby rejected.

The Court strove to distinguish rather than to overrule *Myers v. United States*,[86] in which it had upheld the President's unlimited removal powers, and declared that the FTC could not "in any proper sense be characterized as an arm or an eye of the executive."[87] The FTC was said to exercise no part of the executive power but to act either as an agency of Congress and the judiciary or under quasi-legislative and quasi-judicial powers.[88] The Court stated that Congress may legitimately provide that a quasi-legislative or quasi-judicial body perform its functions independently of Presidential control and that such independence could be safeguarded only by protection against removal at will.[89]

The importance of *Humphrey's Executor* for the field of enforcement lies in the Court's recognition that the FTC possessed statutory authority to prevent unfair methods of competition through the utilization of cease and desist orders. If such an order were disobeyed, the Court admitted, "the commission may apply to the appropriate circuit court of appeals for its enforcement."[90] While this route to enforcement of the Federal Trade Commission Act was more circuitous than a direct civil enforcement action,[91]

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neglect of duty, or malfeasance in office." *Id.* at 619. The Court held that this provision was intended to limit removal to specified causes only, *id.* at 621-26, and that the statute was constitutional, *id.* at 626-32.

86. 272 U.S. 52 (1926). See notes 11-18 *supra* and accompanying text for discussion of *Myers*.

87. 295 U.S. at 628.

88. *Id.*

89. *Id.* at 629. One of the major purposes suggested by the Supreme Court in *Humphrey's Executor* for holding that the President lacked an absolute removal power was that otherwise the Commissioners could not be depended upon "to maintain an attitude of independence against [the President's] will." *Id.* The rule in *Humphrey's Executor* has led to the independence, at least as a formal matter, of the regulatory commissions. *See* C. HYNEMAN, BUREAUCRACY IN A DEMOCRACY 311 (1950). This independence has led to calls for greater presidential involvement in the formulation of regulatory policy. *See* Bruff, *supra* note 7.

90. 295 U.S. at 620-21.

91. *Id.* At the time the FTC could not, in the first instance, sue in federal court to enjoin an alleged unfair method of competition. Federal Trade Commission Act, ch. 311, § 5, 38 Stat. 717, § 5 (1914) (current version at 15 U.S.C. § 45 (1975)).

it still embodied the "discretionary power to seek judicial relief"[92] that in *Buckley* appeared to define the enforcement power reserved to the President.[93] This FTC enforcement power was lodged in a body purposely insulated from any formal Presidential direction. Enforcement thus may be pursued independently of the President.

The Court in *Humphrey's Executor* was not forced to confront the existence of independent enforcement power because it evidently felt that characterization of the FTC as a nonexecutive agency sufficed to decide the removal issue. The enforcement power of the FTC may have been viewed by the Court as a collateral power or as a minor aid to the quasi-judicial powers of the FTC, insufficient by itself to alter the fundamental nature of the Commission.[94]

A direct separation-of-powers challenge to an enforcement action by an independent regulatory agency has never reached the Supreme Court. In fact, the issue appears to have been decided only once.[95] In *ICC v. Chatsworth Cooperative Marketing Ass'n*,[96] the ICC had obtained an injunction against certain practices that, as stipulated by the defendants, violated the Interstate Commerce Act. On appeal, appellants' only challenge[97] to the

92. 424 U.S. at 138.

93. Both the enforcement scheme at issue in *Buckley* as well as that in *Humphrey's Executor* involved civil actions. By placing the locus of Presidential enforcement authority in article II, however, the Court in *Buckley* placed civil enforcement upon the same constitutional footing as criminal enforcement. Thus, the availability of independent civil enforcement appears to be the same as the availability of independent criminal enforcement.

94. The Court concluded that "[t]o the extent that [the FTC] exercises any executive function—as distinguished from executive power in the constitutional sense—it does so in the discharge and effectuation of its quasi-legislative or quasi-judicial powers, or as an agency of the legislative or judicial departments of the government." 295 U.S. at 628.

95. Disputes about whether Congress intended that a particular regulatory agency possess independent enforcement authority, in contrast to whether Congress has the power to create independent enforcement, do arise occasionally. *See, e.g.*, I.C.C. v. Southern Ry., 543 F.2d 534 (5th Cir. 1976), *rehearing denied en banc*, 551 F.2d 956 (1977); I.C.C. v. Koral Sales, Inc., 435 F. Supp. 1182 (E.D. Wis. 1977).

96. 347 F.2d 821 (7th Cir.), *cert. denied*, 382 U.S. 938 (1965).

97. 347 F.2d at 822.

order was that the section[98] that authorized the ICC to apply to a district court to enjoin a violation was an unconstitutional infringement upon the President's constitutional authority. The Seventh Circuit ruled that the Commission's independent enforcement power was valid.[99]

The reasoning in *Chatsworth* is flawed,[100] but the decision no doubt correctly states the prevailing view. The absence of constitutional challenges to independent agency enforcement power is itself an indication that the power of Congress to create independent law enforcement is accepted.[101]

The existence of independent enforcement power cannot be reconciled with the active theory. Civil enforcement is not a quasi-judicial or quasi-legislative function that can be legitimated by labeling it nonexecutive,[102] nor is civil enforcement by

98. 49 U.S.C. § 322(b)(1963) (repealed by Pub. L. No. 95-473, § 41(b), 92 Stat. 1466 (1978)).

99. 347 F.2d at 822.

100. The court stated that initiation of enforcement actions is not part of the executive power. *Id.* at 822. This conclusion is incorrect insofar as it relates to a usual policy decision to initiate an enforcement action. *See* United States v. Nixon, 418 U.S. 683, 693 (1974). Of course where enforcement procedure is defined by law, the courts can ensure that the law is obeyed. *See* Panama Refining Co. v. Ryan, 293 U.S. 388 (1935). But recognition that prosecutorial discretion is subject to judicial review does not render a decision to bring an enforcement action anything other than an essentially executive function. Nader v. Saxbe, 497 F.2d 676, 679 (D.C. Cir. 1974).

The Seventh Circuit also relied on *Humphrey's Executor*. 347 F.2d at 822. Although the Supreme Court did not question independent agency enforcement authority, the propriety of such authority was not an issue in *Humphrey's Executor*. *See* note 94 *supra* and accompanying text.

101. The National Labor Relations Board, for example, has been granted similar independent authority to initiate actions to enforce its orders under section 10(e) of the National Labor Relations Act, 29 U.S.C. § 160(e) (1973). Such orders are routinely enforced by the courts, either on direct petition by the NLRB, *e.g.*, NLRB v. C. T. Krehbiel Co., 593 F.2d 262 (6th Cir. 1979); NLRB v. King's Royal, Inc., 592 F.2d 341 (6th Cir. 1979), or on cross-application, *e.g.*, Cox Corp. v. NLRB, 593 F.2d 261 (6th Cir. 1979); Prestolite Wire Div. v. NLRB, 592 F.2d 302 (6th Cir. 1979); Marsden Elec. Co., Inc. v. NLRB, 586 F.2d 8 (6th Cir. 1978).

102. *See* Harvey Aluminum, Inc. v. NLRB, 335 F.2d 749, 754 (9th Cir. 1964) (internal agency proceeding characterized as enforcement of a public act). A court action would appear even more plainly to be enforcement. An enforcement action cannot be said to be quasi-judicial or quasi-legislative in the sense that the federal courts or Congress could actually prosecute such a suit.

an independent agency a necessary collateral function that is inseparable from quasi-legislative and quasi-judicial powers.[103] The power to select enforcement targets and to make enforcement policy without formal input from the President represents clear independent execution of the laws by executive officers. So long as this independent authority exists, there appears to be no logical reason why criminal law enforcement could not be treated in precisely the same manner by Congress.[104]

B. Independent Interpretation

While civil enforcement by independent agencies is the most dramatic example of independent execution, the independent interpretive authority of traditional executive officers is an even more significant negation of the idea that executive officers serve as agents of the President.[105] The formal independence of execu-

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103. In *Buckley* the Court demonstrated that enforcement powers are not an inseparable part of quasi-legislative and quasi-judicial powers, 424 U.S. at 138-41, and recognized the separate executive power implications of such enforcement authority.

A separation of prosecutorial function from adjudication is not only theoretical; the Administrative Procedure Act already imposes just such separation to a great extent. 5 U.S.C. § 554(d) (1977). *See, e.g.*, Adolph Coors Co. v. F.T.C., 497 F.2d 1178 (10th Cir. 1974), *cert. denied*, 419 U.S. 1105 (1975). As for the argument that enforcement is collateral to quasi-legislative powers, there would appear to be no reason why regulatory agencies could not enter into rulemaking without any prosecutorial function, much as does Congress at present. Adjudication, however, could well cease to be an independent policy-making tool of the regulatory agencies under such separation.

104. *See* note 93 *supra*. This result would be, of course, a vast departure from present practice. *See* note 71 *supra*.

In the wake of Watergate, questions concerning the ability of the Justice Department to investigate and prosecute violations of criminal statutes perpetrated by high government officials led to proposals for prosecutorial independence from the President. *See* Note, *Removing Politics from the Justice Department: Constitutional Problems with Institutional Reform*, 50 N.Y.U.L. REV. 366 (1975); Note, *The Proposed Court-Appointed Special Prosecutor: In Quest of a Constitutional Justification*, 87 YALE L.J. 1692 (1978). The enactment of the special prosecutor provisions of the Ethics in Government Act of 1978, 28 U.S.C. §§ 591-98 (1978), represents a congressional response to these concerns. The unreviewable discretion of the Attorney General to ask for the appointment of a special prosecutor, 28 U.S.C. § 592(f) (1978), suggests that Congress is not yet ready to challenge the President's traditional control over law enforcement.

105. The independent agencies are formally defined as part of the execu-

tive officers in interpreting the laws is well established.[106] There is little doubt that Congress may, for example, place a quasi-judicial decision solely in the hands of a lower executive officer and may protect his decision against attempts by superiors to reverse it.[107] While the President has not tested this tradition of independence, language in *Butterworth v. Hoe*[108] suggests that Presidential interference would not be successful.

In *Butterworth* the Commissioner of Patents decided to issue a contested patent to the assignees of one of the claimants. An appeal was taken from that decision to the Secretary of the Interior under regulations promulgated by the Secretary, and the Secretary reversed the decision of the Commissioner. The assignees then obtained a writ of mandamus from the appellate court of the District of Columbia to require the Commissioner to prepare the patent in accordance with his earlier decision.[109] The United States Supreme Court affirmed the issuance of the writ of mandamus and held that no right of appeal to the Secretary of the Interior existed.

> The conclusion cannot be resisted that, to whatever else supervision and direction on the part of the head of the department may extend, in respect to matters purely administrative and executive, they do not extend to a review of the action of the

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tive branch. *See* 5 U.S.C. § 105 (1977): "For the purpose of this title 'Executive agency' means an Executive department, a government corporation, and an independent establishment." On the other hand, the regulatory agencies are recognized generally as different from other components of the executive branch. *See* Hyneman, note 89 *supra*, at 311 (describing the popular assumption that regulatory commissions are independent of the President); BROWNLOW COMMITTEE REPORT, *supra* note 6, at 37 (criticizing the independence of the regulatory agencies and urging coordinated control by the executive branch); R. CUSHMAN, THE INDEPENDENT REGULATORY COMMISSIONS 442 (1941) (independent regulatory commissions are and must be parts of more than one department of government).

106. *Compare* Wilcox v. Jackson, 38 U.S. (13 Pet.) 498 (1839), *with* Barnard's Heirs v. Ashley's Heirs, 59 U.S. (18 How.) 43, 45 (1855) (discussing supervisory powers of the Commissioner of the General Land Office over land rights awarded by lower administrative officers). *See also* Buttfield v. Stranahan, 192 U.S. 470 (1904); Orchard v. Alexander, 157 U.S. 372, 384 (1894); Gilchrist v. Collector of Charleston, 10 Fed. Cas. 354 (C.C.D.S.C. 1808) (No. 5420).

107. Orchard v. Alexander, 157 U.S. 372, 384 (1894).

108. 112 U.S. 50 (1884).

109. *Id.* at 51-54.

> Commissioner of Patents in those cases in which, by law, he is appointed to exercise his discretion judicially. It is not consistent with the idea of a judicial action that it should be subject to the direction of a superior, in the sense in which that authority is conferred upon the head of an executive department in reference to his subordinates. Such a subsection takes from it the quality of a judicial act.[110]

The breadth of this language suggests its applicability had the President attempted to review the Commissioner's decision. The Secretary claimed authority to review by virtue of his role as head of an executive department.[111] The Court rejected this argument by referring to the limited, specific statutory authority granted to superior executive officers in the patent context.[112] The failure of the Court even to mention the possibility of Presidential authority suggests that quasi-judicial decisions are always controlled by statute. In fact, the Court's comment that the action of an executive officer can by statute be rendered "entirely independent, and, so far as executive control is concerned, conclusive and irreversible,"[113] could well be viewed as a rejection of Presidential control over quasi-judicial acts and as perhaps a recognition of independence even in execution of the laws.[114]

In contrast to quasi-judicial activity there are no similarly clear statements of independence in the area of quasi-legislative decisionmaking.[115] The Supreme Court has, however, referred to the recipient of quasi-legislative authority as an "agent" of Congress in the drafting of regulations.[116] This language implies that the line of authority for this task runs from the officer to Congress rather than to the President.[117]

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110. *Id.* at 67.

111. *Id.* at 56.

112. *Id.* at 64-67.

113. *Id.* at 56.

114. *See id.* at 67. For an even clearer suggestion that statutory discretion in at least a quasi-judicial area can be finally vested in a lower officer, beyond the power of the President to interfere, see United States *ex rel.* Ulrich v. Kellogg, 30 F.2d 984 (D.C. Cir.), *cert. denied*, 279 U.S. 868 (1929) (no review of consular officers' decisions on issuance of visa).

115. The practice of delegation of quasi-legislative authority by Congress is, however, well established. *See, e.g.*, Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 43 (1825).

116. United States v. Grimaud, 220 U.S. 506, 516 (1911).

117. Buckley v. Valeo, 424 U.S. 1 (1976), does not demonstrate hostility

Interpretive functions can be distinguished, though with difficulty, from acts of execution of the laws.[118] A failure of Presidential direction in the interpretive area, therefore, does not necessarily undermine the active theory. On the other hand, independent action by executive officers in any area of responsibility is inconsistent with the view that there is a "constitutional ideal of a fully coordinated Executive Branch responsible to the President."[119]

C. *Ministerial Functions*

Even in the field of functions plainly constituting execution of laws, executive branch officials may act personally rather than as agents of the President. The clearest example of such independence is in the area of ministerial functions.[120]

One question among many discussed in *Marbury v. Madison*[121] was the authority of the courts to exercise judicial review over acts of executive officers. Speaking for the Court, Chief Justice Marshall concluded that in cases in which the Constitution vests the President with "political powers" the acts of subordinate officers are in law the acts of the President.[122] In this

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to the desire of Congress to insulate quasi-legislative authority from Presidential control, though the Court held that officers who perform such functions must be appointed in accordance with the Appointments Clause. *Id.* at 140-41. The Court pointed out that interpretive powers are normally "performed by independent regulatory agencies or by some department in the Executive Branch under the direction of an Act of Congress." *Id.* at 141. The reference to the direction of Congress may have been intended to emphasize the independence that can potentially be granted to executive officers engaged in rulemaking. Certainly the Court's language echoes *Humphrey's Executor*, in which independence was held to flow from a similar statutory purpose. *Id.* (citing Humphrey's Executor v. United States, 295 U.S. 602, 628 (1935)).

118. *See* note 55 *supra*.

119. BROWNLOW COMMITTEE REPORT, *supra* note 6, at 37.

120. Lack of Presidential control over ministerial acts tends to undermine Presidential authority over discretionary acts since the distinction between the two functions is unclear, *see* 31 VAND. L. REV. 91, 93-94 (1978). It also reduces the President's practical influence with Congress, since it withdraws his potential ability to delay the carrying out of a legislative directive.

121. 5 U.S. (1 Cranch) 137 (1803).

122. The question Chief Justice Marshall considered was whether the act of withholding a commission was reviewable. The Court concluded that if delivery was a political act, there could be no judicial review. *Id.* at 164. In the

context at least, an agency relationship prevails. Though the political realm was not defined, the President's military and foreign affairs powers were probably intended. A different relationship between the President and an executive officer was said to exist when the executive officer is commanded by Congress to perform a particular act. According to Chief Justice Marshall, Congress could choose not to put the officer, in his performance of a ministerial act, under the direction of the President, and in such an instance the President apparently could not forbid the performance of the duty.[123]

Although Marshall was concerned primarily with the reach of judicial mandamus and not with the relationship of executive officers to the President, his discussion of ministerial duties is a theoretical challenge to the active theory. Marshall evidently felt that performance of a ministerial act is the responsibility of the executive officer on whom the duty is placed.[124] Carrying out a ministerial command is an act of executing the laws. The active theory would vest the President with the responsibility to carry out the ministerial duty. The duty may have been entrusted to an inferior officer as a formal matter, but it is the President who would be acting.[125]

D. Discretionary Functions

The theoretical existence of executive officer independence in the ministerial area, though a doctrinal affront to the active

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exercise of political powers, executive officers are merely extensions of the will of the President. *Id.* at 165-66.

The political realm was probably intended to refer to the President's military and foreign affairs powers. *See* Zamir, *supra* note 7, at 71. *But see* United States v. Black, 128 U.S. 40, 44 (1888).

123. 5 U.S. at 166.

124. *Id.*

125. Even under the active theory a proper ministerial command ultimately would have to be carried out. But the actor who could be compelled to act would be the President, not the lower executive officer. Under the active theory the President could legitimately forbid a lower officer to perform a ministerial duty because the officer is merely the alter ego of the President. Judicial power would then run against the President to see that the ministerial act was performed. Such an agency relationship would not place the President above the law; it merely would recognize the President rather than the named officer as the responsible actor. *Marbury* indicates instead that the lower officer is the responsible actor.

theory, has little or no practical significance. No matter which officer executes the law, Congress is ultimately entitled to enforcement of a ministerial command. The area of discretionary commands, on the other hand, is one of tremendous theoretical and actual consequence. Presidential control over acts of discretion guarantees Presidential policy control over the executive branch.[126] Furthermore, Presidential control over discrtionary action is a necessary corollary of the view that the President executes the laws.

The centrality of Presidential direction of lower officer discretion was formally stated in 1855 by Attorney General Cushing, who described the rule of the active theory for the circumstances "in which an executive act is, by law, required to be performed by a given Head of Department."[127] He concluded that Presidential direction over administrative action does exist outside the ministerial area.[128]

> Take now . . . that common or most ordinary style [for legislation], in which an executive act is, by law, required to be performed by a given Head of Department. I think here the general rule to be . . . that the Head of Department is subject to the direction of the President. I hold that no Head of Department can lawfully perform an *official* act against the will of the President; and that will is by the Constitution to govern the performance of all such acts.[129]

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126. This is true because Congress is not capable of making all policy choices and then translating its decisions into ministerial commands. In the discretion of administrators lies the importance of the executive branch and the heart of the competition for control between the President and Congress. *See* Karl, *supra* note 6, at 19-20; notes 5-9 *supra* and accompanying text.

127. 7 OP. ATT'Y GEN. 453, 469 (1855). Attorney General Cushing had been asked whether instructions by Heads of Departments were lawful without express reference to the direction of the President. *Id.* at 453 (quoting a communication from the President of the United States). He analyzed the fundamental nature of the President's administrative authority and concluded that express direction was not required because, "as a general rule, the direction of the President is to be presumed in all instructions and orders issuing from the competent Department . . . ." *Id.* at 482.

128. *Id.* at 469-70. Cushing may also have excluded quasi-judicial acts from Presidential control. *Id.* at 470-71.

129. *Id.* at 469-70 (emphasis in original). In Cushing's view, a denial of the power of Presidential direction would allow Congress "so [to] divide and transfer the executive power as utterly to subvert Government . . . ." *Id.* at 470.

Cushing grounded this description of agency in the observation that under article II only the President could perform executive acts.[130]

Although not noted by Cushing, his view of independent discretion had been convincingly rejected in dictum by the Supreme Court in 1837 in *Kendall v. United States*.[131] *Kendall* grew out of a statutory order to the Postmaster General to pay a money award. The Postmaster General paid only a part of the award, whereupon the disappointed mail contractor sued for the rest. The lower court issued a writ of mandamus ordering the Postmaster General to make the remainder of the payment due.[132] The Postmaster General interpreted the responsibility for payment to be a matter of discretion[133] and argued that only the President, and not a court, could direct the exercise of such discretion.[134]

Since the Court decided that the act in question was ministerial,[135] it did not hold that executive discretion could be independent of the President. A key passage shows, however, that the Court did view executive officers as free from Presidential direction in carrying out even discretionary duties.

> The executive power is vested in a President; and as far as his powers are derived from the constitution, he is beyond the reach of any other department, except in the mode prescribed by the constitution through the impeaching power. But it by no

130. *Id.* at 463.

131. 37 U.S. (12 Pet.) 524 (1838).

132. *Id.* at 526-35.

133. *Id.* at 592-93. The primary position of the Government was that a ministerial command that did not affect the public could be enforced by means of mandamus. Ministerial acts that did affect the public were to be controlled by the President. *Id.* at 542-44. At a later point, however, the Government was at pains to point out that the act in question was not ministerial at all, and acknowledged the authority of the judiciary to compel the performance of ministerial duties. *Id.* at 592-96.

134. *Id.* at 599-600, 612. Counsel for the Postmaster General argued, in relation to executive officers, in the same manner as Attorney General Cushing, *see* text accompanying notes 127-30 *supra*, that under the Constitution there could not be "acts of independent subordinates." 37 U.S. at 543-44. At another point, however, the Government appeared to admit that a lower executive officer could at least refuse to obey an order of the President and could not be compelled to act, though he could be removed. *Id.* at 600.

135. *Id.* at 610. The Court also noted that the President had not forbidden payment of the awards. *Id.* at 612-13.

> means follows, that every officer in every branch of that department is under the exclusive direction of the President. Such a principle, we apprehend, is not, and certainly cannot be claimed by the President.
>
> There are certain political duties imposed upon many officers in the executive department, the discharge of which is under the direction of the President. But it would be an alarming doctrine, that congress cannot impose upon any executive officer any duty they may think proper, which is not repugnant to any rights secured and protected by the constitution; and in such cases, the duty and responsibility grow out of and are subject to the control of the law, and not to the direction of the President. And this is emphatically the case, where the duty enjoined is of a mere ministerial character.[136]

Although it is emphatically the case with ministerial commands that the President does not have a power of direction, that appears to have been thought by the Court also to be the rule pertaining to all other commands, including, presumably, discretionary ones.[137]

A famous illustration of the legal incapacity of the President to act in the face of discretion granted to a lower executive officer occurred in 1938 when Secretary of the Interior Ickes rejected President Roosevelt's requests to authorize the sale of helium to Germany.[138] The President could not himself authorize the sale because that power had been granted to the Secretary.[139] If the President were in fact executing the law, he would be permitted to act directly in place of his agent. The Secretary's legal authority to refuse to act and risk removal, demonstrates the formal weakness of the office of the President.[140] An unsuccessful at-

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136. *Id.* at 610.

137. *Id.*; *see* E. CORWIN, PRESIDENTIAL POWER AND THE CONSTITUTION 94 (1976).

138. For the Secretary's account, see Ickes, "My Twelve Years with FDR" SAT. EVE. POST, June 5, 1948, at 81. This celebrated incident was singled out in the HOOVER COMMISSION REPORT, *supra* note 48, as one example of a statutory grant of discretion to a lower officer eroding the constitutionally mandated line of command running downward from the President. *Id.* at 4. It is difficult to see how a valid statute could erode a constitutional requirement. The Commission did not actually call such delegation unconstitutional.

139. *See* Act of Sept. 1, 1937, Pub. L. No. 75-411, 50 Stat. 887.

140. The President could have fired the Secretary and replaced him with someone who favored the sales. That action might have run the risk of involving

tempt in 1949 to give to the President a general power of direction over the executive branch[141] further underscores the existing gap in the President's legal powers.[142]

From the beginning of the Republic, Congress has acted as if formal Presidential control over execution were purely a matter of legislative authorization. Early Congresses gave to the President an express statutory power of direction over the departments associated with the President's delineated "political" authority over foreign affairs[143] and defense.[144] This power of direction was omitted from the domestic departments such as the Treasury[145] and the Post Office.[146] During this period Congress demonstrated

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the helium policy in public debate. A less riskly course would have been to apply serious Presidential pressure, such as the threat of removal, or political pressure. Ickes' account suggests that serious pressure was not forthcoming. Perhaps in reality the President used Ickes' opposition as a smokescreen for his own disapproval of the sales.

141. S. 942, 81st Cong. 1st Sess. § 101(c) (1949), entitled "The General Executive Management Act."

142. *See* McGrain v. Daugherty, 273 U.S. 135, 177-78 (1927) (Congress has powers of organization in military and criminal law enforcement); United States v. Mouat, 124 U.S. 303, 308 (1888) (an inferior officer may be vested by statute with an independent power of appointment); 10 OP. ATT'Y GEN. 111 (1861) (Congress has organizational power in military departments); E. CORWIN, *supra* note 4, at 69-70 (Congress creates all offices). Although Congress has plenary power in organizational matters, *see* 272 U.S. 52, 248 (1926) (Brandeis, J., dissenting), Congress may decide to yield some reorganization authority to the President. *See* United States v. Fresno Unified School Dist., 592 F.2d 1088 (9th Cir. 1979).

There is a surprising tendency to think of the office of the President as more powerful than it is in fact. For example, it is said that when President Ford found out that HEW had prohibited certain father-son and mother-daughter school activities, "he ordered immediate suspension and reexamination of the rule." Bruff, *supra* note 7, at 465 n.67. The question of the President's authority to intervene in this way could present a serious constitutional issue depending upon the precise statutory framework. Apparently, though, the public perceives the President as the one in charge of the executive branch, and the question was never raised.

143. Act of July 27, 1789, ch. 4, § 1, 1 Stat. 28.

144. Department of War, Act of August 7, 1789, ch. 7, § 1, 1 Stat. 49; Department of the Navy, Act of April 30, 1789, ch. 35, § 1, 1 Stat. 553.

145. Act of September 2, 1789, ch. 12, § 2, 1 Stat. 65, 66.

146. Act of May 8, 1794, ch. 23, § 3, 1 Stat. 357. Presidential direction was omitted from the Organic Act of the Interior Department as well. Act of March 3, 1849, ch. 108, § 1, 9 Stat. 395.

a commitment to independent execution of the laws by placing discretion in the Postmaster General to enter into contracts for post roads, despite the argument that this function should be controlled by the President.[147] In the Treasury Department the practice of independence was at least as great. For a significant period in our early history, the President did not even see department budget estimates before the Treasury Department transmitted them to Congress.[148] In fact, the Treasury Department recommended tax policy to the Congresss.[149] Though not without dissent,[150] one commentator has concluded, "Guided by the model of the colonial governments the framers of the Constitution probably did not intend the President to be administrative chief of the executive branch, clothed with a general power to control the acts of all executive officers."[151]

E. Appointment and Removal

The argument could be made that the President's power of appointment and removal are the equivalent of a formal power of direction[152] and thus vindicates the active theory. Removal and appointment, however, cannot substitute for an agency relationship. A principal is not limited to removing one agent and selecting another; a principal may direct his agent's actions or remove all authority from the agent and act directly in his place.[153] If the

147. L. WHITE, THE FEDERALISTS 79 (1965).

148. L. WHITE, THE JACKSONIANS 78 (1954).

149. L. WHITE, *supra* note 147, at 326.

150. "The law and the Constitution alike prescribed that in theory the whole business of the executive branch, domestic and foreign, be performed by the President or at his direction." L. WHITE, THE JEFFERSONIANS 70-71 (1965).

151. Zamir, *supra* note 7, at 869. Such a system of decentralization was not necessarily an anomaly at the time. *Id.* at 873. Indeed, the role of fragmentation in curbing arbitrary powers had modern adherents. *See* Myers v. United States, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting).

152. A formal power of direction has been said to emanate from the removal power, E. CORWIN, *supra* note 4, at 85; F. GOODNOW, THE PRINCIPLES OF THE ADMINISTRATIVE LAW OF THE UNITED STATES 81 (1905), as well as from statutes and other indirect control devices that support the principles of hierarchy. *See* Zamir, *supra* note 7, at 873.

153. One of the distinguishing characteristics of the agency relationship is that the agent may act "with the same effect as if [the principal] were to act in person." RESTATEMENT (SECOND) OF AGENCY § 20 (1958). Control of the agent by the principal is a basic attribute of agency. *Id.* at § 14. The significance

President possessed the sole power of execution of the laws, he would be able to maintain this degree of authority over the actions of executive officers.[154] In addition to these theoretical problems, however, appointment and removal are not the practical equivalent of an agency relationship.

The President's appointment power[155] is a particularly undependable means of control over executive officer discretion.[156] Even in a situation in which the President has the power to appoint[157] and manages to find an individual with whom he agrees on major issues,[158] Congress may limit that power. The Senate must approve major Presidential nominations,[159] and Congress'

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of traditional agency concepts is not that the common law must govern relationships in the executive branch. But once it is assumed that executive officers merely act for the President, then the traditional prerogatives of a principal become logical and appropriate expressions of Presidential power. Under the active theory, it is the President who is acting. Accordingly, he ought to be able to dismiss his aide and act directly.

154. There is an important theoretical difference between removal to enforce the formal power of direction and removal instead of a power of direction. In the former case, removal is a proper sanction utilized to assert constitutional authority. In the latter case, removal is merely an example of effective threat.

The difference between the two approaches is illustrated in the famous bank removal episode. *See* E. CORWIN, PRESIDENTIAL POWER AND THE CONSTITUTION 90-91 (1976). President Jackson removed Secretary of the Treasury Duane when Duane, acting within his statutory authority, refused to transfer national funds from the national bank. In Jackson's view:

> The removal of Duane was the constitutionally ordained result of that officer's attempt to usurp the President's constitutional prerogatives; or, in broader terms, the President's removal power, in this case unqualified, was *the sanction provided by the Constitution for his power and duty to control all his subordinates in all their official actions of public consequence.*

Id. at 91 (emphasis in original).

155. U.S. CONST. art. II, § 2.

156. Compare the President's authority to appoint article III judges. By itself, appointment does not ensure continuing control. *But see* Robinson, *On Reorganizing the Independent Regulatory Agencies*, 57 VA. L. REV. 947, 950-51 (1971).

157. Congressional attempts to create offices that do not require Presidential appointment will be difficult to sustain. *See* Buckley v. Valeo, 424 U.S. 1 (1976).

158. The judgment by the President that he does agree and will continue to agree with the actions of his appointee is subject to great miscalculation. *See* L. KATCHER, EARL WARREN: A POLITICAL BIOGRAPHY 400-02 (1967).

159. *See* note 155 *supra*.

power over organization is such that Congress decides which officer executes which law.[160] Thus, if Congress is sufficiently determined it may give a statutory program to one particularly sympathetic executive officer for execution, despite any possible Presidential disfavor of the program.

The President's removal power is a far more potent source of policy control than is the power of appointment.[161] Chief Justice Taft suggested in *Myers* that removal could represent the means to ensure the Presidential administrative control that he viewed as constitutionally required.[162] The removal power has in fact been used from the beginning of the nation's history as a means of maintaining Presidential policy control.[163] Since most officers will not risk being fired over a disagreement with the President, removal has been considered the practical equivalent of an express Presidential power of direction.[164]

There exist, however, several reasons why removal is not a suitable, practical replacement for the power of direction. In the first place, policy control through removal operates only prospectively. Once it is recognized that an executive officer may be given the authority to execute a law, his decision is not automaticaly reversed even if he is replaced.[165] Furthermore, removal is not

160. *See* note 142 *supra*. There are other limitations on the efficacy of the appointment power. The President does not necessarily control appointment of inferior officers. *See* United States v. Mouat, 124 U.S. 303, 308 (1888). Furthermore, Congress may restrict the qualifications for an office. *See generally* Myers v. United States, 272 U.S. 52, 265-74 (1926) (Brandeis, J., dissenting).

161. Removal has even been thought to create a formal power of direction. *See* note 152 *supra*.

162. 272 U.S. at 135. Chief Justice Taft approached the removal power from the same perspective as did President Jackson. They both thought that Presidential direction of administrative officers was and ought to be the constitutional norm. *See* note 17 *supra*. *Humphrey's Executor* illustrates the opposite perspective in which a Presidential removal power is rejected precisely because direction is not valid. 295 U.S. at 629.

163. For example, President Adams dismissed Coxe as Commissioner of Revenue in 1797, L. WHITE, *supra* note 147, at 289, and Pickering as Postmaster General in 1800, *id.* at 251-52, essentially for political differences.

164. *See* Grudstein, *supra* note 1, at 309.

165. *See* Myers v. United States, 272 U.S. 52, 135 (1926) (President may consider the decision after its rendition as a reason for removing the officer). The President might not be able to utilize removal prospectively, as a threat. If the lower officer has been granted personal discretion, any threat to fire him might

always available. In the case of the independent agencies, the power of removal does not exist,[166] and it is not necessarily available in the case of lower officer appointees.[167] Even in cases in which removal is available, the political cost of removal may be great.[168] The President might also hesitate to remove an officer because the officer is valuable in other contexts. Finally, even if the power of removal is ultimately exercised, the President has been forced to expend time and energy to accomplish indirectly what the active theory states he ought to be able to do directly: control all execution of the laws. If the President does not control all execution of law, or if he does so only indirectly, the executive power cannot be said to include the power to execute the laws. This is true in the face of the admittedly great Presidential influence that flows not only from the removal power, but from other control devices available to the President.[169] The conclusion that the President is not treated as if he executed the laws leads to a search for an alternative theory of the executive power.

IV. THE PASSIVE THEORY OF THE EXECUTIVE POWER

A. *The President Supervises Execution of the Laws*

The short survey in part II of this article suggests a tentative negative hypothesis: the President does not execute the laws.

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invalidate a decision that did follow Presidential direction. *See* Accardi v. Shaughnessy, 347 U.S. 260 (1954); Morgan v. United States, 298 U.S. 468 (1936); Federation of Civic Ass'ns v. Volpe, 459 F.2d 1231 (D.C. Cir. 1971), *cert. denied*, 405 U.S. 1030 (1972). *But see* Zamir, *supra* note 7, at 878.

166. Wiener v. United States, 357 U.S. 349 (1957); Humphrey's Executor v. United States, 295 U.S. 602 (1935).

167. *E.g.*, United States v. Perkins, 116 U.S. 483 (1886); *In re* Hennen, 38 U.S. 230 (1839).

168. Bruff, *Presidential Exemption from Mandatory Retirement of Members of the Independent Regulatory Commissions*, 1976 DUKE L.J. 249, 273-74; *cf.* 35 OHIO ST. L.J. 513 (1974) (President Nixon's removal experience).

169. There are in fact a host of disciplinary measures and incentives that an administrative superior can utilize to enforce policy judgments upon erstwhile independent subordinates. *See* C. FRIEDRICH, CONSTITUTIONAL GOVERNMENT AND DEMOCRACY 397-408 (1968). But all indirect control devices suffer from the same defects from the point of view of the active theory. The President would have the right to act directly under the active theory. No indirect device is as dependable or as efficient as that simple expedient.

This view, though perhaps surprising, is not a complete departure from prior constitutional analysis. "[The President] is not authorized to execute them himself, or through agents or officers, civil or military, appointed by himself . . . ."[170] "[The President] has the power of removal, but not the power of correcting, by his own official act, the errors of judgment of incompetent or unfaithful subordinates."[171] Of course, any theory of the executive power requires more than a description of what the President does not do. Article II itself provides the basis for a positive, alternative viewpoint.

Article II does not clearly grant to the President the power to execute the laws.[172] Aside from the probably empty grant of the executive power itself, the President's power over execution is defined by article II, section 3, which provides in part that the President "shall take care that the Laws be faithfully executed." This wording implies that other parties are to execute the laws and that the President is to see that they execute the laws faithfully, thus limiting the President's role to supervision of execution by executive officers.[173] The recognition that the President does not execute the laws, but rather merely supervises execution, is the heart of the passive theory of the executive power.

B. The Scope of Supervision

The President has often been said to supervise execution of

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170. *Ex parte* Merryman, 17 F. Cas. 144, 149 (C.C.D. Md. 1861) (No. 9487).

171. 4 OP. ATT'Y GEN. 515, 516 (1846); *cf.* Parker, *supra* note 29, at 449 ("President's substantive-legal position . . . is not unlike that of any other agency of the administrative branch of the government," *id.*). *See also* 19 OP. ATT'Y GEN. 685, 686 (1890).

172. *See* notes 33-39 *supra* and accompanying text.

173. The constitution of the United States requires the President, in general terms, to take care that the laws be faithfully executed; that is, it places the officers engaged in the execution of the laws under his general superintendence: he is to see that they do their duty faithfully; and on their failure, to cause them to be displaced, prosecuted, or impeached, according to the nature of the case . . . . But it could never have been the intention of the constitution, in assigning this general power to the President to take care that the laws be executed, that he should in person execute the laws himself.

1 OP. ATT'Y GEN. 624, 625 (1823).

the laws,[174] but this description has not been considered a limitation upon Presidential policy control.[175] In contrast, the premise of the passive theory, that executive officers execute the laws, logically requires that Presidential supervision over execution of the laws be limited in scope.

If the President does not execute the laws, Congress could legitimately command that other officers do so, and clearly Congress could command that in execution of a statute an officer use his best judgment. The President's role would be limited to ensuring that the statute be executed faithfully. If the officer, in good faith, used his best judgment, the statute would be executed in a manner faithful to congressional intentions. Accordingly, the President could not interfere solely because of a disagreement with the officer over the proper exercise of discretion.

Under the passive theory, Presidential control over officer decisionmaking would be a function of the degree of independence Congress wished to grant to lower executive officers. Congress could grant a lower officer broad or limited discretion, and any restrictions on officer discretion could be enforced by the President in his supervisory role. The President's supervisory role could be analogized to that of the courts in reviewing administrative actions.[176] There would be no presumption that the President has authority to substitute his views for those of the officer.

Aside from the logical requirements of the passive theory, narrowly defined Presidential supervision over executive officers

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174. *See, e.g.*, Myers v. United States, 272 U.S. 52, 135 (1926); Williams v. United States, 42 U.S. (1 How.) 290, 297 (1843).

175. There is no indication in either *Williams* or *Myers*, for example, that references to supervision were intended in any way to limit Presidential power. *Williams* held that the statutory duty of the President to direct the payment of public money did not require a direct Presidential order in every instance. *Myers* held that the President had an absolute right of removal over executive officers. It is clear in *Myers* that Presidential policy control was considered a valid exercise of Presidential authority. *See* note 17 *supra* and accompanying text.

176. Traditionally there is a narrow standard of review of administrative action. *See, e.g.*, NLRB v. Hearst Publications, Inc., 322 U.S. 111, 130-32 (1944). The standard of review is often framed in terms of actions that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A) (1967); Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 411-16 (1971). Disputes continue to arise in judicial review, as they surely would in Presidential supervision under the passive theory, over whether Congress intended to grant broad discretion to an administrator. *Id.*

is supported by a real, though neglected, tradition. This tradition, ironically, does not arise from attempts by the judiciary or Congress to limit Presidential power but from the executive branch itself. President Madison stated that the responsibility of the President was to "superintend"[177] executive officers and to ensure "good behavior"[178] on their part. In 1823 Attorney General Wirt set out similar limits.[179] When requested to give his opinion of the President's authority to review settlements made by government accounting officers, Wirt responded that article II, section 3 gave to the President no authority to act.

> The Constitution assigns to Congress the power of designating the duties of particular officers: the President is only required to take care that they execute them faithfully . . . [the President is] to see that the officer assigned by law performs the duty faithfully—that is honestly, not with perfect correctness of judgment, but honestly.[180]

Attorney General Crittendon suggested a somewhat greater administrative role for the President: he asserted that the proper way for the President to ensure faithful execution of the law was to remove executive officers "for every neglect or abuse of their official trust."[181] This standard of review permits Congress to place discretion in the hands of executive officers and at the same time allows the President to ensure administrative efficiency as well as integrity.[182]

Judicial support for a narrow definition of Presidential supervision is expressed in the reported view of the circuit court in *Kendall v. United States.*[183] Counsel for the Postmaster General said that the lower court recognized that the act at issue was executive in nature but held that the President has "no other

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177. I ANNALS OF CONGRESS 387 (1789).

178. *Id.* at 379.

179. 1 OP. ATT'Y GEN. 624 (1823).

180. *Id.* at 625-26.

181. 5 OP. ATT'Y GEN. 287, 288 (1851).

182. *See also* Myers v. United States, 272 U.S. 52, 247 (1926) (Brandeis, J., dissenting) (President has inherent authority to suspend lower officers for disloyalty, insubordination, and neglect of duty); L. WHITE, *supra* note 147, at 287-88 (President Adams removed lower officers for administrative neglect and delinquency).

183. 37 U.S. (12 Pet.) 524 (1838). For holding of case and implications for administrative practice, see notes 131-37 *supra* and accompanying text.

control over the officer than to see that he acts honestly, with proper motives without any power to construe the law, and see that the executive action conforms with it."[184] In counsel's view, the circuit court limited the President to supervising integrity rather than discretion. "If [the President] sees the inferior executive officer acting honestly, he can look no further. How, or when they execute a law, are things he has no concern with."[185]

In *Myers v. United States*[186] Chief Justice Taft attempted to reconcile the premise of the passive theory with a more expansive view of supervision. In general, Taft reasoned directly from the premises of the active theory.[187] At one point in his opinion, however, the Chief Justice recognized that in certain instances the President might not have authority to direct an executive officer to a particular outcome.[188] Even in such situations, Taft upheld absolute Presidential control. If a disagreement arose between the officer and the President, the President could remove the officer "on the ground that the discretion entrusted to that officer by statute [had] not been on the whole intelligently or wisely exercised."[189] By allowing the President to supervise the wisdom of an exercise of discretion, Taft's system permitted a great deal of Presidential policy control. In fact, Taft did not appear to recognize any practical difference between execution by the President and supervision.

For Chief Justice Taft, the scope of proper supervision had to include authority to substitute the President's judgment for that of the executive officer. The President's interpretation of a statute controls to ensure "that unitary and uniform execution of the laws which article II of the Constitution evidently contemplated in vesting general executive power in the President alone."[190]

Chief Justice Taft's approach to supervision is inconsistent with his recognition that a statute might legitimately vest discretion in a lower executive officer. Presidential interference in such

184. *Id.* at 539.
185. *Id.* at 542.
186. 272 U.S. 52 (1926).
187. *See* notes 11-18 *supra* and accompanying text.
188. 272 U.S. at 132-35. *See* note 18 *supra.*
189. 272 U.S. at 135.
190. *Id.*

a circumstance, on the ground that the officer was unwise, does not ensure faithful execution; interference frustrates the congressional objective of independent execution.[191] Even post hoc removal could threaten the independent discretion validly sought by Congress.[192] The reason for Taft's inconsistency is perhaps his underlying support of the premises of the active theory.[193] Taft's basic view was that the President is the only officer who may execute the laws, and thus he probably did not view congressional creation of independent execution as legitimate.

The proper scope of supervision under the passive theory is illustrated by examining the differing roles of removal under the active and passive theories. Under the active theory removal serves as a sanction for the failure to obey legitimate Presidential orders; the President's interpretation of a statutory scheme would prevail. Insistence by lower officers upon a contrary policy would not be lawful and would be properly handled by dismissal. In contrast, under the passive theory removal could not be exercised to ensure Presidential control of administrative policymaking, but only to protect a statutory scheme from administrative abuse or neglect.

C. Implications of the Passive Theory

Two significant implications flow from the passive theory. The first is unsettling, in light of our tendency to consider the President as head of the government.[194] Because Congress would be free to give to any executive officer authority to execute a statute, one could say that no constitutional requirement of centralized and consistent policy formulation and execution exists.

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191. *Cf.* 1 OP. ATT'Y GEN. 678, 679 (1824) (without statutory authority President's interference with decisions of accounting officers was a usurpation).

192. *See* note 165 *supra*.

193. *See* note 18 *supra*.

194. *See* Fortas, *supra* note 1, at 1001; Parker, *supra* note 29. The importance of the Presidency is acknowledged even by those who might be considered its critics. *See* Black, *supra* note 9, at 13; Fortas, *supra* note 1, at 987. Whether Presidential power is ascribed to constitutional authority, *see* BROWNLOW COMMITTEE REPORT, *supra* note 6; HOOVER COMMISSION REPORT, *supra* note 48, to legislative sufferance, *see* Black, *supra* note 9, or to a combination of both, *see* Grudstein, *supra* note 1; Zamir, *supra* note 7, reliance upon the Presidency to solve problems has come to be an established fact of American political life. *See* Karl, *supra* note 6, at 2, 23.

There would not appear to be any reason why law enforcement, for example, or any other key responsibility of enforcement and execution, could not be directed by an officer independent of the President, though subject to removal for cause.[195]

Under the passive theory Congress may choose not to divest the President of policy control; but, Congress could decide to give to the President authority to execute a particular law or even pervasive oversight of bureaucratic decisionmaking.[196] Even though the President might thus exercise great authority under the passive theory, the office would have to be viewed as essentially a creature of Congress in domestic affairs.[197]

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195. *See* note 70 *supra*.

196. This is a distinction that proponents of increased Presidential power are apt to miss. For example, the bureaucracy has been called "a major constitutional anomaly [because of the absence of a check or balance] capable of subjecting bureaucracy to political management." Karl, *supra* note 6, at 20-21. But this is entirely incorrect as a matter of constitutional law. Congress has complete control over the bureaucracy and may easily grant all necesssary administrative oversight powers to the President.

It may be true, as has often been suggested, that Congress cannot efficiently manage the bureaucracy. *See* note 7 *supra*. Furthermore, there may well be political and constitutional reasons why Congress refuses to delegate entire administrative power to the President. *See* Karl, *supra* note 6, at 32-33. Nevertheless, before concluding that the existing state of affairs represents an institutional impasse necessitating extreme measures, it should be noted that Congress has delegated vast administrative power to the President already, *see* Zamir, *supra* note 7, and that administrative efficiency is by no means an unmixed blessing in a pluralistic democracy.

> The doctrine of the separation of powers was adopted by the Convention of 1787, not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was, not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy.

Myers v. United States, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting).

197. In a different context, Mr. Chief Justice Vinson derided a "messenger-boy concept" of the Presidency that lacked powers necessary to meet the challenges of the day. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 708-09 (1952) (Vinson, C.J., dissenting). The passive theory suggests a President who is in fact nothing more than the messenger boy of the Legislature in domestic policy matters. If the passive theory is our present conception of the office, we would perhaps do well to consider the startling words of Professor Black:

> My classes think I am trying to be funny when I say that, by simple

The second implication of the passive theory is that the President would retain the power to remove any officer who, in executing the law, abuses his position in some way. Under the passive theory, the proper scope of supervision would be narrow, but within the confines of that scope, the President's removal power could not be limited because it would be constitutionally mandated. Generally speaking, the President presently possesses statutory authority to remove for abuse, even over independent agencies.[198] Insofar as the agencies execute the laws, this removal authority would be required under the passive theory.

Despite the centrality of removal, the passive theory's prohibition of Presidential policy control except by congressional authority could conflict with the constitutional obligation of the President to exercise supervision through the removal power. If the President removed a congressionally protected officer[199] after an exercise of independent discretion, the officer might claim that the removal was motivated by an improper desire for policy control rather than for supervisory goals such as elimination of administrative abuse. Under the passive theory, could the courts intervene in Presidential removal by requiring stated reasons for removal and evaluating the President's good faith?[200]

Judicial intervention would represent a great danger to the President's obligation to protect against the administrative abuse and neglect. In the first place, insofar as such an officer stood in a political relationship to the President, any failure of confidence by the President would justify removal, whatever its source, even under the passive theory.[201] Even if the officer were merely execut-

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majorities, Congress could at the start of any fiscal biennium reduce the President's staff to one secretary for answering social correspondence, and that, by two-thirds majorities, Congress could put the White House up at auction. But I am not trying to be funny; these things are literally true . . . .

Black, *supra* note 9, at 15.

198. *E.g.*, 15 U.S.C. § 51 (1973) (FTC); 49 U.S.C. § 1 (1959 & Cum. Supp. 1979) (ICC).

199. If Congress left an officer unprotected from removal at will by the President, a court would be free to infer a legislative decision to allow Presidential removal power even based upon policy conflict.

200. One court was apparently willing to evaluate the basis of a Presidential removal for cause. United States v. AT&T, 461 F. Supp. 1314, 1350 (D.D.C. 1978).

201. Political duties would include authority in the fields of defense, for-

ing the laws and stood in no special relationship to the President, judicial examination of a specific removal decision would have the effect of eliminating Presidential judgment in precisely the area in which it was intended to operate.[202] Admittedly, unbridled removal authority would inevitably lead to some Presidential policy control that would be unwarranted under the passive theory. The formal acceptance of the view that policy removals are an abuse of Presidential power, however, would serve to discourage flagrant Presidential abuse of the removal power.

V. CONCLUSION

Congress legislates, and the courts decide disputes. What the President does should be obvious to all. Careful consideration reveals, instead, that two different theories of the executive power exist, neither of which has received any serious doctrinal development. These two theories differ over a simple distinction. One theory holds that the President acts; the other that he merely supervises others who act.

The evidence shows that the President need not be the primary actor in execution of the laws. On the other hand, important elements of the active theory continue to influence the Presidency in many ways, not the least of which is our manner of speaking of the office. To be told that the President does not execute the laws might seem absurd to most people, but the office of the Presidency may appear more powerful than it really is.

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eign affairs, and, perhaps, the role of Presidential advisor. *See* note 122 *supra*.

The difficulty of distinguishing among the functions of executive officers for purposes of the removal power was one of the reasons cited by Chief Justice Taft for upholding a general removal power. Myers v. United States, 272 U.S. 52, 134 (1926).

202. The officer would be asking the courts to look behind the President's claim, required under the passive theory, that the removal was for proper cause, either for the alleged real reason or simply to weigh independently the evidence of administrative failure. There are two objections to such a course. Such an endeavor might well be fruitless insofar as it looks for unstated reasons. Moreover, if a court simply attempts to examine the evidence to determine whether the officer was really inefficient, it will be exercising a power specifically granted to the President. Under the passive theory, the President would retain sufficient authority to decide the proper level of competence in the execution of the laws. Occasional arbitrary action is a small price to pay for vindication of a constitutional system of bureaucratic control that permits rapid response to administrative abuse.

Rigorous adoption of the active theory would have unfortunate consequences. All administrative decisionmaking by the executive branch would come under the President's direct control, and Government policy would become synonymous with Presidential policy. The President would have valid claims to new powers of organization, removal, and direction. Nonpolitical independent expertise in decisionmaking would no longer be an attainable goal. Theoretically, quasi-judicial and quasi-legislative acts would not be subject to Presidential policy direction. But given the logical weakness of the distinction between interpretation and execution, even those functions might come under Presidential control. Congress' theoretical capacity to protect legislative policy by placing less discretion in execution is not likely to be utilized in practice given present-day complexities.

On the other hand, adoption of the passive theory would be worse. The Presidency would be left a shell. Certain powers unrelated to execution of the laws would remain.[203] Perhaps even limited powers relating to execution would also remain, although those powers would be subject to congressional withdrawal.[204] But the execution of all government programs could be given to a series of cabinet secretaries, and our system of government could thus be converted into a kind of cabinet system. Even law enforcement could be removed entirely from Presidential control. The removal power itself, its limited role unmasked, might be subject to potential judicial limitation if utilized improperly to ensure policy control. Although Congress could avoid all these consequences by appointing the President administrative chief, the realization of Presidential weakness made evident by recognition of the passive theory might tempt Congress not to grant such power to the President.

The stark contrast between the consequences of the active and passive theories suggests that a balance between them should be found. Such a balance might well reflect our present inconsistent practices. But there is nothing inherently stable about our

203. The Constitution grants authority to the President in military affairs, U.S. CONST. art. II, § 2, cl. 1; *Ex parte* Quirin, 317 U.S. 1, 26 (1942), and foreign affairs, United States v. Pink, 315 U.S. 203 (1942); United States v. Curtiss-Wright Corp., 299 U.S. 304, 320 (1936). These powers do not appear to be tied to Presidential authority over execution of the laws.

204. *See* notes 65-69 *supra* and accompanying text.

present practices because they are not based upon a comprehensible view of Presedential power. Instead of continuing to muddle through as at present, the more likely result, in view of the overwhelming support our administrative practice gives to the passive theory, is that the Presidency will be deprived of the remaining vestiges of the active theory.

If adoption of the passive theory is not a desired course, and if the consequences of the active theory are similarly unacceptable, an effort must be made to develop an alternative, coherent account of the nature of Presidential power over execution of the laws. Such an account, if it is to be persuasive, will have to recognize the two approaches present practices demonstrate. Even if no alternative to the active and passive theories is ultimately formulated, an informed choice between them would at least not leave an important aspect of Presidential power resting upon a foundation of confusion and ambiguity.

RECENT DEVELOPMENTS

Civil Procedure—Class Actions—Denial of Certification—Invalidity of Death Knell Doctrine as Basis for Immediate Appeal

Plaintiff stockholders[1] brought an action in district court to recover damages resulting from their purchase of securities in reliance on a prospectus that was prepared and certified by defendants.[2] Plaintiffs filed a motion to certify their suit as a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure.[3] The district court initially granted plaintiffs' motion, but

1. Named plaintiffs were Cecil and Dorothy Livesay. Plaintiffs alleged that defendants had violated "§§ 11, 12(2) and 17(b) of the Securities Act of 1933, 15 U.S.C. §§ 77k, 77*l*(2), and 77g(b) (1976), and § 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b) (1976)." Coopers & Lybrand v. Livesay, 437 U.S. 463, 466 n.4 (1978).

2. Named defendants were Coopers & Lybrand, an accounting firm; Punta Gorda Isles, Inc., a land development corporation; and certain officers and directors of the Punta Gorda corporation.

3. FED. R. CIV. P. 23(a) provides:

> One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

FED. R. CIV. P. 23(b)(3) provides:

> An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:
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> . . . .
>
> (3) the court finds that the questions of law or fact common to the members of the class predominate over any questons affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) The interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

on further consideration withdrew class certification.[4] Plaintiffs sought immediate review of the decertification order under 28 U.S.C. § 1291.[5] The United States Court of Appeals for the Second Circuit found that the potential for individual recovery was significantly outweighed by the probable cost and complexity of the litigation[6] and therefore based appellate jurisdiction on the "death knell doctrine."[7] On writ of certiorari from the United

4. The district court decertified the class action because plaintiffs were not adequate class representatives as required under Rule 23(b)(3). Plaintiffs were considered inadequate class representatives because they had inordinately delayed in prosecuting the case. The reason plaintiffs had delayed was that the district court had placed a stay on substantive discovery. Plaintiffs, therefore, were inadequate class representatives as a direct result of the actions of the United States District Court for the Eastern District of Missouri. Livesay v. Punta Gorda Isles, Inc., 550 F.2d 1106 (8th Cir. 1977).

5. 28 U.S.C. § 1291 (1970) provides: "The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . ."

Plaintiffs also sought a writ of mandamus under 28 U.S.C. § 1651(a)(1970). The Eighth Circuit of the United States Court of Appeals dismissed the petition for mandamus when it concluded jurisdiction was present under the death knell exception to section 1291. 550 F.2d at 1110.

6. Plaintiffs, both of whom are employed, have an aggregate yearly gross income of $26,000. Their net worth is approximately $75,000, but only $4,000 of this sum is in cash. The remainder consists of equity in their home and investments.

As of December 1974 plaintiffs had already incurred expenses in excess of $1200 . . . . Plaintiffs' new counsel has estimated expenses of this lawsuit to be $15,000. The nature of this case will require extensive discovery, much of which must take place in Florida, where most of the defendants reside. Moreover, the allegations regarding the prospectus and financial statements will likely require expert testimony at trial.

After considering all the relevant information in the record, we are convinced that plaintiffs have sustained their burden of showing that they will not pursue their individual claim if the decertification order stands. Although plaintiffs' total net worth could absorb the cost of this litigation, "it [takes] no great understanding of the mysteries of high finance to make obvious the futility of spending a thousand dollars to get a thousand dollars—or even less!" . . . We conclude we have jurisdiction to hear the appeal.

550 F.2d at 1109-10 (quoting Douglas, *Protective Committees in Railroad Reorganizations*, 47 HARV. L. REV. 565, 567 (1934)).

7. *Id.* at 1110. The death knell doctrine was an exception to the final judgment rule that permitted an appeal as a matter of right from an interlocu-

States Supreme Court, *held*, reversed with directions to dismiss. A denial of class action certification, despite a judicial finding that the individual claims are no longer economically viable, does not constitute a "final decision" within the meaning of 28 U.S.C. § 1291. *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978).

Since the Judiciary Act of 1789,[8] the United States Supreme Court has struggled with the concept of finality and has attempted to devise a generally applicable rule.[9] Nevertheless, courts have made exceptions for hardship cases.[10] *Coopers & Lybrand* represents one of those cases and resolves the question whether a denial of class action certification, which renders the individual claim no longer viable, constitutes a "final decision" within the meaning of the final judgment rule.

The final judgment rule, embodied in 28 U.S.C. § 1291, limits appellate jurisdiction to final decisions of the district courts.[11] The primary purpose of this rule is to prevent unnecessary delays and piecemeal review of issues that arise during the course of litigation.[12] Traditionally, a final decision has been defined as a ruling by the district court that "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment."[13] The Supreme Court, however, recognizes that a rigid application of this definition may lead to irreparable harm and a denial of justice without promoting the desired judicial econ-

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tory order when it effectively terminated the litigation. It has been applied only to those orders denying class action certification. Eisen v. Carlisle & Jacquelin, 370 F.2d 119 (2d Cir. 1966). For those cases concerning the appealability of orders certifying a class action, see, for example, Parkinson v. April Indus., Inc., 520 F.2d 650 (2d Cir. 1975); Kohn v. Royall, Koegel & Wells, 496 F.2d 1094 (2d Cir. 1974); Herbst v. International Tel. & Tel. Corp., 495 F.2d 1308 (2d Cir. 1974).

8. Ch. 20, 1 Stat. 85 (1789) (current version at 28 U.S.C. § 1291 (1970)).

9. *See* text accompanying notes 11-13 *infra*.

10. *See* text accompanying notes 14-47 *infra*.

11. *See* note 5 *supra*. For an excellent history of the final judgment rule, see Crick, *The Final Judgment as a Basis for Appeal*, 41 YALE L.J. 539 (1932).

12. *See* Catlin v. United States, 324 U.S. 229, 233-34 (1945); Cobbledick v. United States, 309 U.S. 323, 324-25 (1940); American Express Warehousing, Ltd. v. Transamerica Ins. Co., 380 F.2d 277, 280 (2d Cir. 1967).

13. Catlin v. United States, 324 U.S. 229, 233 (1945); St. Louis, Iron Mountain & S. R.R. v. Southern Express Co., 108 U.S. 24, 28 (1883); Bostwick v. Brinkerhoff, 106 U.S. 3, 4 (1882); 75 HARV. L. REV. 351, 353 (1961).

omy.[14] As a result, the courts have formulated three exceptions to the final judgment rule.[15]

The first significant exception to the finality requirement was the collateral-orders doctrine enunciated in *Cohen v. Beneficial Industrial Loan Corp.*[16] *Cohen* involved a stockholders' derivative suit in which the district court denied defendant's motion to require plaintiffs to post a security bond as required under New Jersey law. The Court noted that defendant's right to the security bond was a collateral matter in the sense that if review were delayed until final judgment the claimed right would be virtually worthless.[17] Although no final judgment had been entered, the Supreme Court held that the denial of the security bond constituted a final decision under section 1291[18] because the interlocutory order was within "that small class [of orders] which finally determines claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated."[19] This holding was justified on the basis of the "practical rather than technical construction" that had been placed upon the final judgment rule.[20]

The second major exception to the finality requirement was

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14. *See* Swift & Co. Packers v. Compania Colombiana Del Caribe, 339 U.S. 684, 688-89 (1950); Dickinson v. Petroleum Conversion Corp., 338 U.S. 507, 511 (1950); 50 COLUM. L. REV. 1102 (1950).

15. *See* text accompanying notes 16-47 *infra*. Some commentators have suggested that a fourth exception, recognized by the Supreme Court in Forgay v. Conrad, 47 U.S. (6 How.) 201 (1848), allows immediate review of those orders that subject the parties to irreparable injury. *Forgay* involved an action to set aside deeds and for an accounting of rents and profits. The circuit court set aside the deeds and ordered the property to be delivered to plaintiff. The circuit court, however, reserved for further decree the accounting of rents and profits. As a result, no final judgment was entered. In allowing immediate review, the Supreme Court held that a delay until final judgment might result in irreparable injury because plaintiff exercised control over defendant's property. *Id.* 202-06. *See also* 39 U. CHI. L. REV. 403, 409 (1972).

16. 337 U.S. 541 (1949).

17. *Id.* at 546.

18. *Id.* at 545-46.

19. *Id.* at 546.

20. *Id.*

the "balancing approach"[21] developed in *Gillespie v. United States Steel Corp.*[22] In *Gillespie* plaintiff administratix sued to recover damages under Ohio's wrongful death statute[23] and the Jones Act.[24] The district court struck portions of plaintiff's complaint and prayer for recovery.[25] Plaintiff sought immediate review under section 1292(b) and by writ of mandamus to the court of appeals.[26] The court of appeals denied the petition for mandamus and affirmed on the merits without a determination of appealability.[27] The court held that a determination of appealability was unnecessary since its resolution of the merits did not prejudice respondent in any way.[28] On petition for writ of certiorari, the United States Supreme Court held that the district court's order was "final" for purposes of appeal and rendered a decision on the merits.[29] In reaching this result the Court not only followed the practical construction used in *Cohen*[30] but also applied a "balancing test."[31] The Court recognized that the question of finality is determined by competing considerations, the most important of which are " 'the inconvenience and cost of piecemeal review on the one hand and the danger of denying justice by delay on the other.' "[32] As a result, the Court reasoned that the eventual costs both to the parties and to the courts would be less if they ruled on the merits of the case presented.[33] By utilizing this

21. The balancing approach was an attempt to determine appealability by weighing inconvenience and costs of piecemeal review against the danger of denying justice by delay. *See* text accompanying notes 22-33 *infra*.

22. 379 U.S. 148 (1964).

23. OHIO REV. CODE ANN. § 2125.01 (Page 1976). Plaintiff also sought relief under the state survival statute. *Id.* § 2305.21 (Page 1953).

24. Merchant Marine (Jones) Act, ch. 250, § 33, 41 Stat. 1007 (1920) (current version at 46 U.S.C. § 688 (1970)).

25. 321 F.2d 518, 520-21 (6th Cir. 1963). The district court struck from the complaint both the allegations relating to general maritime law and those relating to the Ohio Wrongful Death Act on the ground that plaintiff's cause of action was based exclusively on the Jones Act.

26. *Id.*

27. *Id.* at 522.

28. *Id.*

29. 379 U.S. at 150-54.

30. *See* text accompanying notes 16-20 *supra*.

31. 379 U.S. at 152-53.

32. *Id.* (quoting Dickinson v. Petroleum Conversion Corp., 338 U.S. 507, 511 (1950)).

33. *Id.* at 153.

"balancing approach" the Court justified its holding that the interests of judicial economy and justice were sufficient to constitute a "final decision" out of what was essentially an interlocutory order of the district court.

Relying upon the authority of *Cohen* and *Gillespie,* the United States Court of Appeals for the Second Circuit formulated a third exception to the finality requirement by recognizing a limited right to appeal a Rule 23(c)(1)[34] order denying class certification in *Eisen v. Carlisle & Jacquelin.*[35] In *Eisen* plaintiff filed suit in district court on behalf of himself and all others similarly situated alleging that "odd-lot" dealers[36] had conspired to monopolize trade in violation of the Sherman Anti-Trust Act.[37] The district court dismissed the class action but allowed plaintiff's individual claim to stand.[38] Plaintiff sought immediate review under section 1291. In allowing the interlocutory appeal, the court found that the denial of class certification would virtually end the lawsuit as a practical matter since "[w]e can safely assume that no lawyer of competence is going to undertake this complex and costly case to recover $70 for Mr. Eisen."[39] The court held that

34. FED. R. CIV. P. 23(c)(1) provides: "As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be altered or amended before decision on the merits."

35. 370 F.2d 119 (2d Cir. 1966).

36. Odd-lots are orders for the purchase or sale of securities in less than 100 shares. Odd-lot dealers are those people on the New York Stock Exchange who execute such orders. *See* L. ENGEL, HOW TO BUY STOCKS 91-95 (5th ed. 1971).

37. Sherman Anti-Trust Act, ch. 647, §§ 1, 2, 26 Stat. 209 (1890) (current version at 15 U.S.C. §§ 1, 2 (1970)). Plaintiff also sought relief against the New York Stock Exchange for breaching its duties under the Securities Exchange Act, ch, 38, tit. I, §§ 6b, 6d, 48 Stat. 78 (1933) (current version at 15 U.S.C. §§ 78f(b), 78f(d) (1975)); ch. 404, § 19, 48 Stat. 898 (1931) (current version at 15 U.S.C. § 78s(a) (1975)). *See* 370 F.2d at 120.

38. 41 F.R.D. 147, 152 (S.D.N.Y. 1966).

39. 370 F.2d at 120. The *Eisen* court had to distinguish a prior Second Circuit decision, Lipsett v. United States, 359 F.2d 956 (2d Cir. 1966), that did not permit an immediate appeal from the dismissal of a class action. 370 F.2d at 120-21. *Lipsett* was litigated prior to the amendments to Rule 23 that eliminated the spurious class action. Technically, the death knell situation could not exist under the former rules because the plaintiff was virtually by himself anyway. The other members of the class had to "opt in" to be bound by the litigation. For a discussion of class actions before the amended rules, see Kalven

"[w]here the effect of a district court's order, if not reviewed, is the *death knell* of the action, review should be allowed."[40] In reaching this result, the court justified immediate review of those orders that denied class certification by relying on a practical construction of the final judgment rule.[41] The court realized that the alternatives were "to appeal now or to end the lawsuit for all practical purposes."[42] Furthermore, the court noted that the balancing approach was a legitimate method of resolving whether a denial of class certification effectively terminated the litigation.[43] Although the court sought support in the balancing test of *Gillespie* and the collateral order rule of *Cohen*,[44] it formulated a standard that looked solely to the ultimate effect on the litigation, thereby creating the death knell doctrine,[45] a new exception to the finality rule. During the *Eisen* litigation,[46] Judge Friendly

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& Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. CHI. L. REV. 684 (1941).

40. 370 F.2d at 120-21 (emphasis added).

41. *Id.*

42. *Id.* at 120.

43. *Id.*

44. *Id.*

45. One commentator contends that the *Eisen* court's reliance on the collateral order doctrine of *Cohen* and the balancing approach of *Gillespie* was misplaced. *See* Redish, *The Pragmatic Approach to Appealability in the Federal Courts*, 75 COLUM. L. REV. 89, 93-95 (1975). Professor Redish argued that *Eisen I* offered a pragmatic approach to finality that was distinguishable from the rationales established in *Cohen* and *Gillespie*. Under the death knell doctrine, the denial of class action status effectively terminated the litigation. Thus, the court had no need to interject either the balancing approach or the collateral order doctrine as this only served to weaken the force of its opinion. Courts have generally discussed these doctrines separately. *See, e.g.*, Share v. Air Properties G., Inc., 538 F.2d 279 (9th Cir. 1976); Williams v. Mumford, 511 F.2d 363 (D.C. Cir. 1975); King v. Kansas City S. Indus., Inc., 479 F.2d 1259, 1260 (7th Cir. 1973) (per curiam); Hackett v. General Host Corp., 455 F.2d 618, 627-32 (3d Cir. 1972) (Rosenn, J., dissenting).

46. The *Eisen* litigation spans an eight-year period. The district court dismissed the suit as a class action in 1966. 41 F.R.D. 147 (S.D.N.Y. 1966). The Second Circuit granted an appeal, 370 F.2d 119 (2d Cir. 1966), reversing on the merits and remanding for a determination of class status. 391 F.2d 555 (2d Cir. 1968). The United States Supreme Court denied certiorari. 386 U.S. 1035 (1967). On remand, the district court certified the class. 52 F.R.D. 253 (S.D.N.Y. 1971). In addition, the district court held that defendants should bear the cost of notice. 54 F.R.D. 565 (S.D.N.Y. 1972). The court of appeals reversed and required individual notice to all identifiable class members at plaintiff's expense.

expressed the hope that the United States Supreme Court would pass on the validity of the death knell doctrine,[47] but in *Eisen III* the Court side-stepped the issue by holding that notice costs constituted a collateral order for purposes of appellate jurisdiction.[48]

After *Eisen I* the Second Circuit struggled to develop appropriate guidelines for determining when to apply the death knell doctrine.[49] In *City of New York v. International Pipe & Ceramics Corp.*[50] the city brought a class action against seven concrete pipe manufacturers and sellers for violations of the antitrust laws. In holding that the denial of class certification was not immediately appealable, the court of appeals reasoned that the litigation would probably reach the merits since the class representative, a governmental body, had the resources to continue the litigation.[51] In addition, the city had an incentive to pursue the suit since its individual claim amounted to a substantial sum.[52] The dissenting judge in *International Pipe & Ceramics Corp.* contended that the language in *Eisen I*—"all others similarly situated"—indicated that all members of the purported class should be considered in determining whether to apply the death knell doctrine.[53] In support of this point the dissenting judge reasoned that a plaintiff who could continue the action individually would have no reason to appeal the denial of class certification after judgment on the merits.[54] The majority of the court, however, was unwilling to expand the scope of its inquiry to the entire class and therefore restricted its evaluation to the named representative.[55]

In *Korn v. Franchard Corp.*[56] and *Milberg v. Western Pacific Railroad*[57] which were decided together in 1971, plaintiffs brought

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479 F.2d 1005 (2d Cir. 1973). Certiorari was granted on the issue of notice costs. 414 U.S. 908 (1973). The Supreme Court affirmed the court of appeals by requiring individual notice and placing notice costs on plaintiffs. 417 U.S. 156 (1974).

47. Lerman v. Tenney, 459 F.2d 482 (2d Cir. 1972) (Friendly, C.J., concurring).

48. *See* 417 U.S. 156, 172 (1974).

49. *See* text accompanying notes 50-62 *infra*.

50. 410 F.2d 295 (2d Cir. 1969); *see* 48 N.C.L. REV. 626 (1970).

51. 410 F.2d at 299.

52. *Id.*

53. *Id.* at 300-01 (Hays, J., dissenting).

54. *Id.* (Hays, J., dissenting).

55. *Id.* at 298.

56. 443 F.2d 1301 (2d Cir. 1971).

57. *Id.*

class actions to recover losses resulting from misleading statements made by defendants in violation of the securities laws. The Second Circuit allowed an interlocutory appeal of the dismissal of class status in *Korn*[58] but refused to grant an immediate appeal in *Milberg*.[59] The difference in result can be explained by examining the amounts involved in each case. The court held that the $386 claim in *Korn* served as the death knell to the action while the $8,500 claim in *Milberg* did not.[60] In *Milberg* the court tried to formulate a limiting principle by stating that "the 10,000 dollar jurisdictional minimum impliedly recognizes that a plaintiff with damages close to that amount would find it worthwhile to litigate."[61] The court, however, arguably failed to follow their own standard in *Milberg* when they refused to allow an interlocutory appeal on the $8,500 claim.[62] Although the amount of the claim was close to the jurisdictional minimum, the court showed an inability to formulate a limiting principle that would avoid a case-by-case determination of appealibility.

Other circuits that adopted the death knell doctrine had experienced similar difficulties in determining its applicability. In *Gosa v. Securities Investment Co.*,[63] a securities fraud case, the Fifth Circuit accepted the death knell doctrine but dismissed the appeal from a denial of class status because plaintiffs had failed to develop the record before the district court.[64] Apparently, the court desired specific findings on those factors that it deemed necessary for a determination of whether to apply the death knell doctrine.[65] Obviously, the court felt that more than a mere statement of the amount of plaintiff's claim was required.[66] The court stated:

> We would have to engage in rank speculation if we were to undertake the determination of such matters as: how much expense should reasonably be anticipated in carrying the cause to

58. *Id.* at 1306.
59. *Id.* at 1306-07.
60. *Id.*
61. *Id.* at 1307.
62. *Id.*
63. 449 F.2d 1330 (5th Cir. 1971) (per curiam).
64. *Id.* at 1332.
65. *Id.*
66. *Id.*

> completion; whether the degree of solvency of the named party would assure at least the payment of court costs and basic litigation expense; the likelihood of a recovery which would include attorney fees, either directly or on a contingent basis; or the potential amounts of the claims of other class members.[67]

By requiring an extensive record the court recognized new factors that should be considered in an evaluation of when to apply the death knell doctrine;[68] however, the court realized that the death knell doctrine continued to require a case-by-case determination of appealability.[69]

In *Hooley v. Red Carpet Corp. of America,*[70] an antitrust action, the Ninth Circuit held that a total absence of individually recoverable claims within a purported class was required for the death knell doctrine to be applied.[71] Apparently, the court was concerned that appealability might depend on the joinder decisions of counsel.[72] Thus by carefully selecting only those plaintiffs whose individual claims would not warrant separate litigation, the policy against interlocutory appeals could be frustrated.[73] As a result, the court increased the burden upon those seeking to maintain the suit as a class action.[74] The court noted that not only must the record include those factors that are relevant to the death knell doctrine's applicability to the named class representative, but the district court must make similar findings as to all other members of the purported class.[75] The court believed that this requirement could be accomplished without excessive discovery.[76] The Ninth Circuit in *Hooley,* therefore, undertook what the Second Circuit refused to do in *International Pipe,*[77] expand its inquiry to the entire class.[78] The practical effect of the Ninth

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67. *Id.*
68. *Id.*
69. *Id.*
70. 549 F.2d 643 (9th Cir. 1977).
71. *Id.* at 644 (citing Share v. Air Properties G., Inc., 538 F.2d 279 (9th Cir. 1976)).
72. *Id.* at 645.
73. *Id.*
74. *Id.* at 646.
75. *Id.* at 645.
76. *Id.*
77. 410 F.2d 295 (2d Cir. 1969); *see* text accompanying notes 50-55 *supra.*
78. 549 F.2d at 644.

Circuit's holding restricted the death knell doctrine since all members of the purported class must not have individually viable claims; therefore, the court's expanded consideration of the entire class arguably increased the overall burden on the courts.[79]

The Third Circuit rejected the death knell doctrine in *Hackett v. General Host Corp.*[80] In *Hackett* a consumer of retail bread brought a class action to recover for alleged violations by defendants of the Sherman Anti-Trust Act. In dismissing the appeal the court held that the denial of class certification was not a "final decision," even though plaintiff's individual claim amounted to roughly nine dollars.[81] In reaching this result the court balanced the policies supporting class actions with those policies "which have historically protected the federal appellate courts from being overwhelmed by interlocutory appeals."[82] The court noted that perhaps judicial resources should be spent elsewhere if the individual claim is so small that a plaintiff will not be able to pursue his claim upon an order denying class certification.[83] In essence, the court concluded that its dismissal of the appeal was simply a reflection of the legal marketplace.[84] Moreover, the court recognized that "the existence and effectiveness of alternative discretionary appellate remedies" significantly reduced the inability of a party to continue the litigation after a denial of class certification.[85] Although *Hackett* was an antitrust

79. *Id.* at 645.

80. 455 F.2d 618 (3d Cir.), *cert. denied*, 407 U.S. 925 (1972). *See generally* 86 HARV. L. REV. 438 (1972); 25 VAND. L. REV. 911 (1972); 29 WASH. & LEE L. REV. 465 (1972). Although some commentators feel that *Hackett* only limited the death knell doctrine, subsequent cases in the Third Circuit cited *Hackett* for the proposition that the death knell doctrine was rejected per se. *See* Link v. Mercedes-Benz, 550 F.2d 860 (3d Cir. 1977); Rodgers v. United States Steel Corp., 541 F.2d 365 (3d Cir. 1976); Ungar v. Dunkin' Donuts, 531 F.2d 1211 (3d Cir. 1976); Katz v. Carte Blanche Corp., 496 F.2d 747 (3d Cir.) (en banc), *cert. denied*, 419 U.S. 855 (1974). Relying on *Hackett*, the Seventh Circuit has also rejected the death knell doctrine. *See, e.g.*, King v. Kansas City S. Indus., Inc., 479 F.2d 1259 (7th Cir. 1973).

81. 455 F.2d at 625.

82. *Id.* at 623.

83. *Id.* at 626.

84. *Id.*

85. *Id.* at 623. The court noted that plaintiff had the possibility of immediate review under 28 U.S.C. §§ 1292(b), 1651(a); FED. R. CIV. P. 54(b). *See* note 91 *infra*.

action, the court determined that the death knell doctrine was of little importance since a statutory waiver of the amount-in-controversy requirement necessarily confined the doctrine to federal antitrust and securities actions.[86] Since these statutes provided for an award of reasonable attorney's fees,[87] the court questioned the underlying assumption of *Eisen I* that "no competent counsel would be willing to represent an individual small claimant."[88] The court noted that this assumption did not even apply "to those numerous areas where the protections of rights incapable of measure in money is the primary object of the law suit."[89] Access to public interest law firms along with an award of attorney's fees to successful plaintiffs further reduced the possibility that an individual action could not be maintained after denial of class certification.[90] In addition, the availability of an interlocutory appeal under 28 U.S.C. § 1292(b) statisfied the court that hardship cases had an opportunity for review.[91] Although section

86. 455 F.2d at 623; *see* note 111 *infra*.

87. *Id.* at 622. Reasonable attorney's fees and costs will be awarded to successful plaintiffs in the following situations: noncompliance with Truth in Lending Act, 15 U.S.C. § 1640 (1971); unlawful wiretapping, 18 U.S.C. § 2520 (1970). At the court's discretion, fees may be awarded for Security Act violations, 15 U.S.C. §§ 77k, 77www, 78i (1971), and in suits involving tort claims recovery against the federal government, 28 U.S.C. § 2678 (1971).

88. 455 F.2d at 623.

89. *Id.*

90. *See* Project, *The New Public Interest Lawyers*, 79 YALE L.J. 1068 (1970).

91. 28 U.S.C. § 1292(b) (1977) provides:

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order.

The court also discussed the possibility of appeal under FED. R. CIV. P. 54(b) and 28 U.S.C. § 1651(a) (1977). *See* 455 F.2d at 624. FED. R. CIV. P. 54(b) provides:

> When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross claim, or third party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or

1292(b) certification is purely discretionary, the court noted that there was no indication that it would be applied arbitrarily.[92] The dissenting judge, however, argued that the denial of class status was immediately appealable under the established authority of *Cohen* and *Eisen I*.[93] Although the monetary claims were small, Judge Rosenn, in his dissent, stated that the balancing approach contemplated nothing so insensitive and arbitrary as a dollar test.[94] Moreover, he questioned the adequacy of the alternatives to the death knell doctrine that were proposed by the majority. Regardless of provisions for the awarding of attorney's fees, Judge Rosenn recognized that competent counsel would be unlikely to pursue the individual claims because a public interest law firm would find it difficult to "justify the time and effort required to press a nine dollar antitrust suit."[95]

The United States Supreme Court resolved this conflict between the circuits in *Coopers & Lybrand v. Livesay*,[96] the instant case. The Court refused to allow appellate jurisdiction for an order decertifying a class action under either the collateral order rule or the death knell doctrine.[97] Holding that the collateral order rule was inapplicable,[98] the Court concentrated its analysis on the

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parties only upon an express determination that there is no just reason for delay and upon an expess direction for the entry of judgment.

28 U.S.C. § 1651(a) provides: "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

92. 455 F.2d at 624. All three of these methods for obtaining appellate review of a denial of class certification have been severely criticized. They are considered ineffective primarily because of their discretionary nature. *See generally* Redish, *supra* note 45, at 108-16; 17 VILL. L. REV. 962, 973-76 (1972).

93. 455 F.2d at 627-31 (Rosenn, J., dissenting).

94. *Id.* at 632 (Rosenn, J., dissenting).

95. *Id.* at 631 (Rosenn, J., dissenting).

96. 437 U.S. 463 (1978).

97. *Id.* at 468-77.

98. A Rule 23(c) order refusing to certify a class fails to meet the tests set out in Cohen v. Beneficial Fin. Indus. Loan Co., 337 U.S. 541 (1949). First, the language of Rule 23(c)(1) indicates that an order may be "altered or amended before a decision on the merits." As a result, an order involving class status is tentative. *See In re* Piper Aircraft Dist. Sys. Antitrust Lit., 551 F.2d 213 (8th Cir. 1977); *In re* Cessna Aircraft Dist. Antitrust Lit., 518 F.2d 213 (8th Cir.), *cert. denied*, 423 U.S. 947 (1975); Gerstle v. Continental Airlines, Inc., 466 F.2d 1374 (10th Cir. 1972); *cf.* Share v. Air Properties G., Inc., 538 F.2d 279 (9th Cir. 1976) (The collateral order doctrine would apply if the right involved did not

death knell doctrine. The Court found that the death knell exception contravened the sound policies behind the final judgement rule and had a "debilitating effect on judicial administration."[99] The availability of review under section 1292(b) convinced the Court that adequate review was provided. The discretionary nature of section 1292(b) indicated to the Court a legislative judgment that interlocutory appeals are disfavored.[100] Although the Court did not question the determination of the appellate court that plaintiffs would pursue their individual claims,[101] the Court concluded that such a finding was not considered a sufficient rationale for allowing an immediate appeal.[102]

The practical effect of *Coopers & Lybrand* is that many similar actions will never reach the merits because no plaintiff will be able to maintain an individual action for such a nominal claim.[103] Nevertheless, the Court justified its holding by relying on the policies supporting the final judgment rule.[104] In reaching this conclusion, the Court chose not to discuss the balancing approach that it endorsed in *Gillespie*.[105] For instance, the Court failed to consider the policies supporting class actions in making

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reach the merits; however, as a practical matter, the circumstances in which that situation would exist are difficult to imagine in the class action context.). Second, the order is often inseparable from the merits. *See, e.g.*, Share v. Air Properties G., Inc., 538 F.2d 279 (9th Cir. 1976). Third, the discretionary nature of a class action determination extends into the particular facts of the case. *See, e.g.*, Windham v. American Brands, Inc., 565 F.2d 59 (4th Cir. 1977); General Motors Corp. v. City of New York, 501 F.2d 639 (2d Cir. 1974). Finally, the court recognized that these determinations are subject to review on final judgment. *See, e.g.*, Samuel v. University of Pittsburgh, 506 F.2d 355 (3d Cir. 1974).

99. 437 U.S. at 471.

100. *Id.* at 472.

101. *Id.* at 470.

102. *Id.* at 477.

103. Appeal as a matter of right still exists under 28 U.S.C. § 1292(a) (1977), which provides in part: "(a) The Courts of Appeals shall have jurisdiction of appeals from: (1) Interlocutory orders . . . granting, continuing, modifying, refusing or dissolving injunctions . . . ."

Even the status of section 1292(a) is questionable considering Gardner v. Westinghouse Broadcasting Co., 437 U.S. 478 (1978), which held that the denial of class action certification that limits the scope of injunctive relief is not immediately appealable under section 1292(a).

104. 437 U.S. at 470-71.

105. *See* note 125 *infra*.

its determination of appealability.[106] The majority in *Hackett* addressed this issue by noting that

> the redress of the nine dollar wrong should, from a policy viewpoint, be left to the realm of private ordering. . . . [Moreover,] the individual claim often will be so small . . . that [the] decision of the legal marketplace may be the best reflection of a public consciousness that the time of the lawyers and of the court should best be spent elsewhere.[107]

The Supreme Court, however, declined to discuss this issue, stating that the policies underlying class actions were "irrelevant" to its reasoning "though proper for legislative consideration."[108] Arguably, these policies are highly relevant since the potential for injustice is greater when the claims of many plaintiffs, as opposed to one plaintiff, are effectively denied review.[109] The Court based its decision solely on a construction of the final judgment rule rather than on a balancing of the merits of class actions.[110] Nevertheless, the Court's restrictive attitude toward class actions is well documented by its decisions regarding aggregation of claims and notice costs.[111] The Court has noted the vexatious nature of class actions. In the *Eisen* litigation the Court characterized the suit as a " 'Frankenstein monster posing as a class action.' "[112] Other courts have recognized that the class action threat often compels innocent defendants to settle frivolous suits.[113] As a re-

106. 437 U.S. 463, 470-71 (1978).

107. Hackett v. General Host Corp., 455 F.2d 618, 626 (3d Cir.), *cert. denied*, 407 U.S. 925 (1972).

108. 437 U.S. at 470.

109. Class actions serve a significant purpose. In modern society where a single harmful act may result in a great deal of damage, a procedural mechanism is needed whereby the small claims of many individuals may be grouped together. In addition to avoiding a multiplicity of actions, private class actions help to enforce the public regulatory scheme. *See* 86 HARV. L. REV. 438, 446 (1972).

110. 437 U.S. at 470-71.

111. The Court's attitude toward class actions is questionable. *See, e.g.*, Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974) (placed notice costs on plaintiff); Zahn v. International Paper Co., 414 U.S. 291 (1973) (each member of the class must satisfy the jurisdictional amount); Snyder v. Harris, 394 U.S. 332 (1969) (Because of a $10,000 amount-in-controversy requirement, the decision to preclude aggregation of claims that are separate and distinct has virtually eliminated class actions from federal courts.).

112. Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 169 (1974) (quoting Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 572 (1968) (Lumbard, C.J., dissenting)).

113. *See* Meyer, *The Social Utility of Class Actions*, 42 BROOK. L. REV. 189

sult, the Court may have implicitly considered these policies in making its determination.

Despite the Court's failure to deal adequately with the policies supporting class actions, it did conclude that the death knell doctrine was not a workable response to the question of appealability within the framework of the final judgment rule.[114] The Court noted the considerable confusion that had developed over the proper criterion to be applied in resolving whether a plaintiff could effectively continue the litigation.[115] The Court was obviously focusing on the numerous cases following *Eisen I*.[116] Although the Second Circuit had tried to deal with this problem in *Milberg* by setting a standard for review, the Court was still disturbed by the post-*Eisen I* case-by-case determinations.[117] Moreover, the Court questioned the validity of an appealability rule based on the amount of a plaintiff's claim. The Court noted that any such guideline required a legislative determination, and absent a standard, a decision would necessarily be an arbitrary one.[118] The Court also refused to adopt the *Gosa* requirement of an extensive record.[119] Although an extensive record would not infringe on legislative prerogatives to the same extent as an amount-in-controversy rule, it would still require a case-by-case determination of appealability.[120] The Supreme Court rejected this refinement of the death knell doctrine as a drain on scarce judicial resources.[121] The Court stated that "this incremental benefit is outweighed by the impact of such an individualized jurisdictional inquiry on the judicial system's overall capacity to administer justice."[122] Although such a cost-benefit analysis is warranted, the Court must have assumed that most plaintiffs would not continue their actions upon denial of class status.[123] Without

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(1975); Labowitz, *Class Actions in the Federal System and in California: Shattering the Impossible Dream*, 23 BUFF. L. REV. 601 (1974).

114. 437 U.S. at 471.
115. *Id.* at 472 n.18.
116. *See* text accompanying notes 49-79 *supra*.
117. *Id.*
118. 437 U.S. at 472.
119. *Id.* at 473.
120. *See* text accompanying notes 63-69 *supra*.
121. 437 U.S. at 473.
122. *Id.*
123. *Id.*

such an underlying premise, the Court's reasoning would be self-defeating from the standpoint of judicial economy since all members of a class might bring individual actions upon dismissal of the class action.[124] The Court, however, indicated its unwillingness to engage in speculation by noting that the balancing approach, as applied in *Gillespie,* was limited to the unique circumstances of that case.[125] The Court realized that this approach to appealability, which was inherent in the death knell doctrine, was fundamentally flawed.[126] The balancing approach contemplates that those cases not meeting its criterion are denied immediate appeal, but once a court has undertaken the task of determining its appellate jurisdiction, the interest in judicial economy warrants a determination on the merits.[127] As a result the Court was rightfully concerned with the death knell doctrine's effect on the efficient use of scarce judicial resources.

While the death knell doctrine's balancing approach was a drain on judicial resources, the Court could have avoided this problem by resorting to the approach used in *Korn* and *Milberg.*[128]

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124. *See, e.g.,* Escott v. Barchris Constr. Corp., 340 F.2d 731 (2d Cir. 1965).

125. The Court felt that Gillespie v. United States Steel Corp., 379 U.S. 148 (1964), does not support an immediate appeal of a denial of class status as a matter of right.

> In *Gillespie,* the Court upheld an exercise of appellate jurisdiction of what it considered a marginally final order that disposed of an unsettled issue of national significance because review of that issue unquestionably "implemented the same policy Congress sought to promote in § 1292(b)," . . . and the arguable finality issue had not been presented to this Court until argument on the merits, thereby ensuring that none of the policies of judicial economy served by the finality requirement would be achieved were the case sent back with the important issue undecided. In this case, in contrast, respondents sought review of an inherently nonfinal order that tentatively resolved a question that turns on the facts of the individual case; and, as noted above, the indiscriminate allowance of appeals from such discretionary orders is plainly inconsistent with the policies promoted by § 1292(b). If *Gillespie* were extended beyond the unique facts of that case, § 1291 would be stripped of all significance.

437 U.S. at 477 n.30 (quoting Gillespie v. United States Steel Corp., 379 U.S. 148, 154 (1964)).

126. 437 U.S. at 474.

127. *Id.*

128. *See* text accompanying notes 56-62 *supra.*

In the case of nominal claims the court in *Korn* was willing to take judicial notice that an individual action could not be maintained.[129] Although such an approach has merit from the standpoint of judicial economy, the Supreme Court refused to allow such an appeal in the instant case.[130] The Court recognized that the taking of judicial notice of a nominal claim still amounted to the formulation of an appealability rule based on the amount in controversy.[131] Without a legislative prescription, the Court noted that "an amount-in-controversy rule is necessarily an arbitrary measure of finality because it ignores the variables that inform a litigant's decision to proceed, or not to proceed, in the face of an adverse class ruling."[132] Moreover, the Court feared that appellate jurisdiction might depend on the joinder decisions of counsel.[133] In *Hooley* the court expanded its inquiry to the entire class to avoid this result.[134] While an expanded inquiry into the entire class could avoid this abuse, the *Coopers & Lybrand* Court realized that even the taking of judicial notice threatened to increase the overall burden on the courts.[135]

Although the Court was concerned with procedural problems preventing a proper review of a denial of class action certification, it determined that section 1292(b) provided an adequate opportunity for review.[136] The purpose of section 1292(b), according to its legislative history, was to expedite the ultimate termination of litigation and thereby save unnecessary expense and delay through the appeal of interlocutory orders.[137] The Court, therefore, felt that the discretionary nature of section 1292(b) was necessary to ensure that "such review will be confined to appropriate cases and [avoid] time-consuming jurisdictional determinations in the court of appeals."[138] Moreover, the Court noted

129. *Id.*

130. 437 U.S. at 473.

131. *Id.* at 472.

132. *Id.*

133. *Id.* at 473.

134. *See* text accompanying notes 70-79 *supra.*

135. 437 U.S. at 473.

136. *Id.* at 474-75. A thorough discussion of the adequacy of section 1292(b) as a mechanism for immediate review is beyond the scope of this Note.

137. S. REP. No. 2434, 85th Cong., 2d Sess. 1, *reprinted in* [1958] U.S. CODE CONG. & AD. NEWS 5255, 5256-57.

138. 437 U.S. at 474-75.

that the death knell doctrine circumvented the restrictions of section 1292(b) because only "exceptional circumstances justify a departure from the basic policy of postponing appellate review until after the entry of a final judgment."[139] One commentator, however, has suggested that section 1292(b) is inappropriate when matters are within the discretion of the court because one of the requirements is that orders must involve a "controlling question of law."[140] Since class action determinations are basically discretionary with the district court,[141] such an interpretation would severely limit the availability of section 1292(b) as an effective avenue for immediate review. Nevertheless, some courts have reviewed, under section 1292(b), a discretionary class action determination by the district court.[142] One court has stated that "the key consideration is not whether the order involves the exercise of discretion, but whether it truly implicates the policies favoring interlocutory appeal."[143] Although section 1292(b), as a practical matter, will limit the availability of immediate review for a denial of class action certification, it is probably the best solution to the problem of providing a workable mechanism for interlocutory appeals of class action determinations. Since the need for review of class action orders will depend on a case-by-case determination, section 1292(b) "is preferable to attempts to formulate standards which are necessarily so vague as to give rise to undesirable jurisdictional litigation with concomitant expense and delay."[144]

Coopers & Lybrand has eliminated immediate review of class action determinations as a matter of right. Consequently, plain-

139. *Id.* at 475 (quoting Fisons, Ltd. v. United States, 458 F.2d 1241, 1248 (7th Cir. 1972)).

140. *See* C. WRIGHT, FEDERAL COURTS § 102, at 463 (2d ed. 1970).

141. *See, e.g.*, City of New York v. International Pipe & Ceramics Corp., 410 F.2d 295, 298 (2d Cir. 1969).

142. *See, e.g.*, Susman v. Lincoln Am. Corp., 561 F.2d 86 (7th Cir. 1977); Lukenas v. Bryce's Mountain Resort, Inc., 538 F.2d 594 (4th Cir. 1976); Katz v. Carte Blanche Corp., 496 F.2d 747 (3d Cir.) (en banc), *cert. denied*, 419 U.S. 885 (1974); Wilcox v. Commerce Bank, 474 F.2d 336 (10th Cir. 1973); Johnson v. Georgia Hy. Express, Inc., 417 F.2d 1122 (5th Cir. 1969).

143. Katz v. Carte Blanche Corp., 496 F.2d 747, 756 (3d Cir.) (en banc), *cert. denied*, 419 U.S. 885 (1974).

144. Parkinson v. April Indus., Inc., 520 F.2d 650, 660 (2d Cir. 1975) (Friendly, J., concurring).

tiffs must now await a final judgment to obtain review by the appellate courts. The implications of *Coopers & Lybrand* are clear. The Court will not be receptive to the expansion of its appellate jurisdiction into other areas in which interlocutory orders have worked a similar hardship such as discovery, venue, and summary judgment.[145] Moreover, consumer class actions will be much more difficult to maintain, and in many instances the public will be forced to rely on regulatory agency action.[146]

In holding that the class decertification order was not appealable as a matter of right, the Court in *Coopers & Lybrand* imposed a hardship on the individual plaintiffs. The practicalities of this particular litigation spelled the death knell of the action. Efficiency in the administration of the judicial system, however, demanded the result reached in this case. The sound policies behind the final judgment rule do not favor piecemeal appeals. The death knell doctrine did not provide a workable framework consistent with those policies. Obviously, the Court was correct that an appeal as a matter of right from every denial of class certification would produce an undue burden on the courts. Those few cases involving controlling questions of law could obtain immediate review under section 1292(b). The Supreme Court, therefore, properly rejected the death knell doctrine in light of the policies supporting finality and the adequacy of currently available avenues for review.

STEVEN DELL CRABTREE

145. 437 U.S. at 470.

146. *See* note 109 *supra*.

Constitutional Law—Searches and Seizures—Standing and Fourth Amendment Rights

A police officer received a report of a robbery in a nearby town and a description of the getaway car. Thereafter, the officer noticed that the car in which defendants were passengers fit the description given in the report. After following the car for some time and calling in assistance, the police stopped and searched the car. During the search the police found a sawed-off rifle under the front seat and a box of shells in the locked glove compartment. Defendants were arrested.[1] Before trial defendants moved to suppress the rifle and shells on the ground that the search violated the fourth amendment.[2] Neither defendant owned the automobile and neither asserted ownership of the rifle or the shells seized; therefore, the trial court denied the motion because defendants lacked standing to assert violation of fourth amendment rights.[3] Defendants were subsequently convicted of armed robbery. The Illinois Court of Appeals affirmed.[4] On writ of certiorari from the United States Supreme Court, *held,* affirmed. The standing inquiry is better subsumed under the analysis of

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1. Neither the court of appeals' opinion nor the Supreme Court's opinion reveals whether the other occupants of the car were arrested. Apparently the driver was the owner of the car and the girlfriend and former wife of one of defendants. Rakas v. Illinois, 99 S. Ct. 421, 443 n.20 (1978) (White, J., dissenting); State v. Rakas, 46 Ill. App. 3d 569, 571, 360 N.E.2d 1252, 1253 (1977). The other occupant is mentioned only in passing as one of defendants' female companions. 99 S. Ct. at 423.

2. 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.

3. Because of this holding neither the trial court nor the Supreme Court determined whether probable cause existed to justify the search and seizure under the automobile exception to the warrant requirement. Rakas v. Illinois, 99 S. Ct. at 424-25; *see* State v. Rakas, 46 Ill. App. 569, 360 N.E.2d 1252 (1977); note 63 *infra* and accompanying text.

4. The Illinois Supreme Court denied defendants leave to appeal. 99 S. Ct. at 424.

substantive fourth amendment rights and since defendants were merely passengers in an automobile their fourth amendment rights, defined as legitimate expectations of privacy, were not violated by the search and seizure of evidence from the locked glove compartment and from the area under the front seat of the car. *Rakas v. Illinois*, 99 S. Ct. 421 (1978).

The fourth amendment to the United States Constitution protects "[t]he right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures."[5] To implement this protection, the Supreme Court adopted a rule of exclusion that prevents the introduction of evidence obtained in violation of this amendment.[6] The basic justification for the use of an exclusionary rule is that the state should not be permitted to gain an advantage over a citizen by violating a constitutional right. By excluding the use of this evidence in a criminal prosecution, law enforcement officers purportedly will be deterred from making illegal searches and seizures.[7] The rule is invoked only when its remedial objectives are most effectively served.[8] Traditionally, only defendants who had established standing could urge exclusion of unconstitutionally seized evidence,[9] and a defendant had satisfied the standing requirement if he had a legally recognized interest in the premises searched or the property seized.[10] The United States Supreme Court had held that a person who was legitimately on the premises had a

5. U.S. CONST. amend. IV.

6. Weeks v. United States, 232 U.S. 383 (1914). The Supreme Court applied the exclusionary rule to the states through the fourteenth amendment in Mapp v. Ohio, 367 U.S. 643, 655 (1961).

7. This exclusionary rule was "designed to safeguard Fourth Amendment rights generally through its deterrent effect." United States v. Calandra, 414 U.S. 338, 348 (1974); *see, e.g.*, Stone v. Powell, 428 U.S. 465 (1976); Mapp v. Ohio, 367 U.S. 643 (1961); *cf.* 428 U.S. at 496 (Burger, C.J., concurring) (the Chief Justice discussed the diminishing value of the exclusionary rule as a deterrent).

8. United States v. Calandra, 414 U.S. 338, 348 (1974).

9. *See, e.g.*, Brown v. United States, 411 U.S. 223 (1973) (discussed in text accompanying notes 52-54 *infra*); Jones v. United States, 362 U.S. 257 (1960) (discussed in text accompanying notes 19-27 *infra*).

10. Jones v. United States, 362 U.S. 257, 266 (1960). *See generally* J. COOK, CONSTITUTIONAL RIGHTS OF THE ACCUSED: PRE-TRIAL RIGHTS, §§ 76-77, 442-48 & 442 n.9 (1972).

sufficient interest to satisfy the standing requirement.[11] Once standing was found, the next inquiry was whether any substantive fourth amendment rights were violated by the search or seizure.[12] After the United States Supreme Court decision of *Katz v. United States*[13] substantive fourth amendment protections were defined in terms of reasonable expectations of privacy.[14] In *Rakas* the Court viewed the standing and substantive rights questions under the same test.[15] Consequently, the issue in *Rakas* was reduced to whether defendants' authorized presence in the automobile gave rise to any legitimate expectations of privacy that were violated by the search and seizure of evidence from that vehicle.[16]

Prior to 1960 lower courts had held that a defendant satisfied the standing requirement only if he had a property interest in the premises searched or the property seized.[17] Consequently, a defendant's ability to contest the validity of a search often turned on subtle distinctions peculiar to property law.[18] In 1960, however, the Supreme Court in *Jones v. United States*[19] fully addressed the standing issue for the first time.[20]

Defendant in *Jones* was in a friend's apartment when federal

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11. 362 U.S. at 267. *See* text accompanying notes 23-27 *infra*; note 25 *infra* (discussion of the alternative holding of the Court in *Jones*).

12. 362 U.S. at 267. *See generally* Knox, *Some Thoughts on the Scope of the Fourth Amendment and Standing to Challenge Searches and Seizures*, 40 Mo. L. Rev. 1, 40 (1975).

13. 389 U.S. 347 (1967). *See* text accompanying notes 34-40 *infra*.

14. *E.g.*, United States v. Chadwick, 433 U.S. 1, 11 (1977); United States v. Dionisio, 410 U.S. 1, 8 (1973).

15. 99 S. Ct. at 428.

16. *Id.* at 429.

17. *E.g.*, United States v. Pisano, 193 F.2d 361, 365 (7th Cir. 1951); Gibson v. United States, 149 F.2d 381, 384 (D.C. Cir.), *cert. denied*, 326 U.S. 724 (1945).

18. *See, e.g.*, Gaskins v. United States, 218 F.2d 47, 48 (D.C. Cir. 1955) (guest lacked standing); Steeber v. United States, 198 F.2d 615, 617 (10th Cir. 1952) (one with dominion had standing).

19. 362 U.S. 257 (1960).

20. Other cases had involved standing, but the issue was only incidentally discussed. *See* United States v. Jeffers, 342 U.S. 48 (1951) (although premises searched were rented by defendant's aunts, he could object to the search because he had a possessory interest in the property seized); McDonald v. United States, 335 U.S. 451 (1948) (Jackson, J., concurring) (to allow the guest in this case to object was correct because "even a guest may expect the shelter of the rooftree he is under against criminal intrusion." *Id.* at 461.).

narcotics agents, executing a warrant, searched the apartment and found narcotics in a bird's nest on an awning outside the apartment window.[21] Defendant testified

> that the apartment belonged to a friend, Evans, who had given him the use of it and a key with which [defendant] had admitted himself on the day of the arrest . . . that he had a suit and a shirt at the apartment, that his home was elsewhere, that he paid nothing for the use of the apartment, that Evans had let him use it "as a friend," that he had slept there for 'maybe a night' and that at the time of the search Evans had been away . . . for about five days.[22]

The Court held that defendant had a sufficient interest in the premises to contest the legality of the search because at the time of the search defendant was on the premises with consent of the owner.[23] In expressly departing from the view that standing was limited by fine distinctions of property law, a unanimous Court[24] decided "that anyone *legitimately on 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."[25] The con-

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21. 362 U.S. at 258-59.

22. *Id.* at 259 (quoting defendant's trial testimony on cross-examination).

23. *Id.* at 265. The Court was interpreting Rule 41(e) of the Federal Rules of Criminal Procedure. Its interpretation has been extended to cases not involving Rule 41(e). *See* Wong Sun v. United States, 371 U.S. 471, 492 n.18 (1963); text accompanying notes 28-33 *infra*.

24. All nine Justices joined the Frankfurter opinion on the standing question. 362 U.S. at 258. Justice Douglas filed a lone dissent on the resolution of the merits. *Id.* at 273.

25. 362 U.S. at 267 (emphasis added). The Court alternatively held that in cases in which possession is the gravamen of the offense charged, the defendant can challenge the search without asserting any interest in the property seized. *Id.* at 264. This automatic standing rule was adopted to discourage the government from urging contradictory positions "by framing the indictment in general terms, while prosecuting for possession." *Id.* at 265. Any necessity for the automatic standing rule was substantially undermined in Simmons v. United States, 390 U.S. 377 (1968). *See* notes 43 & 54 *infra*.

Also, the *Jones* opinion seemed to extend standing to another group of defendants—those "against whom the search was directed." 362 U.S. at 261. This language caused later defendants to urge a target-of-the-search theory which some courts followed. *E.g.*, United States v. Mulligan, 488 F.2d 732, 736-37 (9th Cir. 1973); Glisson v. United States, 406 F.2d 423, 425-27 (5th Cir. 1969). Defendants in *Rakas* argued this extension of *Jones*. 99 S. Ct. at 424-25. *See* notes 42, 48 & 67 *infra*.

ceptual distinction between standing and substantive fourth amendment rights was maintained in the Court's conclusion that since defendant had established standing, "he was entitled to have the merits of his motion to suppress adjudicated."[26] Apparently, the Court determined that property law distinctions should not be the sole measure of who should be able to contest the legality of a search, and, consequently, more defendants could invoke the exclusionary rule.[27]

In 1963 the Court addressed standing again in *Wong Sun v. United States*.[28] Federal narcotics agents illegally seized heroin from defendant Yee's home and used it against defendant Wong Sun.[29] Distinguishing *Jones* because defendant Wong Sun was not

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26. 362 U.S. at 267. Even though the trial court did not pass on the sufficiency of the warrant because it found no standing, the Court rejected defendant's claim that the warrant was not supported by probable cause. *Id.* at 271. Justice Douglas dissented from the ruling on the warrant. *Id.* at 273. The Court was unanimous, however, on the standing question.

27. *See* note 7 *supra* and accompanying text. Most lower federal and state courts followed the *Jones* legitimately-on-the-premises rule and conferred standing on guests in apartments, *e.g.*, Murray v. United States, 351 F.2d 330, 334 (10th Cir. 1965), *cert. denied*, 383 U.S. 949 (1966); State v. Manetti, 56 Del. 32, 189 A.2d 426, 427 (1963); State v. Simms, 10 Wash. App. 75, 516 P.2d 1088 (1973); on guests of lodgers in motel rooms, *e.g.*, 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, *e.g.*, 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); Kleinbart v. State, 2 Md. App. 183, 234 A.2d 288 (1967); Commonwealth v. Lanoue, 356 Mass. 337, 251 N.E.2d 894 (1969); People v. Smith, 35 Misc. 2d 533, 230 N.Y.S.2d 894 (Kings County Ct. 1962) (dictum); 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).

28. 371 U.S. 471 (1963).

29. Federal narcotics officers, relying on a tip from an unreliable informant, went to the house of one Toy, broke down the door, and arrested him. A search of Toy's residence uncovered no narcotics but Toy admitted to smoking some heroin with one Yee. At the house described by Toy, Yee surrendered some heroin and implicated Toy and Wong Sun. The latter was arrested at his apartment, a search of which produced no narcotics. All three defendants submitted unsigned written statements incriminating each other. *Id.* at 473-78. Insofar as admissibility was concerned, the Supreme Court held that the heroin seized

on the premises at the time of the search,[30] the Court held that the evidence need not be excluded.[31] "The seizure of this heroin invaded no right of privacy or premises which would entitle Wong Sun to object to its use at his trial."[32] Under the standing concept, however, invasions of constitutionally protected rights did not determine a person's legal ability to object; instead, the existence of a legally recognized interest allowed a person to claim that a protected right was invaded.[33] The above careless language in *Wong Sun* betrayed the Court's confusion of the standing analysis with the determination of substantive fourth amendment rights.

In *Katz v. United States*[34] the Supreme Court recognized privacy as the primary concern of the fourth amendment. At issue in *Katz* was whether recordings of defendant's side of conversations, obtained by an electronic device attached to the outside of

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from Yee's home could not be used against Yee because it was obtained by an illegal search of his home. Neither could the heroin be used against Toy because the discovery of Yee was the fruit of the illegal search of Toy's house. The heroin was admissible against Wong Sun, however, because he was not on the premises at the time of the search and it was not fruit of the poisonous tree because the connection between the arrest and Toy's statement had "become so attenuated as to dissipate the taint." *Id.* at 491. For a good analysis of *Wong Sun*, see 42 N.C.L. REV. 219 (1964).

30. 371 U.S. at 492 n.18 (1963).

31. *Id.* at 472.

32. *Id.* This holding is the problem that bothered commentators most: If police could illegally search *A*'s house for the purpose of using the evidence found against *B*, then deterrence, the theory behind the exclusionary rule, could never be accomplished. *See* Grove, *Suppression of Illegally Obtained Evidence: The Standing Requirement on Its Last Leg*, 18 CATH. U.L. REV. 150 (1968); White & Greenspan, *Standing to Object to Search and Seizure*, 118 U. PA. L. REV. 333 (1970); Comment, *Standing to Object to an Unreasonable Search and Seizure*, 34 U. CHI. L. REV. 342 (1967). The Court in Alderman v. United States, 394 U.S. 165 (1969), concluded, however, "that the additional benefits of extending the exclusionary rule to other [i.e., third-party] defendants would [not] justify further encroachment upon the public interest in prosecuting those accused of crime and having them acquitted or convicted on the basis of all the evidence which exposes the truth." *Id.* at 175. From this balancing approach emerged the rule that fourth amendment rights are personal rights and may not be asserted vicariously. *Id.* at 174.

33. The same evidence could not be used against Toy although the seizure did not invade his right of privacy or premises either. Instead the seizure at Yee's house was considered the fruit of the illegal search of Toy's home, thus Toy was accorded standing.

34. 389 U.S. 347 (1967).

a public telephone booth, were admissible in evidence for the Government. Prior to *Katz*, the analysis of substantive fourth amendment rights, like standing, had been closely associated with common law property classifications; unless officers had intruded upon a constitutionally-protected-area, the defendant's fourth amendment rights were not violated.[35] In *Katz* the Court rejected the constitutionally protected area approach and held that the evidence was inadmissible because defendant "justifiably relied" on the privacy of his conversations while he was in the telephone booth.[36] What a person "seeks to preserve as private" may be protected while what he "knowingly exposes to the public is not."[37] The Court concluded that defendant's expectation of privacy was justified because "[o]ne who occupies [a telephone booth], shuts the door behind him, and pays the toll . . . is surely entitled to assume that the words he utters will not be broadcast to the world."[38] Justice Harlan in his concurring opinion defined more explicitly than the majority a standard to be used for the determination of substantive fourth amendment rights:[39] "there is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy, and secondly that the expectation be one that society is prepared to recognize as 'reasonable.' "[40]

Although *Katz* did not involve standing, the Court's treatment of substantive fourth amendment protections affected standing analysis during the same Term in *Mancusi v. DeForte*.[41] The issue was whether a union official had standing to suppress union records seized during a search of the office he occupied. Even though defendant was present at the time of the search, the Court avoided the *Jones* legitimately-on-the-premises rule[42] and,

35. *See* Goldman v. United States, 316 U.S. 129, 134 (1944); Olmstead v. United States, 277 U.S. 438, 457 (1928).

36. 389 U.S. at 350-53.

37. *Id.* at 351.

38. *Id.* at 352.

39. *Id.* at 360 (Harlan, J., concurring).

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

41. 392 U.S. 364 (1968). State officials, after serving a subpoena duces tecum to the union local of which defendant was a vice president, searched and seized records from an office that defendant shared with other union officials. *Id.* at 365.

42. The Court did not disparage *Jones* as a precedent. The facts of *Jones*

instead, held that under all the circumstances defendant had a reasonable expectation of freedom from government intrusion that "was inevitably defeated by the entrance of state officials."[43]

The next Term in *Alderman v. United States*[44] the Court emphasized property interests in holding that a homeowner had standing to object to evidence seized from third-party conversations overheard through electronic surveillance of his premises.[45] The majority saw no difference for standing purposes between police illegally entering a home and then seizing something tangible that belonged to a third party and police seizing intangible conversations between third parties through illegal electronic surveillance of defendant's home. In both situations, the Court said the homeowner had standing whether or not he was present during the invasions.[46] The emphasis placed on defendant's ownership of the premises where the conversations occurred seemed misplaced in light of *Katz*, however, because the *Katz* majority

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simply were compared with the facts in *DeForte:*

> There was no indication that the area of the apartment near the bird's nest had been set off for Jones' personal use, so that he might have expected more privacy there than the rest of the apartment; in this, it was like the part of DeForte's office where the union records were kept. Hence, we think that our decision that Jones had standing clearly points to the result which we reach here.

Id. at 370.

In dissent, Justice Black argued that the legitimately-on-the-premises language of *Jones* was dictum and that "the one against whom the search was directed" was the correct standard. *Id.* at 375-77 (Black, J., dissenting). In a footnote in Bumper v. North Carolina, 391 U.S. 543 (1968), Justice Stewart also confused the *Jones* holding when he wrote for the Court that "there can be no question of the [defendant's] standing to challenge the lawfulness of the search. He was the 'one against whom the search was directed,' and the house searched was his home." 391 U.S. at 548 n.11 (quoting Jones v. United States, 362 U.S. 257, 261 (1960)). *See* note 25 *supra* and notes 48 & 67 *infra.*

43. 392 U.S. 364, 369 (1968). In another case decided the same Term, the Court rendered the automatic standing holding in *Jones* meaningless by holding that defendant's testimony in support of a motion to suppress evidence on fourth amendment grounds may not be admitted against him at trial over his objection. Simmons v. United States, 390 U.S. 377 (1968). *See* note 25 *supra*; note 54 *infra.*

44. 394 U.S. 165 (1969).

45. *Id.* at 176. The government admitted overhearing conversations, but other details were not given. *Id.* at 170 n.3.

46. *Id.* at 176-77.

rejected the notion of constitutionally protected areas.[47] The *Alderman* majority may have relied on ownership interests rather than privacy expectations because the issue in *Alderman* was defendant's standing whereas the *Katz* privacy test applied to substantive fourth amendment rights. The *Alderman* Court's language, however, went far beyond the mere standing issue; the Court did not believe "that *Katz* . . . was intended to withdraw any of the protection which the Amendment extends to the home."[48] To be sure, the *Alderman* decision not only granted standing to homeowners but also appeared to view home ownership as an indication of fourth amendment protections.

In a dissenting opinion in *Alderman,* Justice Harlan, joined by Justice Stewart, denounced the majority rationale and argued that the Court "should reject traditional property concepts entirely, and reinterpret standing in light of the substantive principles developed in *Katz.*"[49] Justice Harlan simply applied the expectation of privacy standard to determine defendant's standing and concluded that a person not a party to the overheard conversation could have no subjective expectation of privacy as to that conversation merely because it occurred on his property.[50] In a footnote rebuttal to the dissenters, the Court attempted to reconcile *Alderman* with *Katz* by suggesting that a homeowner rightfully expects privacy "for himself, his family and his *invitees,* and the right to object to the use against him of the fruits of that invasion."[51]

The distinction between standing and substantive rights was obscured in *Alderman* and *DeForte* by using the *Katz* privacy

47. 389 U.S. 347, 351-52 (1967).

48. 394 U.S. at 180. Justice Fortas, joined by Justice Douglas, concurred, arguing that any person against whom the search was directed should have standing to object to the admission of evidence obtained from that search. *Id.* at 207-09 (Fortas, J., concurring). Using *Jones* for support, Fortas enunciated a target theory for standing under which anyone who was the target of an investigation would have standing. Justice Harlan rejected the theory for what he considered to be vast administrative difficulties. *Id.* at 188 n.1 (Harlan, J., dissenting). The majority opinion did not address the argument. For a persuasive discussion in favor of the target theory, see White & Greenspan, *supra* note 32, at 346-66. *See* notes 25 & 42 *supra*; note 67 *infra.*

49. 394 U.S. at 191 (Harlan, J., dissenting).

50. *Id.* at 192 (Harlan, J., dissenting).

51. *Id.* at 179 n.11 (emphasis added).

language, but any doubt that *DeForte* and *Alderman* cast on the existence of separate rules for standing as opposed to substantive fourth amendment rights was removed by the Court in 1973 in *Brown v. United States*.[52] A unanimous Court applied purely pre-*Katz* standing principles in holding that "there [was] no standing to contest a search where, as here, the defendants: were not on the premises at the time of the contested search and seizure; alleged no proprietary or possessory interest in the premises;"[53] and possession was not an element of the offense charged.[54] No mention was made of privacy interests or *Katz*; thus, the Court seemed willing to judge a defendant's ability to object by these tests alone, to the exclusion of privacy expectations.

In *United States v. Chadwick*,[55] the most recent case in which substantive rights were defined by legitimate expectations of privacy, the Court examined precautions taken by defendants to protect their privacy. The issue in *Chadwick* was whether federal agents should have obtained a warrant to search defendants' footlocker that had been lawfully seized and was in the Government's exclusive control.[56] In concluding that the search of defendants' footlocker without a warrant violated the fourth amendment, the Court found that "[b]y placing personal effects inside a double-locked footlocker, [defendants] manifested an expectation that the contents would remain free from public examination."[57]

In *Chadwick* the Government tried to analogize a footlocker to an automobile to justify the warrantless search.[58] The Court said, however, that the "diminished expectation of privacy which

52. 411 U.S. 223 (1973). After being arrested for stealing merchandise from a warehouse, defendants revealed to the police that following two previous thefts from the same warehouse they had delivered their stolen goods to a store in another city. While defendants were in custody, the police searched the store pursuant to a faulty warrant and found the stolen merchandise. The trial court held that defendants lacked standing, and thus denied their motion to suppress the evidence seized from the store. *Id.* at 224-26.

53. *Id.* at 229.

54. *Id.* The Court, however, cast further doubt on the validity of the automatic standing rule. *See id.* at 228; notes 25 & 43 *supra*.

55. 433 U.S. 1 (1977).

56. *Id.* at 11.

57. *Id.*

58. *Id.* at 12.

surrounds the automobile"[59] does not apply to a footlocker. The majority said that an automobile seldom serves as a residence or a repository of personal effects, its occupants and contents are open to public view, and a car is subject to inspection and official scrutiny; thus, a person's expectation of privacy in personal luggage is greater than in an automobile.[60]

Brown and the other standing cases framed the rule that a defendant who either had a possessory interest in the area searched or was legitimately present at the time of the search had standing to object to the constitutionality of the search.[61] The *Katz* and *Chadwick* cases revealed that a defendant's substantive rights might not follow from the showing of possessory interests or legitimate presence.[62] As to passengers in an automobile, the Supreme Court had not spoken definitively on either the standing or substantive rights issues. The Court, however, usually upheld warrantless searches of automobiles under what was called the automobile exception to the warrant requirement. The warrantless search of a motor vehicle would be permissible if the searching officer had probable cause to believe that it contained evidence of a crime.[63] The Court, however, simply did not determine the validity of these searches on the grounds of privacy expectations.[64] Although the Supreme Court had mentioned that the ex-

59. *Id.*

60. *Id.* at 13.

61. *See* text accompanying notes 19-27, 41-46, 52-54 *supra.*

62. *See* text accompanying notes 34-40, 55-60 *supra.*

63. Chambers v. Maroney, 399 U.S. 42 (1970) (occupants of car suspected of armed robbery, car stopped, occupants arrested, car searched at station; held search valid because probable cause to believe the car contained fruits of crime); Dyke v. Taylor Implement Mfg. Co., 391 U.S. 216 (1968) (defendant arrested for reckless driving; held search invalid because no reason to believe car contained seizable evidence); *see* Preston v. United States, 376 U.S. 364 (1964) (occupants of automobile arrested for vagrancy; held search of car invalid); Carroll v. United States, 267 U.S. 132 (1925) (automobile search upheld as authorized by statute and supported by probable cause). When the car was under the exclusive control of the police the Court has upheld warrantless searches pursuant to police inventory regulations and procedure. *See* South Dakota v. Opperman, 428 U.S. 364 (1976) (inventory search pursuant to police regulation); Cooper v. California, 386 U.S. 58 (1967) (search pursuant to normal police procedure one week after impoundment).

64. *See* Chambers v. Maroney, 399 U.S. 42 (1970). *Contra,* Cardwell v. Lewis, 417 U.S. 583 (1974) (plurality opinion included privacy expectations in support of the validity of a warrantless search).

pectations of automobile occupants were diminished as opposed to the expectations of persons in nonmobile places,[65] the pure substantive rights issues of passenger privacy had not been confronted by the Court.

In the instant case, *Rakas v. Illinois*,[66] the Supreme Court applied the expectation-of-privacy test, used in the determination of substantive fourth amendment rights, to the standing question and thus eliminated the need for standing as a separate inquiry.[67] The conceptual incorporation of standing into an analysis of substantive fourth amendment rights is laudable.[68] In every so-called standing case except *Jones*, the Court was actually determining defendants' fourth amendment rights under the rubric of standing.[69] As a result, the conceptual distinction between

65. *See* United States v. Martinez-Fuerte, 428 U.S. 543, 561 (1976) (expectations in automobile different than in residence).

66. 99 S.Ct. 421 (1978).

67. The Court accomplished this from two perspectives. First, the Court said that "the better analysis [of a defendant's ability to object] forthrightly focuses on the extent of a particular defendant's rights under the Fourth Amendment, rather than on any theoretically separate, but invariably intertwined concept of standing." *Id.* at 428. Second, the Court rejected the legitimately-on-the-premises standard used in standing questions in favor of the *Katz* privacy test. *Id.* at 430. To understand the effect of the incorporation of the standing requirement by way of the latter perspective is easier. The Court also rejected defendants' target theory for standing. *Id.* at 425. *See* notes 25, 42 & 48 *supra*.

68. Justice Rehnquist clearly stated that traditional article III standing must still be met by litigants alleging constitutional injury. 99 S. Ct. at 428. Indeed, a criminal defendant is unlikely to fail to have the requisite personal stake in a prosecution such that lack of adversity would bar his claim under the case or controversy requirement of article III. Furthermore, the traditional standing rule that a proponent assert his own legal rights rather than the rights of others is virtually the same as the long established substantive fourth amendment rule that "Fourth Amendment rights are personal in nature." *Id. See generally* W. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 11.3, at 553 (1978).

Some commentators have argued that the fourth amendment standing requirement is valuable and that anyone whose rights are arguably violated should be allowed to object. Knox, *Some Thoughts on the Scope of the Fourth Amendment and Standing to Challenge Searches and Seizures*, 40 MO. L. REV. 1, 52.2 (1975). The Court totally rejected this argument by eliminating the need for standing and by requiring the defendant's own privacy interests to be violated.

69. This misuse of the standing requirement is most readily apparent in Alderman v. United States, 394 U.S. 165 (1969). *See* text accompanying notes

standing and substantive rights was often blurred.[70] The Court eliminated this confusion by discarding the distinction. With Justice Rehnquist writing for the five majority justices, the Court decided that for a defendant to dispute the legality of a search his fourth amendment rights must have been infringed by the government.[71] The *Rakas* majority determined that, under *Katz*, fourth amendment rights are to be determined by legitimate expectations of privacy.[72] With standing properly subsumed under substantive fourth amendment analysis,[73] the threshold question in every case is whether the defendant had a legitimate expectation of privacy in the area searched or in the articles seized.

Although the Illinois appellate court had denied defendants standing, most jurisdictions that addressed the question had followed the *Jones* legitimately-on-the-premises rule and accorded automobile passengers standing.[74] The Court, however, rejected the legitimately-on-the-premises test of *Jones* as "too broad a gauge for measurement of Fourth Amendment rights."[75] A literal interpretation of "legitimately on the premises" would extend fourth amendment protection far beyond privacy expectations that, after *Katz*, are the core values of the fourth amendment. The Court reasoned that to allow a casual visitor walking into a house one minute before a search commences and leaving one minute after the search ends to contest the legality of the search

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44-51 *supra*. When scrutinizing defendant's standing, all the Court should have been concerned about was whether defendant fit within the mechanical standing rules so that he could object to the evidence seized. Clearly, in *Alderman* the Court was very concerned about a homeowner's fourth amendment rights rather than simply about his ability to object. *See* 394 U.S. at 176-80. Apparently, the majority believed that a homeowner has fourth amendment rights that are violated by an illegal electronic surveillance of his home even though the question on appeal was couched in terms of standing. *See id.* at 168-69. On reargument the parties were directed by the Court to address the standing question.

70. *See* Knox, *supra* note 68, at 52.2. *Compare* Wong Sun v. United States, 371 U.S. 471, 492 (1963) *with* Jones v. United States, 362 U.S. 257, 267 (1960).

71. 99 S. Ct. at 429.

72. *Id.* at 430.

73. *Id.* at 429.

74. *See* note 27 *supra*.

75. 99 S. Ct. at 429.

would be absurd.[76] Although legitimate presence is to be taken into account, it cannot be controlling.[77]

Moreover, the Court recognized property rights as a factor that gives rise to a legitimate expectation of privacy. Justice Rehnquist specified that an expectation must be more than subjective; it must have "a source outside of the Fourth Amendment, either by reference to concepts of . . . property law or to understandings . . . recognized and permitted by society."[78] The majority concluded that property concepts have not been abandoned as determinants of privacy interests, noting that inherent in property rights is the right to exclude others. This conclusion follows the approach to substantive fourth amendment rights set forth in *Katz,* which explicitly recognized that the right to exclude others carries with it expectations of privacy.[79] Because the right to exclude others is an indication of privacy expectations, the Court said, "one who owns or lawfully possesses or controls property will in all likelihood have a legitimate expectation of privacy."[80]

In finding that property rights give rise to a legitimate expectation of privacy, the Court relied to some extent on *Alderman.*[81] The majority in *Alderman* opined that because defendant owned the house, he had standing to object to evidence obtained from the electronic surveillance of conversations between third parties.[82] The dissent in *Alderman* denounced the majority opinion for failure to use the expectation-of-privacy approach.[83] Thus, the *Rakas* Court recognized that the property-rights rationale and the legitimate-expectation-of-privacy test are reciprocal interests because property concepts are societal recognitions of privacy expectations.[84]

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76. *Id.* at 430. The legitimately-on-the-premises standard was criticized in the same manner in White & Greenspan, *supra* note 31, at 345. Professor LaFave convincingly rebuts this criticism using the same expectation of privacy approach adopted by the Court in *Rakas. See* LAFAVE, *supra* note 68, § 11.3 at 553.

77. 99 S. Ct. at 433.

78. *Id.* at 430 n.12.

79. *See* text accompanying notes 36 & 37 *supra.*

80. 99 S. Ct. at 430 n.12.

81. *Id.*

82. *See* text accompanying notes 45 & 46 *supra.*

83. *See* text accompanying note 49 *supra.*

84. The Court in *Alderman* viewed ownership as sufficient to confer fourth

Although all the Justices agreed that property interests should not be the sole indicator of fourth amendment rights,[85] the *Rakas* dissent[86] vigorously argued that the majority opinion limited the fourth amendment to the protection of property rights.[87] The minority contended that the Court was taking a step back to the pre-*Jones* days of determinations based purely on the existence of a common law property right.[88] The dissent probably overreacted to this aspect of the majority opinion.[89] As Justice Powell explained in his concurring opinion, "the Court states today [that] property rights . . . should be considered in determining whether an individual's expectations of privacy are reasonable."[90]

The problem with the Court's analysis in *Rakas* lies in its application of the legitimate-expectation-of-privacy standard to the facts of the case. Defendants in *Rakas* asserted no possessory or proprietary interest in the car or in the rifle and shells;[91] instead, they argued that because they were legitimately on the

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amendment rights. 394 U.S. at 180 (dictum); *see* text accompanying note 48 *supra*. The *Alderman* dictum and the proposition that property concepts embody societal expectations compel the use of property interests as indications of privacy expectations even over Justice Harlan's dissent to the contrary in *Alderman*.

85. 99 S. Ct. at 430, 441 (White, J., dissenting).

86. Mr. Justice White was joined by Mr. Justice Brennan, Mr. Justice Marshall and Mr. Justice Stevens dissenting.

87. 99 S. Ct. at 441 (White, J., dissenting).

88. *Id.* at 440 (White, J., dissenting).

89. Although the Court is not making a complete return to the policy of determining fourth amendment rights on the basis of common-law property rights, after *Rakas* apparently the only way automobile passengers can invoke the fourth amendment is to have some property interest in the area of the car that was searched. *See* text accompanying note 120 *infra*.

90. *Id.* at 435 (Powell, J., concurring). A curious aspect of the *Rakas* decision is that the Court could have reversed the trial court's finding of lack of standing under *Jones* and have upheld the search of the car under the automobile exception to the warrant requirement. *See* note 63 *supra* and accompanying text. The Court may have been constrained by the failure of the trial court to make a finding of probable cause, *see* note 3 *supra*. In *Jones*, however, the Court determined the sufficiency of the warrant without the benefit of the trial court's determination. *See* note 26 *supra*. In any event, the majority simply did not scrutinize *Rakas* under the previous warrantless search cases. Instead, the Court viewed the case under the *Katz* privacy analysis through the former standing cases.

91. 99 S. Ct. at 423.

premises they should be able to contest the validity of the search.[92] The majority disagreed. Mere legitimate presence on the premises conferred no interest protected by the fourth amendment[93] because rights under that amendment must be determined by legitimate expectations of privacy.[94] The Court found that defendants' claim failed because "they made no showing[95] that they had any legitimate expectation of privacy in the glove compartment or area under the seat of the car in which they were merely passengers."[96] By attaching such significance to the particular areas searched, the Court narrowed its view of privacy expectations. What once had been analyzed in terms of the entire area searched—premises,[97] apartment,[98] office,[99] telephone booth[100]—was analyzed by the Court in terms of the particular areas "from which incriminating evidence was seized."[101]

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92. *Id.* at 424.

93. *Id.* at 429.

94. *Id.* at 429-30.

95. Although "claim" as well as "show" is used by the majority, *see id.* at 434 n.17, the use of "showing" must be read to mean failed to prove rather than failed to allege. Before the decision in the instant case, the unanimous decision in Brown v. United States, 411 U.S. 223 (1973), *see* text accompanying notes 52-54 *supra*, required defendants to show either legitimate presence on the premises or an ownership interest in the premises searched or property seized. Defendants had no reason to believe that the law was any different four years later when they were tried. *See* 99 S. Ct. at 443 n.19 (White, J., dissenting).

96. 99 S. Ct. at 433.

97. *See, e.g.*, Brown v. United States, 411 U.S. 223 (1973); Wong Sun v. United States, 371 U.S. 471 (1963).

98. Jones v. United States, 362 U.S. 257 (1960).

99. Mancusi v. DeForte, 392 U.S. 364 (1968).

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

101. 99 S. Ct. 421, 434 (1978). The particular-areas approach is especially troubling because no way exists to determine how particularly the Court will scrutinize an area. The particular areas here were the glove compartment and the area beneath the seat. If the evidence in these areas had been further compartmentalized, for example, had the sawed-off rifle been in a brief case, would the particular area from which the evidence was seized be the area beneath the seat or the area inside the briefcase? Clearly with the renewed recognition of property ownership, if the passenger asserted no interest in the car, briefcase, or gun, the "particular area" classification would be irrelevant. One can readily see, however, that at some point the determination of the "particular area" in which the defendant has a legitimate expectation of privacy will control the outcome of the case.

Although Justice Rehnquist said that no former cases decided by the Supreme Court would have been decided differently under the *Rakas* rationale,[102] the *Rakas* and *Jones* decisions are not easily reconciled because of *Rakas'* particular-areas language. The entire apartment was searched in *Jones,* yet the only incriminating evidence was found in a bird's nest on an awning outside the apartment window.[103] In *Rakas* the entire car was searched but the only incriminating evidence was found in the glove compartment and area under the seat.[104] The unanimous Court in *Jones* emphasized that defendant was in the apartment with the consent of the owner.[105] *Jones* was distinguished by the majority in *Rakas* because the *Jones* defendant had a key to the apartment, kept possessions there, and could exclude all others except the owner.[106] The *Rakas* Court concluded that Jones "could legitimately expect privacy in the areas which were the subject of the search and seizure."[107] How a guest's privacy expectations can be greater in a bird's nest located outside an apartment window than in a locked glove compartment or area under the front seat of a car is difficult to understand. Assuming that defendants in both *Jones* and *Rakas* actually placed the incriminating evidence where it was found, their exercise of precaution might give rise to a legitimate expectation of privacy in both cases similar to the expectation of privacy in the locked footlocker in *Chadwick.*[108] An expectation of privacy must be reasonable, however, and two fac-

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102. *Id.* at 428.

103. *See* Jones v. United States, 262 F.2d 234, 235 (D.C. Cir. 1958); text accompanying note 21 *supra.*

104. 99 S. Ct. at 423.

105. Jones v. United States, 362 U.S. 257, 265 (1960).

106. 99 S. Ct. at 433.

107. *Id.*

108. *See* text accompanying notes 56 & 57 *supra.* Justice Powell assumed that one of the *Rakas* defendants put the rifle under the front seat. 99 S. Ct. at 436 (Powell, J., concurring). Defendant in *Jones* was seen putting his hand on the awning. 362 U.S. at 259. The *Rakas* majority limited its decision to what the defendants showed, which was, only legitimate presence on the premises. Arguably, even if defendants had shown that they had put the shells in the glove compartment and the rifle under the seat, this minor precaution would not have been sufficient to find legitimate expectations of privacy. Notwithstanding the defendants' manifested expectation of privacy, defendants were in an area less deserving of privacy interests—an automobile. *See* text accompanying notes 109 & 110 *infra.*

tors militate toward finding reasonableness in *Jones* but not in *Rakas*. First, defendant in *Jones* had the key to the apartment and thus controlled access to the bird's nest by controlling access to the apartment. *Rakas* defendants did not control access to either the car or the locked glove compartment since they had the key to neither. Second, although Justice Rehnquist states that the *Rakas* result would have been the same even in the analogous situation of a dwelling place,[109] the inherent differences between residences and motor vehicles create difficulty in finding legitimate expectations of privacy in the latter. As the Court noted, "one's expectation of privacy in an automobile . . . [is] significantly different from the traditional expectation of privacy and freedom in one's residence."[110] The distinction is supported by the following reasons given by Justice Powell in his concurring opinion: "Automobiles operate on public streets; they are serviced in public places; they stop frequently; they are usually parked in public places; their interiors are highly visible; and they are subject to extensive regulation and inspection."[111]

Under *Rakas*, the scope of the fourth amendment, which is defined as legitimate expectations of privacy, is the measure of a defendant's ability to exclude evidence at a suppression hearing. By eliminating any separate test for standing the Court has sewn some stitches into the seamless web of the fourth amendment. The decision makes sense insofar as it applies the test the Court has used in the substantive area of the fourth amendment since *Katz*.[112] The troubling part of the decision is the way in which the test is applied in this case. On one hand the Court properly recognizes that property and possessory interests can be a measure of legitimate privacy expectations insofar as they stand as societal recognition of privacy interests.[113] On the other hand the Court required that a defendant show a legitimate privacy expectation in the particular areas from which the evidence was seized.[114] One

109. 99 S.Ct. at 433.

110. *Id.* at 433 n.15 (quoting United States v. Martinez-Fuerte, 428 U.S. 543, 561 (1976)).

111. 99 S. Ct. at 436 n.2 (Powell, J., concurring).

112. A discussion of the merits of the expectation-of-privacy test is beyond the scope of this Note. For a critical and authoritative analysis see Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 383-405 (1974).

113. *See* text accompanying notes 78-83 *supra*.

114. *See* note 101 *supra* and accompanying text.

way that privacy expectations can be shown is by the actual placing of the object where it is found, thus manifesting a subjective expectation that the object will not be exposed to the public as in *Chadwick*[115] and *Katz*.[116] But as *Rakas* has been analyzed above, even if the defendants had so manifested their expectations the distinctions between automobiles and residences would remove their expectations from the grounds of reasonableness.[117] Therefore, apparently the only way an automobile passenger can show a legitimate expectation of privacy in the particular area from which the evidence is seized is either to own that area, to control access to that area,[118] or to claim ownership of the seized evidence.[119] Having reached this point, the *Rakas* decision appears to limit the fourth amendment rights of automobile passengers in the same way pre-*Jones* cases limited all criminal defendants' ability to obtain fourth amendment standing. Insofar as auto passengers' expectations are so limited, the dissent's statement does not appear incorrect in that "it is hard to imagine

115. 433 U.S. 1 (1977); *see* text accompanying note 57 *supra*.

116. 389 U.S. 347 (1967); *see* text accompanying note 38 *supra*.

117. *See* text accompanying notes 108-11 *supra*.

118. One must possess the key in order to control access to an area. Closing the door is not enough. 99 S. Ct. at 436 & n.4 (Powell, J., concurring).

119. *Id.* at 430 n.11. The Court's recognition that property interests give rise to privacy expectations would apparently confer fourth amendment rights on the owner of a car (or glove compartment) searched, notwithstanding a distinction between automobiles and residences. Furthermore, had defendants alleged that they owned the rifle and shells seized, they would have had standing to object under the old tests. Apparently the use at privacy expectations does not diminish the significance of alleged ownership of the property seized. *See* 99 S. Ct. at 430 n.11. The *Simmons* rule, *see* note 43 *supra*, that bars the use at trial of testimony in support of a motion to suppress protects a defendant who admits ownership for the purpose of establishing standing or privacy expectations from having the fact of ownership used against him at trial. Apparently defendants in *Rakas* did not take advantage of the *Simmons* rule, believing that the *Jones* legitimately-on-the-premises standard was adequate. Negative psychological pressure probably diminishes a defendant's willingness to take the benefit of the *Simmons* rule and claim ownership at the suppression hearing to get the merits of the motion adjudicated. How the switch to the expectation-of-privacy test will affect counsel strategy at suppression hearings remains to be seen.

anything short of a property interest that would satisfy the majority."[120]

M. CLARK SPODEN

120. 99 S. Ct. at 442 (White, J., dissenting). In Delaware v. Prouse, 99 S. Ct. 1391 (1979), the Court held that the fourth amendment prohibits random stops of automobiles for the purpose of checking operator licenses and vehicle registration. Defendant in *Prouse* was a passenger-owner. *Id.* at 1394 n.1. In dictum the Court, through Justice White, addressed automobile occupants' expectations of privacy.

> An individual operating or *travelling* in an automobile does not lose all reasonable expectation of privacy . . . . [P]eople are not shorn of all Fourth Amendment protection when they step from their homes onto the public sidewalks. Nor are they shorn of those interests when they step from the sidewalks into their automobiles.

Id. at 1400-01 (citation omitted) (emphasis added).

Constitutional Law—Sixth Amendment Right to Trial by Jury—Five Jurors Are Not Enough

In 1973 defendant, manager of a movie theatre in Atlanta, Georgia, exhibited the X-rated movie *Behind the Green Door* and subsequently was arrested and charged with two misdemeanor counts of distributing obscene materials. Despite defendant's request for a twelve-member jury, the court impaneled only five jurors, pursuant to Georgia law.[1] Found guilty on both counts, defendant appealed to the Court of Appeals of the State of Georgia and claimed, *inter alia*, that the use of the five-member jury deprived him of his sixth and fourteenth amendment right to trial by jury.[2] In rejecting this claim, the court of appeals reasoned that since *Williams v. Florida*[3] had not established a constitutional minimum number of jurors for criminal trials, a five-member jury was not unconstitutional. The Supreme Court of Georgia denied certiorari. On certiorari from the United States Supreme Court, *held*, reversed. In criminal cases in which the accused is assured a jury trial,[4] the sixth and fourteenth amendments guarantee the accused the right to trial by a jury composed of more than five members. *Ballew v. Georgia*, 435 U.S. 223 (1978).

In the landmark case of *Williams v. Florida*,[5] the Supreme Court held that a state was not required to use a jury of twelve members to satisfy the sixth amendment right to trial by jury made applicable to the states by the fourteenth amendment,[6] but

1. GA. CONST. art. 6, § 16 (codified as GA. CODE ANN. § 2-5101 (1973)) (current version at GA. CODE ANN. § 2-4401 (1977)). "Effective March 24, 1976, the number of jurors in the Criminal Court of Fulton County was changed from five to six." Ballew v. Georgia, 435 U.S. 223, 226 n.5 (1978).

2. Ballew v. State, 138 Ga. App. 530, 227 S.E.2d 65 (1976), *cert. denied*, (unreported), *rev'd sub nom.*, Ballew v. Georgia, 435 U.S. 223 (1978).

3. 399 U.S. 78 (1970).

4. In Baldwin v. New York, 399 U.S. 66 (1970), the Court held that if imprisonment of six months or more was imposed the defendant had a right to trial by jury.

5. 399 U.S. 78 (1970).

6. The Court had previously held in Duncan v. Louisiana, 391 U.S. 145 (1968), that the sixth amendment right to trial by jury was fundamental to the American scheme of justice and thus was incorporated into the fourteenth amendment. The relevant part of the sixth amendment states: "In all criminal

the Court declined to specify the minimum jury size constitutionally required.[7] In reaching its decision, the *Williams* Court found that history, precedent, and the strong dicta of previous decisions dealing with jury size were inconclusive and chose instead a test that examined "the function that the particular feature [twelve members] performs and its relation to the purposes of the jury trial."[8] Citing six studies on jury size,[9] the Court concluded that the purposes and functions of the jury would not be noticeably altered by a reduction in number from twelve to six.[10] In the subsequent decision of *Colgrove v. Battin*,[11] the Court held that the federal right to trial by jury in civil cases, guaranteed by the seventh amendment, did not require a jury composed of twelve members.[12] The Court bolstered this position and reaffirmed the correctness of *Williams* by citing four studies dealing with the differences between six- and twelve-member juries.[13] As a result of *Williams* and *Colgrove*, voluminous empirical data was published on the differences between six- and twelve-member group decisions.[14] The instant case relies heavily on this data in barring the states from further reducing jury size in criminal cases. Because most of the studies relied upon by the Court show significant differences between the functioning of juries composed of six members and juries composed of twelve, the continued vitality of *Williams* has been placed in doubt despite the Court's reaffirmation of the *Williams* decision.

The history of trial by jury[15] reveals that hundreds of years of experimentation with the size of the jury preceded the estab-

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prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . ." U.S. CONST. amend. VI.

7. 399 U.S. 78, 91 n.28 (1970).

8. *Id.* at 99-100.

9. *Id.* at 101 n.48.

10. *Id.* at 100-01.

11. 413 U.S. 149 (1973).

12. *Id.* at 160.

13. *Id.* at 159 n.15.

14. *See* Ballew v. Georgia, 435 U.S. 223, 231 n.10 (1978).

15. *See generally* W. FORSYTH, HISTORY OF TRIAL BY JURY (1892); W. HOLDSWORTH, HISTORY OF ENGLISH LAW (3d ed. 1922); L. MOORE, THE JURY (1973); J. THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW (1898); Thayer, *The Jury and Its Development*, 5 HARV. L. REV. 249, 295, 357 (1892); White, *Origin and Development of Trial by Jury*, 29 TENN. L. REV. 8 (1961).

lishment of twelve as the appropriate number.[16] Once the number of twelve was settled upon in England, however, the size of the jury became a protected requisite.[17] The early colonists brought the English common law, including the right to trial by jury, with them.[18] The colonists continued to maintain a high regard for the jury, as evidenced by repeated references to the jury in the early legislative enactments, revolutionary documents, and state constitutions.[19] The framers of the United States Constitution were also concerned with preserving the right to trial by jury in both criminal and civil cases.[20] Despite the traditional use of twelve-

16. The beginnings of trial by jury in the common law of England have generally been traced to the reign of William the Conqueror, who invaded England in 1066. L. MOORE, *supra* note 15, at 35; White, *supra* note 15, at 14. During the reign of Henry II (1154-1189) the Constitution of Corendon (1164), which stated that twelve men would be used to compose a jury, was enacted. L. MOORE, *supra* note 15, at 37 (citing Wells, *The Origin of the Petty Jury*, 27 LAW Q. REV. 347 (1911)). Thus, probably under the reign of Henry II the number twelve became the usual size for the jury, but even then the number did not remain uniform. J. THAYER, *supra* note 15, at 85. Indeed, through the reign of King John (1199-1216) the number of jurors ranged from six to sixty-six. L. MOORE, *supra* note 15, at 41.

17. By the year 1665, one authority stated:

> "And first as to their [the jury's] number twelve; and this number is no less esteemed by our law than by Holy Writ. If the twelve apostles on their twelve thrones must try us in our external state, good reason both the law to appoint the number twelve to try our temporal. The tribes of Israel were twelve, the patriarchs were twelve, and Solomon's officers were twelve. 1 Kings iv. 7 . . . . Therefore not only matters of fact were tried by twelve, but of ancient times twelve judges were to try matters of law, in the Exchequer Chamber, and there were twelve counsellors of state for matters of state; and he that wageth his law must have eleven others with him who believe he says true. And the law is so precise in this number of twelve, that if the trial be by more or less, it is a mistrial."

J. THAYER, *supra* note 15, at 90 (quoting G. DUNCOMB, TRIAL PER PAIS 92 (8th ed. 1766) (brackets added by J. Thayer)). *See also* 4 W. BLACKSTONE, COMMENTARIES* 349-50; L. MOORE, *supra* note 15, at 41-42.

18. L. MOORE, *supra* note 15, at 97.

19. *See generally* SOURCES OF OUR LIBERTIES (R. Perry & J. Cooper ed. 1959); L. MOORE, *supra* note 15. The fact that the first legislative enactment to be held unconstitutional was a New Jersey statute that provided for a jury composed of only six members is not surprising in a country so concerned with trial by jury. Holmes v. Walton, 4 AM. HIST. REV. 456 (1780), *noted in* 31 HARV. L. REV. 669, 672-73 (1918).

20. When the delegates from the various states met in May, 1787, to revise

member juries, the legislative history of the Constitution and the Bill of Rights leaves no clear impression whether the framers intended the jury size to be set at twelve.[21]

The first decision at the federal level that squarely addressed the issue of what size jury was constitutionally required in a criminal trial was *Thompson v. Utah*,[22] decided in 1898. Defendants were accused of grand larceny for stealing a calf. The case was tried by a jury of twelve persons while Utah was still a territory. Defendants were found guilty but were given a new trial, this time after Utah had become a state. Under the new Utah Constitution, only eight jurors were required. The Supreme Court decided that when the crime was committed, the governing law for this territory was the United States Constitution, including the Bill of Rights.

> It must consequently be taken that the word "jury" and the words "trial by jury" were placed in the Constitution of the United States with reference of the meaning affixed to them in the law as it was in this country and in England at the time of the adoption of the instrument; and that when Thompson committed the offence of grand larceny in the territory of Utah—which was under the complete jurisdiction of the United States for all purposes of government and legislation—the supreme law of the land required that he should be tried by a jury composed of not less than twelve persons.[23]

Thompson firmly established that both the Constitution and the sixth amendment referred to a jury composed of twelve members.[24] For the next seventy-two years *Thompson* remained the

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and to strengthen the Articles of Confederation, the first individual liberty they placed in the new Constitution was the right to trial by jury in criminal offenses. SOURCES OF OUR LIBERTIES, *supra* note 19, at 403. Upon completion of the Constitution, a major objection arose that this provision, which became article III, § 2, cl. 3, was insufficient, primarily because there was no similar guarantee to trial by jury in civil cases. L. MOORE, *supra* note 15, at 105. Opponents of the Constitution were so successful in their demands for further guarantees that no less than three of the first ten amendments referred to jury rights.

21. *See* Frankfurter & Corcoran, *Petty Federal Offenses and the Constitutional Guarantee of Trial by Jury*, 39 HARV. L. REV. 917, 968-69 (1926). *See also* Williams v. Florida, 399 U.S. 78 (1970).

22. 170 U.S. 343 (1898).

23. *Id.* at 350.

24. *Thompson* was criticized later in *Williams* because the laws of the Territory of Utah already provided for a jury of twelve; therefore, it was unneces-

leading case on the constitutionally required number of jurors in a federal criminal trial. Many subsequent decisions cited *Thompson* as authority and reiterated its correctness, either in their holdings or in dicta.[25]

The Supreme Court was then confronted with the problem of deciding whether the right to a jury trial should be imposed upon the states. In approaching the problems of applying sections of the Bill of Rights to the states, the Court had to balance delicate and important conflicting interests, including fundamental individual rights on one hand and individual state autonomy on the other. As a result of this struggle, the selective incorporation doctrine emerged whereby the Court applied to the states only those sections of the Bill of Rights that were deemed fundamental to the American scheme of justice by incorporating these rights into the due process clause of the fourteenth amendment.[26]

In 1968 the Court in *Duncan v. Louisiana*[27] addressed a state statute that prohibited a jury trial for defendant charged with a misdemeanor. Defendant claimed that such a statute deprived him of due process under the fourteenth amendment and of the right to trial by jury under the sixth amendment. The Court agreed.

> Because we believe that trial by jury in criminal cases is fundamental to the American scheme of justice, we hold that the

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sary to discuss the Constitution or the sixth amendment to find this provision an ex post facto law. 399 U.S. at 90 n.26. Why the Court in *Thompson* based its decision on the Constitution is not exactly clear, but the holding in the case is very explicit; this eight-member jury provision was an ex post facto law because the United States Constitution gave the defendant the right to a jury of twelve when the crime was committed.

25. *See* Patton v. United States, 281 U.S. 276 (1930) (dictum) (jury must contain twelve members, be presided over by judge having power to instruct them, and render unanimous verdict); Rasmussen v. United States, 197 U.S. 516 (1904) (constitutional jury is same as at common law and must consist of twelve members); Marshall v. Dow, 176 U.S. 581 (1900) (dictum) (no doubt that sixth amendment required common-law jury of twelve members); Capital Traction Co. v. Hof, 174 U.S. 1 (1899) (dictum) (trial by jury in its usual sense is trial by a jury of twelve men). *But see* Palko v. Connecticut, 302 U.S. 319 (1937) (dictum) (states may modify trial by jury or do away with it altogether); Snyder v. Massachusetts, 291 U.S. 97 (1934) (dictum) (states may abolish trial by jury if they choose).

26. *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 11-2 (1978).

27. 391 U.S. 145 (1968).

> Fourteenth Amendment guarantees a right of jury trial in all criminal cases which—were they to be tried in federal court—would come within the Sixth Amendment's guarantee.[28]

The implication of this statement is that state courts are held to the same standards as federal courts, including the requirement of twelve-member juries. This implication would appear to be a logical inference in light of the Supreme Court's repeated stance that once the fourteenth amendment was held to incorporate a particular section of the Bill of Rights, a watered-down version would not be applied to the states and the same standard would apply equally to both federal and state proceedings.[29] The *Duncan* Court recognized this implication but did not see it as a very severe infringement upon the states.[30] The Court also stated that providing a jury trial was based upon the need to impose "an inestimable safeguard against the corrupt or over-zealous prosecutor and against the compliant, biased, or eccentric judge," on one hand, and "a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges" on the other.[31]

In 1970 *Williams v. Florida*[32] was decided. In *Williams* the Court was faced with the constitutionality of a state statute that provided for a six-member jury in all but capital cases. Taking into consideration the Court's decisions dealing with the size of the jury, the outcome of this issue may have seemed resolved by applying simple logic. Since the Court had apparently established that the federal standard required a jury composed of twelve jurors in criminal cases and had also established that this standard should apply equally to the states, the logical conclusion was that the state courts had to provide for a jury composed of twelve jurors. The *Williams* Court, however, did not reach this result.

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28. *Id.* at 149. In reviewing the esteem of the jury system, the Court felt at ease citing Blackstone's reference to the twelve-member jury, *id.* at 151-52, (citing 4 W. BLACKSTONE, COMMENTARIES* 349-50), and *Thompson,* which supported the twelve-member jury, 391 U.S. at 154 n.21 (citing Thompson v. Utah, 170 U.S. 343, 349-50 (1898)). Two years later in *Williams* the Court altered its attitude toward this support. 399 U.S. at 90-92, 93 n.35.

29. *See* Malloy v. Hogan, 378 U.S. 1, 10-11 (1964) and cases cited therein.

30. 391 U.S. at 158 n.30.

31. *Id.* at 156.

32. 399 U.S. 78 (1970).

In holding that the six-member jury was constitutional, the Court, after reviewing the history of trial by jury, concluded that the feature of twelve jurors was "a historical accident, unrelated to the great purposes which gave rise to the jury in the first place."[33] Furthermore, the Court observed that the rationale in *Thompson* and subsequent cases was based on the unsound reasoning that every feature of the common-law jury was necessarily included in the Constitution when it referred to "jury."[34] The Court found that the history of the Bill of Rights dealing with the term "jury" was at best ambiguous.[35] Having concluded that history and precedent were neither clear nor conclusive, the *Williams* Court held that the relevant inquiry was whether the size of the jury played any role in its function. It concluded:

> To be sure, the number should probably be large enough to promote group deliberation, free from outside attempts at intimidation, and to provide a fair possibility for obtaining a representative cross-section of the community. But we find little reason to think that these goals are in any meaningful sense less likely to be achieved when the jury numbers six, than when it numbers 12—particularly if the requirement of unanimity is retained. And certainly the reliability of the jury as a factfinder hardly seems to be a function of its size.[36]

The Court supported this conclusion with six studies dealing with six-member juries and twelve-member juries that seemed to indicate there were no discernible differences in the functioning of these groups.[37]

The reaction to *Williams* was almost universally negative as critics pointed out the many flaws in both the Court's rationale and the case's outcome.[38] In his concurring opinion, Justice Har-

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33. *Id.* at 89-90.

34. *Id.* at 90-92.

35. *Id.* at 92-99.

36. *Id.* at 100-01.

37. *Id.* at 101 n.48. An examination of these studies reveals that their conclusions are based on the subjective opinions of judges, lawyers, and clerks who discerned no differences between the different sized panels. The studies are not based on any scientific or empirical data. *See* note 43 *infra* and accompanying text.

38. Despite the absence of any apparent rationale for the number twelve, it does not follow that the size of the jury has no significance. The jury serves to protect the accused from oppression either by the

lan, a staunch opponent of the selective incorporation doctrine, indicated that since the incorporation doctrine mandated that the same standards be applied to both the federal and state courts, then the Court must have impliedly abandoned a federal standard to allow the states elbow room to experiment.[39] He objected to changing the well-settled federal standard since sound constitutional interpretation required the jury be fixed as it was at common law because "[t]he right to a trial by jury has no enduring meaning apart from historical form."[40] Furthermore, he was concerned with the inevitable problem of determining the minimum size of the jury, because if twelve were not required, no reason was apparent to require six.[41]

> prosecution or a biased judge, and the size of the jury is relevant to the performance of that protective function. Thus, the possibility of jury bias against defendant is increased when he is a member of a minority group unrepresented in the jury room; as the number of jurors increases, it becomes more likely that at least one representative of defendant's minority group will be on a given jury, at least in the absence of systematic discrimination in juror selection. Moreover, in view of the unanimity requirement, the defendant can escape conviction if even one juror doubts his guilt, and he is more likely to find such a juror when the jury's size is large.

The Supreme Court, 1969 Term, 84 HARV. L. REV. 1, 166 (1970) (footnotes omitted).

> Regardless of this absence of evidence [of differences between 12-member and 6-member juries], and contrary to the finding of the Court, there must be at least *some* relationship between function and number or else just one juror would be a sufficient buffer between the accused and his accusor. If one man were sufficient then it would seem that the presence of the judge would eliminate the concept of a jury in its function as a buffer. It would follow then that the number of people chosen bears *some* relation to the function of the jury.

59 KY. L.J. 996, 1004 (1971) (emphasis in original).

Another criticism, using a statistical analysis, demonstrated that the representation of minorities would decrease as the jury size decreased and that the difference would not be negligible as the Court presumed it would. 23 U. FLA. L. REV. 402, 408 (1971).

39. 399 U.S. at 118, 130 (1970) (Harlan, J., concurring). Justice Harlan concurred in the result because he believed the states should have the freedom to experiment. However, he bitterly questioned the rationale of the Court. Modifying a federal standard to allow the states to experiment was something the Court in other contexts had said it would not do. *See, e.g.*, Malloy v. Hogan, 378 U.S. 1, 10-11 (1964).

40. *Id.* at 125.

41. *Id.* at 125-26.

Critics of the *Williams* decision[42] noted that the studies relied on by the Court were merely observations made by judges, lawyers, and clerks,[43] and therefore, these studies were erroneously relied on for the proposition that six-member panels perform as well as the larger twelve-member panels. In addition, if the underlying rationale of the Court was to save the states time and expense in trial proceedings, such savings had not been convincingly demonstrated in the few studies that dealt with the economy of the six-member jury.[44] Finally, Justice White's observation that the reliability of the jury as a factfinder did not alter

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42. One of the most thorough critics of *Williams* was Hans Zeisel. *See* Zeisel, . . . *And Then There Were None: The Diminution of the Federal Jury*, 38 U. CHI. L. REV. 710 (1971). Zeisel also was coauthor of the most extensive study about juries. H. KALVEN, JR. & H. ZEISEL, THE AMERICAN JURY (1966). *See also* M. SAKS, JURY VERDICTS (1977); Sassi, *The Criminal Jury Faces Future Shock*, 57 JUD. 12 (1973); 22 CASE WEST. L. REV. 529 (1971); note 38 *supra*.

43. "This is scant evidence by any standards." Zeisel, *supra* note 42, at 715.

44. A reduction in the size of the jury from twelve to six in the federal system would save an estimated four million dollars, which "is only 2.4 per cent of the total federal judicial budget, and little more than a thousandth part of one percent of the total federal budget." Zeisel, *supra* note 42, at 711 (citing N.Y. TIMES, May 17, 1971, at 1, col. 1; OFFICE OF MANAGEMENT AND BUDGET, EXECUTIVE OFFICE OF THE PRESIDENT, THE BUDGET OF THE UNITED STATES, FISCAL YEAR 1972 523 (1971)). The savings in court time would be, according to one study, "at best four-tenths . . . of one percent of the judge's working time." Zeisel, *supra* note 42, at 711. Another study, conducted subsequently, found no change in court time in one federal court that used both six- and twelve-member juries. Pabst, *Statistical Studies of the Cost of Six-Man Versus Twelve-Man Juries*, 14 WM. & MARY L. REV. 326 (1972).

Although saving court time and cost is a legitimate state goal, such a consideration should not be a significant determining factor in establishing the requirements of due process. Indeed, two years after *Williams* was decided the author of that opinion, Justice White, wrote:

> The establishment of prompt efficacious procedures to achieve legitimate state ends is a proper state interest worthy of cognizance in constitutional adjudication. But the Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones.

Stanley v. Illinois, 405 U.S. 645, 656 (1972) (footnote omitted).

with the jury's size was challenged.[45] Logically, if the size of the panel played no part in the jury's reliability, then a jury of only one would be sufficient. The Court in *Duncan,* however, had already rejected the proposition that the states could do away with the jury altogether and use only a judge as a factfinder in criminal proceedings.[46]

In *Colgrove v. Battin,*[47] decided in 1973, the Supreme Court was required to determine whether six-member juries in federal civil litigation was permissible under the seventh amendment. Although the Court was aware of the arguments against reduction of jury size,[48] it chose to rely on the rationale of *Williams* and supported its conclusion by citing four favorable studies dealing with jury size. To the Court, this "convincing empirical evidence" was persuasive enough to reaffirm the correctness of the *Williams* decision.[49] Since *Colgrove* was decided, however, authorities have

45. The most noticeable difference observed between the larger twelve-member panels and the smaller panels of six was that the smaller the panels, the less likely they were to include minorities. In a population with a 10% minority, there would be a 72% chance of finding at least one member of that minority in a randomly selected group of twelve members. However, there would be only a 47% chance of obtaining at least one minority member in a randomly selected group of six. Zeisel, *supra* note 42, at 716. *See also* M. SAKS, *supra* note 42, at 18-19. While the chances of finding two minority members in randomly selected groups of twelve would be 34%, the chances would be only 11% in a group of six. Zeisel, *supra* note 42, at 719-20; M. SAKS, *supra* note 42, at 15-16.

Another difference noted between the twelve-member and six-member panels was that the deviation in damage awards in civil suits would be greater with the six-member panels, thus increasing the "gamble" of using a jury as its size diminished. Zeisel, *supra* note 42, at 716-18. In criminal cases there would be fewer hung juries and more convictions with the smaller panel. *Id.* at 719-20. *See also* M. SAKS, *supra* note 42, at 15-16. It is interesting to note that this evidence was presented to and rejected by the Court in the subsequent *Colgrove* decision, *see* note 48 *infra* and accompanying text, yet was later accepted almost completely in *Ballew. See* text accompanying notes 57-65 *infra.*

46. *See* note 28 *supra* and accompanying text.

47. 413 U.S. 149 (1973).

48. *Id.* at 159 n.15. *See also* A. GINGER, JURY SELECTION IN CRIMINAL TRIALS §§ 2.24-2.26 (1975) (unsuccessful amicus curiae brief by Siegfried Hesse).

49. 413 U.S. at 159 n.15. According to one authority, there may have been yet another reason why the Court decided *Colgrove* as it did. Apparently, between the time *Williams* was decided and the *Colgrove* decision, fifty-five of the ninety-two federal district courts adopted local rules providing trial of civil cases with juries composed of fewer than twelve members. These courts obviously anticipated the *Colgrove* decision, yet in so doing, they had taken it upon them-

examined these studies and found their conclusions flawed by improper methods used in testing.[50] Thus, although persuasive to the Court, these studies have proven to be neither conclusive nor convincing in their proposition that no significant differences exist between twelve-member and six-member juries.

Ballew v. Georgia,[51] the instant case, can be viewed as the latest chapter in the history of trial by jury and of the study of jury size. An interesting aspect of *Ballew* is the Court's reliance on empirical studies concerning jury size.[52] The holding of the Court was not derived from history, common law, or legislative enactments. Perhaps of greater significance is the fact that the evidence relied on by the Court had not been "subjected to the traditional testing mechanisms of the adversary process."[53] The Court's use of this evidence was particularly dangerous since similar evidence was used in both *Williams* and *Colgrove* and that evidence was later demonstrated to be unreliable and misleading.[54]

The heavy use of empirical data is a natural outgrowth of *Williams*. Since the *Williams* Court found the Constitutional Convention debates on jury size lacking in certainty, it chose to turn elsewhere for guidance. The Court turned to what few stud-

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selves to modify the law of the land, which, according to Capital Traction Co. v. Hof, 174 U.S. 1, 14 (1899), specifically stated that the civil jury had to be composed of twelve jurors. The *Colgrove* Court was noticeably silent in not reproaching the district courts for their hasty assumptions. Wick, *From Duncan to Williams to Colgrove: A Triple Play Against the Jury System*, 41 INS. COUNSEL J. 106, 107 (1974).

50. *See* M. SAKS, *supra* note 42, at 37-49; Zeisel & Diamond, *"Convincing Empirical Evidence" on the Six Member Jury*, 4 U. CHI. L. REV. 281 (1974).

51. 435 U.S. 223 (1978).

52. Another noticeable aspect of this case is the placement of the burden of going forward with the evidence. In *Williams* the burden was placed on defendant to show why the size of the jury should remain at twelve. *See The Supreme Court, 1969 Term, supra* note 38, at 167. In *Ballew* the burden is placed on the state to show why jury size should be allowed to go as low as five. One possible reason for this shift is that counsel for defendant in *Williams* was unprepared to put forth any evidence indicating significant differences between twelve-member and six-member juries, perhaps because of overconfidence in the outcome of the issue. The brief for the defendant in *Williams* indicates little time was devoted to the issue of jury size. 22 CASE WEST. L. REV. at 531 n.8.

53. 435 U.S. at 246 (Powell, J., concurring).

54. *See* notes 43 & 50 *supra* and accompanying text.

ies it could find dealing with jury size to see if the function of the jury would be significantly impaired if only six jurors were used.[55] But at the time *Williams* was decided the overall quality and quantity of these studies were minimal, and thus the quality of the resulting law suffered.

The use of empirical and social science evidence, although a questionable practice, is not new to the Court[56] despite the criticisms raised against the Court's reliance on such material.[57] One criticism against the use of such evidence is that the Court may rely on early data complied by psychologists, social scientists, and "experts" before an area has been fully explored and before a reasonably definitive position has been reached. An early position taken by some experts may be challenged and later altered or rejected, thus leaving any laws based on this earlier data without support. For the Court's decisions to continue to remain sound, the Court must shift its position each time the experts' statistical foundations are amended. Unpredictable shifting in the law would be unwise policy, as would law based on erroneous data. As the concurring opinion in *Ballew* pointed out, reliance on evidence that has not been closely examined and questioned through the traditional adversary process is suspect.[58] Significantly, however, the concurring opinion offered no suggestions as to what other basis the Court should have used to decide *Ballew*. The instant case may stand for the proposition that when no reasonable alternatives are available, use of empirical data that has not been subjected to the rigors of the adversary process may

55. *See* note 9 *supra* and accompanying text.

56. *See, e.g.*, Memoirs v. Massachusetts, 383 U.S. 413 (1966) (experts used to determine obscenity); Brown v. Board of Educ., 347 U.S. 483 (1954) (psychologists used to determine that the separate but equal doctrine was harmful to children).

57. The use of social scientists, for instance, in determining the law has been both praised and condemned by different authorities. *Compare* Cahn, *Jurisprudence*, 30 N.Y.U.L. REV. 150 (1955) *and* Van den Haag, *Social Science Testimony in the Desegregation Cases—A Reply to Professor Kenneth Clark*, 6 VILL. L. REV. 69 (1960) *with* Clark, *The Desegregation Cases: Criticism of the Social Scientist's Role*, 5 VILL. L. REV. 224 (1959). Experts have also been used in pornography cases. *See, e.g.*, Memoirs v. Massachusetts, 383 U.S. 413 (1966); Doubleday & Co. v. New York, 335 U.S. 848 (1948). For a criticism of the use of experts, see Frank, *Obscenity: Some Problems of Values and the Use of Experts*, 41 WASH. L. REV. 631 (1966).

58. 435 U.S. at 246 (Powell, J., concurring).

be justified. If the empirical evidence is relied on as the single basis for a decision, however, the Court should be prepared to amend its position if the evidence is later challenged, altered, or rejected by the experts.

Since *Williams* and *Colgrove* were decided, a great many studies on jury size have been published.[59] From these studies the *Ballew* Court derived five relevant considerations. First, smaller juries are less likely to produce effective group deliberation because larger groups have higher quality performance and group productivity since larger groups can remember more information and are more likely to overcome individual biases.[60] Second, smaller groups are more likely to reach inaccurate results. After citing three studies, the Court concluded in *Ballew* that "they raise significant doubts about the consistency and reliability of the decisions of smaller juries."[61] "Third, the data suggest that the verdicts of the jury deliberations . . . will vary as juries become smaller,"[62] and this variation will be to the detriment of the defendant. The number of hung juries will decrease by half if the number of jurors is decreased by half.[63] Fourth, there will be a reduction in the probability of a representative cross section of the community, including minorities, found on any given jury.[64] Such exclusion of minorities would weaken the goals of *Smith v. Texas*[65] and *Carter v. Jury Commission*,[66] which sought to promote the use of juries that represented true cross sections of the community by holding that systematic exclusions of minorities from jury service was unconstitutional. Fifth, many of the studies that have shown little or no differences between the outcomes of jury panels of six and jury panels of twelve have methodological flaws that tend to mask such differences.[67] Indeed, the Court went to some length to point out that at least two of the studies relied on in *Colgrove* contained such methodological problems.[68]

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59. *See id.* at 231 n.10 (1978).
60. *Id.* at 232-34.
61. *Id.* at 235.
62. *Id.* at 236.
63. *Id.*
64. *Id.* at 236-37.
65. 311 U.S. 128 (1940).
66. 396 U.S. 320 (1970).
67. 435 U.S. at 237-38.
68. *Id.* at 238 nn.30 & 31.

The Court reaffirmed the holding of *Williams*,[69] but, in light of the evidence relied on in *Ballew* and the findings of the Court,[70] the soundness of this reaffirmation is questionable. Since the only issue before the Court was whether a five-member panel was constitutionally permissible, not whether six jurors should still be considered adequate, the reaffirmation of *Williams* is dictum. The fact that the Court chose to uphold *Williams* is an indication that the Court realized that *Williams* could be challenged in light of *Ballew*. By its reaffirmation, the *Ballew* Court probably was indicating that *Williams* would not be reconsidered in the near future. Yet, the Court failed to demonstrate any sound reason why *Williams* should not be reexamined.[71] One study relied on by the *Ballew* Court tended to indicate that the proper jury size should be around seven and therefore supported the conclusion of *Williams*.[72] This study was so tenuously based, however, that its conclusion is not persuasive.[73] The Court may have deter-

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69. *Id.* at 239.

70. *See* notes 59-65 *supra* and accompanying text.

71. The *Williams* Court may have been indicating that it would apply the doctrine of stare decisis to the issue of the six-member jury. However, this doctrine is not binding on the courts and when circumstances mandate a change in the law, the doctrine yields to sounder principles of law. As Justice Frankfurter said:

> *[S]tare decisis* embodies an important social policy. It represents an element of continuity in law, and is rooted in the psychologic need to satisfy reasonable expectations. But *stare decisis* is a principle of policy and not a mechanical formula of adherence to the latest decision, however recent and questionable, when such adherence involves collision with a prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience.

Helvering v. Hallock, 309 U.S. 106, 119 (1940) (emphasis in origial); *see* Williams v. Florida, 399 U.S. 78, 127-29 (1970) (Harlan, J., dissenting).

72. 435 U.S. at 234 (citing Nagel & Neff, *Deductive Modeling to Determine an Optimum Jury Size and Fraction Required to Convict*, 1975 WASH. U. L.Q. 933).

73. The Nagel & Neff study, *supra* note 72, does state that the optimum jury size should be around seven, but this conclusion is based on the premise that it is ten times worse for an innocent party to be found guilty than for a guilty party to be found innocent. Nagel & Neff, *supra* note 72, at 944-48. To support this premise, Nagel & Neff only cite the same statement by William Blackstone. *Id.* at 945 (citing 4 W. BLACKSTONE, COMMENTARIES* 358). Thus, one could as easily assume that it is twenty or a hundred times worse for an innocent party to be found guilty than for a guilty party to be found innocent. In fact,

mined that the totality of the evidence presented in *Ballew* indicated that the benefits of the six-member panels outweighed the benefits of the larger twelve-member panels and that therefore, although the *Williams* rationale should not be extended to allow further reduction of the size of the jury, *Williams* should not be overruled. The evidence relied on by the Court indicates, however, that the benefits of the twelve-member panel outweigh the benefits of the six-member panel,[74] and therefore the *Williams* decision, because of the lack of support for its basic assumption that the six-member panel performs as well as the twelve-member panel, should at least be reconsidered, if not overruled.[75]

The Court's reliance on this empirical data, much of which

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the Nagel & Neff study points out that if one assumes that it is thirteen times worse for an innocent party to be found guilty than for a guilty party to be found innocent, then the optimum jury size would be twelve. *Id.* at 959.

74. One argument advanced by Georgia was that the smaller, five-member panel was sufficient to represent adequately the community. 435 U.S. at 241. The Court rebutted this argument by citing a study that showed that twelve-member panels were superior to six-member panels in their deliberations, communication, community representation, and reliability. 435 U.S. at 242 (citing M. SAKS, JURY VERDICTS at 107 (1977)).

Counterbalancing the benefits of the larger jury were the state's interests in saving time and money. 435 U.S. at 243-44. The Court found that the savings in financial resources would be substantial if the size of the jury were reduced from twelve to six. *Id.* at 244. However, this finding was not based on studies dealing with the states. Instead, this finding was based on two separate articles by Zeisel and Pabst that dealt with saving costs in the federal system. Pabst, *supra* note 44; Zeisel, *Twelve Is Just*, 10 TRIAL 13 (Nov.-Dec. 1974). The Zeisel study concluded that any savings in costs in the federal system would be de minimus compared with the benefits of the twelve-member jury. Zeisel, *supra* note 15. The Pabst study concluded that, although man-hours seemed to be saved by the use of smaller juries, this finding may not be accurate because part of the savings detected may have been attributable to more effective controls over the management of the six-member juries used in the study. Pabst, *supra* note 44, at 329. The Court further relied on the Pabst study to show that little or no savings in court time was found in the use of smaller, six-member panels rather than twelve-member panels. 435 U.S. at 244.

75. The strength of the reaffirmation of *Williams* might also be questioned in light of the other Justices' lack of agreement with Justice Blackmun's opinion. Only Justice Stevens joined in the opinion. 435 U.S. at 245. Justice White, who wrote *Williams*, concurred only in the result. *Id.* Justices Powell, Rehnquist, and Chief Justice Burger concurred but questioned the rationale of the Court. *Id.* Justices Brennan, Stewart, and Marshall concurred but did not think that the defendant should be tried again. *Id.* at 246.

was rejected in *Colgrove*,[76] indicates a dramatic shift in the Court's attitude toward the size of the jury. The significance of this change in attitude is evidenced by the fact that all the data cited by the Court as authority indicated that a significant degree of difference exists between the functioning of juries composed of *twelve* members and juries composed of *six*. None of the studies to which the Court referred dealt with differences between groups of six and groups of five. In addition, the Court used its observations from the data to negate all arguments presented by the state of Georgia[77] and to conclude that no overriding state interests were present that would permit a further reduction in the size of the jury.[78]

The importance of *Ballew* is that it does establish for the states a minimum jury size that is constitutionally permitted. In *Williams*, the Court allowed the states the freedom to experiment with the size of the jury without defining the limits of that latitude. But the foreseeable issue arising from *Williams* was that eventually the Court would have to determine a minimum jury size; otherwise, the states could do away with the jury system altogether, an action which the Court had forbidden the states in *Duncan*.[79] The *Ballew* decision indicates the Court is now more aware than it was in *Williams* of the difficulties that arise in determining the minimum size of the jury. Had the *Williams* Court been aware of the complexities involved, the wisest choice for the Court would have been to maintain the minimum size of the jury at twelve, at least until further evidence firmly established a justifiable reason to permit smaller panels. After considering the complex problems in *Ballew*, the assumption could be made that empirical evidence may never be accurate enough to take the question of the size of the jury out of the realm of the arbitrary and into the realm of the ascertainable. If this assumption is made, then a return to the twelve-member jury would

76. *See* note 48 *supra* and accompanying text.

77. 435 U.S. at 239-43.

78. *Id.* at 243-44.

79. In Duncan v. Louisiana, 391 U.S. 145 (1968), the Court had refused to let the states abandon trial by jury if the possibility of imprisonment was sufficiently serious. In Baldwin v. New York, 399 U.S. 66 (1970), the Court held that there was a right to a jury trial if the penalty to be imposed was six months or greater.

perhaps be the most viable alternative. Although twelve is an arbitrary number itself, it is at least supported by hundreds of years of experimentation and a gradual acceptance of twelve as a reasonable size. Judges, lawyers, legislatures, and laymen seemed more or less content that twelve jurors were both sufficiently representative of the community and reasonably manageable. As for allowing the states the right to experiment, certainly a mandate that the states must provide a jury composed of more than five members is just as much a restriction on state autonomy as a mandate requiring them to provide a jury of twelve. The only difference is the number imposed.

The *Ballew* decision is filled with hints that the Court is no longer as convinced as it once was that *Williams* and *Colgrove* were decided correctly. Indeed, had the empirical data used by the Court in *Ballew* been presented to the *Williams* Court, *Williams* probably would have been decided differently. That many state legislatures and federal courts have relied upon the *Williams* and *Colgrove* decisions is unfortunate because this reliance may hinder the Supreme Court while reconsidering those decisions.[80] From a legal standpoint, however, if the evidence found in *Ballew* is accepted as true and is applied to the rationale of *Williams*, the logical conclusion is that *Williams* should be overruled. The ultimate determination is whether our judicial system is really better off with juries of six members than with

80. By 1972, fifty-six out of ninety-four federal district courts allowed six-member juries in civil cases, including the western and middle districts of Tennessee. *See Annual Report of the Director of the Administrative Office of the United States Courts, 1972* 169, 179 (U.S. Gov. Print. Off. Wash. 1973) [hereinafter cited as *Report*]. By 1974, twelve districts had not reduced the number of jurors in civil cases. *See Report, 1974*, at 327. As of 1977, only ten districts had not reduced the jury's size in civil cases. *See Report, 1977*, at 479-80. In addition, a bill has been introduced in the 95th Congress to reduce the number of jurors to six in all civil cases tried in federal courts. *See Report, 1977*, at 83.

In Tennessee, the state constitution provides: "That the right of trial by jury shall remain inviolate . . . ." TENN. CONST. art. 1, § 6. This provision has been held to mean a jury as it existed under the common law of North Carolina at the time of the adoption of the Tennessee Constitution. Thus, twelve jurors are required, but the jurors or the entire jury can be waived. *See* Patten v. State, 221 Tenn. 337, 426 S.W.2d 503 (1968), *cert. denied*, 400 U.S. 844 (1970). In civil cases, the parties may stipulate that the jury shall consist of any number less than that provided by law. TENN. R. CIV. P. 48.

juries of twelve. The data indicates that twelve-member panels perform the function of a jury much better than six-member panels; but, it also indicates that, although little time is saved, some expense is reduced by the use of smaller panels.[81] If the constitutionality of the six-member jury is ever challenged again, the Supreme Court should address the issue whether the increased performance of the jury is worth the cost.[82]

ALBERT K. COCKE

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81. *See* note 74 *supra* and accompanying text.

82. In a recent decision, Burch v. Louisiana, 99 S. Ct. 1623 (1979), the Supreme Court held that jury unanimity must be maintained in state criminal courts using six-member panels. Since the Court had previously held that unanimity was not required in state criminal courts using twelve-member panels, Apodaca v. Oregon, 406 U.S. 404 (1972) (concurrence of ten out of twelve members allowed in certain noncapital cases); Johnson v. Louisiana, 406 U.S. 356 (1972) (concurrence of nine out of twelve members allowed in certain noncapital cases), the *Burch* decision indicates the Court's awareness of the potential loss of reliability of the jury as a factfinder and as a representative cross section of the community when the jury's size is reduced to six. The *Burch* decision, nonetheless, indicates the Court's continuing satisfaction with *Williams*. 99 S. Ct. at 1626.

Federal Courts—Diversity Jurisdiction—Ancillary Jurisdiction and Third-Party Practice

Plaintiff, a citizen of Iowa, brought a diversity[1] action for the wrongful death of her husband against defendant public utility corporation, alleging that the utility negligently constructed, maintained, and operated the power line where the deceased workman was electrocuted in an industrial accident. Defendant, a Nebraska corporation, impleaded a third party,[2] the corpora-

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1. 28 U.S.C. § 1332(a) (1976) provides in pertinent part: "The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000 . . . and is between . . . citizens of different States . . . . " 28 U.S.C. § 1332(c) (1976) provides: "For the purposes of this section . . . a corporation shall be deemed a citizen of any State by which it has been incorporated and of the State where it has its principal place of business . . . . "

2. FED. R. CIV. P. 14 deals with third-party practice and provides a means for drawing into the action a party not named in the complaint:

> (a) . . . At any time after commencement of the action a defending party, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him . . . . The person served with the summons and third-party complaint, hereinafter called the third-party defendant, shall make his defenses to the third-party plaintiff's claim as provided in Rule 12 and his counterclaim against the third-party plaintiff and crossclaims against other third-party defendants as provided in Rule 13. The third-party defendant may assert against the plaintiff any defenses which the third-party plaintiff has to the plaintiff's claim. The third-party defendant may also assert any claim against the plaintiff arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff. The plaintiff may assert any claim against the third-party defendant arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff, and the third-party defendant thereupon shall assert his defenses as provided in Rule 12 and his counterclaims and crossclaims as provided in Rule 13 . . . . A third-party defendant may proceed under this rule against any person not a party to the action who is or may be liable to him for all or part of the claim made in the action against the third-party defendant.
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> (b) . . . When a counterclaim is asserted against a plaintiff, he may cause a third party to be brought in under circumstances which under this rule would entitle a defendant to do so.

tion that owned and operated a crane that had come in contact with the power line and created the arc of electricity fatal to decedent. After the original defendant moved for summary judgment, plaintiff amended her complaint to state a claim against third-party defendant and alleged that it was incorporated in Nebraska and had its principal place of business in Nebraska. Defendant answered with a qualified general denial, admitting incorporation in Nebraska and denying generally all other allegations in the complaint. The original defendant's motion for summary judgment was granted,[3] and the case went to trial on plaintiff's claim against third-party defendant. On the third day of trial evidence was introduced to demonstrate that third-party defendant's principal place of business and, therefore, its citizenship, was in Iowa, not in Nebraska. Third-party defendant moved to dismiss the action for lack of subject matter jurisdiction. After the trial was concluded with a verdict for plaintiff, the trial judge denied defendant's motion.[4] On review, the Court of Appeals for the Eighth Circuit affirmed the judgment,[5] relying in part[6] on

3. Kroger v. Omaha Pub. Power Dist., 523 F.2d 161 (8th Cir. 1975) (holding that without ownership, control, or a duty to maintain the lines, the utility corporation had no duty to the decedent).

4. Kroger v. Owen Equip. & Erection Co., 558 F.2d 417, 429 (8th Cir. 1977) (appendix to majority opinion). The trial judge relied on United Mine Workers v. Gibbs, 383 U.S. 715 (1966), and retained jurisdiction because "[d]espite the fact the defendant has exclusive knowledge of the extent of his business in Iowa, it remained silent on this issue until more than two years subsequent to the filing of the amended complaint." 558 F.2d at 427 (quoting unpublished Memorandum Opinion of the district court).

5. 558 F.2d at 428.

6. *Id.* at 425-27. The court also considered with approval an estoppel theory that would preclude defendant's jurisdictional challenge after deliberate concealment of the defect. In a variety of contexts the Supreme Court has confirmed the rule that lack of subject matter jurisdiction may be raised at any time, by any party, or even by the court. *See, e.g.*, American Fire & Cas. Co. v. Finn, 341 U.S. 6 (1951); Capron v. VanNoorden, 6 U.S. (2 Cranch) 126 (1804). FED. R. CIV. P. 12(h)(3) provides that this defense is never waived. The rule is said to follow from the distribution of power between federal and state courts and from the limited nature of federal jurisdiction. Mansfield, Coldwater, & Lake Mich. Ry. v. Swan, 111 U.S. 379, 383-84 (1884) (quoting Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 566-67 (1856) (Curtis, J., dissenting)). Unfortunately, the rule permits a party to conceal lack of jurisdiction until he may gain an advantage by revealing it. If he wins on the merits, he remains silent; if he loses or is able to delay beyond the statute of limitations, he may raise the

United Mine Workers v. Gibbs,[7] in which the Supreme Court held that a federal court has power to attach to a federal claim another claim which has no independent basis of jurisdiction if the claims have a close factual nexus.[8] On writ of certiorari to the Court of

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defect and win on the question of jurisdiction. The maneuver is unfair to the other party who, if he had had notice of the defect, could have brought his claim in the proper court in a timely fashion. Moreover, the tactic wastes the time and energies of the court and is a misuse of the federal forum. *See* 1 MOORE'S FEDERAL PRACTICE ¶ 0.60[4], at 631-32 (2d ed. 1979); ALI STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS § 1386(a) (1969).

For these reasons, lower courts have ventured at least three routes around the rule. First, as in *Kroger*, jurisdiction has been retained by estopping the defendant to deny what he has admitted by his deliberate concealment of a jurisdictional defect. "The doctrine of the perpetual availability of jurisdictional challenge furnishes no sanctuary to appellant in the light of such conduct." 558 F.2d at 427. *See also* Murphy v. Kodtz, 351 F.2d 163 (9th Cir. 1965); DiFrischia v. New York Cent. R.R., 279 F.2d 141 (3rd Cir. 1960).

A second approach has been to retain jurisdiction by applying the rules of procedure to take as admitted those allegations not denied. *See* Biggs v. Public Serv. Coordinated Transp., 280 F.2d 311 (3rd Cir. 1960) (invoking FED. R. CIV. P. 8(d)). The Supreme Court, however, has expressly disapproved any solution, either equitable or procedural, that forecloses an objection to subject matter jurisdiction. In this context the Court has said that "[t]he jurisdiction of the federal courts is carefully guarded against expansion . . . by prior action or consent of the parties." American Fire & Cas. Co. v. Finn, 341 U.S. 6, 17-18 (1951).

The dissenting judge in *Kroger v. Owen* offered a third solution: dismiss the case for lack of jurisdiction but sanction defendant and his counsel by assessing against them all the costs incurred by plaintiff. 558 F.2d at 432 (Bright, J., dissenting) (citing Basso v. Utah Power & Light, 495 F.2d 906, 910-11 (10th Cir. 1974)). Since under the Federal Rules a party does not usually certify the pleadings, assessments against a party would seem to raise due process questions. Attorneys, however, must certify that there is good ground to support the pleadings, and they are subject to disciplinary action for a willful violation of that requirement. FED. R. CIV. P. 11. This latter approach would comply with the perpetual availability rule and would, at the same time, deter the most flagrant abuses of that doctrine. *See* note 88 *infra*.

7. 383 U.S. 715 (1966).

8. 558 F.2d at 423-24 (citing 383 U.S. at 726). In recognizing jurisdiction for a plaintiff's claim against a nondiverse party, the Eighth Circuit decision was the single exception in the courts of appeals. *See, e.g.*, Fawvor v. Texaco, Inc., 546 F.2d 636 (5th Cir. 1977); Johnson v. Better Mats. Corp., 556 F.2d 131 (3d Cir. 1976); Saalfrank v. O'Daniel, 533 F.2d 325 (6th Cir. 1976); Parker v. W. W. Moore & Sons, 528 F.2d 764 (4th Cir. 1975); Kenrose Mfg. Co. v. Fred Whitaker Co., 512 F.2d 890 (4th Cir. 1972). A number of commentators, however, have

Appeals for the Eighth Circuit, the United States Supreme Court, *held*, reversed. When the main claim is based on the general diversity statute, the district court has no power to hear a plaintiff's claim against a third-party defendant unless that claim is supported by an independent basis of jurisdiction. *Owen Equipment & Erection Co. v. Kroger*, 437 U.S. 365 (1978).

The problem before the Supreme Court was the extent to which a plaintiff can be accorded the benefits of the ancillary and pendent jurisdiction of the federal courts. The case raised the specific question whether in the context of general diversity jurisdiction a plaintiff could assert a claim against a third-party defendant whom he could not have sued independently in federal court. Although in recent years the lower courts have usually extended jurisdiction to all parties and claims needed to adjudicate a case, most have refused to extend jurisdiction to support a plaintiff's claims against a nondiverse third-party defendant. A resolution of the problem must take into account the constitutional and statutory grants of federal judicial power, the judicial doctrines of pendent and ancillary jurisdiction, and the purposes of the modern rules of civil procedure.

Federal courts are courts of limited jurisdiction; the limits are defined generally by the Constitution and specifically by acts of Congress. "Courts created by statute can have no jurisdiction but such as the statute confers."[9] Diversity jurisdiction is provided for in article III of the Constitution[10] and was enacted by Congress in the First Judiciary Act in 1789.[11] In *Strawbridge v. Curtiss*[12] Chief Justice Marshall announced the rule that has de-

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urged the extension of ancillary jurisdiction to include a plaintiff's claims against a third-party defendant. Most notably, Professor Moore, who had formerly supported denial of jurisdiction in that setting, urged that jurisdiction over these claims should come within the court's discretion. 3 MOORE'S FEDERAL PRACTICE ¶ 14.27[1], at 574 (2d ed. 1979).

9. Sheldon v. Sill, 49 U.S. 651, 652, 8 How. 448, 449 (1850).

10. U.S. CONST. art. III, § 2, cl. 1, provides in relevant part: "The judicial Power shall extend . . . to Controversies . . . between Citizens of different States . . . ."

11. Act of Sept. 24, 1789, ch. 20, § 11, 1 Stat. 73, 78. Despite numerous reenactments and a slight alteration in language, the statutory provision for general diversity jurisdiction remains unchanged. *See, e.g.*, Grover & B.S.M. Co. v. Florence S.M. Co., 85 U.S. (18 Wall.) 553 (1873).

12. 7 U.S. (3 Cranch) 267 (1806).

fined diversity of citizenship for most of the history of our system: every party on one side of a lawsuit must have a citizenship different from every party on the other side of the suit. This rule of complete diversity is still the rule followed under the general diversity statute, although in *State Farm Fire & Casualty Co. v. Tashire*[13] the Supreme Court held that the *Strawbridge* rule was not mandated by the Constitution. Article III is satisfied by minimal diversity, and Congress may broaden diversity jurisdiction "so long as any two adverse parties are not co-citizens."[14]

That lower federal courts may not hear cases outside the statutory jurisdictional grant is an almost indisputable proposition,[15] but it is only an initial one. Within the statutory scheme the federal courts have developed judicial doctrines of ancillary and pendent jurisdiction to support adjudication of additional claims not independently capable of being adjudicated in federal court. Thus, even though jurisdiction was limited by statute and, for example, in a diversity action the statute was construed to require complete diversity, claims that were not "original [but were] dependent [could be] maintained without reference to the citizenship or residence of the parties."[16] Similarly, although neither the Constitution[17] nor the federal question statute[18] expressly grants to the federal judiciary the power to decide matters of state law, courts decide state law questions as an aid to their determination of cases arising under federal law.

Ancillary jurisdiction developed as a practical tool employed, not at the outset of litigation, but at some point after the filing of the original claim.[19] It is used appropriately whether jurisdic-

13. 386 U.S. 523 (1967).

14. *Id.* at 531 (Court decided that Congress had intended minimal diversity in the language of the particular statute at issue, the interpleader statute, 28 U.S.C. § 1335 (1976)). Whether the *Strawbridge* rule was required by article III of the Constitution or was merely a construction of the statute had been discussed but not decided in earlier cases. *E.g.*, Treinies v. Sunshine Mining Co., 308 U.S. 66, 71-72 (1939); Shields v. Barrows, 58 U.S. (17 How.) 130, 145 (1855).

15. *See generally* C. WRIGHT, LAW OF FEDERAL COURTS § 10 (3d ed. 1976).

16. Freeman v. Howe, 65 U.S. (24 How.) 450, 460 (1860).

17. U.S. CONST. art. III, § 2, cl. 1.

18. 28 U.S.C. § 1331(a) (1976).

19. *See, e.g.*, Supreme Tribe of Ben-Hur v. Cauble, 255 U.S. 356, 366-67 (1921); Freeman v. Howe, 65 U.S. (24 How.) 450, 460 (1860).

tion of the original claim rested on diversity,[20] on the presence of a federal question,[21] or on some other jurisdictional base,[22] and supported the addition of both claims and parties.[23] The doctrine has its origin in the preservation of the process and judgments of the federal judicial system.[24] In the leading case, *Freeman v. Howe*,[25] the Supreme Court held that state courts could not interfere with property already in the custody of a federal court.[26] Appellees argued that since their citizenship was not diverse to the parties claiming the property in a federal action, they were without a forum for their meritorious claims.[27] To this plea, the Court remarked that appellees could have asserted their claims in the federal court and that, since their claims were dependent and not original, the jurisdictional defect would not exclude them.[28] Outside this narrow situation of property within the court's custody, ancillary jurisdiction was also employed solely to preserve and give effect to a prior federal judgment.[29] In conjunction with these protections of the federal judicial process, the Court has acknowledged simple fairness as a basis for exercising extraordinary jurisdiction.[30]

Although early cases dealt almost exclusively with property in the custody of a federal court,[31] the ancillary concept was ex-

20. *See, e.g.*, Kenrose Mfg. Co. v. Fred Whitaker Co., 512 F.2d 890 (4th Cir. 1972).

21. *See, e.g.*, Dery v. Wyer, 265 F.2d 804 (2d Cir. 1959).

22. *See, e.g.*, Leather's Best, Inc. v. S.S. Mormaclynx, 451 F.2d 800, 810 nn.11 & 12 (2d Cir. 1971) (dictum) (admiralty jurisdiction).

23. *E.g.*, Revere Copper & Brass, Inc. v. Aetna Cas. & Sur. Co., 426 F.2d 709 (5th Cir. 1970).

24. *See* Minahan, *Pendent and Ancillary Jurisdiction of the United States Federal District Courts*, 10 CREIGHTON L. REV. 279, 284 (1976).

25. 65 U.S. (24 How.) 450 (1860).

26. *Id.* at 459.

27. *Id.* at 460.

28. *Id.*

29. *See, e.g.*, Root v. Woolworth, 150 U.S. 401 (1893); Pacific R.R. v. Missouri Pac. Ry., 111 U.S. 505 (1884); Dietzsch v. Huidekoper, 103 U.S. 494 (1880).

30. "[I]t is but common justice to furnish [the nondiverse claimants] with an equal and adequate remedy in the court itself which maintains control of the property . . . . " Krippendorf v. Hyde, 110 U.S. 276, 281 (1884).

31. As late as 1925, the Court stated, "No controversy can be regarded as dependent or ancillary unless it has a direct relation to property . . . drawn into the court's possession or control by the principal suit." Fulton Nat'l Bank of Atlanta v. Hozier, 267 U.S. 276, 280 (1925).

panded greatly in *Moore v. New York Cotton Exchange*.[32] The main claim was a suit for violation of federal antitrust laws, but the Court allowed defendant to assert a state claim in the nature of a compulsory counterclaim since the state claim arose "out of the transaction which [was] the subject matter of the suit."[33] "Transaction" was defined in terms of "logical relationship" and a similarity of "essential facts."[34] This modern statement of ancillary jurisdiction opened the way for application of the doctrine to third-party litigation, especially after the adoption of the modern rules of procedure in 1938.[35]

While ancillary jurisdiction became a broad utilitarian doctrine supporting the addition of claims and parties after the initiation of the principal suit and in numerous jurisdictional settings, pendent jurisdiction was much more limited. The pendent doctrine pertained exclusively to cases arising under some federal law and to the original plaintiff's additional state claim against the original defendant.[36] The doctrine was first expressed in *Osborn*

32. 270 U.S. 593 (1926). In this case no property was within the court's custody nor was any prior judgment to be preserved.

33. *Id.* at 609. The Court did not discuss any ancillary precedents, nor did it mention ancillary jurisdiction. The apparent authority for the holding was Equity Rule 30, 226 U.S. 657 (1912) (current version at FED. R. CIV. P. 13(a)), which governed counterclaims. The Court's entire discussion addressed the problem whether the counterclaim was compulsory or permissive. Having decided that it was compulsory, the Court concluded that the question of jurisdiction need not be considered. 270 U.S. at 609. Nonetheless, *Moore* is considered the leading case in modern ancillary jurisdiction. *See, e.g.*, Fraser, *Jurisdiction of the Federal Courts of Actions Involving Multiple Claims*, 76 F.R.D. 525 (1978).

34. 270 U.S. at 610. Transaction is now commonly defined as a factual relationship. *See, e.g.*, LASA Per L'Industria Del Marmo Soc'y Per Azioni v. Alexander, 414 F.2d 143, 147 (6th Cir. 1969); Great Lakes Rubber Co. v. Herbert Cooper Co., 286 F.2d 631, 634 (3d Cir. 1961); Dery v. Wyer, 265 F.2d 804, 807 (2d Cir. 1959).

35. The Federal Rules of Civil Procedure became effective in 1938. Prior to the adoption of the modern rules, both common-law precepts and various enacted codes of procedure posed numerous obstacles to the addition of claims and parties to an original suit. The obstacles resulted in a multiplicity of suits, which imposed unwanted burdens on the courts and on the parties. "Under the Rules, the impulse is toward entertaining the broadest possible scope of action; . . . joinder of claims, parties, and remedies is strongly encouraged." UMW v. Gibbs, 383 U.S. 715, 724 (1966).

36. The additional state claim did not create a problem in diversity cases

v. Bank of the United States[37] in which the Court held that the presence of a state law question did not defeat federal jurisdiction.[38] In fact, the state question could be decided along with the issues of federal law in order that the federal court could decide the whole case. The considerations here were not practical, equitable ones; they were constitutional concerns, balancing the need to exercise federal jurisdiction over "[c]ases . . . arising under . . . the Laws of the United States"[39] with the limitations imposed by comity and federalism. As the doctrine developed, the Court established that, once jurisdiction was properly invoked, the federal court could decide the state question without reaching the federal one[40] or even after deciding against the federal claim.[41] The latter situation can be justified only by convenience and judicial economy;[42] no great issues of federal judicial power require deciding a state law claim alone.

The Supreme Court clearly expressed a pragmatic basis for pendent jurisdiction in *United Mine Workers v. Gibbs*.[43] "[I]f,

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since jurisdiction was based on the citizenship of the parties and that ground necessarily remained for any claims brought between the two main parties. In a diversity case the only jurisdictional defect in plaintiff's additional claim would be that it did not satisfy the statutory amount. Conceptually, exercise of jurisdiction over claims below the requisite amount would be supported, if at all, by the pendent doctrine, but this problem is generally treated separately as aggregation. When multiple plaintiffs attempt to aggregate their claims to satisfy the statutory amount, the Supreme Court has applied the pendent jurisdiction doctrine. *See* note 96 *infra*.

37. 22 U.S. 251, 9 Wheat. 738 (1824).

38. *Id.* at 255-57, 9 Wheat. at 819-22.

39. U.S. CONST. art. III, § 2, cl. 1.

40. Siler v. Louisville & Nashville R.R., 213 U.S. 175 (1909).

41. Hurn v. Oursler, 289 U.S. 238 (1933). In this plagiarism case, the Court extended jurisdiction to the state claim of unfair competition along with the federal claim for copyright infringement because the claims were "but different grounds—[for] the same cause of action." *Id.* at 247. The "cause of action" term was characteristic of the various state codes of civil procedure as they defined what a plaintiff must plead in his complaint. The restrictive term was abandoned by the Federal Rules, and subsequently by most states, in favor of "a short and plain statement of the claim," FED. R. CIV. P. 8(a)(2). The formulation in *Hurn* reflected the contemporary procedural definition. *See* note 44 *infra*.

42. *See* H. HART & H. WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 804 (1953); C. WRIGHT, THE LAW OF FEDERAL COURTS § 19, at 73 (3d ed. 1976).

43. 383 U.S. 715 (1966).

considered without regard to their federal or state character, a plaintiff's claims are such that he would ordinarily be expected to try them all in one judicial proceeding, . . . there is power in federal courts to hear the whole."[44] Holding that jurisdictional power is established if "[t]he state and federal claims . . . derive from a common nucleus of operative fact,"[45] the Court directed that this power be exercised at the courts' discretion for reasons of "judicial economy, convenience, and fairness to the litigants."[46] Thus, the issue of federal power was satisfied by a close factual relationship between the two claims, and questions regarding the propriety of joining the state claim were left as matters within the discretion of the judge.[47]

Although pendent jurisdiction had been exercised exclusively in connection with original parties,[48] some lower courts read the broad language in *Gibbs* as authority for joining parties, as well as claims, to the main action.[49] Application of the doctrine

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44. *Id.* at 725. The leading jurisdiction cases clearly demonstrate the interplay between procedure and jurisdiction. Noting the tension between the *Hurn* "same cause of action" formulation and the Federal Rules, the Court observed that "[u]nder the Rules, the impulse is toward entertaining the broadest possible scope of action." *Id.* at 724. In Moore v. New York Cotton Exchange, 270 U.S. 593 (1926), the "transaction" term was taken directly from the relevant Equity Rule. *See* note 33 *supra*. Similarly, in Hurn v. Oursler, 289 U.S. 238 (1933), the definitional language matched the prevailing procedural term. *See* note 41 *supra*.

On the other hand, that jurisdiction derives only from the Constitution and acts of Congress is equally clear. FED. R. CIV. P. 82 states in part: "These rules shall not be construed to extend or limit the jurisdiction of the United States district courts . . . . " This seeming paradox is resolved by judicial interpretation. "The doctrines of ancillary and pendent jurisdiction, as we know them today, are a by-product of the tensions produced when courts of limited jurisdiction strive to implement a modern procedural system." Minihan, *Pendent and Ancillary Jurisdiction of the United States Federal Courts*, 10 CREIGHTON L. REV. 279, 296 (1976). *But see* C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1444 (1971). *See also* Goldberg, *The Influence of Procedural Rules on Federal Jurisdiction*, 28 STAN. L. REV. 395 (1975).

45. 383 U.S. at 725.

46. *Id.* at 726.

47. *Id.* at 725.

48. Aldinger v. Howard, 427 U.S. 1, 9 (1976). *See generally* Fortune, *Pendent Jurisdiction—The Problem of Pendenting Parties*, 34 U. PITT. L. REV. 1 (1972); Note, *Federal Pendent Party Jurisdiction and United Mine Workers v. Gibbs—Federal Question and Diversity Cases*, 62 VA. L. REV. 194 (1976).

49. *E.g.*, Schulman v. Huck Finn, Inc., 472 F.2d 864 (8th Cir. 1973); Con-

in this setting would permit the original plaintiff to join a state claim against a nondiverse party with his federal claim against another party if a sufficient factual connection could be shown between the two claims and if the discretionary factors of *Gibbs*[50] weighed in favor of joining the claims. The Supreme Court seemed ready to apply the *Gibbs* fact-based standard to pendent-party situations in *Moor v. County of Alameda*[51] but declined to decide whether *Gibbs* permitted pendent-party jurisdiction and held only that, even if such jurisdiction were permitted, the lower court had not abused its discretion in refusing jurisdiction.[52]

In *Aldinger v. Howard*[53] the Court met the pendent-party question with a basic, but seemingly forgotten, proposition:

> But the question whether jurisdiction over the instant lawsuit extends not only to a related state-law claim, but to the defendant against whom that claim is made, turns initially, not on the general contours of the language in Art. III, i.e. "Cases . . . arising under," but upon the deductions which may be drawn from congressional statutes as to whether Congress wanted to grant this sort of jurisdiction to federal courts.[54]

In *Aldinger* plaintiff alleged that she had been wrongfully discharged from her job. She brought a federal civil rights claim against county officials and joined a state law tort claim against the county itself. Federal jurisdiction rested on 28 U.S.C. § 1343, the jurisdictional counterpart of the civil rights statutes. The Court reasoned that since suits against counties were not authorized by 42 U.S.C. § 1983, the relevant jurisdictional statute could

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necticut Gen. Life Ins. Co. v. Craton, 405 F.2d 41 (5th Cir. 1968).

50. 383 U.S. 715 (1966). Efficiency and fairness factors weigh in favor of pendent jurisdiction; however, if the federal claim is dismissed before trial, if closely related issues of state and federal law suggest a likelihood of jury confusion, or if state claims predominate, the court should decline jurisdiction over those claims. 383 U.S. at 728-29.

51. 411 U.S. 693 (1973). Plaintiff brought an action in federal court for violation of his civil rights under 42 U.S.C. section § 1983 (1976) and attempted to assert a state claim against another, nondiverse party at the same time. He argued unsuccessfully that since the second claim arose out of the same nucleus of operative facts, the court should exercise its discretionary power and allow the nondiverse party to be joined as a defendant.

52. 411 U.S. at 715-17.

53. 427 U.S. 1 (1976).

54. *Id.* at 16-17.

not support a state claim against a pendent-party county and held that an independent basis of jurisdiction would be required for the state claim.[55] A broad decision on the propriety of pendent-party jurisdiction was thus avoided by the finding of an implied exclusion in the statute.

The holding in *Aldinger* was carefully limited to the particular jurisdictional statute, and the Court suggested that in another statutory setting pendent-party jurisdiction might well be proper.[56] Further, the holding was limited to the situation in which a plaintiff attempted to join a defendant whom he could not have sued independently in federal court. "If the new party . . . is not otherwise subject to federal jurisdiction, there is a more serious obstacle to the exercise of pendent jurisdiction than if parties already before the court are required to litigate a state-law claim."[57] The state of the law seemed to be that jurisdiction would extend to a plaintiff's claims against a party who was before the court, for example, as a third-party defendant joined under ancillary jurisdiction, and who was not excluded in some particular way by the jurisdictional statute on which the main claim rested.[58]

While the notion of pendent-party jurisdiction was emerging in the late 1960's and early 1970's, ancillary jurisdiction was expanding in the lower courts as well. The modern rules of civil procedure, with liberal provisions for joinder of claims and parties, permitted extensive multiparty, multiclaim litigation not possible before.[59] Each additional claim and party required some jurisdictional basis, and insofar as these claims arose out of the same transaction as the original claim and did not have an independent jurisdictional base, ancillary jurisdiction was applied.[60]

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55. 427 U.S. at 17. At the time, the question of a municipality's liability for civil rights violations was controlled by Monroe v. Pape, 365 U.S. 167 (1961), in which the Court held that municipal corporations were immune from such liability. The Court later expressly overruled that holding. Monell v. New York City Dep't of Soc. Serv., 436 U.S. 658 (1978) (holding that while the city could not be liable solely under respondeat superior, it could be liable for its own official acts). Although a different result might now be reached in a section 1983 suit, *Monell* in no way affects the rationale of *Aldinger*.

56. 427 U.S. at 18.

57. *Id.*

58. *See* Fraser, *supra* note 33, at 533.

59. *See* note 35 *supra*.

60. *See generally* Fraser, *Ancillary Jurisdiction and the Joinder of Claims*

In particular, with respect to impleaded parties[61] no independent basis of jurisdiction was required for a defendant's claim for indemnity against a third-party defendant,[62] a defendant's ancillary claim for his own damages against the third-party defendant,[63] or a third-party defendant's counterclaims and defenses and his fourth-party indemnity claims.[64] In addition, in some circuits the third-party defendant was allowed to assert claims against the plaintiff with no independent basis of jurisdiction.[65] A few district courts also allowed a plaintiff to sue the third-party defendant without diversity or some other independent statutory jurisdictional basis.[66]

While practical procedural needs served to expand the scope of ancillary jurisdiction,[67] the pendent-party concept tested the limits of *Gibbs*. In the background were concerns for maintaining a proper balance between federal and state courts and the requirements of the jurisdictional statutes, in particular the requirement of complete diversity. Although the pendent and ancillary forms of jurisdiction developed in different settings, and have thus had different application and definitions, both concepts deal with one fundamental question: When can the federal court entertain a claim that does not come within an express statutory grant of jurisdiction?[68]

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in the Federal Court, 33 F.R.D. 27 (1963).

61. FED. R. CIV. P. 14(a). See note 2 *supra* for text of this rule.

62. *E.g.*, Dery v. Wyer, 265 F.2d 804 (2d Cir. 1959).

63. *E.g.*, Nishimatsu Constr. Co. v. Houston Nat'l Bank, 515 F.2d 1200 (5th Cir. 1975) (dictum); Schwab v. Erie Lackawanna R.R., 438 F.2d 62 (3d Cir. 1971).

64. *E.g.*, Penn Finance Corp. v. Chelsea Title & Guar. Co., 371 F. Supp. 398, 399 n.1 (E.D. Pa. 1974).

65. *E.g.*, Mayer Paving & Asphalt Co. v. General Dynamics Corp., 486 F.2d 763 (7th Cir. 1973), *cert. denied*, 414 U.S. 1146 (1974); Revere Copper & Brass, Inc. v. Aetna Cas. & Sur. Co., 426 F.2d 709 (5th Cir. 1970).

66. *E.g.*, Morgan v. Serro Travel Trailer Co., 69 F.R.D. 697 (D. Kan. 1975); Davis v. United States, 350 F. Supp. 206 (E.D. Mich. 1972); Buresch v. American La France, 290 F. Supp. 265 (W.D. Pa. 1968); Olson v. United States, 38 F.R.D. 489 (D. Neb. 1965); Sklar v. Hayes, 1 F.R.D. 594 (E.D. Pa. 1941).

67. Liberal joinder of claims and parties enables the courts to resolve in one proceeding all questions arising out of one transaction. Such joinder avoids the necessity for multiple suits that burden the parties with expense, delay, and the risk of inconsistent results and that burden the courts with duplication of effort and sensitive issues of comity.

68. *See generally* Comment, *Pendent and Ancillary Jurisdiction: Towards*

In *Owen v. Kroger*,[69] the Supreme Court acknowledged the "generic" similarity of the pendent and ancillary doctrines and the possible application of either line of cases to the added-party problem.[70] Assuming without deciding that pendent theory as expressed in *Gibbs* would support a plaintiff's ancillary claim against a third-party defendant in a diversity case,[71] the Court followed the approach taken in *Aldinger*. *Gibbs*, the Court stated, defined only the broadest permissible scope of jurisdiction provided in article III; Congress defines the exact scope in specific grants of jurisdiction.[72] With *Gibbs* limited to a general interpretation of constitutional power, the *Kroger* decision turned on a construction of the general diversity statute. Initially, the Court simply reiterated the rule of *Strawbridge* as construed in *Tashire*: article III permits minimal diversity, but the general diversity statute requires complete diversity.[73] However, the Court did not suggest that complete diversity for *all* adverse parties is required. The "context" of the claim was viewed as "crucial."[74] The statute's implied prohibition of claims against nondiverse parties applies only to the plaintiff, who has chosen the forum and thereby has subjected himself to the most restrictive reading of the statute.[75] When the principal suit rests on the general diversity statute, federal courts have no power to hear a plaintiff's claims against nondiverse parties; such claims cannot be supported by ancillary or pendent jurisdiction.[76] On the other hand,

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a Synthesis of Two Doctrines, 22 U.C.L.A. L. REV. 1263 (1975); Note, *Rule 14 Claims and Ancillary Jurisdiction*, 57 VA. L. REV. 265, 267-72 (1971).

69. 437 U.S. 365 (1978).

70. *Id.* at 370 & n.8.

71. *Id.* at 371 n.10.

72. *Id.* at 373.

73. *Id.* at 373 & n.13.

74. *Id.* at 375-76.

75. *Id.* at 376.

76. *Id.* at 377 n.21. The breadth of the Court's statement of the holding makes it clear that *Kroger* is not limited to cases in which the main claim has been dismissed before trial. The dismissal of the main claim appeared only in the preliminary statement of the facts and played no part in the Court's analysis. Jurisdiction over ancillary claims is usually not defeated by dismissal of the original suit. *See, e.g.*, Dery v. Wyer, 265 F.2d 804 (2d Cir. 1959) (retaining jurisdiction over an ancillary claim after the main claim was dismissed).

Arguably, *Kroger* will not preclude jurisdiction of a plaintiff's compulsory counterclaims against a nondiverse third-party defendant since the plaintiff

the Court found in the statute an implied permission for a defendant's claims against nondiverse parties. "Haled into court against his will,"[77] a defendant deserves the protective application of ancillary jurisdiction.[78]

In *Kroger* the Court's search for congressional intent was cursory and rested entirely on a notion of adoption by reenactment. The Court found a clearly demonstrated congressional mandate in the repeated reenactments of diversity jurisdiction with no change in the requirement of complete diversity.[79] This treatment assumes that Congress was aware of and consciously approved the courts' decisions on particular matters of procedural detail. The Court assumed too much from legislative silence. In another context, the Court has said that "the fact that Congress has remained silent or has re-enacted a statute which we have construed . . . does not necessarily debar us from reexamining and correcting the [courts'] own errors."[80] Congress has never spoken to the Court's expansion of jurisdiction through ancillary and pendent doctrines. It may, by inaction, have empowered the judiciary to deal with these matters. At most, Congress was probably aware of the rule of complete diversity as it applied to parties in an original action. Indeed, that was the setting in *Strawbridge*, and that case would not be overruled by

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could be said to be in the posture of a defendant and to deserve more generous jurisdiction. Of course, the Court presumed that plaintiff's foresight extended to parties that defendant might implead, and the presumption might include foresight of claims that those parties might file against him. If so, any plaintiff would be at great risk in a diversity action since he might find himself forced by a third-party defendant to bring a separate action in state court with respect to claims that he either did not foresee or did not intend to press.

77. 437 U.S. at 376.

78. *Id.* The Court expressly approved ancillary jurisdiction in the context of a defendant's third-party indemnity claim, *id.*, but simply acknowledged that "[i]t has been said" that ancillary jurisdiction properly applies in other contexts (intervention, joinder, crossclaims), *id.* at 375 n.18.

79. *Id.* at 374. Evidence of the mandate was found in the 1946 Advisory Committee's Note to rule 14, in which the committee observed that a majority of courts had required an independent ground of jurisdiction for a plaintiff's claims against a third-party defendant. *Id.* at 374 n.16. The Court reached the tenuous conclusion that Congress was aware of this Committee Note and approved the majority view by enacting the 1948 version of general diversity jurisdiction. *Id.*

80. James v. United States, 366 U.S. 213, 220 (1961).

approving jurisdiction for a plaintiff's claims against a party impleaded by the defendant.[81]

More than with congressional intent, the Court was concerned that a plaintiff might manipulate a lawsuit to avoid any requirement of diversity.[82] If ancillary or pendent jurisdiction could support a plaintiff's claims against a nondiverse party, he could sue only those defendants who were of diverse citizenship, wait for them to implead nondiverse joint tortfeasors, and then sue those nondiverse parties. While this anticipation of events would not amount to collusion to create jurisdiction, the majority viewed a plaintiff's assertion of claims in this situation as an impermissible circumvention of the statute.[83] To avoid this problem entirely, the Court found an absolute bar in the statute.

The solution is too broad. Assuming, as the Court did, that jurisdiction should be denied in such cases, it could have been denied through the discretionary power expressed in *Gibbs*. *Gibbs* recognized that "pendent jurisdiction is a doctrine of discretion, not of plaintiff's right"[84] and that the issue of jurisdiction remains open throughout the litigation.[85] Further, "recognition of a federal court's wide latitude . . . does not imply that it must tolerate a litigant's effort to impose upon it what is in effect only a state law case."[86] The particular factors suggested in *Gibbs*[87] were in the context of a federal question case, but additional ones could be outlined for diversity cases. For example, if lack of diversity appeared in the pleadings, the trial court should dismiss; even if that defect became evident later in the proceedings, the court could dismiss if the plaintiff apparently knew or should

81. *See* 437 U.S. at 380-83 (White, J., dissenting) (quoting and distinguishing Aldinger v. Howard, 427 U.S. 1, 14-15 (1976)); text accompanying notes 58 & 59 *supra*.

82. 437 U.S. at 374.

83. *Id.* at 374 n.17. Since "[a] district court shall not have jurisdiction . . . in which any party . . . has been improperly or collusively made or joined to invoke the jurisdiction of such court," 28 U.S.C. § 1359 (1976), the dissenting justices would treat only actual collusion to avoid the diversity requirement with dismissal. 437 U.S. at 382-83 (White, J., dissenting). Absent collusion, however, the dissent saw no need to restrict the plaintiff in his claims against parties whom he did not bring into the action. *Id.*

84. UMW v. Gibbs, 383 U.S. 715, 726 (1966).

85. *Id.* at 727.

86. *Id.*

87. *See* note 50 *supra*.

have known the true citizenship of the defendants. These factors would weigh heavily in favor of retaining jurisdiction over the plaintiff's claim in *Kroger*. Not only did the third-party defendant fail to clarify his citizenship until the trial was almost concluded,[88] but the record indicates that the geographical location of his place of business could not have been easily ascertained.[89] Furthermore, in addition to the expense and delay of a second proceeding, the statute of limitations may have run on plaintiff's action in state court.[90]

A particularly troublesome part of the decision is the Court's treatment of ancillary jurisdiction. Having held that the trial court lacked the power to invoke ancillary jurisdiction for plaintiff's claim, the Court stated in dictum that the claim would not have been ancillary to the main case because it was not "logically dependent" on the original claim.[91] Logical dependence as used by the *Kroger* Court implies some *necessary* relationship between the ancillary claim and the main claim. The Court offered two examples: third-party claims[92] and claims to property in the custody of a federal court.[93] In the first example, the third-party defendant, by definition, can be liable only if the defendant is found liable; in the second example, because the state court cannot interfere with the federal proceeding, the nondiverse claimant can protect his rights only if the federal court extends its jurisdiction. Such a limited theory of ancillary jurisdiction ignores the practical needs of complex litigation that produced the broad

88. The Court did mention the asserted inequity in the delayed challenge to jurisdiction but termed it "irrelevant." 437 U.S. at 377 n.21 (citing American Fire & Cas. Co. v. Finn, 341 U.S. 6 (1951)). This summary treatment of the second ground of the Eighth Circuit's holding clearly indicates that the Court is not willing to reconsider the perpetual availability of an objection to subject matter jurisdiction. *See* note 6 *supra*.

89. 437 U.S. at 369 n.5; *see* Brief for Respondent in Opposition to the Petition for Certiorari at 6, Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365 (1978).

90. 437 U.S. at 376 n.20. The Court called this a matter of state law only and not a proper consideration in the question of federal jurisdiction. *Id. But see* ALI STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS § 1386(b) (1969) (proposing a federal statute to require the tolling of state statutes of limitations for timely actions filed in federal court).

91. 437 U.S. at 376.

92. *Id.*

93. *Id.* at 375 n.18 (citing Freeman v. Howe, 65 U.S. (24 How.) 450 (1860)).

scope of action contemplated by the rules of civil procedure.[94]

Since the modern standard for ancillary jurisdiction in the lower courts is found in the close factual relationship of the claims,[95] the Supreme Court's definition encourages a restrictive approach to such jurisdiction. *Owen v. Kroger* is the first case in decades in which the Supreme Court has addressed ancillary theory directly[96] and should be read as a tentative criticism of the lower courts' liberal "factual similarity"[97] test. Since the Court expressed its view only in dictum, a case in which jurisdiction is not foreclosed by statute may still persuade the Court to approve a more pragmatic approach in line with the lower courts' decisions.

Owen v. Kroger can best be understood as one of a variety of cases restricting access to the federal courts[98] and, in particu-

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94. *See* notes 44 & 67 *supra*.

95. *See* note 34 *supra*.

96. In Aldinger v. Howard, 427 U.S. 1 (1976), the Court reviewed the development of pendent and ancillary doctrines, *id.* at 6-13, but decided the case on statutory grounds, *id.* at 16-18. Similarly, in class action cases the Court has avoided addressing the doctrines directly by interposing a strict reading of the statutory jurisdictional amount requirement. Zahn v. International Paper Co., 414 U.S. 291 (1973) (holding that class action plaintiffs whose claims did not separately meet the jurisdictional amount could not aggregate their claims with named parties who did meet the requirement); Snyder v. Harris, 394 U.S. 332 (1969) (holding that when none of the plaintiffs could satisfy the amount requirement, they were not permitted to aggregate their claims).

97. The Court cited Moore v. New York Cotton Exch., 270 U.S. 593 (1926), in support of the requirement of "logical dependence" and not "mere factual similarity." 347 U.S. at 376. Although the Court in *Moore* did speak of "logical relationship," this term was explained as a similarity of "essential facts," 270 U.S. at 610, and not as any necessary dependence of the ancillary claim on the principal one.

98. Constitutional and prudential doctrines of standing impede challenges to government action. *E.g.*, Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26 (1976); Warth v. Seldin, 422 U.S. 490 (1975); Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208 (1974); United States v. Richardson, 418 U.S. 166 (1974). Class action requirements have become quite restrictive. *See* Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974); Zahn v. International Paper Co., 414 U.S. 291 (1973); Snyder v. Harris, 394 U.S. 332 (1969). Deference to state courts has barred plaintiffs seeking injunctions against enforcement of local law, Huffman v. Pursue, Ltd., 420 U.S. 592 (1975); Younger v. Harris, 401 U.S. 37 (1971), and petitioners seeking federal writs of habeas corpus, Stone v. Powell, 428 U.S. 465 (1976). *See generally* A Statement of the Board of Governors, Society of American Law Teachers (Oct. 10, 1976) (suggesting that the

lar, as a judicial response to the caseload burden imposed by diversity jurisdiction.[99] The statutory holding causes no disruption in current practice because only a minority of courts had adopted the position taken by the Eighth Circuit in *Kroger*.[100]

On the other hand, the outmoded ancillary standard expressed in *Kroger* will likely cause some confusion in the lower courts, which are, after all, the courts that must deal with the tangle of complex litigation. The jurisdictional solutions thoughtfully developed by those courts should not be ignored as the Court looks back to the origins of ancillary jurisdiction. To the extent that the restrictive theory of ancillary jurisdiction is prompted by a concern about an increase in diversity cases, the Court has cautiously grounded the *Kroger* holding on an interpretation of the diversity statute and not on a general theory of ancillary jurisdiction applicable in all jurisdictional settings. If Congress does limit diversity jurisdiction, the Court will be free of a recent restrictive precedent and may be more receptive to a factual-similarity standard.

Finally, although the Court again carved out a class of claims that cannot be supported by a *Gibbs* pendent theory,[101] its treatment of *Gibbs* was encouragingly careful in two particular ways. First, the Court seemed to acknowledge, *inter alia*, the commonality of the pendent and ancillary doctrine. This recognition promises a more unified theory of jurisdiction and avoids limiting *Gibbs* to federal question cases. Second, nothing in *Kroger* precludes the exercise of pendent-party jurisdiction in cases brought under other jurisdictional statutes. By its statutory holding the Court avoided both a constitutional holding and a definitive statement of judicial theory on the pendent-party question. The Court has not decided a pendent-party question arising under the

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restricted access most heavily burdens lower-income and public-interest groups).

99. One-fourth of the district courts' case-related time is spent on diversity cases. FEDERAL JUDICIAL CENTER, THE 1969-79 FEDERAL DISTRICT COURT TIME STUDY 89 (1971) (computation based on Table XXXIX); Burger, *Chief Justice's Yearend Report, 1977*, 64 A.B.A.J. 211, 212 (1978).

100. For circuit courts denying jurisdiction to a plaintiff's claim against nondiverse parties, see note 8 *supra*. For district courts extending jurisdiction to such claims, see note 66 *supra*.

101. *See* text accompanying note 55 *supra*; note 96 *supra*.

general federal question statute.[102] The most appealing occasion for approving pendent-party jurisdiction would be one in which the plaintiff's federal claim fell within the *exclusive* jurisdiction of the federal court, as, for example, a tort action against the United States[103] or a suit under federal patent or copyright law.[104] In such a case an injured party would not have the option of joining his federal claim with his related claims against second parties in a state forum. He would thus be required to bear the burdens of multiple suits if he could not invoke pendent-party jurisdiction.[105] Since the analysis in *Kroger* rests at least in part on plaintiff's ability to choose the forum, an exclusive jurisdiction case should produce a different result. Indeed, anticipation of such a situation probably accounts for the narrow statutory holding in *Kroger*.

JUDY WOOD BLACK

102. Since both diversity and federal question jurisdiction are provided by the Constitution and by statute, the Court cannot approve pendent-party jurisdiction in general federal question cases without assigning some greater inherent value to federal question jurisdiction. That value might be found in the federal nature of the claim asserted and in a policy that plaintiffs with federal claims should not be deterred by uncertainties of jurisdiction from seeking a federal forum. P. BATOR, A. MISHKIN, D. SHAPIRO & H. WECHSLER, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 923 (1973). But state and federal courts have concurrent jurisdiction over most federal claims and are both presumed to be competent forums for them. When Congress has preferred the federal court, it has enacted exclusive jurisdiction provisions. *See* Shakman, *The New Pendent Jurisdiction and the Federal Courts*, 20 HARV. L. REV. 262, 266 (1968).

103. 28 U.S.C. § 1346(b) (1976).

104. *Id.* § 1338(a) (1976).

105. *See* Ortiz v. United States, 595 F.2d 65 (1st Cir. 1979) (extending pendent-party jurisdiction in a suit against the United States, 28 U.S.C. § 1346(b) (1976)); Wood v. Standard Prod., 456 F. Supp. 1098 (E.D. Va. 1978) (exercising pendent-party jurisdiction in a maritime case brought under 28 U.S.C. § 1333 (1976), an exclusive jurisdiction provision). *Contra*, Ayala v. United States, 550 F.2d 1196 (9th Cir.), *cert. granted*, 434 U.S. 814 (1977), *cert. dismissed per Rule 60*, 435 U.S. 982 (1978).

Worker's Compensation—Multiple Schedule Injury—Three-Member Rule and Policy

Plaintiff suffered work-related injuries in an industrial accident resulting in permanent disability and was entitled to compensation under the Tennessee Workmen's Compensation Law.[1] The treating physician testified that plaintiff had suffered permanent anatomical impairment of fifteen percent to the left leg, fifteen percent to the right leg, and thirty-five percent to the left hand.[2] Anatomical disability to the body as a whole was rated at twenty-five percent impairment.[3] The trial court found plaintiff totally and permanently disabled as a result of multiple injuries received in the accident.[4] Defendants, employer and insurance carrier, appealed, contending that the judgment was improper because the injuries were confined to scheduled members[5] and that consequently recovery must be awarded exclusively on the basis of the Schedule Injury formula of section 50-1007 subsection (c) of the Tennessee Code Annotated.[6] On appeal by writ of error[7] to the Tennessee Supreme Court, *held*, affirmed. Injuries to three or more scheduled members is not specifically addressed by statute; therefore, compensation is not restricted to the Schedule Injury format. *Tennlite, Inc. v. Lassiter*, 561 S.W.2d 157 (Tenn. 1978).

The issue before the *Tennlite* court was whether compensation for permanent injuries to three scheduled bodily members

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1. TENN. CODE ANN. §§ 50-901 to 1211 (1977 & Cum. Supp. 1978).

2. Tennlite, Inc. v. Lassiter, 561 S.W.2d 157, 158 (Tenn. 1978).

3. *Id.* Although the physician declined to estimate industrial disability, he suggested that industrial disability would probably exceed anatomical disability. Other proof was offered showing that plaintiff was unable to work around the home or farm, had a ninth grade education, was unable to climb or do heavy lifting, was left-handed, and was skilled only at manual labor. *Id.* at 158, 160.

4. *Id.* at 157-58.

5. *Id.* at 158. *See* TENN. CODE ANN. § 50-1007(c), paras. 13, 16 (Cum. Supp. 1978). The first portion of TENN. CODE ANN. § 50-1007(c) sets forth specific losses of bodily members and describes the period of compensation for loss of each specific member.

6. 561 S.W.2d at 158.

7. Cases arising under the Workmen's Compensation Law have a right of direct appeal to the Tennessee Supreme Court and docket priority as provided by TENN. CODE ANN. § 50-1018 (1977).

is confined to the compensation provided by the Schedule Injury format of the Tennessee Workmen's Compensation Law. This schedule specifically provides for injuries to single members and combinations of two members but does not seem to provide for injuries to three members.[8] The issue whether the schedule does provide for three members is influenced by two ostensibly competing policies. The first policy is embodied in a 1963 amendment[9] to section 50-1007 subsection (c). The 1963 amendment has been construed to require that injuries to scheduled bodily members be compensated solely by the Schedule Injury format at least with respect to permanent partial disability and, arguably, even with respect to permanent total disability.[10] However, authority also supports a contrary view that injuries to scheduled members do not preclude an award for permanent total disability.[11] Second, a legislative mandate declares that the Workmen's Compensation Law is "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."[12] Tennessee courts have interpreted this language as requiring a liberal construction of the statute to favor the employee and to compensate commensurate with disability.[13] The facts of *Tennlite* highlight the conflict between these policies. Although the legislative mandate suggests that plaintiff not be confined to the scheduled in-

8. *See* TENN. CODE ANN. § 50-1007(c), paras. 13, 16 (Cum. Supp. 1978).

9. *See id.* para. 38 ("The benefits provided by this paragraph shall not be awarded in any case where benefits for a specific loss are otherwise provided in this title.").

10. *See* Shores v. Shores, 217 Tenn. 96, 395 S.W.2d 388 (1965). *Shores* held that Schedule Injuries resulting in permanent partial disability must be compensated solely from the Schedule Injury compensation format. Dictum in *Shores* might be read to imply that an award of Permanent Total disability compensation would be precluded when injuries are solely to scheduled members. *See* note 62 *infra* and accompanying text. Post-*Shores* cases create an inference that Schedule Injuries preclude an award of Permanent Total disability compensation. *See* text accompanying notes 63-75 *infra*.

11. *See* text accompanying notes 27-42 *infra*.

12. TENN. CODE ANN. § 50-918 (1977).

13. *See* Ward v. Ward, 213 Tenn. 657, 663-64, 378 S.W.2d 754, 757 (1964); Johnson v. Anderson, 188 Tenn. 194, 198-99, 217 S.W.2d 939, 941 (1949); Griffith v. Goforth, 184 Tenn. 56, 67, 195 S.W.2d 33, 37 (1946). *See generally* Kelly, *The Demarcation of Disabilities Under Tennessee Workman's Compensation Laws*, 20 TENN. L. REV. 333, 340-41 (1948).

jury allowance when in fact greater actual disability has been suffered, the 1963 amendment has been interpreted otherwise, at least for permanent partial disability and, arguably, even for permanent total disabilities. The Schedule Injury format would probably have provided less compensation for permanent disability for plaintiff than would have been provided by an award under the permanent total disability provision.[14] The resolution of the conflict between an arbitrary award of compensation based solely on the type of injury, Schedule or Non-Schedule, rather than an award based on the degree of actual disability was the primary problem before the *Tennlite* court.

Three statutory methods are provided for compensating permanently disabling injuries and are germane to the issue of appropriate compensation.[15] These methods are differentiated by

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14. Under the Schedule Injury format, TENN. CODE ANN. § 50-1007(c) (Cum. Supp. 1978), the maximum period specified for any combination of injured members from one accident is 400 weeks of compensation. The supreme court's decision of Griffith v. Goforth, 184 Tenn. 56, 195 S.W.2d 33 (1946), specifically precludes the aggregation of individual schedule awards. Because of *Griffith*, the maximum period of disability payments allowed under section 50-1007 subsection (c) would seem to be 400 weeks. Under the permanent total disability provision, TENN. CODE ANN. § 50-1007(d) (Cum. Supp. 1978), plaintiff could receive compensation for up to 550 weeks although any number of weeks exceeding 400 would be payable at only $15.00 per week. The assumption is that defendant in *Tennlite* determined that his liability would be less under section 50-1007 subsection (c) than under section 50-1007 subsection (d). In any event $40,000 is the maximum disability benefit regardless of the provision under which an award is rendered. TENN. CODE ANN. § 50-1005 (Cum. Supp. 1978).

15. Compensation for permanently disabling injuries is provided under TENN. CODE ANN. § 50-1007 (Cum. Supp. 1978). Subsection (c) provides for partial disability and divides injuries into those specifically provided for (i.e. arm, leg, two legs, etc.) and all others not specifically enumerated in the statute. Subsections (d) and (e) specify the award for permanent total disability and define the condition. TENN. CODE ANN. § 50-1007 (Cum. Supp. 1978) provides in part:

> Schedule of compensation—Specific indemnities for certain injuries—Pay for concurrent injuries—Permanent partial disability.—The following is the schedule of compensation to be allowed employees under the provisions of the Workmen's Compensation Law:
>
> . . . .
>
> (c) Permanent Partial Disability. In case of disability partial in character but adjudged to be permanent, there shall be paid to the injured employee . . . .
>
> . . . .

the type of injury and by the degree of resulting disability. Injuries to specific bodily members listed in a schedule are Schedule Injuries.[16] Permanent partial disability that results from the loss of a specific bodily member or combination of two members listed in the schedule results in predetermined compensation as set forth in the schedule.[17] This method is referred to as Schedule

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For the loss of a hand, sixty-six and two-thirds percent (66 2/3%) of average weekly wages during one hundred and fifty (150) weeks.

. . . .

For the loss of a leg, sixty-six and two-thirds percent (66 2/3%) of the average weekly wages during two hundred (200) weeks [Schedule Injury].

. . . .

For the loss of two (2) legs, sixty-six and two-thirds percent (66 2/3%) average weekly wages during four hundred (400) weeks.

. . . .

For the loss of one (1) leg and one (1) hand, sixty-six and two-thirds percent (66 2/3%) of the average weekly wages during four hundred (400) weeks [Multiple Schedule Injury].

. . . .

All other cases of permanent partial disability not above enumerated shall be apportioned to the body as a whole, which shall have a value of four hundred (400) weeks, and there shall be paid compensation to the injured employee for the proportionate loss of use of the body as a whole resulting from the injury [Non-Schedule Injury]. . . . The benefits provided by this paragraph shall not be awarded in any case where benefits for a specific loss are otherwise provided in this title [1963 amendment].

(d) Permanent Total Disability. For permanent total disability as defined in subsection (e), sixty-six and two-thirds percent (66 2/3%) of the wages received at the time of the injury . . . . This compensation shall be paid during the period of such permanent disability, not exceeding five hundred and fifty (550) weeks . . . . The total amount of compensation payable under this subsection shall not exceed forty thousand dollars ($40,000) in any case . . . .

(e) Permanent Total Disability Defined. When an injury not otherwise specifically provided for in this chapter as amended, totally incapacitates the employee from working at an occupation which brings him an income, such employee shall be considered "totally disabled," and for such disability compensation shall be paid as provided in subsection (d) hereof, provided that the total amount of compensation payable hereunder shall not exceed forty thousand dollars ($40,000), exclusive of medical and hospital benefits.

16. *See* TENN. CODE ANN. § 50-1007(c), paras. 13, 16 (Cum. Supp. 1978).

17. *Id.* paras. 13, 16, 26 & 30.

Injury compensation. Injuries to portions of the body not specifically listed in the schedule are Non-Schedule Injuries.[18] Permanent partial disability that results from such an injury is compensated by apportionment to the body as a whole of the proportionate loss of use of the body resulting from the injury.[19] This method is referred to as Non-Schedule Injury compensation. Permanent total disability is found when an injury not specifically provided for by statute totally incapacitates the employee to the degree that he cannot work at an income-producing occupation.[20] This type of disability provides the greatest period of disability income[21] and is referred to as Permanent Total compensation.

As originally enacted the Tennessee Workmen's Compensation Law expressed no statutory preference for the method of compensation. The legislature did mandate, however, that the statutes were remedial in nature and should be equitably construed.[22] The absence of a legislative preference coupled with the legislative mandate of equitable construction allowed the courts to construe the statutes liberally in favor of the employee when necessary to award compensation commensurate with the disability incurred.[23]

Using this flexibility, the pre-1965 decisions outlined several approaches for determining compensation. If an employee suffered an injury and loss listed in the Schedule Injury format and the *partial* disability incurred was not unusual or extraordinary, the employee received the scheduled amount of compensation.[24] If an employee suffered an injury and loss of use of a bodily member listed in the Schedule Injury format but the *partial* disa-

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18. *See id.* para. 38.

19. *See id.*

20. *Id.* (e).

21. *See id.* (d). *See also* note 14 *supra.*

22. 1919 Tenn. Pub. Acts ch. 123, § 47 (codified at TENN. CODE ANN. § 50-918 (1977)).

23. "The courts have generally construed the statute so as to give injured employees every benefit which it was reasonably intended to confer . . . ." Griffith v. Goforth, 184 Tenn. 56, 67-68, 195 S.W.2d 33, 37 (1946). See Kelly, *supra* note 13, for an exhaustive, but not necessarily approving, discussion of the development of liberal statutory construction used by the courts to award appropriate compensation to the employee.

24. *See* Adams Constr. Co. v. Cantrell, 195 Tenn. 675, 263 S.W.2d 516 (1953).

bility incurred was unusual and extraordinary in that the Schedule Injury adversely affected other portions of the body, the court apportioned the disability to the body as a whole to provide greater compensation.[25] These Schedule Injuries were compensated by application of the Non-Schedule Permanent Partial Injury method of computing the compensation award. If an employee suffered an injury and loss of use of a bodily member listed in the Schedule Injury format but the resulting disability was so severe that the employee was *totally* disabled, the courts recognized this result and awarded compensation for permanent total disability.[26]

The court's treatment of injuries to scheduled members resulting in permanent total disability demonstrated a rational and liberal application of the statute. In *Russell v. Virginia Bridge & Iron Co.*,[27] plaintiff suffered injuries to his foot and ankle, which were Schedule Injuries.[28] The trial court reasoned that since plaintiff could allow his foot to be amputated, he was not permanently and totally disabled and held that he was entitled only to Schedule Injury compensation for the loss of a foot.[29] The supreme court reversed and awarded Permanent Total disability compensation.[30] The court reasoned that

> [i]t is not uncommon to see a man without a hand or a foot who is very active and capable of engaging in a gainful occupation. Such a person was not rendered totally incapacitated by the loss of his hand or foot, and it was to this class that remuneration for the specific loss of a member was intended to apply. On the other hand, where an employee, as the result of an injury, is disabled to the extent that he cannot work at an occupation which will bring him an income, he is entitled to the compensation provided therefor; and *it is immaterial whether his condition resulted from an injury primarily to his arm, hand, leg, foot, head or some other member of his body.*[31]

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25. *See* Gluck Bros., Inc. v. Eddington, 209 Tenn. 174, 352 S.W.2d 216 (1961); Claude Henniger Co. v. Bentley, 205 Tenn. 241, 326 S.W.2d 446 (1959).

26. *See* Johnson v. Anderson, 188 Tenn. 194, 217 S.W.2d 939 (1949); Russell v. Virginia Bridge & Iron Co., 172 Tenn. 268, 111 S.W.2d 1027 (1938). *See generally* Kelly, *supra* note 13, at 352-60.

27. 172 Tenn. 268, 111 S.W.2d 1027 (1938).

28. *Id.* at 270, 111 S.W.2d at 1028.

29. *Id.* at 272, 111 S.W.2d at 1028-29.

30. *Id.* at 275, 111 S.W.2d at 1030.

31. *Id.* at 279, 111 S.W.2d at 1031 (emphasis added).

The *Russell* court cited as support for its decision two prior supreme court decisions that had held, as did *Russell,* that if the injury to a scheduled member results in permanent and total disability, the court shall award Permanent Total disability compensation.[32]

Russell was relied upon in the 1947 case of *Plumlee v. Maryland Casualty,*[33] in which plaintiff had suffered burns to one leg, a Schedule Injury.[34] The trial court awarded Permanent Total compensation and defendant appealed contending that compensation should be restricted to the Schedule Injury provision.[35] The supreme court affirmed the award, reasoning that if "the injured member is useless and a 'hindrance'[36] . . . if it is still attached to the body of the employee, his compensation is to be fixed by the loss of earning capacity resulting from injury to the *single member.*"[37]

Two years later *Plumlee* was relied upon in *Johnson v. Anderson*[38] in which plaintiff suffered injuries to one leg and was awarded Permanent Total compensation.[39] The *Johnson* court stated that "since the loss of the use of the right leg resulted in permanent total disability to follow the only gainful occupation for which the petitioner was trained or suited, this disability alone, justified the award."[40] The court also stated that "[u]nder a familiar principle of statutory construction the Court has so held that the later subsection (e) [Permanent Total Disability Defined] prevailed over the earlier subsection (c) [Permanent Partial Disability-Schedule Injuries] . . . ."[41]

These cases stand for the proposition that when a Schedule Injury does not result in complete severance of the member injured yet produces permanent and total disability, Permanent

32. Central Sur. & Ins. Corp. v. Court, 162 Tenn. 477, 36 S.W.2d 907 (1931); Kingsport Silk Mills v. Cox, 161 Tenn. 470, 33 S.W.2d 90 (1930).

33. 184 Tenn. 497, 201 S.W.2d 664 (1947).

34. *Id.* at 498, 201 S.W.2d at 665.

35. *Id.* at 498-99, 201 S.W.2d at 665.

36. Central Sur. & Ins. Corp. v. Court, 162 Tenn. 477, 481, 36 S.W.2d 907, 908 (1931).

37. 184 Tenn. at 500, 201 S.W.2d at 666 (emphasis added).

38. 188 Tenn. 194, 217 S.W.2d 939 (1949).

39. *Id.* at 198, 217 S.W.2d at 940-41.

40. *Id.* at 198, 217 S.W.2d at 940.

41. *Id.* at 198-99, 217 S.W.2d at 941.

Total disability compensation shall be awarded. These cases have not been expressly overruled and therefore could be regarded as representing the present state of the law. The use of these equitable constructions of the compensation statute evidenced the courts' concern with the actual disability suffered rather than with the literal statutory classification of the injury.[42]

Although *Russell, Plumlee,* and *Johnson* established that Schedule Injuries were not a bar to an award of Permanent Total disability compensation, the 1946 decision of *Griffith v. Goforth*[43] represented a unique application of the compensation statutes. Plaintiff had suffered injuries to eight scheduled members and was awarded Permanent Total compensation by the trial court.[44] Plaintiff appealed contending that the scheduled compensation for each of his separate injuries should be added together to compute his compensation.[45] The Tennessee Supreme Court determined that the proper method of computing compensation was to take the two worst injuries and to award compensation based on the most severe injuries under the Schedule Injury format.[46] The supreme court found that the compensation method requested by plaintiff would result in compensation greater than twice that allowed for permanent total disability and that the legislature could not have intended such a result.[47] The court concluded that multiple injuries were not Schedule Injuries for the purpose of aggregating the schedule amounts of compensation but noted that the amount of compensation for the two most severe injuries under the Schedule Injury format was greater by

42. *See* Johnson v. Anderson, 188 Tenn. 194, 217 S.W.2d 939 (1949); Plumlee v. Maryland Cas. Co., 184 Tenn. 497, 201 S.W.2d 664 (1947); Griffith v. Goforth, 184 Tenn. 56, 195 S.W.2d 33 (1946); Russell v. Virginia Bridge & Iron Co., 172 Tenn. 268, 111 S.W.2d 1027 (1938). "The courts of Tennessee, taking their cue from the legislative mandate—the command of liberal construction—continue in the vanguard of the majority of state courts in giving a liberal construction to the Compensation Act, thus insuring that it fulfills its designed humane purpose and objectives." Cate, *Workmen's Compensation,* 6 VAND. L. REV. 1012, 1020 (1953).

43. 184 Tenn. 56, 195 S.W.2d 33 (1946). *See also* Kelly, *supra* note 13, at 341-45; 19 TENN. L. REV. 798 (1947).

44. 184 Tenn. at 63-64, 195 S.W.2d at 36.

45. *Id.* at 64, 195 S.W.2d at 36.

46. *Id.* at 67, 195 S.W.2d at 37-38.

47. *Id.* at 66, 195 S.W.2d at 37.

a small amount than that awarded for permanent total disability.[48] In keeping with the principle of liberal construction in favor of the employee the court found that plaintiff should be awarded the greater amount. In reaching this conclusion the court stated that "[t]he rule of liberality in construing the statute should be followed in determining the amount to be paid. The courts have generally construed the statute so as to give injured employees every benefit which it was reasonably intended to confer."[49] Although *Griffith* might offer ostensible support for the notion that an injury to scheduled members would exclude an award for permanent total disability, the court was simply opting for the schedule amounts because under the law that then existed, plaintiff would thereby receive greater benefits.[50]

In 1965, however, the Tennessee Supreme Court in *Shores v. Shores*[51] restricted the flexibility of the courts in dealing with Schedule Injury cases. In *Shores* plaintiff had suffered an injury to his foot and was awarded Permanent Partial compensation for sixty-five percent disability to the body as a whole (Non-Schedule Permanent Partial Injury).[52] Defendant appealed contending that section 50-1007 subsection (c) (Schedule Injury Provision) should be the sole source of the award in view of the 1963

48. *Id.* at 66-67, 195 S.W.2d at 37. At the time of the *Griffith* decision no statutorily expressed maximum amount for compensation for permanent *partial* awards under the Schedule Injury format was in existence. Because of this the *Griffith* court was able to make an award to plaintiff in excess of the amount he would have received under the permanent total disability provision. An award of this type is no longer available since TENN. CODE ANN. § 50-1005 (Cum. Supp. 1978) places a maximum amount of $40,000.00 on compensation under this chapter exclusive of medical, hospital, and funeral benefits. In addition, section 50-1007 subsections (c) and (d) also contain an express provision limiting the maximum award payable under those subsections to $40,000.00.

49. 184 Tenn. at 67-68, 195 S.W.2d at 37.

50. Although our statute does not permit us to add the total number of weeks allowed for permanent partial disability to individual members, and multiply this by the average weekly wage, yet, if it appears that the compensation for injury to two members as provided in the statutory schedule is in excess of the amount allowed for permanent total disability, we think he [employee] should be paid the greater amount.

Id. at 67, 195 S.W.2d at 37.

51. 217 Tenn. 96, 395 S.W.2d 388 (1965), *noted in* 33 TENN. L. REV. 256 (1966).

52. 217 Tenn. at 98, 395 S.W.2d at 389.

amendment to section 50-1007 subsection (c).[53] The 1963 amendment[54] consisted of a single sentence added to the end of the paragraph dealing with Non-Schedule Permanent Partial Injuries and provided that "[t]he benefits provided by this paragraph shall not be awarded in any case where benefits for a specific loss is [*sic*] otherwise provided in Title 50, Tennessee Code Annotated."[55] The court recounted the history of flexibility in awarding compensation appropriate for actual disability and stated that the court should choose the most appropriate method based on the extent of disability when no legislative preference was evidenced for one form of compensation over another.[56] The court cited cases concerned with permanent partial disability as well as *Plumlee* and *Russell*, which dealt with permanent total disability, as evidence of the past liberal approach.[57] The court then interpreted the 1963 amendment to exclude the historic choice of the most appropriate compensation method.[58] The court held that when an injury to a scheduled bodily member occurred, the compensation provided by the Schedule Injury provision was the exclusive form of compensation regardless of the degree of actual partial disability incurred.[59] The effect of this holding was to reduce the compensation award by over sixty-four percent for the *Shores* plaintiff despite the fact that an injury of similar disability resulting from injury to a non-scheduled member would have entitled plaintiff to the greater amount.[60]

The *Shores* decision created the anomalous situation in which injured employees who were disabled to the same degree would receive differing amounts of compensation determined solely by the type of injury suffered. Whether this inequitable

53. *Id.* at 99, 395 S.W.2d at 389.

54. 1963 Tenn. Pub. Acts ch. 362, § 4 (currently codified in TENN. CODE ANN. § 50-1007(c)(Cum. Supp. 1978)).

55. *Id.*

56. 217 Tenn. at 101, 395 S.W.2d at 390.

57. *Id.* at 100, 395 S.W.2d at 389-90.

58. *Id.* at 101-02, 395 S.W.2d at 390.

59. *Id.*

60. *Id.* at 98, 102, 395 S.W.2d at 389-91. The trial court had made an award of 260 weeks of compensation based on a finding of 65% disability to the body as a whole. The supreme court restricted plaintiff's award to the Schedule Injury format and awarded 93.75 weeks of compensation based on a 75% disability to the foot.

result was reasonably intended by the legislature is certainly questionable.[61] *Shores* was in conflict with both pre-amendment court policy and with the implied legislative intent of compensation commensurate with actual disability. It required the court to look to the type of injury rather than the actual degree of disability in determining the compensation award.

Dictum in *Shores*, coupled with the court's reference to the permanent total disability cases of *Plumlee* and *Russell*, might be read to imply that a Schedule Injury precludes not only Non-Schedule Permanent Partial Injury compensation but also Permanent Total disability compensation.[62] *Shores*, however, dealt only with a permanent partial disability question and therefore should not be interpreted as overruling *Plumlee* and *Russell*.

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61. Before *Shores* was decided possible interpretations of the 1963 amendment were considered. The proper construction of the statute was thought to be that the Schedule Injury format should be the exclusive source of compensation for permanent partial disability only when the resulting disability was usual and ordinary and did not adversely affect other portions of the body. The effect of an interpretation like that subsequently adopted by *Shores* was thought to "unduly constrict the benefits available under the statute." S. STONE & R. WILLIAMS, TENNESSEE WORKMEN'S COMPENSATION § 67 (Supp. 1965).

One interpretation of *Shores* sought to confine the holding to those cases in which the effects of the injury were not abnormal. 33 TENN. L. REV. 256 (1966). But, "where there are abnormal and unusual effects, the schedule should not be exclusive." *Id.* at 262.

62. 217 Tenn. at 101, 395 S.W.2d at 390. In discussing the law prior to the 1963 amendment, the court at one point referred to "total" disability, thus implying (albeit ambiguously) that the 1963 amendment might affect both Permanent Partial and Permanent Total disability compensation. Whether the reference to total disability was intended or whether the court really meant to refer to partial disability apportioned to the body as a whole is unclear. The language in question is set forth as follows:

> When the Legislature, prior to the 1963 amendment, provided for both *total* disability and specific loss of a member without expressly saying that either shall be exclusive then under the direction in the Act and the interpretation of the courts for a liberal construction, it is nothing but logical to say when the facts and evidence showed an injury to the body as a whole it should be allowed . . . .
>
> The Act plainly [now, with the 1963 amendment] so provides and a line must be drawn somewhere under this Act, and, as we see it under the Act, the line must be drawn here, that is, when there is a specific loss provided in this Act then this becomes the total amount for which benefits can be allowed.

Id. at 101-02, 395 S.W.2d at 390 (emphasis added).

The inference that Schedule Injuries precluded Permanent Total compensation was strengthened in 1967 by the supreme court decision of *Federated Mutual Implement & Hardware Ins. Co. v. Cameron.*[63] The court held that where permanent injuries were to both scheduled and nonscheduled members, the 1963 amendment was not a bar to an award of Permanent Total disability compensation.[64] In reaching this position, the court relied on *F. Perlman & Co. v. Ellis.*[65] *Perlman* had created an exception to *Shores* by holding that injuries to both schedule and nonschedule members occurring in the same accident and resulting in permanent partial disability could be compensated by apportionment to the body as a whole and were not subject to the limitations imposed by the 1963 amendment.[66] By adopting the reasoning in *Perlman*, the *Federated Mutual* court implied that the Schedule Injury provision would be the exclusive source of the award if only scheduled members were affected. *Federated Mutual* could thus be interpreted to stand for the proposition that the type of injury, Schedule or Non-Schedule, and not the degree of actual disability, is determinative of the method of compensation.

Further confusion resulted from the 1969 decision of *Murray Ohio Manufacturing Co. v. Yarber.*[67] Plaintiff alleged that his injuries resulted in his being "totally disabled from performing any gainful employment."[68] This allegation, if proven, would satisfy the definition of permanent total disability.[69] The trial court

63. 220 Tenn. 636, 422 S.W.2d 427 (1967). Plaintiff suffered a leg injury requiring amputation of the leg, which was a Schedule Injury, and injuries to his buttocks and back, which were Non-Schedule Injuries. *Id.* at 637-38, 422 S.W.2d at 427-28.

64. *Id.* at 640, 422 S.W.2d at 428.

65. 219 Tenn. 373, 410 S.W.2d 166 (1966). Plaintiff suffered a head injury resulting in loss of hearing, which was a Schedule Injury, and a speech impairment, dizziness, and headaches, which were Non-Schedule Injuries. *Id.* at 375, 410 S.W.2d at 167. The supreme court upheld the trial court's determination that the combination of Schedule and Non-Schedule Injuries was a proper basis for an award of Permanent Partial compensation apportioned to the body as a whole and that plaintiff was not restricted to Schedule Injury compensation. *Id.* at 379, 410 S.W.2d at 169.

66. *Id.*

67. 223 Tenn. 404, 446 S.W.2d 256 (1969).

68. *Id.* at 407, 446 S.W.2d at 257.

69. *See* TENN. CODE ANN. § 50-1007(e) (Cum. Supp. 1978).

awarded plaintiff "100 percent permanent total disability."[70] Murray Ohio then was granted a motion for a new trial on a Second Injury Fund[71] question. At the close of the second trial the court held that if the Second Injury Fund was not applicable, Murray Ohio would be liable to plaintiff for "100 per cent (100%) total permanent disability to the body as a whole."[72] On appeal the Tennessee Supreme Court held that because the injury was confined to a schedule member, compensation was restricted to that provided in the Schedule Injury format.[73] Because the trial court described the disability as "100 per cent" and "to the body as a whole,"[74] one inference is that the award was made under Tennessee Code Annotated section 50-1007 subsection (c), Permanent Partial Disability. If the trial court's award were under section 50-1007 subsection (c), then the supreme court's holding would conform to the *Shores* decision. However, the trial court's use of the words "permanent total disability"[75] creates an equally plausible inference that the court perceived plaintiff's actual disability as being permanent total in nature. If this perception was the court's operative assumption, the supreme court's decision conformed to the dictum of *Shores* by precluding Permanent

70. 223 Tenn. at 407, 446 S.W.2d at 257.

71. The Second Injury Fund, TENN. CODE ANN. § 50-1027 (1977), is a provision designed to limit liability of employers and to encourage employment of individuals who have already sustained a prior permanently disabling injury. Under this provision, when an employee becomes permanently and totally disabled because of the combination of a prior permanent disability and a current injury, the employer is liable only for that disability that would have resulted had not the prior permanent disability existed. The state, through the Second Injury Fund, is liable for the remainder of compensation up to the maximum for permanent total disability.

72. 223 Tenn. at 408, 446 S.W.2d at 257.

73. *Id.* at 413, 446 S.W.2d at 260. The court also held that the Second Injury Fund compensation under section 50-1027 was inapplicable because the prior and subsequent disabilities upon which the claim for disability was based were related to the same bodily member. *Id.* at 412-13, 446 S.W.2d at 259-60.

74. *Id.* at 407-08, 446 S.W.2d at 257. The concept of percentage disability to the body as a whole is derived from the express language of section 50-1007(c), Permanent Partial Disability. Section 50-1007 subsections (d) and (e) relating to permanent total disability do not contain language indicating that percentage disability to the body as a whole is relevant to a determination of permanent total disability.

75. *Id.*

Total compensation when only a scheduled member is injured. This interpretation would further restrict the court's ability to award compensation commensurate with actual disability.

The status of the law in Tennessee prior to *Tennlite* can be summarized as follows. When a Schedule Injury to two or fewer members results in permanent partial disability, the compensation award must be determined by application of the Schedule Injury format. Compensation may be accomplished by awarding the scheduled amount for the specific member or members[76] or by apportioning the loss to a larger scheduled member.[77] Even in the event that the injury results in permanent partial disability greater than that contemplated by the schedule, the court may not apportion the loss to the body as a whole to provide compensation commensurate with actual disability.

In the event that a Schedule Injury results in permanent total disability, the law is perhaps unclear. *Shores, Federated Mutual,* and *Murray Ohio* all contain language that suggests that if confronted with a Schedule Injury that resulted in permanent total disability, those courts might have held that the Schedule Injury compensation was the exclusive source of the employee's award. None of those decisions, however, expressly overruled *Plumlee, Russell,* and *Johnson,* and therefore, the state of the law should still be that when a Schedule Injury does not result in complete severance of the bodily member yet does result in permanent and total disability, the court should award permanent total disability compensation.

The position of the Tennessee courts that the Schedule Injury format is the exclusive source of compensation for permanent partial disability resulting from Schedule Injuries and the arguable inference of Schedule Injury exclusiveness even if permanent total disability results is contrary to the modern trend in other jurisdictions.[78] Recent decisions by the Tennessee Supreme Court

76. *See* Shores v. Shores, 217 Tenn. 96, 395 S.W.2d 388 (1965).

77. Davis Blasting Co. v. Roberts, 517 S.W.2d 5 (Tenn. 1974); *accord,* Eaton Corp. v. Quillen, 527 S.W.2d 74 (Tenn. 1975). *See also* text accompanying notes 58-62 *supra.*

78. "The great majority of modern decisions agree that, if the effects of the loss of the member extend to other parts of the body and interfere with their efficiency, the schedule allowance for the lost member is not exclusive." 2 A. LARSON, LARSON'S WORKMEN'S COMPENSATION, DESK EDITION § 58.20 at 10-33 (1978). Even when there has been a "clear-cut loss" of a scheduled member, the

indicate a more liberal approach to the Schedule Injury problem,[79] but no decision has gone so far as to overrule *Shores* or to allow an actual disability approach to Schedule Injury compensation for permanent partial disability cases.

In the instant case, *Tennlite, Inc. v. Lassiter*,[80] the Tennessee Supreme Court was faced with a multiple Schedule Injury situation factually similar to *Griffith v. Goforth*[81] in that the number of members injured was greater than that covered by any single provision of the statute.[82] The *Tennlite* court, however, was re-

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dominant trend is that schedule allowances should not be exclusive. *Id.* § 58-20, at 10-33 to 10-34. Professor Larson's treatise should be read with care as pre-*Shores* Tennessee decisions are cited for the proposition quoted in the first sentence above, implying that Tennessee is among those jurisdictions using the actual degree of disability approach to determine the applicability of Schedule Injury compensation. Tennessee, however, does not consider the degree of actual partial disability. Since *Shores* and its progeny the courts have awarded only the scheduled amount when a scheduled member was affected, except in the situation where a smaller Schedule Injury may be apportioned to a larger scheduled member. Davis Blasting Co. v. Roberts, 517 S.W.2d 5 (Tenn. 1974); *accord*, Eaton Corp. v. Quillen, 527 S.W.2d 74 (Tenn. 1975).

79. The 1970 decision of Industrial Coated Prod. of America, Inc. v. Buchanan, 224 Tenn. 69, 450 S.W.2d 566 (1970), held the 1963 amendment to prohibit apportionment of the loss of a smaller scheduled member to a larger scheduled member. *Industrial Coated Products* was implicitly overruled by Davis Blasting Co. v. Roberts, 517 S.W.2d 5 (Tenn. 1974) (loss of one phalange of finger apportioned to entire finger). *Accord*, Eaton Corp. v. Quillen, 527 S.W.2d 74 (Tenn. 1975) (loss of finger apportioned to hand). Further evidence of a liberal trend in application of the Schedule Injury provision is found by comparing the Tennessee Supreme Court decision of Chapman v. Clement Bros. Inc., 222 Tenn. 223, 435 S.W.2d 117 (1968), with Continental Ins. Cos. v. Pruitt, 541 S.W.2d 594 (Tenn. 1976). The *Chapman* court found an "upper extremity" to be an arm and limited recovery to the Schedule Injury compensation. 222 Tenn. at 229-30, 435 S.W.2d at 119-21. On essentially the same facts the *Continental* court determined that "upper extremity" included both the arm and the shoulder, and, therefore, these injuries were not specifically provided for by the Schedule Injury format. 541 S.W.2d at 597. The *Continental* court then apportioned the disability to the body as a whole, providing compensation greater than that available under the schedule. *Id.* at 595.

80. 561 S.W.2d 157 (Tenn. 1978).

81. 184 Tenn. 56, 195 S.W.2d 33 (1946). *See* text accompanying notes 43-50 *supra*.

82. *See* TENN. CODE ANN. § 50-1007(c) (Cum. Supp. 1978). The Schedule Injury format provides for injuries to single members and combinations of two members. Plaintiff in *Tennlite* had suffered injuries to three members.

stricted in available methods of compensation by statutory changes not applicable in *Griffith*[83] and may have been influenced by the ambiguous state of the law created by the *Shores* dictum, *Federated Mutual,* and *Murray Ohio.*[84] The influence of *Shores* and the 1963 amendment may be inferred from the existence of ample pre-*Shores* case law that would have allowed the *Tennlite* court to take an actual disability approach and award Permanent Total compensation.[85] Possibly the court thought that *Shores* and its progeny precluded this approach and, perhaps for this reason, did not discuss the cases in its opinion.

Rather than dealing directly with the conflict between pre- and post-1963 amendment cases, the *Tennlite* court approached the determination of appropriate compensation by utilizing the specific language of section 50-1007 subsection (e) which provides in part that "when an injury not otherwise specifically provided for . . . totally incapacitates an employee from working . . . such employee shall be considered 'totally disabled.' "[86] The court noted that the Schedule Injury provision specifically provides for injuries to single members and combinations of two members but does not specifically provide for injuries to three or more members, nor does it provide guidelines for computing compensation for such multiple-member injuries.[87] The court then held that "multiple injuries to three or more members are not covered by the schedule set out in subsection (c)."[88] Having determined that

83. 184 Tenn. at 66-67, 195 S.W.2d at 37. At the time of the *Griffith* decision no statutorily expressed maximum amount for compensation for permanent *partial* awards under the Schedule Injury format was in existence. Because of this the *Griffith* court was able to make an award to plaintiff in excess of the amount he would have received under the permanent total disability provision. An award of this type is no longer available since TENN. CODE ANN. § 50-1005 (Cum. Supp. 1978) places a maximum amount of $40,000.00 on compensation under this chapter, exclusive of medical, hospital, and funeral benefits. In addition, section 50-1007 subsections (c) and (d) also contain an express provision limiting the maximum award payable under those subsections to $40,000.00.

84. *See* text accompanying notes 51-74 and 76-79 *supra.*

85. *See* Johnson v. Anderson, 188 Tenn. 194, 217 S.W.2d 939 (1949); Plumlee v. Maryland Cas. Co., 184 Tenn. 497, 201 S.W.2d 664 (1947); Russell v. Virginia Bridge & Iron Co., 172 Tenn. 268, 111 S.W.2d 1027 (1938). *See also* text accompanying notes 27-42 *supra.*

86. *See* TENN. CODE ANN. § 50-1007(c) (Cum. Supp. 1978).

87. 561 S.W.2d at 158-59.

88. *Id.* at 159.

plaintiff's injuries were not subject to the Schedule Injury provision, the court was then free to provide Non-Schedule Permanent Partial or Permanent Total disability compensation.[89]

The sole Tennessee case cited in support of the court's decision was *Griffith v. Goforth.*[90] The court cited *Griffith* for the proposition that " 'no provision is made [in the Schedule] for multiple injuries above two.' "[91] *Griffith,* as adopted by *Tennlite,* conforms to decisions in other jurisdictions that have confronted the multiple Schedule Injury question and found the Schedule not to be exclusive.[92] *Griffith* was also cited for its policy that the " 'rule of liberality in construing the statute . . . [should be applied] so as to give injured employees every benefit which it was reasonably intended to confer.' "[93] The result reached in *Tennlite* is reasonable and is within the legislature's intent. An employee who is in fact permanently and totally disabled should certainly receive compensation for permanent total disability.

The primary effect of this laudable decision was to provide a limitation on the scope of application of the Schedule Injury provision and the 1963 amendment, restoring to the courts at least some opportunity to award appropriate compensation for the individual's disability.[94] When three or more scheduled members are injured the court may now apportion the disability to the body as a whole to find permanent partial disability, or the court may find a plaintiff permanently and totally disabled if justified and award benefits accordingly. Depending on future interpreta-

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89. *Id.* at 159-60.

90. 184 Tenn. 56, 195 S.W.2d 33 (1946).

91. 561 S.W.2d at 159 (quoting Griffith v. Goforth, 184 Tenn. at 64, 195 S.W.2d at 36).

92. The *Tennlite* court cited cases from several jurisdictions in which courts have found that when multiple scheduled injuries produce greater disability than contemplated by the schedule provisions, multiple injuries will not be restricted to the schedule compensation. 561 S.W.2d at 159 (citing, *inter alia,* Engle v. Industrial Comm., 77 Ariz. 202, 269 P.2d 604 (1954); Williamson v. Bush & LaFoe, 294 So.2d 641 (Fla. 1974); Superior Constr. Co. v. Day, 127 Ind. App. 84, 137 N.E.2d 543 (1956)). The policy of compensation commensurate with disability is central to those decisions and to *Tennlite.*

93. 561 S.W.2d at 159, n.2 (quoting Griffith v. Goforth, 184 Tenn. 56, 67-68, 195 S.W.2d 33, 37 (1946)).

94. *Tennlite v. Lassiter* was cited with approval and followed in the recent Tennessee Supreme Court decision of General Smelting & Refining, Inc. v. Whitefield, 579 S.W.2d 857, 859 (Tenn. 1979).

tions of the *Tennlite* decision, its second effect may be unfortunate for a certain group of employees. A mechanical application of *Tennlite* could produce inequitable results. If an injured employee suffered a severed foot plus two other minor but permanent Schedule Injuries, a mechanical application of *Tennlite* would place the employee outside the Schedule Injury format. The court could award him either Permanent Partial or Permanent Total compensation based upon his degree of disability. However, if this employee had a highly technical skill whose marketability was unaffected by his physical losses, he would incur no compensable loss.[95] In one sense, this result seems just, since the purpose of the Workmen's Compensation Law is to compensate the employee commensurate with the disability incurred; if no disability has been incurred then no compensation would be justified. In another sense, however, the result seems arbitrary for if the employee had lost only his foot, he would have received compensation under the Schedule Injury format, which would have required no proof of actual disability. The courts have considered the Schedule Injury provision to be not only a form of compensation for disability but also a form of indemnity for the loss of a bodily member.[96] To deny the hypothetical plaintiff any compensation because he has suffered too many injuries violates this policy. If the courts look to the policy of *Tennlite* rather than to the mechanical application of its rule, the spirit of *Griffith* should be applied to the hypothetical situation and result in Schedule Injury compensation for the two most severe injuries. Under this approach the scheduled benefits would be awarded when those benefits exceed the benefits available under the Non-Schedule Permanent Partial subsection. A court would thereby indemnify the plaintiff for part of his loss and reaffirm the remedial and equitable policies of the statute.

95. If the injuries do not prevent the employee from working at a gainful occupation he may not receive Permanent Total compensation. Permanent Partial disability compensation requires proof of actual disability unless the recovery is under the Schedule Injury format. This employee's three injuries take him out of the Schedule classification according to *Tennlite*. 561 S.W.2d at 159. Since he will not be able to show actual disability as required for Non-Schedule Permanent Partial disability, he will receive no compensation for his physical losses.

96. *See* Shores v. Shores, 217 Tenn. 96, 101, 395 S.W.2d 388, 390 (1965).

The *Tennlite* court could have approached the problem it confronted by application of basic principles of statutory construction and provided a more straightforward result. First, that portion of the statute dealing with permanent disability is divided into two categories. Section 50-1007 subsection (c) applies to permanent partial disability and subsections (d) and (e) apply to permanent total disability. Section 50-1007 subsection (c) includes the Schedule Injury provision, and the first sentence of this subsection states that permanent disability "partial in character"[97] is to be compensated under this subsection. The plain meaning of this quoted phrase is that this subsection is to apply only to disability that is *partial.* If a disability is *total* it does not meet the threshold requirement of subsection (c) and Schedule Injury compensation should not be applicable.

Second, the 1963 amendment was added to the last paragraph of section 50-1007 subsection (c). The amendment stated that "[t]he benefits provided by this paragraph shall not be awarded in any case where benefits for a specific loss is [*sic*] otherwise provided in Title 50, Tennessee Code Annotated."[98] The paragraph so amended dealt with apportionment of disability to the body as a whole. Permanent total disability is not mentioned anywhere in subsection (c). The 1963 amendment should limit the benefits of this specific paragraph only in relation to other benefits provided in this subsection dealing with permanent partial disability. The Tennessee courts have consistently held that limitations imposed on one subsection are not applicable to other subsections of the disability provisions.[99] The 1963 amendment should in no way influence the award of Permanent Total compensation under section 50-1007 subsections (d) and (e).

By construing the disability provisions as separate, indepen-

97. *See* TENN. CODE ANN. § 50-1007(c) (Cum. Supp. 1978).

98. *See id.* para. 38 ("The benefits provided by this paragraph shall not be awarded in any case where benefits for a specific loss are otherwise provided in this title.").

99. *See* Wilkinson v. Johnson City Shale Brick Corp., 156 Tenn. 373, 381-82, 2 S.W.2d 89 (1928) (petition to rehear). "In other words, one deals with permanent partial and the other with permanent total disability, and they are in no way related or connected." *Id.* at 382, 2 S.W.2d at 89. *Accord,* Liberty Mutual Ins. Co. v. Maxwell, 164 Tenn. 1, 46 S.W.2d 67 (1932); Clayton Paving Co. v. Appleton, 163 Tenn. 27, 39 S.W.2d 1037 (1931).

dent subsections so that the 1963 amendment was only applicable to subsection (c) (Permanent Partial Disability) the *Tennlite* court could have then relied on prior case law. Since *Shores* and its progeny do not clearly hold that Schedule Injuries preclude an award of Permanent Total compensation, *Plumlee,*[100] *Russell,*[101] and *Johnson*[102] could have provided the court with ample precedent to award appropriate compensation without regard to the number of members injured. Such a holding would have eliminated any confusion as to the state of the law when a Schedule Injury results in permanent and total disability irrespective of the number of members involved, even if two or fewer were affected.

Any of these three approaches would have allowed the *Tennlite* court to award Permanent Total compensation without regard to the number of members injured, thereby benefiting a potentially greater number of permanently and totally disabled employees. These alternate approaches, however, would not allow the courts to award Permanent Partial compensation apportioned to the body as a whole. The *Tennlite* holding does allow apportionment to the body as a whole for partial disability, but it does so only when three or more schedule members are affected.[103] The *Shores* holding would still prevent apportionment to the body as a whole when two or fewer members are affected and will continue to produce inequitable results by requiring that the type of injury, Schedule or Non-Schedule, be determinative of the compensation award.

The ultimate solution to the entire problem of the scope of application of the Schedule Injury provision is to reinterpret the 1963 amendment in light of the legislative history of its enactment. The amendment was the subject of bills in both the Tennessee House[104] and Senate.[105] To reach a consensus on the final wording and purpose of the amendment, the bills were submitted

100. 184 Tenn. 497, 201 S.W.2d 664 (1947). *See* text accompanying notes 29-33 *supra.*

101. 172 Tenn. 268, 111 S.W.2d 1027 (1938). *See* text accompanying notes 23-28 *supra.*

102. 188 Tenn. 194, 217 S.W.2d 939 (1949). *See* text accompanying notes 34-37 *supra.*

103. 561 S.W.2d at 159-60.

104. House Bill No. 621, HOUSE JOURNAL 872 (Tenn. 1963).

105. Senate Bill No. 511, SENATE JOURNAL 376 (Tenn. 1963).

to a joint House-Senate subcommittee.[106] On the date of the passage of the 1963 amendment a statement of intent was issued by the joint subcommittee and was approved and entered in the *1963 House Journal.*[107] The statement of intent emphatically demonstrates the legislative purpose.

> [I]t is expressly intended that the present law be changed so as to merely preclude a double recovery resulting from both an award for injury to a specific scheduled member and for disability to the body as a whole where both are suffered due to the same loss of members of the same injury to a member. It is expressly not intended by said section to preclude recovery for disability to the body as a whole instead of a scheduled benefit where injury or loss of a specific scheduled member results in disability to the body as a whole. The construction of law as heretofore established, allowing disability to the body as a whole in cases where such disability results from loss or injury to a scheduled specific member is expressly intended to be preserved except that double recovery (scheduled award plus body as a whole award) alone is intended to be eliminated.[108]

Clearly the amendment's purpose was solely to prevent double recovery from both Schedule and Non-Schedule injury provisions for the same injury. The statement is equally clear and emphatic that the amendment's purpose was neither to change prior judicial policy nor to prevent the award of Non-Schedule partial or Permanent Total disability compensation when justified. The amendment was not intended to restrict compensation to the Schedule Injury format as had been done in *Shores* and its progeny. The objective of the courts in interpreting statutes is to implement the legislative intent when it is known. To do otherwise is to usurp the legislative function. Since the statement of intent makes known the legislative purpose of this amendment, *Shores* and those cases following it should be overruled.[109] This

106. HOUSE JOURNAL 988 (Tenn. 1963).

107. *Id.* at 989.

108. *Id.* at 990.

109. A careful reading of the *Shores* opinion demonstrates that the court approved the pre-1963 amendment case law but felt constrained by the literal language of the amendment. 217 Tenn. at 100-01, 395 S.W.2d at 389-90; *see* text accompanying notes 51-60, *supra*. Had the *Shores* court been presented with the statement of intent, quite likely it would not have held, as it did, that when only a scheduled member was affected the 1963 amendment limited compensation

action would restore to the courts the flexibility necessary to implement the equitable and humane policies of the Workmen's Compensation Law in accord with the legislature's intent.

In the future Schedule Injuries should be dealt with in the following fashion: When an employee suffers a Schedule Injury, the compensation provided in the Schedule Injury provision should be considered as at least the minimum amount of compensation. This approach would reaffirm the position already taken by the courts that Schedule Injuries to important bodily members should be compensated whether the disability occurs presently or may manifest itself in the future. This concept of indemnity should be preserved. If, however, the employee is able to prove that his disability is greater than that contemplated by the Schedule, the disability should be apportioned to the body as a whole to provide increased compensation. This test would be relatively simple. The trier of fact should make a determination based on all relevant facts of the actual disability to the body as a whole. Under this approach, if the compensation is greater than the compensation available under the Schedule Injury format, the employee should receive the greater amount since his disability will be greater than that contemplated by the Schedule. Compensation will then be commensurate with the employee's actual disability. Similarly, if the employee is able to prove that he is permanently and totally disabled, he should receive compensation for permanent total disability. These results would be consistent with the equitable and remedial policies of the Tennessee Workmen's Compensation Law and provide compensation commensurate with actual disability.[110]

LARIMORE B. ROBERTS

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for permanent partial disability exclusively to that provided in the Schedule Injury format. Although fourteen years have elapsed since the *Shores* decision, intervening decisions and the passage of time should not preclude a proper interpretation of the 1963 amendment.

110. On June 25, 1979, the Tennessee Supreme Court clearly held that the 1963 amendment prohibits an award of Permanent Total disability compensation when only a scheduled member is affected. Genesco, Inc. v. Creamer, slip op. (Tennessee Supreme Court, Middle Division, June 25, 1979). The court relied on the permanent partial disability cases of Washington County Bd. of Educ. v. Hartley, 517 S.W.2d 749 (Tenn. 1974); Industrial Coated Prods., Inc. v. Buchanan, 224 Tenn. 69, 450 S.W.2d 566 (1970); Chapman v. Clement Bros.,

Inc., 222 Tenn. 223, 435 S.W.2d 117 (1968); and Shores v. Shores, 217 Tenn. 96, 395 S.W.2d 388 (1965). In *Genesco* the court did not consider the statutory distinctions between permanent partial disability and permanent total disability, *see* text accompanying notes 97-102 *supra*, or the line of decisions holding that limitations on one subsection do not affect other subsections, *see* text accompanying note 99 *supra*. Nor did the court appear to recognize that its decision was the first to extend expressly the arbitrary and harsh effects of the *Shores* interpretation of the 1963 amendment to Permanent Total disability compensation. *See* text accompanying notes 51-77 *supra*.

Plaintiff in *Genesco* was an illiterate fifty-three-year-old woman who had been employed by Genesco, Inc., for thirty-two years. The trial court had awarded 550 weeks of compensation for permanent total disability. The supreme court determined that the appropriate compensation method was based solely on the type of injury suffered (Schedule Injury) rather than on the degree of actual disability. The court's method resulted in a radical decrease in the amount of compensation since plaintiff was thus limited to a maximum award of 125 weeks of permanent disability income. Had the same degree of disability resulted from an injury to a nonscheduled portion of the body, the employee would have received an award for permanent and total disability.

The decision of the *Genesco* court may be a rational extension of the cases cited therein; however, the force of that line of authority is questionable in view of the statement of intent that accompanied the 1963 amendment. *See* text accompanying notes 104-08 *supra*.

Annual Index

Tennessee Law Review

Volume 46

THE UNIVERSITY OF TENNESSEE
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INDEX TO VOLUME 46

AUTHOR INDEX TO ARTICLES AND COMMENTS iii
AUTHOR INDEX TO BOOK REVIEWED iv
SUBJECT INDEX v
TABLE OF CASES vi

Tennessee Law Review Association, Inc.
1505 W. Cumberland Ave.
Knoxville, Tennessee 37916

AUTHOR INDEX TO ARTICLES AND COMMENTS

BLACK, MARTHA S.L.: *Class Actions Pursuant to Tennessee Rule of Civil Procedure 23* 556

COOK, JOSEPH G.: *Criminal Law in Tennessee in 1977-1978—A Critical Survey* 473

EHRLICH, THOMAS: *Charles H. Miller Lecture—Lawyers and Their Public Responsibilities* 713

LEDEWITZ, BRUCE: *The Uncertain Power of the President to Execute the Laws* 757

LOCKABY, ROBERT L., JR.: *Constitutional Challenges to Medical Malpractice Review Boards* 607

MALTZ, EARL M.: *The Burger Court, the Regulation of Interstate Transportation, and the Concept of Local Concern: The Jurisprudence of Categories* 406

PENEGAR, KENNETH L.: *Survey of Tennessee Constitutional Law in 1976-77* 120

SEWELL, TOXEY H.: *Survey of Tennessee Property Law* 160

SOBIESKI, JOHN L., JR.: *The Procedural Details of the Proposed Tennessee Rules of Appellate Procedure* 1

SOBIESKI, JOHN L., JR.: *A Survey of Civil Procedure in Tennessee—1977* 271

SOBIESKI, JOHN L., JR.: *An Update of the New Tennessee Rules of Appellate Procedure* 727

AUTHOR INDEX TO BOOK REVIEWED*

AVNET: *How to Prove Damages in Wrongful Personal Injury and Death Cases* (2d ed.) (Jerry J. Phillips) 269

*Book is indexed under author's name; reviewer's name is in parenthesis.

SUBJECT INDEX

CONSTITUTIONAL LAW
See also *Criminal Law and Procedure; Family Law; Medical Malpractice; Torts*
Commerce Clause — The Burger Court, the Regulation of Interstate Transportation, and the Concept of Local Concern: The Jurisprudence of Categories 406
Due Process — Fundamental Right to Bodily Integrity — Protective Services for Elderly Persons 425
Equal Protection — Aliens — State Restrictions on Employment 692
Equal Protection — Sex Discrimination in Secondary School Athletics 222
Fourth Amendment — Warrant Requirement for OSHA Inspections 446
Survey of Tennessee Constitutional Law in 1976-77 120
The Uncertain Power of the President to Execute the Laws 757

CRIMINAL LAW AND PROCEDURE
Criminal Law in Tennessee in 1977-78—A Critical Survey 478
Equal Protection — Imposing Money Bail 203
Searches and Seizures — Standing and Fourth Amendment Rights 827
Sixth Amendment Right to Trial by Jury — Five Jurors are Not Enough 847

FAMILY LAW
Divorce — Restrictions on Recrimination 461
Due Process — Indigent Parents' Right to Counsel in Child Neglect Cases 649
Due Process — Procedural Safeguards in the Foster Care System 671
Jurisdiction — Extension of Comity to Foreign-Nation Divorce 238

FEDERAL COURTS AND PROCEDURE
Diversity Jurisdiction — Ancillary Jurisdiction and Third-Party Practice 865

LEGAL PROFESSION
Charles H. Miller Lecture—Lawyers and Their Public Responsibilities 713

MEDICAL MALPRACTICE
Constitutional Challenges to Medical Malpractice Review Boards 607

PROCEDURE
See also *Family Law; Federal Courts and Procedure; Medical Malpractice*
Class Actions Pursuant to Tennessee Rule of Civil Procedure *23* 556
Denial of Certification — Invalidity of Death Knell Doctrine as Basis for Immediate Release 807
The Procedural Details of the Proposed Tennessee Rules of Appellate Procedure 1
A Survey of Civil Procedure in Tennessee — 1977 271
An Update of the New Tennessee Rules of Appellate Procedure 727

PROPERTY
Survey of Tennessee Property Law 160

TORTS
Defamation — Public-Figure Status 252

WORKER'S COMPENSATION
Multiple Schedule Injury — Three-Member Rule and Policy 884

TABLE OF CASES*

A

Adams v. Carter County Mem. Hosp. 315, 317, 318-20, *326-27*
Adams v. State 385
Alderman v. United States *832*, 834-36, *838*, *839*, 840
Aldinger v. Howard 874-75, 877, 881
Alexander v. C. C. Powell Realty Co. 171
Alexander v. State 510-11
Ambach v. Norwick 711
American Bank & Trust Co. v. Wilds 193
American Fire & Cas. Co. v. Finn *867*
Anderson v. Nosser *207*, *215*
Anderson v. State 484-85
Application of President & Directors of Georgetown College, Inc. *132*, *431*, 432-34, 436, 437, 441
Argersinger v. Hamlin 653, 655
Arizona v. Washington 549-51
Arnold v. Carter 44, 375, 376, 378, *379*, *747*
Arnold v. Tennessee 636
Ashton v. Kentucky *125*
Associated Press v. Walker 255

B

B., *In re* 663, 664
Baldwin v. Knight *636*
Baldwin v. New York 530, *847*, *862*
Bales v. Bales 469
†Ballew v. Georgia 530-31, 847-64
Bandy v. United States 209, 210
Bates v. State Bar of Ariz. 122, *123*
Beckwith v. United States 519
Bellamy v. Judges *214*, *215*
Bentley v. State 508
Bethany v. State 540-41
Betts v. Brady 652
Bibb v. Navajo Freight Lines, Inc. 411-14, 417, 421, 422
Blackledge v. Perry 537-38, 539
Blair v. Watts 307, 308, 324, 325
Blockburger v. United States 545-46
Blunt v. United States *215*
Boddie v. Connecticut 584-85
Bordenkircher v. Hayes 538-39
Bowan v. Hannah *153*
Bowan v. Tennessee 155
Bowman v. Henard 335-37, 341
Boykin v. *Alabama* *536*
Branstetter v. Barnett 174
Braunfeld v. Brown *135*
Brenden v. Independent School Dist. 228, 229
Brennan v. Buckeye Indus., Inc. 454, 455, 457
Brennan v. Gibson's Prods., Inc. 456, 457
Brotherhood of Locomotive Firemen & Enginemen v. Chicago, Rock Is. & Pac. R.R. 413, 414, 417
Brown v. Board of Educ. *236*
Brown v. Brown 364, 365
Brown v. Hipshire 329-31
Brown v. United States 836, 837, *842*
Bruton v. United States 510-12
Buckley v. Valeo *769*, *777*, 778-80 782, *784*, *786-87*
Bumper v. North Carolina *834*
Burks v. United States 552-53, *744*
Butterworth v. Hoe 785-86

C

Cager, *In re* 659
Califano v. Goldfarb *227*
Califano v. Webster *226*
California v. Byers *520*
Camara v. Municipal Ct. 449-53, 455, 456, 458
Cameron v. Cameron 464, 466, 467
Campbell v. Archer 365, 366
Canning v. Canning 466-68
Cannon v. Grimes 526-27
†Cape v. Tennessee Secondary School Athletic Ass'n 222-37
Carey v. Jones 372, 373
Carnes v. Tennessee Secondary School Athletic Ass'n *230*

*Page references set in italics indicate discussion of the case in footnotes. All other references are to cases discussed in text. † Indicates casenote treatment of the case.

Carter v. Jury Comm'n 859
Chambers v. Maroney 501
Chapdelaine v. Tennessee Bd. of Examiners 152-53
Chapman v. Clement Bros., Inc. 898
†Chastain v. Chastain 461-71
Chimel v. California 501
†Chuy v. Philadelphia Eagles Football Club 252-68
City of Memphis v. IBEW 138-39
City of New York v. International Pipe & Ceramics Corp. 814, 816
City of Whitewell v. White 191-92
Clariday v. State 531-32
Cleaver v. Wilcox 661, 665
Cohen v. Beneficial Indus. Loan Corp. 810, 811, 812, 813, 819
Cohen v. District of Columbia Nat'l Bank 590
Cole v. Arnold 372, 374, 403
Cole v. Dych 189-90
Coleman v. Alabama 525
Colgrove v. Battin 848, 856-57, 859
Collins v. Ruffner 299, 300
Collins v. Tennessee 153-57
Colonnade Catering Corp. v. United States 452-55, 457
Concrete Supply Co. v. Union Peoples Bank 196-97
Confiscation Cases *780*
Connally v. Georgia 494
Continental Ins. Cos. v. Pruitt 898
Cooley v. Board of Wardens 407, 408, 412-15, 419, 420, 423
†Cooper's & Lybrand v. Livesay 807-26
Cowley v. Gibson 315
Craig v. Boren 226-27, 229, 231-35
Craven v. Lawson 342-44
Crist v. Bretz 548
Crist v. Division of Youth & Family Serv. 663, 664
Cumberland Capital Corp. v. Patty 158-59, 393, 394
Curtis Publishing Co. v. Butts 255, 260

D

Dandridge v. Williams 617
Danforth v. State Dep't of Health & Welfare 663, 664
Daniel v. Waters 127
Darby v. Union Planters Nat'l Bank 301
Davis v. Gulf Ins. Group 396-98
Davis Blasting Co. v. Roberts *898*
Delaware v. Prouse *846*
Delffs v. Delffs 391-93
Dender, *In re* 494
District of Columbia v. Little *448*
Donaldson v. Donaldson 282-85
Dore v. Kleppe 592-93
Dorrier v. Dark 123, 126
Douglas v. Douglas 465, 466
Drano Corp. v. Marshall 459
Drummond v. Fulton County Dep't of Family & Children's Serv. 689-90
Duke v. Hooper 163
Duncan v. Louisiana *847*, 851-52, *856*, *862*
Duran v. Elrod *207*

E

Eastin v. Broomfield 617, *620*, 621, 625, 632
Eatherly Constr. Co. v. De Boer Constr., Inc. 199
Edminston Corp. v. Carpenter 192
Edwards v. State 492-93
Eisen v. Carlisle & Jacquelin 562, *567*, 582, *597* 812-14, 818, 819, 821, 822
El Paso v. Simmons 149
Epperson v. Arkansas 127
Estate of Brooks, *In re* 432-34, 436, 437, 441
Evans v. State 541-42
Examining Bd. v. Flores de Otero *702*
Ezell v. Buhler 371, 372

F

F. Perlman & Co. v. Ellis 895
Fanning v. State 487

Farrar v. Farrar 327, 328, 383
Farris v. State 532-33
Federated Mut. Implement & Hardware Ins. Co. v. Cameron 895, 897, 899
First Am. Nat'l Bank v. Chicken Sys. of Am., Inc. 170
Fischer v. Cromwell Co. 380, 381
Fleet Transport Co. v. Tennessee Pub. Serv. Comm'n 138, *139*
Flotemersch v. Bedford County Gen. Hosp. *633*
Flynn v. Jenkins 376, 377
†Foley v. Connelie 692-711, *778*
Forbes v. State 477-78
Ford Motor Co. v. Pace 152
Forgay v. Conrad 810
Frank v. Maryland *448*, 449, 450
Franks v. Delaware 498-99
Frayser Assembly Christian School v. Putnam 367, 368
Freeman v. Howe 870
Frontiero v. Richardson 225
Friesz, *In re* 662, *667*
Fuentes v. Shevin 142
Fulton Nat'l Bank v. Hozier *870*
Furman v. Georgia 154-55, *156*
Furman v. Nichol *148*

G

Gardner v. Westinghouse Broadcasting Co. *820*
Gault, *In re* 654-55, 658-59, 660, 662, 664, 666, 667-68, *669*, 678-79
General Electric Supply Co. v. Arlen Realty & Development Corp. 199
Genesco, Inc. v. Creamer *905-06*
Gertz v. Robert Welch, Inc. 258-60, 261, 262, 264, 265, 266, 267, 268
Gibbs v. Titelman 604
Gideon v. Wainwright 527, 652
Gilbert v. California 516-17
Gillespie v. United States Steel Corp. 811-13, 820, 823
Gillis v. Eggelston 358, 360
Givens v. Third Nat'l Bank 185
Glassock v. State 492-93, 543
Goldberg v. Kelly 653, 657
Golden v. Golden 243, 249
Gosa v. Securities Inv. Co. 815-16, 822
Goss v. Lopez 679
Gouger v. American Mutual Ins. Co. 374, 378, 379
Graham v. Richardson 700
Graham v. State 492-93
Gray v. State 540-41
Green v. Home News Publ. Co. 121
Greene v. Massey 552, *744*
Griffin v. Illinois 207-09, 210, 211, 212, 213, 214
Griffith v. Goforth *886*, *888*, 891-92, 898-901
Griffiths, *In re* 700-01, 702, 705
Griffitts v. Rockford Utility Dist. 392, 393
Griswold v. Connecticut *655-56*
Grizzle v. State 485
Grundy County v. Dyer 400, 401
Gustafson v. Florida 501
Gwin v. State 510, 511

H

Hackett v. General Host Corp. 817-18, 821
Haddock v. Lummus Cotton Gin Co. 357
Halloway v. Arkansas 512-13
Hamby v. Millsaps 369-70
Hansberry v. Lee 583-84
Hanson v. Denckla 278
Hanvy v. Crosman Arms Co. 283
Harden v. State *129*
Harrington v. California 511-12
Harris v. Balk 275
Harris v. Bittikofer 180-82
Harrison v. Schraeder 640-42
Helvering v. Hallock *860*
Henderson v. Ford 298
Henry County v. Summers *190*
Hernandez v. Motor Vessel Skyward 591-92
Herring v. Estate of Tollett 298-99, 301-02
Hester v. United States 505
Highland Constr. Co. v. K.I.T. Coal Co. 367, 368

Hodges v. Rose *156*, 511
Hodges v. State *156*
Holley v. Marks 186
Holmes v. Wilson 353-56
Home Bldg. & Loan v. Blaisdell 151
Hooley v. Red Carpet Corp. of America 816, 824
Hoover v. Meiklejohn 229
Horn v. State 482-83
Horne v. Cox 144
Horner-Rausch Optical Co. v. Ashley 122
Huffine v. Riadon 200
Humphrey's Executor v. United States *765*, *773*, 780-82, *783*, *787*, *795*
Hunter v. State *154*
Hurn v. Oursler *872*, *873*
Huron Portland Cement Co. v. City of Detroit 408-10, 420, 421
†Hyde v. Hyde 238-51

I

Indiana *ex rel.* Anderson v. Brand *151*
Industrial Coated Prod. of America Inc. v. Buchanan *898*
Ingraham v. Wright *657-58*
International Shoe Co. v. Washington 273-80, 289
ICC v. Chatsworth Coop. Mkt'g Ass'n 782-83

J

James E. Strates Shows, Inc. v. Jakobik 361, 362, 364
Jerkins v. McKinney 8, 145
Jewish Child Care Ass'n, *In re* *677*
Johnson v. Anderson 890-91, 897, 903
Johnson v. Haynes 172
Johnson v. State *493*
Jones v. Jones 467, 468
Jones v. State 554-55
Jones v. State Bd. of Med. 622-24
Jones v. United States 829-31, 833, *834*, 838, *841*, 843-44
Jose v. Equifax, Inc. 309, 311, 312-15, 317

K

Kahn v. Shevin *226*
Kalina v. Railroad Retirement Bd. *231*
Kane v. Kane 286-89, 290
Katz v. Carte Blanche Corp. *574*
Katz v. United States *458*, 505, 829, 832-37, *838*, 839-40, 845
Kemp v. Thurmond 195
Kendall v. United States 790-91, 799-800
Key v. State 546-47
Keyishien v. Board of Regents *125*
Knierim v. Leatherwood 190
Knight v. Knight 163
Korematsu v. United States *693*, 696
Korn v. Franchard Corp. 814-15, 823-24
Koster v. (American) Lumbermen's Mut. Cas. Co. 292, 293
Kraus v. City of Cleveland *132*
Kree Inst. of Electrolysis v. State Bd. of Electrolysis Examiners 151-52, 153
Kremens v. Bartley 569-70
Krippendorf v. Hyde *870*

L

Ladd v. Roane Hosiery, Inc. . . . 315-17
Lakeside v. Oregon 519
La Mar v. H & B Novelty & Loan Co. 602, 604
Lambert v. Home Fed. Sav. & Loan Ass'n 173
Land Developers, Inc. v. Maxwell 187-88
Lane v. Brown *216*
Leach v. State 532
Ledbetter v. Turnpike Co. 191
Lee v. Crenshaw 321-24
Lee v. State 522
Lemon v. Kurtzman 127
Letter Carriers v. Austin *773*
Ligon v. Ligon 374, 375
Lindsey v. Fowler *44*
Lipsett v. United States *812*

Livesay v. Tennessee Bd. of Watchmaking 152, 153
Long Island Jewish-Hillside Med. Center v. Levitt *435*
Lovejoy v. Ahearn 329-31
Loving v. Virginia *223*
Lowry v. Lowry 164

M

Maglio v. Jago 521
Mancusi v. DeForte 833-36
Manor v. State 526
Manson v. Braithwaite 513, 514-16
Maples v. State 553-54
Marbury v. Madison 787, *788*
Marlowe v. Kingdom Hall of Jehovah's Witnesses 145, 175-77
Marsh v. State 544
†Marshall v. Barlow's, Inc. 446-60
Marshall v. Chromalloy Am. Corp. 456, *458*
Marshall v. Shellcast Corp. 456, *458*
Massachusetts Bd. of Retirement v. Murgia *438*, 443, 444
Mathews v. Eldridge 657, 665, 684-85, 687
McClanahan v. McClanahan 465, 467
McDaniel v. Paty *134*
McGowan v. Maryland 224, 617
McLouth Steel Corp. v. Jewell Coal & Coke Co. 292
McMahon v. Beach 300
Meacham v. Graham 183, 184
Memphis St. R.R. v. Johnson *730*
Mercy Hosp., Inc. v. Badia *647*
Merryman, *Ex parte* *769*
Metropolitan Gov't of Nashville v. Shacklett 388, 389
Meyer v. Nebraska 656
Milberg v. Western Pacific R.R. 814-15, 822-23
Miles v. Tennessee Consol. Retirement System 150-51
Mincey v. Arizona 504-05
Miranda v. Arizona 519, 521, 522
Mitchell v. Rose 528-29
Mitchell v. W.T. Grant Co. 142
Monday Trucking Co. v. Millsaps *99*
Monell v. New York City Dep't of Soc. Serv. *875*
Monroe v. Pape *875*
Moor v. County of Alameda 874
Moore v. City of East Cleveland 658, 674-75
Moore v. Fowinkle *169*
Moore v. Illinois 516-17
Moore v. Moore 463
Moore v. New York Cotton Exchange 871, *873*, *881*
Morgan v. T.V.A. *758*
Morgan v. Virginia *411*, *412*
Morris v. Gross *642*
Morris v. Michigan State Bd. of Educ. 229
Moten v. State 547-48
Mount v. Mount 467
Mullane v. Central Hanover Bank & Trust Co. *176*, 582-83
Murray Ohio Mfg. Co. v. Yarber 895-97, 899
Myers v. United States *758*, 763-65, 768, 771, 774, 781, 795, *798*, 800, *802*
Myricks, *In re* 662

N

New York City Health & Hosp. Corp. v. Stein *437*, *438*
New York Times v. Sullivan 252, 254-55, 256, 257, 258, 260, 261, 268
Nolan v. State 523-24, 526, 527, 528
Norman v. Tennessee Board of Claims 137-38, *140*
Norris v. Alabama 529
North Am. Capital Corp. v. McCants 169-70
North Carolina v. Pearce 437, 443-44
Nyquist v. Mauclet 702-03

O

Offer v. Dumpson *671*, *673*, *676*, 680, 681
Ohio Valley Water Co. v. Ben Avon Borough 146, 390, 391
Olmstead v. United States 427
Oregon v. Mathiason 519

Osborn v. Bank of the United States 871-72
Overturf v. State *52*, 381-83, 553
†Owen Equip. & Erection Co. v. Kroger 865-83
Oyama v. California 698-99

P

Pairamore v. Pairamore 385-87
Paro v. Longwood Hosp. 619-20, 624-25
Partain v. First Nat'l Bank 590-91
Paty v. McDaniel 126, 133, 334, 335
Pearson v. State 541-42
Pelletier v. United States *210*
Pennoyer v. Neff 274, 285
Pennsylvania v. Lynn *759*
Pennsylvania v. Mimms 502-03
People v. McLaugherty 507
People v. Morales *493*
Perkins v. Smith *704*
Perrin v. Perrin 468
Pierce v. Society of Sisters *656*
Pierson v. Ray 408-09
Pike v. Bruce Church, Inc. *417*, *418*
Planned Parenthood v. Danforth 680
Plumlee v. Maryland Casualty 890-91, 893-94, 897, 903
Pottharst v. SBA 592
Powell v. Alabama 651-52
Prigmore v. State 486-88
Public Service Comm'n v. General Telephone Co. 147-48, 390, 391
†Pugh v. Rainwater 203-21

Q

Quackenbush, *In re* *436*, *437*, *442*, *443*
Quilloin v. Walcott *658*, *682*
Quinlan, *In re* *429*, *430*

R

R.R. Comm'n of Texas v. Rowan & Nichols Oil Co. *147*
†Rakas v. Illinois 827-46
Ray v. Atlantic Richfield Co. 419, 420, 424
Raymond Motor Transp., Inc. v. Rice 415-20, 424
Reed v. Reed 223-25, 227, 228, 622
Reynolds v. United States 130
Roberts v. Louisiana *157*
Roberts v. State Bd. of Equalization 305-07
Robinson, *In re* 659, 660, 661
Robinson v. Trousdale County 162-63
Roe v. Wade *223*, 428, *439*, 656
Rogers v. Ware 404, 405
Romines v. K & S Engineering Contracting Co. 289-92
Rose v. Hodges 156
Rosenbloom v. Metromedia, Inc. 257-58, 259, 266, 267
Rosenstiel v. Rosenstiel 244-45, 246
Rush v. Rush 358, 359
Rushing v. State 533-34
Russell v. Virginia Bridge & Iron Co. 889-91, 893-94, 897, 903

S

Saint Joseph Stock Yards Co. v. United States *147*
Sampson v. State 493, 533
San Antonio Independent School Dist. v. Rodriguez *208*, *710*
Sandborn v. McClean *188*
Satterfield v. Mayes *177*
Savannah Printing Specialties Local 604 v. Union Camp Corp. *773*
Saylors v. Riggsbee 296-98
Scheuer v. Rhodes *708*
Schilb v. Kuebel 212-14, 215, 216
Schlesinger v. Ballard *226*
Scopes v. State 128
See v. City of Seattle 449, 451, 452, 455, 456
Sesson v. State 505-06
Shaffer v. Heitner 273-82, 285, 289
Shannon v. Union Planters Nat'l Bank 183-84
Shapiro v. Thompson *223*

Shelton v. Olgiati *140*
Sherbert v. Verner *135-36*
Sherlin v. Roberson 361-64
Shires v. Magnavox Co. 296
Shockley v. State 478
Shoppers Guide Publishing Co., Inc. v. Woods 120
Shores v. Shores 885, 892-99, 903-04, *904-05*, *906*
Silverman v. Gossett 140-43, *194*
Simeth, *In re* 660
Simmons v. United States 513-14, *834*, *845*
Simon v. St. Elizabeth Med. Center 621, *628-29*
Skinner v. Oklahoma 655
Small World, Inc. v. Industrial Dev. Bd. 341
†Smith v. Edmiston 649-70
†Smith v. Organization of Foster Families *670*, 671-91
Smith v. Texas 859
Smith v. Troyan *231*
Sniadach v. Family Fin. Corp. 142
Solida v. Ledford 294, 295
Sosna v. Iowa *569*
South Carolina State Hwy. Dep't v. Barnwell Brothers, Inc. 408-14, 417, 422
Southern Indus. Banking Corp. v. Delta Properties, Inc. 173
Southern Pacific Co. v. Arizona 410-14, 421, 422
Springer v. Government of the Phil. Is. *777*
Speight v. Miller 298
Stack v. Boyle *205*, 206-07
Stanley v. Illinois 656, 659, 674, 675, *855*
State v. Bates *137*
v. Brown 535-36
v. Byers 507
v. Cabbage 552
v. Chort 506-07
v. Hailey *154*
v. Hammonds *493*
v. Hatchett 486
v. Henderson 512
v. Hudson 544-45
v. Jamison 659
v. Little 498
v. Mackey 536-37, 539-40
v. Mellons 476-77
v. Nelson 478-79
†v. Northern 425-45
v. Patty 491
v. Stacy 491
v. Staggs 479-82
v. Thompson 348-52, *396*
v. Wert 505-07
v. Williams 377-79
v. Witt 551
State *ex rel.* Chapdelaine v. Torrence 143-44
Polin v. Hill 395
Swann v. Pack 126, 129, 439, 442
Melton v. Nolan *152*
State Farm Fire & Casualty Co. v. Tashire 869, 877
Steele v. Waters 126, 127
Stines v. State 484
Strawbridge v. Curtiss 868-69, 877-79
Stroup v. State 488
Stovall v. Denno 514, 515
Sugarman v. Dougall 701-02, 703, 704, 705, 709
Supt. of Belchertown State School v. Saikewicz 435-36, 437, 442
Swallows v. Western Electric Co. 309-11, 313-15, 317

T

Takahashi v. Fish & Game Comm'n 697-98, *700*
Tate v. Short 210, 211, 212
Taylor v. Kentucky 534-35
Tennessee-Carolina Transp., Inc. v. Pentecost 482-83
Tennessee Cent. Ry. v. Tedder *51-52*
Tennessee Dep't of Mental Health and Mental Retardation v. Hughes 394
Tennessee State Bd. of Educ. v. Cobb 303, 304, 395, 396
†Tennlite, Inc. v. Lassiter 884-906
Texas Co., *In re* *757-58*
Thompson v. State 541

Thompson v. Utah 850, *851*, *852*
Time, Inc. v. Firestone 260-62, 264-66, 268
Tindell Home Center v. Union People's Bank 196-97
Toombs v. State 531-32
Trail v. State 520
Train v. City of New York *758-59*
Trice v. Moyers 46, 50
Trigg v. Blanton *83*
Truax v. Raich *696-97*
Turnley v. Garfield *188-89*

U

Union Livestock Yards, Inc. v. Merrill Lynch, Pierce, Fenner & Smith, Inc. 342
Union Pac. Ry. v. Botsford *427*
United Inter-Mountain Telephone Co. v. Public Serv. Comm'n 389, 390
UMW v. Gibbs *866*, 867, *871*, 872-74, 876-77, 879, 882
United States v. Biswell 453-55, 457
v. Ceccolini 509
v. Chadwick 499-502, 836-37, 843, 845
v. Gains 211-12
v. Jenkins 548-49
v. Lewis 495-97, 519-20
v. Matlock 507-08
v. Nixon *776*
v. Radford *207*
v. Robinson 501
v. Rowan 504
v. Scott 549
v. Smith 497-98, 553
v. Stewart 530
v. Sumlin 507-08
v. Wade 516, 517
v. Waller 517-18
United States *ex rel.* Ulrich v. Kellogg *786*
Usery v. Lewis 325, 326, 400-02

V

Vance v. State 488-90
Velsicol Chem. Corp. v. Rowe 332-34
Villines v. State 489
Virginia State Bd. of Pharmacy v. Virginia Consumer Council 122, 123

W

Waller v. Thomas 189
Watkins v. United States 503-04
Weberlist, *In re* *431*
Weinberger v. Wiesenfield *225*, 226
Weiner v. Bank of King of Prussia 603-04
Welch v. T.F.C. Mktg. Serv., Inc. 364
White v. Gilligan *212*
White v. United States *207*
Wiener v. United States *765*
Wiley v. State 540
Williams v. Florida 530, 531, 847-48, *850*, 852-63
Williams v. Illinois 210, 211, 212, 214
Williams v. Oklahoma *157*
Williams v. United States *798*
Williamson County Broadcasting Co. v. Williamson County Bd. of Educ. 338-41
Winship, *In re* *215*
Winters v. Miller *431*
Wisconsin v. Yoder 131, 679-80
Wisconsin *ex rel.* Strykowski v. Wilkie 615-17, *620*, *628-29*, *640*
Wolff v. McDonnell *653-54*
Wong Sun v. United States 831-32
Woodson v. North Carolina *157*, *215*
Wright v. Central DuPage Hosp. Ass'n 629-32

Y

Yett v. Smoky Mtn. Aviation, Inc. 380
Yick Wo v. Hopkins 694, 696
Youngstown Sheet & Tube Co. v. Sawyer 765-67, *769*, 770, 774

Z

Zahn v. International Paper Co. 605, *881*
Zeitlin v. Zeitlin 359-61, 371