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Ruminations on Statutory Interpretation in the Burger Court

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RUMINATIONS ON STATUTORY INTERPRETATION IN THE BURGER COURT

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I thank Professor Kathleen Mullen and Professor Jack Hiller for conversations in which I first explored some of the ideas discussed here. I am alone responsible both for the opinions expressed and for any error.

The legitimate scope of a court's authority to make law where a legislature has spoken by enacting a statute relevant to a case before that court is a recurring issue in American legal thought. The usual assumption entertained in debates over legitimate scope is that a court is bound by the principle of legislative supremacy. Absent unconstitutionality, an applicable statute's command must be enforced whether or not the enforcing court agrees with that command. But the assumption masks substantial difficulty and is controversial at any level of abstraction more concrete than the very general. On what bases should applicability be determined given that the factual patterns confronting a court are susceptible to many alternative legal theories for resolution of the disputes generated by those patterns? On what bases should the meaning of the statutory command be determined? What is the relevance of the court's independent authority to make law to the task of application?

These questions may be viewed as asked and answered by courts and legal academics within the framework of two competing versions of institutional role paralleling similar competing versions of interpretative role[1]

1. *But see* Abraham, *Statutory Interpretation and Literary Theory: Some Common Concerns of an Unlikely Pair*, 32 RUTGERS L. REV. 676, 680 (1979);[hereinafter cited as *Statutory Interpretation and Literary Theory*]. Abraham, *Three Fallacies of Interpretation: A Comment on Precedent and Judicial Decision*, 23 ARIZ. L. REV. 771, 776-77 (1981) [hereinafter cited as *Three Falacies of Interpretation*]. Abraham rejects the Cartesian distinc-

in the arts[2] and in literature.[3] One version grants primacy to the legislature as the author of the statute and therefore emphasizes the statutory text or legislative intention. A court on this view is the mere agent of a legislative principal; its task is accurate duplication of legislative command within the actual context of particular cases. The necessary assumption underlying this first version of judicial role is that accurate duplication of author's meaning is possible; the court's perspective can be suspended in interpretation. The second version grants primacy to the judicial reader or interpreter of the statute and therefore emphasizes the creative role of common law courts. A court on this second view creates the statute in interpreting it; the court's task is to fill an empty vessel with principles or policies[4] appropriate to a dynamic society. The assumption often underlying this second version of judicial role is that accurate duplication of author's

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tion between subject and object he thinks implicit in the distinction made in the text here and largely adopts Stanley Fish's notion of interpretive community. *See infra,* note 3.

2. For a classic survey of the debate in music that emphasizes creative interpretation and draws an analogy to law *see* Frank, *Words and Music: Some Remarks on Statutory Interpretation,* 47 COLUM. L. REV. 1259 (1947).

3. The legal community's interest in contemporary thought in literary criticism has recently become intense. That interest has predictably focused upon the work of E.D. Hirsch (who grants the author primacy) and Stanley Fish (who grants the reader, as limited or defined by the interpretive community in which the reader is "embedded", primacy). E.D. HIRSCH, JR., THE AIMS OF INTERPRETATION (1976)[hereinafter cited as THE AIMS OF INTERPRETATION].; *E.D. HIRSCH, JR., VALIDITY IN INTERPRETATION (1967); S. FISH, IS THERE A TEXT IN THIS CLASS? THE AUTHORITY OF INTERPRETIVE COMMUNITIES (1980).* For an attempt at applying Hirsch to statutory interpretation, see McIntosh, *Legal Hermeneutics: A Philosophical Critique,* 35 OKLA. L. REV. 1 (1982). Legal commentators who have adopted Fish's insights have either attempted to utilize the interpretive community notion as a constraint on judges that warrants the creativity such commentators otherwise advocate or have utilized Fish's attack on the authority of the text and his recognition of the multiplicity and diversity of interpretive communities to adopt a neo-realist stance. For examples of the former, see *Statutory Interpretation, and Literary Theory, supra* note. 1; *Three Fallacies of Interpretation, supra* note 1; Dworkin, *Law as Interpretation,* 60 TEX. L. REV. 527 (1982) also in THE POLITICS OF INTERPRETATION, 249 (W.J.T. Mitchell ed. 1983) [hereinafter cited as *Law as Interpretation*]; Fiss, *Objectivity and Interpretation,* 34 STAN L. REV. 739 (1982) [hereinafter cited as *Objectivity and Interpretation*]. For examples of the latter, see Brest, *Interpretation and Interest,* 34 STAN L. REV. 765 (1982); Levinson, *Law as Literature,* 60 TEX. L. REV. 373 (1982). For Fish's responses, see Fish, *Working on the Chain Gang: Interpretation in Law and Literature,* 60 TEX L. REV. 551 (1982) [herinafter cited as *Chain Gang*]; Fish, *Wrong Again,* 62 TEX L. REV. 299 (1983). For responses to Fish, see, e.g., Dworkin, *My Reply to Stanley Fish (and Walter Benn Michaels): Please Don't Talk About Objectivity Any More* in THE POLITICS OF INTERPRETATION *supra* at 287 [hereinafter cited as *My Reply to Stanley Fish*]; White, *The Text, Interpretation and Critical Standards,* 60 TEX L. REV. 569 (1982).

4. The distinction between principles and policies, if there is a viable distinction, has itself at least two distinct versions. Dean Wellington identifies policy with instrumentalism and principle with ordinary or common morality. Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication,* 83 YALE

meaning is not possible; statutory meaning is a function of reader perspective.

One or the other of these competing versions of institutional role has dominated distinct regimes of academic thought and these regimes have at least influenced judicial behavior.[5] There are three such regimes. The first regime, which shared some of its values with legal positivism, prevailed in the late 19th and early 20th centuries. Under

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L.J. 221 (1973). Wellington's distinction therefore treats a policy justification for a legal rule as a justification from the consequences or presumed effects of the rule. Professor Dworkin treats a policy as a device for furthering community goals or interests and a principle as the source of individual or group rights. R. DWORKIN, TAKING RIGHTS SERIOUSLY 82 (1978). Dworkin denies that his version of the distinction is that between "consequentialist" and "non-consequentialist" argument or between teleological and deontological theory. *Id.* at 295-97, 313-15. Moreover, Dworkin assigns policies to legislatures and principles to courts. *Id.* at 84-86. Wellington, by contrast, recognizes both common law policies and legislative policies and assigns institutional roles with respect to policies by insisting that common law policies must be both widely supported and relatively neutral (in the sense that a common law rule may not disproportionately burden or benefit interest groups). Wellington, *supra*, at 238.

Contrast all of this to the law and economics school whose reliance on a policy (or is it a principle?) of wealth maximization relies on consequentialist technique for its implementation. Courts on wealth maximization premises are the competent forum; policies of redistribution are for legislatures. *See* R. POSNER, ECONOMIC ANALYSIS OF LAW 399-40 (2d ed. 1977).

What is interesting in these distinctions is the relationship between critic's preferences and that critic's version of institutional role. Given a preference for wealth maximization, legislation where possible is to be given a narrow construction. *See* Easterbrook, *Statute's Domains*, 50 U. CHI. L. REV. 533 (1983). *But see* Posner, *Statutory Interpretation—in the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 821-22 (1983). Given a preference for individual or group rights, the legislature's policy pronouncements are to be trumped by an expansive version of constitutional law, DWORKIN, *supra* note 4, at 149, or are to be limited by language, *id.* at 109, or judicial methodology, *Law as Interpretation, supra* note 3, or by a court's choice of a best fitting theory of political morality, Dworkin, *How To Read The Civil Rights Act*, N.Y. REV. BKS, Dec. 20, 1979 at 37[hereinafter cited as *Civil Rights Act*]. Given a preference for the grandeur of the common law method, legislation is to be trumped by rules of "clear statement" where "principles" are at stake. *See* Wellington, *supra* at 262-64.

5. There are a number of versions of the history of intellectual thought on the questions raised here from which the present scheme is loosely and eclectically derived. *See generally*, G.E. WHITE, PATTERNS OF AMERICAN LEGAL THOUGHT 97-191 (1978); *Statutory Interpretation, supra* note 1, at 682-88; Ackerman, *Book Review* 103 DAEDALUS 119 (1974); Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976); Witherspoon, *The Essential Focus of Statutory Interpretation*, 36 IND. L.J. 423 (1961); Witherspoon, *Administrative Discretion to Determine Statutory Meaning: "The Middle Road"* 40 TEX L. REV. 751 (1962); [hereinafter cited as *Middle Road*] Witherspoon, *Administrative Discretion to Determine Satutory Meaning: "The Low Road,"* 38 TEX L. REV. 392, 572 (1960); Witherspoon, *Administrative Discretion to Determine Statutory Meaning: "The High Road,"* 35 TEX. L. REV. 63 (1956).

it, courts, at least as a matter of the rhetoric of their supposed methodology,[6] were to emphasize the plain meaning[7] of statutory text and to therefore apply legislative commands as relatively passive agents of the legislative sovereign.[8] Although the text had primacy under such a view, its primacy was a matter of its availability as the mechanism by which the sovereign's commands could be known.[9]

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6. Perhaps the most notorious statement of this methodology is Justice Roberts' with respect to constitutional interpretation:

> When an act of Congress is appropriately challenged in the court as not conforming to the constitutional mandate the judicial branch of the Government has only one duty—to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former.

United States v. Butler, 297 U.S. 1, 62 (1936). Such sentiments are not time-bound; they appear in the rhetoric (not necessarily the actual thinking) of courts in all of the periods under discussion. *See, e.g.*, T.V.A. v. Hill, 437 U.S. 153 (1978).

7. "Plain meaning" has come to have at least three meanings in legal discourse. It is sometimes used to refer to literalism: the literal words of the statute rather than its purpose or spirit, control. It is sometimes used as a basis for rejecting an argument that an interpreting court should avoid applying literal meaning when application would produce absurd or unreasonable results. It is sometimes used to refer to ordinary meaning, as when a court says that its task is to construe a statute as whole, giving the words that meaning an ordinary speaker of English would give them. *See* R. DICKERSON, THE INTERPRETATION AND APPLICATION OF STATUTES 286 (1975). As the phrase is used in this paper, it encompasses all three of these potential meanings, on the grounds that all three are expressions of a particular perspective regarding the judicial function and are at least generally consistent with each other given that perspective.

8. There is however some danger in too readily attributing passivity to the academic thought of the period. The risk lies in the fact that the most descriptive statements of "mechanical jurisprudence" are not to be found in the alleged practitioners of that methodology but in the realists' attacks on the methodology. It is for example possible to view both Landis and Pound as "literalists," albeit literalists who rely in part on notions of legislative purpose or intent. *See* Landis, *A Note on Statutory Interpretation*, 43 HARV. L. REV. 886 (1930); [hereinafter cited as *A Note on Statutory Interpretation*]. Pound, *Spurious Interpretation*, 7 COLUM. L. REV. 379 (1907) [hereinafter cited as *Spurious Interpretation*]. Yet both were concerned with judicial use of statutes as sources of law for courts to fashion. *See* Landis, *Statutes and the Sources of Law*, HARV. LEGAL ESSAYS 213 (1934); [hereinafter cited as *Statutes and Sources of Law*] Pound, *The Theory of Judicial Decision* 36 HARV. LAW REV. 641 (1923); Pound, *Common Law and Legislation*, 21 HARV. LAW REV. (1908) [hereinafter cited as *Common Law and Legislation*].

9. Although it is believed that this view of the authority of language is generally attributed to positivists, the positivist-utilitarian position on the question was more a matter of aspiration than description. Both Bentham and Austin desired codification from which judicial decision could be deductively derived. Neither thought language so precise in actual usage to permit such a procedure. *See* J. BENTHAM, OF LAWS IN GENERAL 241 (H.L.A. Hart ed. 1970); 2 AUSTIN, LECTURES ON JURISPRUDENCE 997-98 (5th ed. 1885). Kelsen is perhaps a better example of an exponent of the view which gives text primacy. *See* Kelsen, *The Pure Theory of Law*, 51 L.Q. REV. 527-28

Ironically, however, the judicial subserviance to legislative command implicit in the first regime's reliance on the authority of the literal language of statutes very often coexisted with a judicial tendency to confine the operative force of statutes to their language and, therefore, to ensure the widest possible room for the operation and development of legal principle as legal principle was identified by the courts.[10] Legal academics within the tradition of the first regime who were critical of this tendency to limit the potential force of statutes sometimes supplemented reliance on the literal meaning of language with reliance on legislative intent as the mechanism for ensuring judicial adherence to the will of the legislative author of statutory text.[11]

The second regime, which may be identified with legal realism, undertook a sustained attack on the first regime by rejecting the supposed passivity of courts.[12] The realists denied the authority of text by demonstrating the indeterminacy of the meaning of language and denied the authority of legislative intent by pronouncing it a fiction. Judges on these premises are largely free from legislative will.[13] Indeed, in its most extreme versions, realism emphasized the primacy of the interpreting court over the enacting legislature: judges created the law of a statute; legislatures merely provided the occasion for creation.[14]

(1935). And given an emphasis upon the primacy of text, it is possible to treat advocates of the text as distinct from and opponents of advocates of author's meaning, particularly when the latter emphasize author's intent. *See* THE AIMS OF INTERPRETATION, *supra* note 3, at 20-27, 50-73.

10. *See Spurious Interpretation, supra* note 8; *A Note on Statutory Interpretation, supra* note 8.

11. *See A Note on Statutory Interpretation, supra* note 8, at 887.

12. The classic statement of the argument is J. FRANK, LAW AND THE MODERN MIND 131-33, 200-09 (1970). *See also* Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395 (1950); Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863 (1930) [hereinafter cited as *Statutory Interpretation*]. Radin, *A Short Way With Statutes*, 56 HARV. L. REV. 388 (1942).

13. Ironically, the realist strategy was itself incoherent in one important respect: it sought to free the New Deal Congress from a Supreme Court which employed the first regime in constitutional interpretation in overruling legislation and simultaneously to advocate judicial recognition of and use of judicial freedom to make law. *See* Kennedy, *supra* note 5, at 1757. Realism therefore found itself on the horns of the standard dilemma of skepticism: if legal rules do not legitimate judicial action, is the judiciary to abdicate power or use it freely? The skeptical argument itself provides no criterion for this choice.

14. *See Statutory Interpretation, supra* note 12. The classic statement, much approved by the realists, was Gray's: "[I]n truth, all the Law is judge-made law. The shape in which a statute is imposed on the community as a guide for conduct is that

The third regime, perhaps best represented by the Legal Process School,[15] sought to reconstruct in degree the first regime while accommodating the insights of the realist attack. Although it recognized the freedom of judges to choose between alternative interpretations of a statute, the third regime nevertheless denied that this freedom was unconstrained. The language of statutory text, while not controlling, limited possible choices.[16] Appropriate principles of adjudication implicit in the judiciary as an institution were similarly confining.[17] Moreover, in place of language, the third regime substituted legislative purpose as the fundamental basis upon which a modified judicial "agency" could be predicated. Judicial decision according to purpose would at least in degree reestablish the importance of the author of statutory text even though "attribution" of purpose was to be the judiciary's task.[18] Indeed, the third regime may be viewed as compromising[19] the view that the author of text has primacy and the view that the interpreter of text has primacy by treating author and interpreter as rough equals.[20]

There is at least some doubt that the third regime may be said to enjoy current dominance. Indeed, we may have entered an era of the fourth regime, the regime of chaos. It is perhaps true that there is a "new legal process school"[21] whose adherents seek to extend the

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statute as interpeted by the courts. The courts put life into the dead words of the statute." J. GRAY, THE NATURE AND SOURCES OF THE LAW 119-20 (1909).

15. *See generally* H. HART & A. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW (Tent. ed. 1958).

16. *See id.* at 1218-26.

17. *See generally* HART & SACKS, *supra* note 15; A. BICKEL, THE LEAST DANGEROUS BRANCH (1962); L. FULLER, THE MORALITY OF LAW, (Rev. ed. 1969); Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959); Wellington, *supra* note 4. Reconstructed realists might also be placed in this category. *See* Llewellyn, *supra* note 12, at 400; W. TWINING, KARL LLEWELLYN AND THE REALIST MOVEMENT, 321-22 (1973) (Llewellyn's reliance on purpose in drafting the Uniform Commercial Code). It should be noted that, while academics devoted to the legal process school often utilized their theories to constrain judicial role by treating the question of the substantive content of social policy as a question best left to other institutions of government, judges very often use legal process concepts for "activist" ends. *See* Ackerman, *supra* note 5, at 124.

18. *See* HART & SACKS, *supra* note 15, at 1413-16; FULLER, *supra* note 17, at 82-91.

19. *See* Kennedy, *supra* note 5, at 1764-65.

20. For example, Hart and Sacks insisted upon the continued viability of legislative supremacy (by confining attribution of purpose to the words statutory language can bear and by recommending judicial humility) and insisted upon the independent responsibility of the judiciary to preserve legal principle by making assumptions of reasonableness and rationality about the legislature consistent with such principle. *See* HART & SACKS *supra* note 15, at 1156-57, 1410-17. Legislative command was therefore to be interpreted explicitly from the peculiar value premises of the judiciary.

21. *See* Weisberg, *The Calabresian Judicial Artist: Statutes and The New Legal*

life of the third regime in the face of attacks by neo-realists. Such diverse constraints on judicial freedom as interpretive community,[22] dialogue,[23] statutory language,[24] moral principle,[25] and legal topography[26] are currently invoked to distinguish law from "politics." But neo-realist attacks on the third regime have been at least damaging.[27] And the primary intellectual competition confronting neo-realists are systematic theories[28] whose prescriptions for statutory interpretation and for law in other contexts have more in common with the conceptualism of the first regime[29] than with the third regime's reliance on process as a source of value.[30] For example, both devotees of moral philosophy

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Process, 35 STAN. L. REV. 213, 240-49 (1983).

22. *See generally Objectivity and Interpretation*, *supra* note 3.

23. *See generally* Fiss, *Forward: The Forms of Justice*, 93 HARV. L. REV. 1 (1979).

24. *See* R. DWORKIN, *supra* note 4, at 109.

25. *See generally Id.*

26. *See generally* G. CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES (1982).

27. By neo-realists, I mean both critical legal studies adherents and self-proclaimed relativists or nihilists, despite the distinctions which divide them. *See, e.g.*, Brest, *The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship*, 90 YALE L.J. 1063 (1981); Kennedy, *supra* note 5; Kennedy, *Legal Formality* 2 J. LEG. STUD. 351 (1973); Levinson, *supra* note 3; Tushnet, *Following The Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781 (1983). The term may also be taken to include, however, those scholars who, although generally devoted to systematic theories for purposes of deriving policy recommendations, employ skepticism in the context of interpretation to recommend judicial restraint in the use of statutes. *See* Easterbrook, *Legal Interpretation and the Power of the Judiciary*, 7 HARV. J. LAW & PUB. POLICY 87 (1984).

28. *See generally* B. ACKERMAN, PRIVATE PROPERTY AND THE CONSTITUTION (1977). Ackerman's distinction between the "scientific policymaker's" reliance upon an internally consistent comprehensive view and the "ordinary observor's" reliance upon common thought and speech (and therefore upon the primacy of the common law method or the virtues of process) suggests the point made in the text. The "scientific policymaker's" comprehensive view is incompatible with the third regime's reliance upon the virtues of neutral process, particularly where those virtues are thought to include the incrementalism of case by case common law method. It is nevertheless possible to view some scientific policymakers, *e.g.*, Ronald Dworkin, as advocates of an evolved version of the third regime's insistence upon the neutrality of legal principle if that insistence is itself viewed as mandating the internal consistency of principle. *See* Weisberg, *supra* note 21, at 234.

29. *See* G. GILMORE, THE AGES OF AMERICAN LAW 107-08 (1977); G.E. WHITE, TORT LAW IN AMERICA 211-43 (1980).

30. It is true that adherents of wealth maximization as a "comprehensive view" often derive precepts of institutional competency from that view. *See* R. POSNER, *supra* note 4, at 399-407. Questions of institutional competency were at the heart of the third regime. *See* HART & SACKS, *supra* note 15, at 662-69. L. FULLER, *supra* note 17, at 152-86. And Judge Posner, at least, has advocated positions which suggest a willingness to suspend wealth maximization in favor of deference to legislation. *See* Posner, *supra* note 4, at 821-22. The substantive recommendations of economic analysis are, however, derived from its comprehensive view rather than from a theory of adjudication, and

and devotees of economics rely upon "comprehensive views"[31] independent of legal process and statutory text both in prescribing substantive resolutions of legal issues and in characterizing legislative and judicial competencies.[32] Interpretive strategies are then derived from those characterizations. Interestingly, both practitioners of moral philosophy and practitioners of economics, albeit for distinct and inconsistent reasons, have recommended strategies which confine the operational scope of legislation[33]—a position reminiscent of one of the tendencies of the first regime.

If there is therefore no currently dominant interpretive regime in legal academe, it has nevertheless been recently claimed that a particular interpretive strategy has come to prevail in what is loosely termed the Burger Court: the strategy of literalism.[34] If so, the Court has returned full circle to a version of the first regime and to the contradictions of that regime: the text has primacy, but its force is to be strictly limited to the language employed by the national legislature.[35]

There are a number of grounds upon which this claim might be disputed. In the first place, it is at best unclear whether "Burger Court" is an appropriate label. One ideological axis of the present Supreme Court, the "conservative" axis generally disfavored in academic circles, no doubt more often than not exhibits the supposed sins of literalism. But the composition of that axis is notoriously

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the institutional competencies recommendations of the analysis are derived from arguments about the compatability of particular institutions with that view. The tendency of the third regime, by contrast, was argument from theories about institutional competency to substantive recommendations.

31. *See* ACKERMAN, *supra* note 28, at 11.

32. *See, e.g.*, POSNER, *supra* note 4, at 399-418; DWORKIN, *supra* note 4, at 81-130.

33. *See* Easterbrook, *supra* note 4; DWORKIN, *supra* note 4, at 109-10. *But see* Posner, *supra* note 4, at 821-22.

34. *See* Moore, *The Semantics of Judging*, 54 S. CAL. L. REV. 151, 281 (1981); Note, *Intent, Clear Statements, and the Common Law: Statutory Interpretation in the Supreme Court*, 95 HARV. L. REV. 892 (1982). *Cf.* Fiss, *supra* note 23, at 4-5, 46-50 (Burger Court's assault on structural reform by invoking new formalism); Luneburg, *Justice Rehnquist, Statutory Interpretation, The Policies of Clear Statement, and Federal Jurisdiction*, 58 IND. L.J. 211 (1982) (characterizing the approach as an insistence upon clear congressional statement and a refusal otherwise to make law). Nowak, *Resurrecting Realist Jurisprudence: The Political Bias of Burger Court Justices*, 17 SUFFOLK U.L. REV. 549 (1983) (arguing that Burger Court methodology resembles mechanical jurisprudence methodology because its political values resemble the values of the Court in the late 19th and early 20th centuries).

35. *See, e.g.*, Texas Industries, Inc. v. Radcliff Materials, Inc., 451 U.S. 630 (1981); Chiarella v. United States, 445 U.S. 222 (1980); F.C.C. v. Midwest Video Corp., 440 U.S. 689 (1979); Ernst & Ernst v. Hochfelder, 425 U.S. 185 (1976).

unstable.[36] The maximum descriptive content of the phrase "Burger Court" must therefore be limited to some of the justices of the recent Supreme Court some of the time. In the second place, individual justices within one or another of the ideological axes of the Supreme Court are and have been capable of adopting literalism in different cases at different times.[37] One is tempted to suggest that the interpretive strategy which will be employed in any particular case by any particular justice is that which best fits a particular desired result. A less cynical and perhaps more accurate suggestion is that there is currently no authoritative theory of statutory interpretation against which the performance either of the Court or of individual justices might be measured.[38] It is therefore presumptuous to criticize any justice or group of justices either for inconsistency or for heretical methodology.

The purpose of this article is nevertheless not to challenge the claim that the Burger Court has in at least the sense of a general direction adopted a version of literalism as interpretive strategy. That claim is for present purposes assumed. The purposes of the article are instead to explore the reasons which might justify such a strategy and, therefore, to state an argument in partial defense of it. The article will proceed in four parts.

First, the Burger Court's methodology will be examined in an effort to identify the sense or senses in which it is labeled literalism and to identify the values it serves. Second, critical responses to literalism from the perspectives of the second and third regimes will be explored and attacked from the value premises identified as underlying the Burger Court's version of literalism. Finally, the contemporary debate among literary and legal theorists over the notion that reader perspective governs the interpretive enterprise will be examined in an effort to defend the Burger Court's methodology (or,

36. *See, e.g.*, Merrill Lynch, Pierce, Fenner & Smith v. Curran, 456 U.S. 353 (1982); Northwest Airlines v. Transport Workers Union, 451 U.S. 77 (1981); Cannon v. University of Chicago, 441 U.S. 677 (1979); T.V.A. v. Hill, 437 U.S. 153 (1978).

37. *Compare e.g.*, United Steelworkers v. Weber, 443 U.S. 193 (1979) (Brennan, J. delivering opinion for the Court) (spirit or purpose of legislation controlling); International Bhd. Teamsters v. Daniel, 439 U.S. 551 (1979) (Powell, J. delivering opinion for the Court) (purpose controlling) *with, e.g.*, Franks v. Bowman Transportation Co., 424 U.S. 747 (1976) (Brennan, J. delivering opinion for the Court) (language and structure of legislation controlling); Ernst & Ernst v. Hochfelder, 425 U.S. 185 (1976) (Powell, J. delivering opinion for the Court) (language and structure of legislation controlling). *See* Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 215 (1983).

38. *See, e.g.*, DICKERSON, *supra* note 7, at 1-6; HART & SACKS, *supra* note 15, at 1201; Wald, *supra* note 37, at 215-16.

at least, an interpretation of that methodology) against the claim that it constitutes a mere means of enforcing a controversial substantive political perspective.

I. THE BURGER COURT'S INTERPRETIVE STRATEGY

A. *In What Sense Literalism?*

The most incriminating item of evidence supporting a literalism characterization of the Burger Court's interpretive strategy is *T.V.A. v. Hill*.[39] That case involved the question of the application of the Endangered Species Act[40] to a federal project threatening an endangered species of fish. Two portions of the majority opinion in *Hill* are instructive. The first invokes the "plain meaning" rule to interpret the statute:

> This language admits of no exception. Nonetheless, petitioner urges, as do the dissenters, that the Act cannot reasonably be interpreted as applying to a federal project which was well under way when Congress passed . . . the Act. . . .To sustain that position, however, we would be forced to ignore the ordinary meaning of plain language.[41]

The second portion of the majority opinion in *Hill* responds to Justice Powell's dissent, which had invoked third regime arguments concerning the independent responsibility of courts to reconcile legislation with reasonableness:

> [I]n our constitutional system the commitment to the separation of powers is too fundamental for us to pre-empt congressional action by judicially decreeing what accords with 'common sense and the public weal.' Our Constitution vests such responsibilities in the political branches.[42]

One would be hard pressed to find a clearer statement than the first of these excerpts of literalist methodology understood as reliance both on the possibility of plain meaning and on plain meaning as itself establishing the application of statutory language to the facts of a case. And one would be equally hard pressed to find a clearer statement than the second of these excerpts of the rationale underlying

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39. 437 U.S. 153 (1978).

40. Pub. L. 93-205, § 7, 87 Stat. 892 (Dec. 28, 1973). The Act was subsequently amended to relax the requirements imposed by the Court's interpretation in *Hill*. *See* 16 U.S.C. § 1536 (1982).

41. 437 U.S. at 173.

42. *Id.* at 195.

literalist philosophy. Both excerpts taken together suggest the characterization of the Burger Court apparently intended by a literalism label: the Court views itself as a reader of statutes with an obligation to rigidly enforce them as written; creativity—even creativity understood as the conscious consideration of principles and policies underlying or competing with a statute—is a function for the legislative author of statutes. The question posed here is whether the Burger Court's rhetoric ought itself to be taken literally.

Despite the Burger Court's repeated invocation of plain meaning,[43] there are reasons to question a characterization of its methodology which attributes to it a naive reliance upon the authority of language. First, any judicial statement that the plain meaning of language controls decision in a case must itself be interpreted as a statement made within the context of a legal culture which is and which has been for some time critical of the authority of language.

It is true that there remains room within the legal culture for quite distinct degrees of skepticism. Respectable opinion within that culture argues that language, the meaning of which is largely supplied by convention,[44] has standard instances of application and nonapplication so that skepticism should be limited to recognizing that application outside the area of standard instances is not controlled

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43. *See, e.g.*, American Tobacco Co. v. Patterson, 456 U.S. 63, 75 (1982); Rubin v. United States, 449 U.S. 424, 430-31 (1981); Aaron v. Securities Exchange Commission, 446 U.S. 680, 690 (1980); United States v. Turkette, 452 U.S. 576, 580-87 (1981); Jefferson Co. Pharmaceutical Ass'n., Inc. v. Abbott Laboratories, 103 S. Ct. 1011, 1015-16 (1983). *But see, e.g.*, Bob Jones University v. United States, 103 S. Ct. 2017, 2025-26 (1983); Watt v. Alaska, 451 U.S. 259, 266 (1981).

44. There is a continuing debate on the question whether meaning is a function of convention in the use of language or a function of speaker's intention (Alice's debate with Humpty Dumpty in "Through the Looking Glass"). *Compare, e.g.*, Grice, *Utterer's Meaning, Sentence-Meaning and Word Meaning*, in 4 FOUNDATIONS OF LANGUAGE 225 (1968) (intention) *with* J. SEARLE, EXPRESSION AND MEANING, STUDIES IN THE THEORY OF SPEECH ACTS 117-136 (1979) (there is such a thing as literal sentence meaning distinct from speakers utterance meaning and this literal meaning is a matter of convention, but literal meaning is context dependent); *Id.* at 1-29 (Wittgenstein was wrong in suggesting that there is a limitless number of uses of language; there are a limited number of uses). The debate in legal discourse has often taken the form of objective versus subjective theories of interpretation of statutes, contracts and wills. *See* Holmes, *The Theory of Legal Interpretation*, 12 HARV. L. REV. 417, 419 (1899): "We do not inquire what the legislature meant; we ask only what the statute means." The issues are reflected as well in the Hart-Fuller debate. *See* Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958) (viewing convention as partially controlling) Fuller, *Positivism and Fidelity to Law A Reply to Professor Hart*, 71 HARV. L. REV. 630 (1958) (viewing purpose as controlling).

by language.[45] There is also respectable opinion which claims that there are no guaranteed standard instances of the application of language to facts sufficient to permit deduction from statutory language; the link between the language of a statute and the facts of a case which permits application of law to facts is necessarily created by the judge.[46] Between these views lies respectable opinion which suggests either that statutory language establishes broad limits to its possible application and that application within these limits is a matter requiring judicial choice[47] or that language augmented by judicial identification of the context and purpose of its use determines application.[48] None of these views denies the force of the ordinary meaning of statutory language in judicial decision, but all are in degree skeptical of the capacity of language to determine its own application to facts in at least some "hard cases."[49]

If this is an accurate portrayal of the range of respectable opinion within current legal culture, it is at least doubtful that Burger Court

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45. *See* H.L.A. HART, THE CONCEPT OF LAW, 124 (1978); Hart, *supra* note 44; Williams, *Language and the Law*, 61 L.Q. REV. 179, 181-85 (1945). *But see*, Hart, *Problems of Philosophy of Law*, 6 ENCYCLOPEDIA OF PHIL., 264, 271 (P. Edwards ed. 1967). Despite their differences on the question of how legal principles are or ought to be derived, Professor Dworkin's view of the limits statutory language imposes on judicial decision has some similarity to H.L.A. Hart's view that some factual instances are clearly within or without the core of meaning of the words used in the statute. In Dworkin's view, the "cannonical terms" of the statute place limits on its scope. DWORKIN, *supra* note 4, at 109. Moreover, Dworkin apparently thinks that, although a judge must identify the political theory which best fits statutory language in determining what rights the legislature created, *id.* at 109, 111 n. 1, there will in some cases be only one such theory permitted by that language. *See Civil Rights Act*, *supra* note 4, at 41.

46. Moore, *The Semantics of Judging*, 54 S. CAL. L. REV. 151 (1981). Moore's analysis of language is at once more radical and less radical than the arguments of the legal realists. Realists thought at least some cases controlled by statutory language. *See Statutory Interpretation*, *supra* note 12, at 879. Moore argues that there are no "easy cases," Moore, *supra* at 271-91, in part because no word "has a set of conditions that are necessary and sufficient for its correct application." *Id.* at 272. At the same time, Moore rejects the occasional realist claim that words have no objective meaning and that meaning is therefore solely a matter of context; for Moore, convention supplies at least a range of possible meaning. *Id.* at 275-77. For examples of such a realist claim, see Cohen, *Field Theory and Judicial Logic*, 59 YALE L.J. 238, 240-41 (1950); Fuller, *supra* note 44. Moore's argument therefore relies less on the proposition that language lacks objective meaning or that the defects of language (e.g., ambiguity or vagueness) preclude such meaning than upon the incapacity of language to determine its application to a set of real world facts.

47. *See, e.g.*, DWORKIN, *supra* note 4, at 81; HART & SACKS, *supra* note 15, at 1412; *Statutory Interpretation*, *supra* note 12, at 879. *See also supra* note 45.

48. *See, e.g.*, DICKERSON, *supra* note 7, at 54-56; HART & SACKS, *supra* note 15, at 1410-17; J.W. HURST, DEALING WITH STATUTES, 31-66 (1982); Fuller, *supra* note 44.

49. *See supra* notes 45-46.

literalism may be accurately characterized as the heresy of "mechanical jurisprudence;"[50] such a characterization would place the justices at the fringes of that culture. Given that the justices are products of and practitioners within the legal culture, their occasional reliance on plain meaning can at most be interpreted to itself mean that they are less skeptical of the authority of language than some of their fellow skeptics some of the time. The rhetoric of literalism remains a legitimate mode of argument which will be heard, understood and not be taken literally within a legal culture unsure of the degree of its language skepticism. It is a particularly appropriate mode of argument for judges who, although they may be skeptics outside the context of particular cases, think the correspondence between the particular facts before them and the particular statutory language before them an easy question.[51]

The second reason to doubt that a naive literalism characterizes Burger Court methodology is derived from attacks on such literalism. One such line of attack—the language skepticism surveyed above—denies at least in degree the capacity of statutory language to identify the facts to which it applies; a judicial decision that particular facts fall within or without some statutory command is therefore at least often an act of judicial creativity dependent upon the judge's values rather than the mechanical application of the statute's "plain meaning."[52] The skeptical line of attack does not deny that statutory

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50. The phrase is of course Dean Pound's. Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605 (1908). Pound was himself later attacked for his own brand of literalism. FRANK, *supra* note 12, at 151, 221-31; Llewellyn, *A Realistic Jurisprudence—The Next Step*, 30 COLUM. L. REV. 431, 435 (1930).

51. One difficulty with criticism of literalism is that it is typically two-pronged. The first prong attacks literalism descriptively by claiming that language cannot in fact control decision. The second prong attacks literalism normatively by arguing that literalism produces immoral, unreasonable or absurd results. To the extent that the critic concedes the possibility of hard and easy cases—easy in the sense that language clearly contemplates the easy case and that decision according to statutory language produces no absurd or immoral results in such a case—he is subject to the rebuttal that the case decided on a plain meaning rationale was easy in both senses for the judge who decided it. Moreover, the rebuttal is consistent with that version of skepticism which emphasizes the primacy of reader over both text and author: easy and hard cases are in the eye of the beholder (or, at least in the eye of the shared perspective the reader brings to the text). In this debate, the critic adopting skeptical premises is at a distinct disadvantage. His relativism makes his claims about appropriate classification within the hard and easy case structure suspect and it is the judge, after all, who possesses power to direct the violence of the state. *Cf.* Levinson, *supra* note 3, at 396-402 (treating Professor Fiss' attack on Justice Rehnquist as necessarily political).

52. *See supra* text accompanying note 46.

language may have an objective meaning or range of meaning supplied by practice or convention apart from its application to particular facts;[53] it denies only that statutory language itself can determine whether particular facts are identified by that language.[54] However, a second line of skeptical attack on literalism does deny the possibility of objective meaning apart from application. By the terms of this second argument, meaning is determined by the perspective of the interpreter of meaning: statutory meaning is interpreter's meaning and interpreter's meaning is a function of the interpreter's context or ideology or world view.[55]

The distinctions between these lines of attack are that the first tends to distinguish between the possibility of objective meaning in the abstract and the possibility of objective meaning within a situation and argues that judicial creativity is a necessary aspect of the latter;[56] the second tends to collapse abstract and situational meaning[57] and argues that plain meaning is necessarily in the eye of the reader

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53. *See* Moore, *supra* note 34, at 181-202. Moore argues that such features of language as ambiguity and vagueness make questionable the possibility that there are necessary and sufficient conditions governing the correct application of statutory words. He may therefore be thought to question the possibility of objective meaning, even though he concedes that such matters as linguistic context can alleviate ambiguity. *Id.* at 272. But Moore appears to concede the possibility of an objective meaning in the highly limited sense of paradigm items *believed* by a linguistic community to be within the meaning of a word. *Id.* at 287-92. Moore's primary concern is therefore a matter of application within the context of a case.

54. *See generally* Moore, *supra* note 34. *Cf. Statutory Interpretation, supra* note 12, at 879-81. (The Judge must make a choice as to what facts fall within and without the statute within a wide range of discretion).

55. *See, e.g., Statutory Interpretation and Literary Theory, supra* note 1; Brest, *supra* note 27; Brest, supra note 3; Levinson, *supra* note 3. It is of course apparent that this view was in degree the view of the legal realists. *See, e.g.*, FRANK, *supra* note 12, at 62-74; *Statutory Interpretation, supra* note 12, at 881. Its present popularity with legal academics is attributable, however, to their borrowing from certain and controversial literary theorists and philosophers. *See* FISH, *supra* note 3; H. GADAMER, PHILOSOPHICAL HERMENEUTICS (D. Linge, ed. & tr., 1976).

56. *See* DICKERSON, *supra* note 7, at 13-33, 238. (distinguishing between ascertainment of meaning as a "cognitive function" highly dependent upon context and application of a statute "whose revealed meaning fails to dispose of the case at hand" as a creative function). *Cf.*, THE AIMS OF INTERPRETATION, *supra* note 3, at 2-3, 48-49, 85-92 (distinguishing meaning and significance); Moore, *supra* note 34, at 276, 292-93 (words have conventional meanings independent of speaker's intention, but Judge must always create in determining which factual pattern falls within words of a statute).

57. *See* H. GADAMER, TRUTH AND METHOD 275 (1975); Cohen, *supra* note 46, at 240-41. *Cf.* Jones, *The Plain Meaning Rule and Extrinsic Aids In The Interpretation of Federal Statutes*, 25 WASH. U.L.Q. 2, 8-9 (1939) (interpretation of statute cannot be separated from the facts of the case); Llewellyn, *supra* note 12, at 397-99 (court responds to words of statute in part on basis of its sense of the situation and the case); Nutting,

because the reader is predisposed by his perspective to see a particular meaning.[58] The first line of attack therefore views the reader's perspective as a crucial element of application of statutory language to the facts of a particular case. The second line of attack views reader perspective as controlling both the reader's perception of the meaning of statutory language and the reader's perception of the significance of that meaning in the context of a particular case. Both nevertheless share a common theme: statutory interpretation cannot be controlled by the objective meaning of statutory language because it is in degree controlled instead by the value system of the judge.

Given this common theme as a premise, Burger Court use of the plain meaning rule does not betray a belief that meaning somehow resides in language. It betrays instead mere agreement, at least between five of nine justices, about the meaning of particular statutory language in the circumstances of a particular case.[59] Upon the assumptions that language is incapable of controlling decision and that the perceived meaning of a statute is, at least in the circumstances of a particular case, a function of reader perspective, judicial perception of meaning as "plain" is merely agreement about a meaning.[60] The relevant question for a critic of literalism is, on such assumptions, the identification of the judicial perspective within which agreement

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The Ambiguity of Unambiguous Statutes, 24 MINN. L. REV. 509 (1940) [hereinafter cited as *The Ambiguity of Unambiguous Statutes*] (rejecting distinction between interpretation and application); Nutting, *The Relevance of Legislative Intention Established By Extrinsic Evidence*, 20 B. U.L. REV. 601, 610 n.41 (1940) [hereinafter cited as *The Relevance of Legislative Intention*] (same). Contrast Fuller's contextualism, which appears to have placed more emphasis upon the legislative context (purpose) and linguistic context of the text (structure) than upon the reader's context (the case). Fuller, *supra* note 44, at 669.

58. *See, e.g., Statutory Interpretation and Literary Theory, supra* note 1, at 686; FISH, *supra* note 3, at 318. *Cf.* T. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS (2d ed. 1970) (accepted paradigms as structuring scientific thought); J. ROYCE, THE PROBLEM OF CHRISTIANITY, 273-362 (1967) (relying on Charles Pierce) (communities of interpretation). Both Fish and Abraham, relying on Fish and Royce, refer to reader perspective as an "interpretive community." They believe that such a notion, although it eliminates the authority of the text, precludes idiosyncratic judicial decision because there cannot be idiosyncratic perspective in a judge "embedded" in such a community. Unfortunately, the efficacy of this limitation is a matter of one's understanding of the breadth of idiosyncratic perspective. *See My Reply to Stanley Fish, supra* note 3, at 295; *infra*, text accompanying notes 318-34.

59. *See* Llewellyn, *supra* note 12, at 396-97. *Cf.* H.L.A. HART, THE CONCEPT OF LAW, 134-35 (1961) (arguing that people treat law from an "internal point of view" as an authoritative standard of behavior); Moore, *supra* note 34, at 233 (from judge's internal point of view a legal rule is described as "true"). *But cf. My Reply to Stanley Fish, supra* note 3, at 298-303 (rejecting internal point of view/external point of view dichotomy on the theory that skeptical argument about law remains a legal argument).

60. *See Three Fallacies of Interpretation, supra* note 1, at 777.

concerning meaning could be reached. It is that perspective, on these same assumptions, which is the real target of the criticism. In short, if perceived meaning is even partly a matter of the perspective brought by the judge to the tasks of interpretation and application, there cannot be a naive literalism. There can only be a complex value structure which enables a justice to adopt literalism as a mode of argument.[61]

The third reason to question a literalism characterization is that the Burger Court, even the Burger Court as that label has been here narrowly defined, does not in fact rely invariably on the plain meaning of statutory language. It relies, rather, on the usual variety of tools in the judicial arsenal—legislative intent,[62] legislative purpose,[63] rules of clear statement,[64] canons of statutory construction,[65] its constitutional veto over legislation[66]—as well as the plain meaning of language.[67] If a literalism characterization of Burger Court methodology, even the self-proclaimed characterization evident in *T.V.A. v. Hill*, purports to accurately describe an even relatively consistent judicial behavior, it must accommodate the apparent capacity of the particular behavior described by that characterization to be implemented by a variety of devices. It is submitted that the literalism characterization cannot accommodate that capacity unless the characterization is understood not as a reference to a particular device—the plain meaning of language—but as a reference to the underlying normative position of the Burger Court on the question of the proper relationship between courts as readers of statutes, legislatures as authors of statutes and text as the physical embodiment of statutes.

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61. *See Statutory Interpretation and Literary Theory, supra* note 1, at 685-86. *But see infra* text accompanying notes 284-413.

62. *See, e.g.*, Potomac Electric Co. v. Director, Office of Workers Compensation Programs, 449 U.S. 268 (1980); Andrus v. Shell Oil Co., 446 U.S. 657 (1980); University Research Ass'n v. Coutu, 450 U.S. 754, 782-84 (1981).

63. *See, e.g.*, International Bhd. of Teamsters v. Daniel, 439 U.S. 551 (1979); Kern County Land Co. v. Occidental Petroleum Corp., 411 U.S. 582 (1973).

64. *See, e.g.*, City of Milwaukee v. Illinois and Michigan, 451 U.S. 304 (1981); Touche Ross & Co. v. Redington, 442 U.S. 560 (1979).

65. *See, e.g.*, Kremer v. Chemical Constr. Corp., 102 S. Ct. 1883, 1890 (1982); Texas Industries v. Radcliff Materials, Inc., 451 U.S. 630 (1981).

66. *See* N.L.R.B. v. Catholic Bishop of Chicago, 440 U.S. 490 (1979). *But see* Edward J. De Bartolo Corp. v. N.L.R.B. 103 S. Ct. 2926 (1983).

67. *See, e.g.*, Mohasco Corp. v. Silver, 447 U.S. 807 (1980); Aaron v. S.E.C., 446 U.S. 680 (1980); Ernst & Ernst v. Hochfelder, 425 U.S. 185 (1976); T.V.A. v. Hill, 437 U.S. 153 (1978).

It is important that this claim not be misunderstood. It is not a claim that concepts as distinct as intent, language and clear statement rule are consciously manipulated by the Burger Court to reach predetermined substantive results.[68] Nor is it a claim that each such concept is value neutral and therefore available in any particular case as a means of articulating whatever view a judge might entertain about the proper relationship between courts, legislatures and texts. Indeed, each such concept is identifiable, in degree, with quite distinct views about that relationship. A rule of clear statement is by definition a device for ensuring the conditional primacy of reader over author and text where the judiciary's independent view of the importance of some legal principle or policy is threatened by a statute.[69] Legislative intent understood as the immediate legislative objective of a statute is in degree conducive to an interpretive perspective which emphasizes author's meaning; legislative purpose, understood as ultimate legislative objective, is in degree conducive to an interpretive perspective which emphasizes reader's meaning.[70]

The claim made here is, rather, that no tool in the judicial arsenal is so well constructed as to capture the complexity of the underlying normative position a court takes on the question of proper relationship. One such tool will seem to that court to fit best that underlying position in the circumstances of one case and another tool will seem to fit best in the circumstances of another case.[71] The claim is therefore in a limited sense a version of the view that statutory meaning is best understood as reader's meaning: the concepts employed in particular cases to describe meaning, even concepts which purport to

68. The possibility of conscious manipulation is not denied here. It is merely assumed away for present purposes, in part because it cannot be either proved or disproved absent judicial confession, but also in part because the possibility is largely irrelevant. The possibility is largely irrelevant because, even if it is assumed that a conscious result-orientation governed resolution of a particular case, the Supreme Court opinion explaining the result in that case must employ modes of argument acceptable within the legal culture. And it is the mode of argument selected to explain the result which will be confronted and used by the lower courts in subsequent cases.

69. *See, e.g.*, HART & SACKS, *supra* note 15, at 1412-13; Bickel & Wellington, *Legislative Purpose and the Judicial Process: The Lincoln Mills Case*, 71 HARV. L. REV. 1 (1957); Wellington, *supra* note 4, at 262-64; Wellington & Albert, *Statutory Interpretation and the Political Process: A Comment on Sinclair v. Atkinson*, 72 YALE L.J. 1547 (1963).

70. *See infra* text accompanying notes 235-81.

71. *Cf. Civil Rights Act, supra* note 4 (best fitting political theory in interpreting a statute); *Law As Interpretation, supra* note 3, at 543-46 (best fitting interpretation depends, in hard cases, on judge's political theory); Dworkin, *The Forum of Principle*, 56 N.Y.U.L. REV. 469, 476-82 (1981) [hereinafter cited as the *Forum of Principle*] (choice of which sense of author's intention is best depends on judge's political theory).

describe author's meaning or literal meaning, are chosen as best fitting expressions of the underlying normative premises of the reader and these normative premises are sufficiently independent of the logic of the concepts themselves to often permit a choice of concepts. The plain meaning rule provides the most flexible example. That rule may be characterized as precluding resort to reader preferences when used, as in *Hill*,[72] as a reason for rejecting a proposed limitation on the reach of a statute and may be characterized as enforcing reader preferences inconsistent with the principle or policy underlying the statute[73] when used as a reason for refusing to extend the reach of a statute.[74]

However, this is not to suggest acceptance of the argument that statutory meaning is either descriptively or normatively best understood as reader's meaning. It suggests only acceptance of the notion that legislatures as authors are at the mercy of courts as readers[75] and, therefore, that a court's normative perspective on the question of the relationship between author, reader and text will control the theories of statutory meaning employed by that court. A court's normative perspective controls its choice of interpretive strategy and the varied concepts it may employ in service of that strategy, but the strategy chosen might well be that of seeking, whether or not it is descriptively possible to seek, author's meaning.[76]

On these premises, the Burger Court's literalism is best understood not as its general reliance on the plain meaning of statutory language, but as its underlying view of itself as a reader and of Congress as an author; reliance on plain meaning is but a manifestation of that underlying view. The question raised by such an understanding is the content of that view.

B. *The Content of the Burger Court's Underlying Normative View*

The Burger Court's formal statements of its interpretive strategy may be summarized as composed of four propositions: (1) the Court's

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72. 437 U.S. at 195.

73. *See* Johnson v. United States, 163 F. 30, 32 (1st Cir. 1908).

74. *See, e.g.*, Texas Industries Inc. v. Radcliff Materials, Inc., 451 U.S. 630 (1981); Mobil Oil Corp. v. Higginbotham, 436 U.S. 618 (1978). The flexibility of canons of construction is classically demonstrated in Llewelyn, *supra* note 12.

75. *See* HART & SACKS, *supra* note 15, at 1411.

76. It is possible to characterize this position as in fact full acceptance of the descriptive claim that interpretive communities govern meaning. *See Statutory Interpretation and Literary Theory*, *supra* note 1, at 685-86. Whether this is the case depends upon which of several possible versions of the interpretive community claim one accepts. *See infra* text accompanying notes 318-34.

responsibility is to enforce the intent of Congress;[77] (2) the intent of Congress is to be discovered from the words of the statute understood in the lingustic context of the statute read as a whole and as they would be understood by the "normal speaker" of the English language unless extrinsic evidence clearly indicates a contrary intent;[78] (3) although the purposes of the statute understood as the ultimate objectives of the statute or the effects intended by Congress, may aid in its interpretation, purpose may not be used to vary the meaning disclosed by an analysis of the language of the statute;[79] and (4) the Court should employ clear statement rules—requiring a clear and express Congressional decision—to narrowly construe statutory language where a broader interpretation would supplant state law[80] and where the Court is asked to supplement federal statutes by creating interstitial federal common law.[81]

The first two of these propositions are boilerplate judicial homilies which may be found in one form or another in opinions written both by justices sharing the Burger Court's normative view and justices opposed to that view.[82] What distinguishes the Burger Court

77. *See, e.g.*, Dickerson v. New Banner Institute, Inc., 103 S. Ct. 986, 994 (1983); Merrill, Lynch, Pierce, Fenner & Smith v. Curran, 456 U.S. 353, 378 (1982); Chapman v. Houston Welfare Rights Organization, 441 U.S. 600, 608 (1979).

78. *See, e.g.*, North Dakota v. United States, 103 S. Ct. 1095, 1102-03 (1983); American Tobacco Co. v. Patterson, 456 U.S. 63, 68-69 (1982); Consumer Product Safety Comm'n. v. GTE Sylvania, Inc. 447 U.S. 102, 108-10 (1980); Perrin v. United States, 444 U.S. 37, 42-45 (1979). As it is used here, "linquistic context" means the language context within which particular words or phrases appear. Thus, although a particular word way have an infinite set of possible conventional meanings in isolation, that set is reduced when the word is considered in the context of the sentence, paragraph or entire text in which it appears.

79. *See, e.g.*, City of Milwaukee v. Illinois and Michigan, 451 U.S. 304 (1981); Ford Motor Credit Co. v. Cenance, 452 U.S. 155, 158-59 (1981); United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166, 179 (1980); United Steelworkers v. Weber, 443 U.S. 193, 216-19 (1979) (Burger, C.J. dissenting); *Id.* at 228-30 (Rehnquist, J. dissenting); Ernst Ernst v. Hochfelder, 425 U.S. 185, 198-201 (1976).

80. *See, e.g.*, Pennhurst State School and Hospital v. Halderman, 451 U.S. 1, 16 (1981); Employees of Dept. of Public Health & Welfare v. Dept. of Public Health & Welfare, 411 U.S. 279 (1973); New York Department of Social Services v. Dublino, 413 U.S. 405, 413-14 (1973).

81. *See, e.g.*, Merrill, Lynch, Pierce, Fenner & Smith v. Curran, 456 U.S. 353, 395-409 (1982) (Powell, J. dissenting); City of Milwaukee v. Illinois and Michigan, 451 U.S. 304, (1981); Northwest Airlines, Inc. v. Transport Workers Union of America, 451 U.S. 77, (1981); Cannon v. University of Chicago, 441 U.S. 677, 730-49 (1979) (Powell, J. dissenting).

82. *See, e.g.*, Complete Auto Transit v. Reis, 451 U.S. 401 (1981); Mohasco Corp. v. Silver, 447 U.S. 807 (1980).

is that it appears to take seriously the identification of congressional intent with statutory language[83] and is therefore more reluctant to inquire beyond the meaning supplied by reference to the conventions of ordinary usage than was typical of the Warren Court era.[84] That distinction is made more apparent in the third and fourth propositions. The Burger Court, in sharp contrast to its predecessor, declines to attribute general purposes to statutes and to then reason from such purposes when asked to make law interstitially; it relies instead upon its sense of or intuitions about the ordinary or plain meaning of statutory language even though its sense or intuition may be influenced as much by its understanding of the historical context of enactment as by its understanding of language conventions.[85]

There is an apparent contradiction in this description between the Court's literalism when it is asked, as in *T.V.A. v. Hill*,[86] to create exceptions to apparent meaning to avoid "absurd" results and the Court's use of clear statement rules to require express statements of Congressional intent to alter the status quo in cases in which the Court is asked to create interstitial federal common law.[87] That contradiction may be reconciled by reference to underlying normative

83. *See, e.g.*, Aaron v. S.E.C., 446 U.S. 680 (1980); Mohasco Corp. v. Silver, 447 U.S. 807 (1980).

84. *Compare* Potomac Electric Power Co. v. Director, Office Workers Compensation Programs, 449 U.S. 268 (1980) *with* Moragne v. States Marine Lines, Inc., 398 U.S. 375 (1970).

85. *Compare* Moragne v. States Marine Lines, Inc., 398 U.S. 375 (1970); J.I. Case v. Borak, 377 U.S. 426 (1964); Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957) *with* Mobile Oil Corp. v. Higginbotham, 436 U.S. 618 (1978); Touche Ross & Co. v. Redington, 442 U.S. 560 (1979). It is of course the standard wisdom that Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938) does not eliminate the possibility of federal common law. Clearfield Trust Co. v. United States, 318 U.S. 363 (1943). The question, nonetheless, is the scope of federal common law, interstitial of otherwise. *See* Merrill, Lynch, Pierce, Fenner & Smith v. Curran, 456 U.S. 353, 395-409 (1982) (Powell, J. dissenting); City of Milwaukee v. Illinois, 451 U.S. 304, 311-13 (1981).

By "ordinary meaning" I do not mean that the Court engages in a sophisticated effort to parse ordinary language in the manner of the ordinary language philosophers. *See* J.L. AUSTIN. SENSE AND SENSIBILIA (1962); J.L. AUSTIN, HOW TO DO THINGS WITH WORDS (1962). The Court is a participant in communication, not an observor. I mean instead that the Court believes that there is an ordinary meaning supplied by convention even though it may at least intuitively recognize that a legislature may engage in a number of distinct "speech acts" in enacting a statute and therefore that convention may be complex. Ironically, reliance on supposed convention is in some tension with the Court's insistence that it must follow the intent of Congress, for an intention theory of meaning suggests that convention is not controlling. The Court purports to resolve that tension by suggesting in effect that convention as modified or identified by the context of enactment is good evidence of intention.

86. 437 U.S. 153 (1978).

87. *See, e.g.*, Northwest Airlines, Inc. v. Transport Workers Union, 451 U.S.

view. As the Burger Court perceives it, the Court's role is to enforce the congressional balance or political compromise reflected by a statute and to require clear congressional decision where an issue appears unresolved by that compromise or where fundamental questions appear not to have been considered by Congress in formulating a compromise.[88] The Burger Court's tendency to employ clear statement rules is consistent with the view of those theorists who advocate "judicial activism" to preserve legal principle from legislative encroachment absent a clear legislative decision to abrogate principle. But the Burger Court adopts that view in support of "fundamental values" or "principles" which tend to restrict federal judicial authority.

These points may be made more concrete by examining the excerpts from the majority opinion in *T.V.A. v. Hill* quoted above. These excerpts reject the notion, common to anti-literalist theories, that courts should avoid an application of a statute which would produce absurd, unreasonable or unjust results.[89] Such theories typically proceed from either of two arguments: either the legislature could not have intended absurd, unreasonable or unjust results[90] or courts have both the authority and the duty to maintain the integrity of law independent of their obligation to respect legislative supremacy.[91] These arguments contain a series of implicit judgments about the proper relationship between reader, author and text which inform characterization of the underlying normative view implicit in the Burger Court's rejection, in some cases, of these arguments.

One common feature of both arguments is that they implicitly assume that the statutory text can and does convey a meaning distinct from the meaning judicially desired. Neither argument is therefore wholly skeptical about the authority of the text;[92] it would otherwise

77 (1981); Sante Fe Industries v. Green, 430 U.S. 462 (1977).

88. *See* Lundeburg, *supra* note 34, at 269.

89. *See, e.g.*, Fuller, *supra* note 44, at 663; HART & SACKS, *supra* note 15, at 106-10; Moore, *supra* note 34, at 277-81. The literalist view is defended in, *e.g.*, *Spurious Interpretation*, *supra* note 8; Kelsen, *supra* note 9, at 527.

90. *See, e.g.*, Church of the Holy Trinity v. United States, 143 U.S. 457 (1892); United States v. Kirby, 74 U.S. (7 Wall.)482 (1868); Riggs v. Palmer, 115 N.Y. 506 (1889). *Cf.* Fuller, *supra* note 44, at 661-69 (relying on purposive interpretation).

91. *See, e.g.*, HART &SACKS, *supra* note 15, at 101; Moore, *supra* note 34, at 277-81. *Cf.*, R. POUND, JURISPRUDENCE 480 (1959) (absurd results to be avoided by independent application of judge-made remedies after statute is literally interpreted).

92. Although such an argument may be framed as a language skepticism argument, it must at least implicitly concede that an ascertainable meaning is communicated by the text (or that some authorial intention is expressed by text); it is the "significance" or reach of that meaning which is in dispute. *Cf.* THE AIMS OF INTERPRETATION, *supra*, note 3, at 49 (distinguishing meaning and significance). Assume, for example, the problem of determining whether the "rule" of the opinion in case 1 is to be applied to

be unnecessary to provide a justification for rejecting the meaning thought to be conveyed by the text.[93] The postulated anti-literalist arguments and the Burger Court's literalist argument therefore proceed from an at least similar premise—the text conveys an ascertainable meaning which could be applied in a case in which absurd,

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the facts of case 2. Application is dependent upon whether the inevitable differences between the facts of case 1 and the facts of case 2 are thought to be important. Cohen, *The Ethical Basis of Legal Criticism*, 41 YALE L.J. 201, 215-19 (1931). What is an important difference is a matter of choice—perhaps of moral choice. *Id.* But if importance is a matter of moral choice, that choice presupposes an understanding of the "moral" meaning of the "rule" of case 1 and of the moral implications of that rule in the circumstances of case 2.

93. It is perhaps possible to distinguish a case in which the problem is thought to be that of the absurd or unjust result—which problem presupposes an ascertained meaning—and a case in which the judge is simply unsure whether the facts before him are within the statute's meaning and therefore grasps for the dictionary or for legislative purpose. *Compare* Church of the Holy Trinity v. United States, 143 U.S. 457 (1892) (The problem of absurd result) *with* Interstate Commerce Commission v. Kroblin, 113 F. Supp. 599 (N.D. Iowa 1953) *aff'd.* 212 F.2d 555 (8th Cir. 1954) (the problem of ascertaining meaning of words used in a statute).

It is however also possible to view these cases as presenting the same problem: in both cases, a choice must be made between possible meanings as a first step *and* a choice must be made about absurdity of result under a chosen meaning as a second step. The opinion in the case decided in terms of absurd result does not expressly focus on the question of the meaning of words because first step choice is unconscious or automatic (*e.g.*, because the judge comes to the words of the statute with a preconceived notion of meaning he attaches to the words of the statute). The opinion in the case decided in terms of ascertaining the meaning of the words of the statute focuses on the question of meaning because the judge does not come to those words with a preconceived notion of meaning and must therefore confront a choice of meaning directly and because, in the process of excluding some possible meanings, he is likely to consciously or unconsciously take into account his preconceived notions about absurdity or injustice. *Cf.*, Fuller, *supra* note 44, at 663 (obvious linguistic answer does not mean that the judge did not ask a question about statutory purpose); Moore, *supra* note 34, at 279 (there may be easy cases in the sense that there are cases both linguistically and morally easy, but the judge must ask a normative question in every case to determine whether it is easy).

The cases are however different in precisely this important sense: that the judge *perceives* the dilemma confronting him as a different dilemma in the linguistically difficult and morally difficult cases. In the morally difficult case, the judge may either conclude that an absurd or immoral result is a price which must be paid for achieving the general justness of statutory rules predictably applied or conclude that an exception to the statutory rule is necessary to avoid an unjust result. Either decision proceeds from the judge's perception that he understands the statute's meaning. The linguistically difficult case is different because the judge does not perceive that he understands the statute's meaning. The dilemmas perceived by the judge are distinct whether or not the problems presented are distinct, and it is this difference in the judge's perception which permits him to speak intelligibly of the vagueness or ambiguity of language in the linguistically difficult case and of absurd results and the appropriate roles of the judge and legislature in the morally difficult case.

unreasonable and unjust results might follow; application is therefore a matter of judicial choice. Although the Burger Court occasionally denies that it has such a choice, it in fact always has the choice; it merely exercises the choice more often than not in favor of disregarding the consequences of literal application.[94] But that implicit decision, like its alternative, merely makes the point made above—the decision is made on the basis of some underlying normative theory about proper relationship and literalism is best understood as one such underlying theory.[95]

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94. *See, e.g.*, United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166 (1980); Consumer Product Safety Comm'n v. G.T.E. Sylvania Inc., 447 U.S. 102 (1980); Mobil Oil Corp. v. Higginbotham, 436 U.S. 618 (1978); T.V.A. v. Hill, 437 U.S. 153 (1978). *But see, e.g.*, Arizona Governing Committee v. Norris, 103 S. Ct. 1236, 1248 (1983) (Powell, J. concurring and dissenting); International Bhd. of Teamsters v. Daniel, 439 U.S. 551 (1979).

As Professor Moore points out, the *Holy Trinity* "escape hatch" must always be confronted so long as its doctrine remains an option. Moore, *supra* note 34, at 280 n.281. *See* Church of the Holy Trinity v. United States, 143 U.S. 457, 459 (1892). That is, if there is a possibility that a court will disregard its linguistic sense of the meaning of statutory language in cases of absurdity or injustice (or even in cases of outrageous absurdity or injustice), that inquiry must be made in every case. That results are obviously not absurd and, therefore, that linguistic sense is controlling in a given case does not mean that the absurdity question was not asked. *See id.* at 279.

This logic nevertheless ignores questions of degree. If the Court does not very often invoke *Holy Trinity*, infrequency of use does not necessarily mean that the Court seldom perceives the results it views itself as compelled by its linguistic sense to reach as absurd or unjust. It may instead suggest a tolerance of absurdity. And tolerance of absurdity is in operation an approximation of a literalist philosophy.

95. It is for example possible to justify a conclusion that a court should not disregard apparent linguistic meaning in cases of absurd results and should be wary of finding "gaps" in statutes so as to permit interstitial judicial lawmaking on the theory that the predictability and consistency generated by following rules is preferable to "doing justice" in individual cases. *See*, Kelsen, *supra* note 9, at 528. Rawls, *Two Concepts of Rules*, 64 PHIL. REV. 3 (1955). *Cf.* G. FLETCHER, RETHINKING CRIMINAL LAW, 170-71 (1978) (rejecting purposive interpretation); Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537, 542-53 (1972) (rejecting case by case or contextual and utilitarian approach to justice); Epstein, *A Theory of Strict Liability*, 2 J. LEG. STUD. 151 (1973) (similar rejection). It is no doubt true that a decision to adopt this viewpoint is a normative decision. *See* Kennedy, *supra* note 5, at 1760-62. It may also be true that the realization of such a view is dependent upon it being possible to deduce right answers from statutory language. *See generally* Moore, *supra* note 34. But it is not necessarily true that the impossibility of such a deduction renders the decision itself impossible or the effort to implement it self-delusive. To the extent that a judge is committed to the decision to adopt such a normative viewpoint and seeks to implement that decision the decision is approximated in practice. *Cf.* Moore at 167 (suggesting that formalism's ideals can be realized to the limited extent made possible by his argument that deduction from authoritative language is not possible in any case).

A second feature common to both anti-literalist arguments is that they assume a rational, reasonable legislature seeking just results.[96] That assumption is expressed as a descriptive claim in the argument from legislative intent or purpose: a reasonable legislature could not have intended absurd or unjust results. It is expressed as a normative claim in the argument from independent judicial responsibility: whatever the actual character of the legislature, courts ought to demand reasonable and just legislative commands.[97] If the Burger Court is more often than not inclined to reject these claims,[98] what is its view of the national legislature? The view implicit in that rejection is that the legislature both descriptively can be and normatively may be irrational, unreasonable and tolerant of unjust results. At least it can and may be these things where irrationality, unreasonableness and injustice are assumed to be institutionally relative epithets.[99]

Reasonableness and rationality from the perspective of a process which purports to decide cases on the basis of principle have different meanings than reasonableness and rationality from the perspective of a process understood to make law prospectively through the mechanism of compromise and bargain between conflicting interest groups.[100] And the injustice of particular results is equally a question of perspective. Unjust results in particular cases are just results if justice is understood from the perspective of various versions of rule

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96. *See* HART & SACKS, *supra* note 15, at 1157, 1415.

97. *See, e.g.*, HART & SACKS, *supra* note 15, at 101; *Civil Rights Act, supra* note 4, at 41; Fiss, *supra* note 23, at 17; Bickel & Wellington, *supra* note 69 at 7-8.

98. A difficulty with a claim that the Burger Court rejects the noted anti-literalist arguments is that it occasionally utilizes such arguments in opinions which might otherwise be characterized as literalist in orientation. *See* American Tobacco Co. v. Patterson, 456 U.S. 63, 70-71 (1982).

99. *Compare* J. ELY, DEMOCRACY AND DISTRUST, 251 n.69 (1980) (legislative classifications are rationally related to the "cross-purposes" that give them birth); Neal, *Baker v. Carr: Politics In Search of Law*, 1962 SUP. CT. REV. 252, 289-91 (suggesting that, although the process of political compromise in operation may appear irrational from a judicial perspective, that process viewed as an institution is rational) *with* Dixon, *The Supreme Court and Equality: Legislative Classifications, Desegregation, and Reverse Discrimination*, 62 CORNELL L. REV. 494, 497 (1977) (legislatures are by their nature irrational); Posner, *The De Funis Case and the Constitutionality of Preferential Treatment of Racial Minorities*, 1974 SUP. CT. REV. 1, 16-31 (legislative process cannot be judged by standard of rationality).

100. *See generally* R. DAHL, DEMOCRACY IN THE UNITED STATES (3d ed. 1976); L. FROMAN, THE CONGRESSIONAL PROCESS (1967); W. KEEFE & M. OGUL, THE AMERICAN LEGISLATIVE PROCESS: CONGRESS AND THE STATES (5th ed. 1981). For commentary advocating judicial recognition of the realities of political compromise and judicial enforcement of such compromise, *see* Easterbrook, *supra* note 4, at 540-41; Posner, *supra*, note 4 at 819.

utilitarianism.[101] A judicial decision declining to apply a statute for the reason that application would generate an unjust result in a particular case, even if expressed in terms of the inconsistency of such a result with the principle, policy or purpose thought to underlie the statute, is necessarily a decision to reject one version of justice and to accept another.[102] In short, the Burger Court's view of the legislature is less a matter of its tolerance of legislative unreasonableness than a matter of its tolerance of reasonableness legislatively defined.[103] It is also a matter of a version of justice tolerant of occasionally unjust applications of that legislative definition grounded on the potentially erroneous assumption that the legislative definition has been judicially ascertained.

The third feature common to the postulated anti-literalist arguments is that courts are capable of making the judgment regarding rationality, reasonableness and justice demanded by anti-literalist theory. The literature supporting this assumption is extensive. Reason, rationality and justice are said to be the products of minimum legal principles which define legal methodology,[104] of institutional constraints,[105] of binding principles of popular morality,[106] of internally consistent moral philosophy[107] and, perhaps, even of economic "science."[108] To the extent that the Burger Court rejects an anti-literalist argument, it implicitly accepts a far less optimistic view of

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Modern decision theory would suggest that the process of political compromise, particularly when characterized by logrolling, is rational in the sense, at least, that it is necessary in a collective decision making process which preserves democratic values. *See generally* K. ARROW, SOCIAL CHOICE AND INDIVIDUAL VALUES (2d ed. 1963); J. BUCHANAN & G. TULLOCK, THE CALCULUS OF CONSENT (1965). Moreover, judicial rationality understood as consistency may be an illusion. *See* Easterbrook, *Ways of Criticizing the Court*, 95 HARV. L. REV. 802 (1982); Farago, *Intractable Cases: The Role of Uncertainty In the Concept of Law*, 55 N.Y.U.L. REV. 195, 229-31 (1980).

101. *See* note 95 *supra*.

102. *See* note 95 *supra*.

103. *See, e.g.*, Griffin v. Oceanic Contractors, Inc., 102 S. Ct. 3245, 3252-53 (1982); Schweiker v. Wilson, 450 U.S. 221, 244 (1981) (Powell, J. dissenting); Fullilove v. Flutznick, 448 U.S., 490 (1981) (plurality opinion by Burger, C.J.); Mohasco Corp. v. Silver, 447 U.S. 807, 826 (1980); Mobil Oil Corp. v. Higginbotham, 436 U.S. 618, 623 (1978).

104. *See, e.g.*, FULLER, *supra* note 17, at 81-91; HART & SACKS, *supra* note 15, at 1410-17.

105. *See, e.g.*, FULLER, *supra* note 17, at 168-81. Fiss, *supra* note 23, at 12-13.

106. *See generally* Wellington, *supra* note 4.

107. *See Forum of Principle*, *supra* note 71, at 471-76.

108. *See* Easterbrook, *supra* note 4, at 545-47; Posner, *supra* note 4, at 819; Posner, *Economics, Politics, and the Reading of Statutes and the Constitution*, 49 U. CHI. L. REV. 263, 278-80 (1982). Although both Easterbrook and Posner adopt an agency theory of the judicial function in interpreting statutes, they both utilize economic theories of

judicial competence.[109] The reasonableness and justice of an application of a statute is a characterization requiring an at least implicit reference to some value system, and it is rare that such a value system is uncontroversial. The Burger Court's uncertainty about its capacity to discover and apply an uncontroversial value system may constitute the grain of truth supporting the conservative characterization with which it has been labelled. The conservatism of literalism is potentially less the conservatism of an ideological commitment than the conservatism of an uncertainty about judicial competence to entertain such a commitment.[110]

The final feature common to the postulated anti-literalist arguments is that they base the legitimacy of statutory law primarily upon a process of judicial validation of a statute as law rather than upon the legislative source of that statute.[111] That is, a statute derives its legitimacy from the judicial act of fitting it within a rational, reasonable and just legal fabric on the value premises of that fabric (or of the judge's perception of those premises).[112] To the extent that majoritarian values contribute to the legitimation of the statute, the judicial act of fitting the statute to the fabric is viewed as an incident within a process of on going communication with the legislature;[113] democratic values are therefore expressed through this process rather than exclusively embodied in the legislature.

To the extent that the Burger Court rejects the postulated anti-literalist arguments, it implicitly rejects the notion of legitimacy underlying these arguments. The Burger Court's version of legitimacy may instead be viewed as compartmentalized: the statute's legitimacy

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legislation to limit, in distinct degrees, the scope of legislation, thereby arguably leaving greater room for the operation of judicial "rationality".

109. *See, e.g.*, Chevron U.S.A., Inc. v. National Resources Defense Council, 52 U.S.L.W. 4845, 4853 (U.S. June 25, 1984) Merrill, Lynch, Pierce, Fenner & Smith v. Curran, 456 U.S. 353, 408 (1982) (Powell, J. dissenting). Northwest Airlines, Inc. v. Transport Workers Union, 451 U.S. 77, 97-99 (1981); Texas Industries v. Radcliff Materials, Inc. 451 U.S. 630, 646 (1981); Mobil Oil Corp. v. Higginbotham, 436 U.S. 618, 625-26 (1978).

110. *See* Note, *supra* note 34, at 901-02. *But see id.* at 908-12. It is of course possible that this is a false dichotomy; it may be impossible to escape ideological commitment. *See infra* text accompanying notes 284-413.

111. *See id.* at 903-05.

112. *See, e.g.*, FULLER, *supra* note 17, at 226-27; HART & SACKS, *supra* note 15, at 1413; Fiss, *supra* note 23, at 11-17; Moore, *supra* note 34, at 277-81.

113. *See, e.g.*, G. CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES, 166 (1982); E. LEVY, AN INTRODUCTION TO LEGAL REASONING, 32 (1949); FULLER, *supra* note 17, at 226-27; Bickel & Wellington, *Legislative Purpose and Judicial Process, supra* note 69, at 34-35; Fiss, *supra* note 23, at 13-16.

is derived from its legislative source and that source is the sole repository of democratic values; the Court's function, as a sort of agent of a legislative principal,[114] is not to legitimate that which comes to it legitimated.[115] Under this view, legitimacy is a function of process, but, in contrast to the anti-literalist view, is a function of the democratic pedigree of legislative process rebuttable only in the event that values of constitutional dimension are threatened. Under the anti-literalist view, judicial values not of constitutional dimension are largely the source of legitimation.[116]

II. A CRITIQUE OF OBJECTIONS TO THE BURGER COURT'S INTERPRETIVE STRATEGY

There are four traditional objections to literalism applicable to the Burger Court: the objection from the limitations of language, the objection from the fictional character of legislative intent, the objection from the normative character of formalism, and the normative objection to formalism. The first three of these objections are descriptive in the sense that they claim that the Burger Court's methodology is implausible either because its analytical tools are inadequate or because it cannot escape responsibility for the political character of its judgments. The response argued here is that the methodology is plausible despite its conceded defects and that objections to it are in fact normative.

The last objection is self-evidently normative: it claims that the Burger Court's methodology is grounded upon an inferior version of the moral responsibility of the judge. There will be no response here to the last objection both because the values reflected in Burger Court literalism are sufficiently well recognized as legitimate in American legal culture that they cannot be dismissed as alien to that culture and because the objection presents merely an alternative conception of the moral responsibility of the judge. A choice between conceptions cannot be other than an arbitrary exercise of power—the power

114. For explicit invocations of agency notions *see* Easterbrook, *supra* note 4; Posner, *supra* note 49; Landis & Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 J.L. & ECON. 875 (1975). A court on such an analysis is the agent of the Congress which enacted a statute (rather than a subsequent congress or the current congress) and is to emphasize the legislative compromise rather than the hopes or goals of the interest groups which bargained for the compromise. *See* Posner *supra* note 108, at 820.

115. *See, e.g.*, Chevron U.S.A., Inc. v. National Resources Defense Council, 52 U.S.L.W. 4845, 4853 (U.S. June 25, 1984); T.V.A. v. Hill, 437 U.S. 153, 195 (1978).

116. *See generally* Wellington, *The Nature of Judicial Review*, 91 YALE L.J.486 (1982).

of a judge to adopt a conception and to impose its consequences on others and the lesser power of the writer or of the reader to express argument or disagreement.[117] This article assumes that it is usefully possible to argue about the plausibility of method or the internal consistency of alternative conceptions of judicial responsibility. It further assumes, as an exercise of power,[118] that it is not possible to successfully argue about right thinking, or even about the morality or plausibility of internal consistency. The central theme of the response may therefore be taken as a claim that the Burger Court's version of the moral responsibility of the judge can be plausibly approximated in practice whether or not normatively inferior to its alternatives.

A. *The Objection From The Limitations Of Language*

It may be argued that statutory language cannot serve as a source of authority for an interpretation because the meaning of language within the context of a particular case is indeterminate. This is the objection from one of the two forms of language skepticism surveyed above.[119] The rejoinder submitted in the first section of this article was by way of confession and avoidance. Upon the assumption that the meaning of statutory language is indeterminate as a matter of its application to particular facts, its indeterminacy does not matter both because the Burger Court's literalism is not a naive reliance on the determinacy of language meaning and because it is the Burger Court's underlying normative view which is the real target of criticism.[120] But this rejoinder cannot serve as complete defense if that underlying normative view relies in part upon a belief that congressional intent is to be discovered from the words of a statute understood in their linguistic context and as they would be used by a normal speaker of English. Whether or not the Burger Court is naive about literalism, that reliance requires that the Court believe it possible in some sense to determine whether the facts of a case fall within or without the "plain" meaning of statutory language.

It is however crucial that the Court be recognized as believing in the possibility that the language of a statute determines its

117. *Cf.* J. ELY, *supra* note 99, at 58 (there is no single sound method of moral reasoning); Leff, *Unspeakable Ethics, Unnatural Law*, 1979 DUKE L.J. 1229, 1245-49 (although the Constitution may serve by assumption as an ultimate evaluator, it provides inconsistent commands, and choice between these commands is arbitrary).

118. *Cf.* Knapp & Michaels, *Against Theory*, 8 CRITICAL INQUIRY 723, 738-40 (1982) (a theory that interpretation is a function of interpreter's beliefs is itself a mere belief).

119. *See supra* notes 52-59 and accompanying text.

120. *See supra* text accompanying notes 59-76.

application to facts only in some sense. The Court need not believe in the possibility of plain meaning in the sense demanded by a pristine positivism and therefore often demanded by language skeptics intent upon attacking positivism. It need not, for example, believe that statutory language "has a set of conditions that are necessary and sufficient for its correct application"[121] to believe that such language has a plain meaning. Nor is it necessary for the Court to believe that some fact or set of facts before it are necessarily in or guaranteed to be within the core of meaning of statutory language.[122] It is merely necessary that the Court *believe* that the facts before it fall within the meaning of statutory language and that such a belief be viewed as plausible, as a matter of plain or ordinary meaning, by "normal speakers of English" for the Court to employ "plain meaning" as an argumentative strategy for application of a statute to the facts of a case.[123] It is, in short, not necessary that Burger Court literalism satisfy the demands either of the positivist or the language skeptic; it may predicate its literalism on its "intuitions"[124] about plain meaning in, at least, those instances in which it perceives that the facts of the case clearly fall within or without plain meaning and in which this perception is, as a matter of plain meaning as distinguished from the moral or practical implications of that meaning, generally shared.

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121. Moore *supra* note 34, at 272.

122. *Id.* at 287.

123. *See id.* at 287-92. Moore accepts as plausible a version of H.L.A. Hart's "core meaning" and "standard instances" arguments. *See* Hart, *supra* note 44, at 606-08. Moore refers to that version as a "weak paradigm" argument under which "an item is a paradigm if the linguistic community, or any speaker or listener in it, *believes* the item is in the extension of a predicate." Moore, *supra* note 34, at 287-88 (emphasis in the original). He contends that this argument is plausible only for "natural kind words", as distinguished from theoretical terms, nominal kind words, dispositional terms and ethical words. *See id.* at 202-03. He further argues, however, that "all words are potentially natural kind words" in his refutation of the criterial theory of meaning, *id.* at 217, and argues that theoretical words in law are infected with the frailties (e.g., vagueness and ambiguity) of ordinary words because the former are defined by the latter. *Id.* at 235-47.

Note that Moore's limited adoption of H.L.A. Hart's theory is predicated in part on his rejection of Fuller's linguistic attack on Hart's theory of core meaning as the "pointer theory of meaning." *See* Fuller, *supra* note 44, at 668. In brief, Moore attacks Fuller's contextualism on the common sense basis that "words must have some objective (i.e., non-context—dependent) meaning if communication is to exist at all." Moore, *supra* note 34, at 276.

124. "Linguistic intuition" is Professor Moore's terminology. Moore, *supra* note 34, at 293. Moore argues, however, that intuitions are not adequate to satisfy the demands of positivism. *See id.* at 281-93.

The plain meaning of statutory words understood in the linguistic context of the statute read as a whole and as they would be used in that context by a normal speaker of English suffices as a justification for literalism on the common sense ground that it suffices as the basis for communication in human intercourse. The language skeptic cannot go so far as to deny the efficacy of plain meaning without denying the common sense observation that human beings communicate by means of their shared perceptions of the meaning of the language they employ in communicating. It does not matter that communication in human intercourse is often imperfect; a plain meaning approach does not necessarily require perfection, and a court's "plain meaning" interpretation of a statute may be viewed as analogous to elements of communication between human beings—as an hypothesis communicated to the legislature and subject to correction by the legislature as an act of perfecting the communication.[125]

Nor does it matter that such communication is possible only because speakers and listeners or authors and readers are members of speech,[126] linguistic,[127] or interpretive[128] communities—communities which share the concepts, values, knowledge and habits assumed by a communication. It does not matter so long as it is plausible to suppose that the justices and legislators share a common membership and that the justices, given their dependence on community, at least unconsciously take into account both language conventions and the dependence of meaning upon the historical context of congressional use of language.[129] All that is required to make literalism plausible is that it resemble human communication in sufficient degree that it may be said to generally work as communication.

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125. *Cf.* THE AIMS OF INTERPRETATION *supra* note 3, at 32-35 (arguing that understanding entails a process neither wholly intuitive nor wholly governed by convention).

It is quite possible to object that the dialogue contemplated by this analogy is rendered improbable by institutional limitations on communication: Congress may not be able to respond. *See* Note, *supra* note 34, at 905. This however, is an argument about the efficacy of the institutional arrangement within which communication must occur. It succeeds or fails as an argument about efficacy rather than an argument about the implausibility of ordinary usage as a criterion of meaning. It is moreover vulnerable to the rejoinder that alternative theories of interpretation presuppose a communication between Congress and the Court and are themselves subject to a similar objection.

126. *See, e.g.*, DICKERSON, *supra* note 7, at 106.

127. *See* Moore, *supra* note 34, at 287.

128. *See* FISH, *supra* note 3, at 303-71.

129. *See* J. SEARLE, *supra* note 44, at 117-136 (literal meaning, although distinct from utterer's meaning—or intended meaning—is nevertheless dependent upon context). In

There nevertheless remain two difficulties with a plain meaning approach. The first is that statutory language will often not seem to convey a plain meaning at least in the sense that it will often not seem to supply a determinate answer to the question of statutory application.[130] The second is that reliance on a belief in or intuition about meaning may be thought to undermine the Court's underlying normative view: if the Court does view itself as the mere agent of the sovereign legislature faithfully duplicating that sovereign's commands, it may be thought to require the capacity to be certain of its deductions from language; perhaps mere belief or intuition will not do.[131]

1. The Indeterminate Answer Difficulty

The indeterminate answer difficulty arises in one or both of two senses. Either the words of the statute are so vague or ambiguous or open textured[132] that the Court perceives that it is unclear whether the facts of a particular case fall within or without the meaning of these words or the Court perceives some moral objection to the application of the plain meaning of the words of the statute to the facts before it.[133]

(a). The Breakdown of Plain Meaning

The first of these possibilities presents a problem of the breakdown of plain meaning as a strategy; the shared belief or perception which gives ordinary usage efficacy as a strategy is missing. The

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fact, the Burger Court seeks intended meaning but treats literal meaning as evidence of intended meaning and repeatedly resorts to context in an effort to grasp the latter. *See infra* text accompanying notes 177-282.

It is occasionally not possible to make the supposition of common membership, as where Congress employs technical language and experts are consulted. *See, e.g.*, Dowson Chem. Co. v. Rohm & Haas Co., 448 U.S. 176, 187 (1980); Corning Glass Works v. Brennan, 417 U.S. U.S. 188, 201-02 (1974); Bradley v. United States, 410 U.S. 605, 609 (1973). It is arguably not possible to make the supposition in the case of old statutes on the ground that historical perspective cannot be recaptured. Despite the latter difficulty, it is possible to attempt to enter the historical community of past legislatures—that is the attempt of originalists. *See* AIMS OF INTERPRETATION, *supra* note 3, at 36-49.

130. *See supra* notes 93, 94.

131. *See* Moore, *supra* note 34, at 281.

132. On the distinctions between ambiguity, vagueness and open texture, *see* Moore, *supra* note 34, at 181-202. It has been said that a word is vague "when it is used in a fluctuating way"; but the open texture of a word is a matter of our inability to define it by specifying all of the situations in which it is to be used. Waismann, *Verifiability*, 19 ARISTOTELIAN SOC'Y SUPP. Vol. 119, 124-25 (1945).

133. *See supra* notes 93-94 and accompanying text.

traditional judicial response to such a breakdown is to resort to a search for legislative intent or purpose, often in the materials of legislative history. The Burger Court's response is no different.

An example may illustrate this point. The National Labor Relations Act requires that an employer bargain in good faith with a labor organization certified or recognized as the exclusive bargaining representative of the employer's employees regarding "wages, hours, and other terms and conditions of employment."[134] Is the decision to close down part of a business a subject matter within the meaning of this language such that an employer must bargain over that decision? There is surely no guarantee that a partial closure is within or without the necessary meaning even of "terms and conditions of employment." And there are grounds both for a belief that a partial closure is within those terms and for a belief that a partial closure is not within those terms. To the extent that a partial closure is characterized as a termination of employment, it would seem within the meaning of "terms and conditions of employment." To the extent that a partial closure is characterized as a decision regarding the commitment or withdrawal of capital, it would seem without the meaning of "terms and conditions of employment."

A typical judicial response to this problem of characterization is to resort to an analysis grounded upon an identification of the purposes underlying a statutory command and therefore upon an inquiry independent of any close examination of language. The Burger Court, in *First National Maintenance Corporation v. NLRB*[135] did precisely that: partial closure decisions are not mandatory subjects of bargaining because the purposes the Court chose to identify as the purposes underlying the statutory bargaining obligation would not be furthered by mandated bargaining.

If there is a distinction between the Burger Court's response to breakdown and, for example, the Warren Court's response to breakdown, it is in the Burger Court's tendency to be less inclined to perceive a breakdown and in its tendency to resort to extrinsic evidence of immediate legislative intent rather than ultimate legislative purpose when it does perceive a breakdown.[136] *First National*

134. *See* 29 U.S.C. §§ 158(a)(5), 158(d) (1976).

135. 452 U.S. 666 (1981).

136. *Compare, e.g.*, J.I. Case v. Borak, 377 U.S. 426 (1964); Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957) *with* Aaron v. S.E.C. 446 U.S. 680 (1980); Mobil Oil Corp. v. Higginbotham, 436 U.S. 618 (1978). *See* Schweiker v. Wilson, 450 U.S. 221, 244 n.6 (1981) (Powell, J. dissenting).

Maintenance is merely a counterexample. Both tendencies follow from the Burger Court's underlying normative view: plain meaning ought to be enforced as the best evidence of legislative intent whenever possible and resort to ultimate purpose implies too expansive a role for the Court in law making.

From the point of view of those critics of the Burger Court who attack its reliance on plain meaning, the objection to these tendencies is that the Court too seldom perceives a breakdown because it is insensitive to the dependence of language meaning on context, function or purpose.[137] The meaning of words varies with the context of the use of those words because meaning is a function of shared assumptions about use; meaning resides not in words but in an understanding of how words may be employed or the roles they may perform within a practice of language use.[138]

This objection has merit, but exploits an ambiguity in the notion of context. The context of statutory words might be thought to mean linguistic context or the historical context of enactment and therefore to refer to the problem of the meaning of statutory language independent of its application—the concepts or range of concepts conveyed by statutory language.[139] The Burger Court rather clearly is aware of context at the level of the conceptual meaning of a statute, for it employs the technique of ordinary or conventional usage of statutory

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137. *See, e.g.*, ARISTOTLE, NICHOMACHAEAN ETHICS Bk V ch. 10; GADAMER, *supra* note 57, at 289-94, 470-73; Note, *supra* note 34, at 904-07. *Cf., e.g.*, Bishin, *The Law Finders: An Essay In Statutory Interpretation*, 38 S. CAL. L. REV. 1, 6-7 (1965) (generally attacking literalism on this ground); Cohen, *supra* note 46, at 537-38 (same).

138. *See* L. WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS §§ 193-98 (G.E.M. Anscombe ed. 1963). *See also* Ryle, *The Theory of Meaning in* BRITISH PHILOSOPHY IN THE MID-CENTURY (C.A. Mace ed. 1957). The basic insight of this view is that meaning is a matter of use within a situation; the content of a rule is a matter of what is done with it and understanding is a function of competence in the game in which language is employed. This does not mean, however, that there are no rules; rules exist in the sense that there is agreement about what is to be done in particular cases—a shared reaction to the question of the proper use of the rule.

139. *See* Dahnke-Walker Milling Co. v. Bandurant, 257 U.S. 282, 293 (1921) (Brandeis, J. dissenting) (distinguishing construing and applying a statute); DICKERSON, *supra* note 7, at 13; de Sloovere, *Textual Interpretation of Statutes*, 11 N.Y.U.L. Q. REV. 538, 553-58 (1934) (distinguishing interpretation and application); Graff, *"Keep Off The Grass", "Drop Dead", and other Indeterminacies: A Response to Sanford Levison*, 60 TEX. L. REV. 405, 411 (1982) (same); *supra* note 56. The distinction resembles the distinction between connotation and denotation. *See* J.S. MILL, A SYSTEM OF LOGIC, 20-26 (1864). The distinction has however been criticized. *See, e.g., The Ambiguity of Unambiguous Statutes, supra* note 57; *The Relevance of Legislative, supra* note 57, at 610 n. 41.

words in the linguistic context of the statute read as a whole to narrow the range of the possible concepts conveyed by statutory words[140] and refers to legislative history in an effort to invoke congressional intent as the arbiter of that range of concepts.[141] In this sense, the Burger Court is fully aware of the characteristic of language that its meaning is a matter of its use within a situation,[142] but views the question posed by that characteristic as the meaning of the legislature's use of language within the situation of enactment.

The context of a statute might alternatively be thought to mean, however, the context within which the statute is to be given concrete meaning in the situation of the facts of a particular case.[143] The latter notion refers to the problem of application: do the facts fall within the range of concepts conveyed by statutory language? Although the Burger Court's practice of examining the context of enactment establishes the range of concepts from which an argument that the facts of a case fall within or without the plain meaning of a statute may be based, there is no doubt that such a claim is insensitive to the problem of the context of use of language within the situation of the facts of a case.

The problem of the context of use within the situation of a case is perhaps best illustrated by the example of a statute enacted in response to a set of historical conditions which do not exist at the time of application.[144] The Norris LaGuardia Act[145] was enacted in 1932 in response to judicial use of the labor injunction to preclude organizational efforts of labor unions. It withdraws jurisdiction from federal courts to issue injunctions in a "labor dispute." Later labor legislation enacted in 1935, 1947 and 1959 created a system of labor law

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The distinction is not necessarily defeated by Wittgenstein's claim, *supra* note 138, that knowing the meaning of a rule is knowing its use. That claim may be understood as a claim that one cannot know a rule apart from its use, but the point of the distinction made here is that there are two uses of a statutory rule, only one of which entails application of the rule within a set of specific facts. *Cf.* Luban, *Epistemology and Moral Education*, 33 J. LEGAL ED. 636, 639-40 (1983) (there are two uses of rules: application and the logical interconnection of rules "to form theories").

140. *See, e.g.*, Aaron v. S.E.C., 446 U.S. 680 (1980); Ernst & Ernst v. Hochfelder, 425 U.S. 185 (1976).

141. *See, e.g.*, County of Washington v. Gunther, 452 U.S. 161, 184-88 (1981) (Rehnquist, J. dissenting); United Steelworkers v. Weber, 443 U.S. 193, 219-50 (1979) (Rehnquist, J. dissenting); T.V.A. v. Hill, 437 U.S. 153 (1978).

142. *See* Graff, *supra* note 139, at 408-12.

143. *See supra* note 139.

144. *See* Bishin, *supra* note 137, at 7.

145. 29 U.S.C. §§ 101-115 (1976). This is the example analyzed in Bishin, *supra* note 137.

which encourages organization, collective bargaining and enforcement of collective bargaining agreements. Should the Norris LaGuardia Act be applied to preclude enjoining a strike in breach of a no strike clause in a collective bargaining agreement in 1970?

A purposive interpretation of the Act's withdrawal of the jurisdiction of federal courts to issue injunctions in "labor disputes" would take into account the differences between the historical context of enactment and the historical context of application and would decline to apply the Act in part by emphasizing a current policy favoring enforcement of collective bargaining agreements.[146] A literal interpretation would treat an employee strike in protest of employer practices in 1970 as a "labor dispute" within the plain meaning of the Act. It would therefore enforce the arguably irrelevant historical intent of the Congress which enacted the Norris LaGuardia Act to preclude federal court interference in such disputes.[147]

However, insensitivity to the problem of the context of application is a matter of degree. There is no guarantee that a strike in 1970 is necessarily within the meaning of the phrase "labor dispute," but it is by no means implausible for the Burger Court to believe that such a strike is within the plain meaning of that phrase, particularly where a congressional intent to foreclose judicial regulation is emphasized in assigning meaning to it. Such a belief is not wholly insensitive to context. It requires a judgment that an economic strike in breach of an agreement not to strike is a labor dispute—a judgment influenced by judicial identification of immediate congressional intent at the time of enactment. But it is a belief insensitive to the question of the consequences of application for some potential definitions of underlying statutory purpose.

The argument that an economic strike in 1970 is not within the meaning which *should* be attributed to the phrase "labor dispute" is a normative argument which proceeds from a distinct premise about judicial function; courts ought to apply statutes by reference to that underlying statutory purpose which best fits the current state of the law or the current needs of society and therefore ought to be sensitive to the context of use. Such an argument has merit if viewed as a normative argument, but it does not establish the impossibility

146. *See* Boys Markets, Inc. v. Retail Clerks Local 770, 398 U.S. 235 (1970); Sinclair Refining Co. v. Atkinson, 370 U.S. 195, 215-29 (1962) (Brennan, J. dissenting).

147. *See* Sinclair Refining Co. v. Atkinson, 370 U.S. 195, 205-08 (1962). *See also* Buffalo Forge Co. v. United Steelworkers, 428 U.S. 397 (1976). *But see* Jacksonville Bulk Terminals v. International Longshoremen 102 S. Ct. 2673, 2687-89 (1982) (Burger, C.J. dissenting); *Id.* at 2689-90 (Powell, J. dissenting).

of reliance on ordinary meaning in application or the implausibility of insensitivity to the context of judicial use. Indeed, the primary objection to such an insensitivity is that it is in many cases successful as a strategy for enforcing plain meaning; what is objectionable is the threat of that success.

(b) The Moral Objection to Plain Meaning

The possibility of moral objection to the application of plain meaning is typically described as the possibility of the absurd, unreasonable or unjust result.[148] It may also be viewed, however, as including the possibility of the inadequacy of plain meaning to accomplish a statute's underlying purpose.[149] Both versions of the moral objection possibility may be framed either as an argument consistent with the Burger Court's normative view or as an argument inconsistent with that view. Either the Court must, to adhere to its role as the agent of the Congress, ignore ordinary meaning to enforce its principal's intent or the Court must ignore that meaning to be faithful to its independent role as a court in ensuring the reasonableness, justice and efficacy of law.[150] Notice that both arguments assume that meaning has been ascertained; the question posed by the arguments is whether that meaning should be ignored.[151] Given its underlying normative view, the Burger Court's tendency is to tolerate absurd, unreasonable and unjust results and to reject arguments grounded upon notions of independent judicial responsibility for reasonable and just laws on the theory that absurdity, reasonableness and justice characterizations are matters of perspective best resolved by the political branches.[152]

This does not mean either that the Burger Court does not ask itself a question in every case about such matters as reasonableness or justice or that it will not occasionally reject plain or ordinary meaning on moral grounds.[153] It can be described as rejecting an

148. *See supra* notes 93-95 and accompanying text.

149. *See* J.I. Case Co. v. Borak, 377 U.S. 426 (1964); Kardon v. National Gypsum Co., 69 F. Supp. 512 (E.D. Pa. 1946).

150. *See supra* text accompanying notes 89-91.

151. *See supra* note 93.

152. *See supra* notes 89-103 and accompanying text.

153. It is at least arguable, for example, that the Burger Court has chosen between alternative "conceptions" of the "concept" of discrimination in Title VII in part on the basis of its perception that a particular conception would better preserve employer interests in predictability and efficiency—moral grounds within the meaning of "moral" as it is used in the text. *See, e.g.*, Connecticut v. Teal, 457 U.S. 440, 456-64 (1982) (Powell, J. dissenting); General Electric Co. v. Gilbert, 429 U.S. 125 (1976). A better example of a plain meaning approach to Title VII ignored the problem of

"unreasonable and unjust result," as unreasonableness and injustice are defined from a controversial perspective, in *First National Maintenance Corporation*, discussed above.[154] It is unreasonable to require bargaining over the decision to close part of a business because such bargaining may impede the efficient movement of capital to higher uses. It is moreover unjust to do so because management has a "right" to unilaterally determine the scope of an enterprise, and that "right" may not be impaired absent a clear congressional statement that it shall be impaired.

The Burger Court therefore necessarily *chooses* plain meaning when it enforces plain meaning because it retains the option to deviate from plain meaning on moral grounds where it finds the moral argument supporting deviation convincing.[155] However, the difficulty presented by convincing moral arguments supporting deviation is that they cannot often be credibly characterized as politically neutral arguments. The intuitive appeal of a court's claim that a legislature could not have intended an absurd application of an understood or "plain" meaning is a shared understanding of absurdity;[156] the shared assumptions which enable communication include assumptions about what applications of communicated meaning would be absurd, unreasonable or unjust. But shared understanding is very often not universal; a management "right" to unilateral decision regarding the scope of an enterprise is controversial. That is the normative ground for the Burger Court's tendency, suspended in *First National Maintenance*, to tolerate absurdity and injustice; controversy is for the Congress.

The moral objection to the Burger Court's tendency to tolerate absurdity and injustice is at bottom that some meaning other than

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"unreasonable" or "immoral" consequences, but did not enjoy the support either of Chief Justice Burger or of Justice Rehnquist: Los Angeles Dept. of Water and Power v. Manhart, 435 U.S. 702 (1978).

154. *See supra* text accompanying notes 134-35.

155. *See supra* text accompanying notes 98-103.

156. *See* F. LIEBER, LEGAL AND POLITICAL HERMENEUTICS 28-30 (1839) *reprinted as* 5 *Classics in Legal History* (1970); MacCallum, *Legislative Intent*, 75 YALE L.J. 754, 771-74 (1965). *Cf.* WITTGENSTEIN, *supra* note 138, at 33e (Wittgenstein's well known question whether exclusion of the game of dice must have been in the mind of a speaker who says "show the children a game" to warrant the speaker's protest when the children are taught dice); DICKERSON, *supra* note 7, at 105-116 (treating these questions as a matter of context and therefore as a matter of ascertaining meaning). *But cf.* Findlay, *Use, Usage and Meaning*, THE THEORY OF MEANING 116-27 (G.H.R. Parkinson ed. 1968) (use theory errs in supposing that use may be wholly explained in terms of public or interpersonal use; it must also be explained in terms of internal or personal use).

plain meaning or literal meaning is the meaning the justices ought to seek because the justices are responsible for the results they reach and cannot shift that responsibility to the Congress.[157] The difficulty with that objection is that it assumes agreement both about the character of absurdity and injustice and about the moral weight of absurdity and injustice.

The Burger Court's tolerance of absurdity and injustice may often constitute disagreement with the critic's version of absurdity and injustice. To the extent that the Burger Court would agree that it has in any particular instance tolerated absurdity and injustice in the name of plain meaning, it necessarily differs with its critics over the weight absurdity and injustice should be assigned when measured against the Court's understanding of institutional role. Both of these forms of disagreement are about the morality of judicial decision. They are not about whether judges are responsible for the results they reach, but about what results ought to be reached. Even an argument which claims that congressional decision must be respected despite injustice is an argument that the moral responsibility of the judge compels him to reach such a result. The moral objection to the Burger Court's tendency to tolerate absurdity and injustice cannot therefore claim that the Court has abdicated responsibility; it can at most claim only that the controversial moral premises of its objection to results reached in particular cases or of its objection to the Court's understanding of institutional role are preferable to the Court's controversial moral premises. There is, despite pretentions to the contrary, no high ground to this debate; there are only inconsistent versions of the content of the moral responsibility of the judge.

2. The Necessity of Certainty Difficulty.

The second difficulty with reliance upon plain meaning understood as that meaning which is supplied by a court's intuitions or beliefs about meaning in the circumstances of a case is that it may be viewed as undermining the Burger Court's normative position. If the Burger Court's normative position was some version of an idealized positivism, this difficulty would be fatal, for idealized positivism surely requires that judges be capable of deducing results from statutory language with certainty. Linguistic intuitions about the meaning of ordinary language cannot satisfy such a criterion.[158]

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157. Professor Moore, at least, repeatedly recognizes the necessity for and supplies normative arguments. *See* Moore, *supra* note 34, at 277-81.

158. *See id.* at 281-92.

The Burger Court's rhetoric sometimes suggests that it claims adherence to an idealized positivism; the Court says that it faithfully enforces the plain meaning of the legislative sovereign's commands. But the Burger Court more often treats language as an expression of legislative intent and very often seeks to confirm its perception of the meaning of such language in legislative history.[159] This treatment distinguishes its approach from pristine positivism in the crucial respect that statutory language and legislative history are mere evidence. For pristine positivism, meaning resides in language.[160]

The distinction is important because, although the Burger Court's rhetoric treats application of a statute as a matter of deduction, the premises for the Court's syllogisms are supplied by its intuitions about congressional intent derived from the evidence before it.[161] A pristine positivism would, by contrast, insist upon logical deduction from what the words of the statute must mean, without reference to intent, and it is such a deduction which is not plausible. Moreover, there is no more reason to presume that the Burger Court's rhetoric states the realization of an ideal than there is to presume that a court bent on achieving reasonable and just results has attained a state of perfect moral knowledge. The Burger Court's rhetoric is argument favoring a point of view which it seeks to approximate by the means available to it;[162] the question is whether imperfections in those means doom the enterprise.

Critics of Burger Court literalism appear to think the enterprise doomed,[163] but their arguments often fail to account for the possibility of approximation. Certainty of deduction from language is an impossibility, but this does not leave only the possibility of judicial decision by reference to moral principle.[164] A judge's moral intuitions are quite likely to consciously or unconsciously enter into his perceptions of plain meaning,[165] but this does not compel a conclusion that

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159. *See, e.g.*, Northwest Airlines, Inc. v. Transport Workers Union, 451 U.S. 77 (1981); T.V.A. v. Hill, 437 U.S. 153 (1978).

160. *But see supra* note 9.

161. That is, the mechanism of shared intuition necessarily supplies the premises. *See generally* Moore, *supra* note 34. The fact that the Burger Court employs the rhetoric of deduction does not mean, however, that it is necessarily unaware that it is guessing.

162. *See* text and notes 62-70 *supra*.

163. *See, e.g.*, Moore, *supra* note 34, at 281; Nowak, *supra* note 34, at 561.

164. *See* H.L.A. HART, *supra* note 45, at 135-37; *Cf.* THE AIMS OF INTERPRETATION, *supra* note 3, at 82-84 (attacking Heidegger's version of the hermeneutic circle, which version would render interpretation a function of the interpreter's historical perspective, on the ground that it fails to account for questions of degree).

165. It is no doubt the case that one's moral biases influence one's perceptions

the conventions of ordinary usage cannot substantially influence decision. The Burger Court's normative position can be approximated through reliance on ordinary usage supplemented by references to linguistic context, extrinsic evidence of legislative intent, et cetera, even if it cannot be realized by such a reliance.

The proof is in criticism of the Court's methodology. To the extent that criticism of Burger Court literalism is not criticism of the Burger Court's literalist rhetoric,[166] it is criticism about the effects of that rhetoric—effects such as the Court's refusals to extend the plain meaning of statutory language by creating judicially implied remedies and the Court's tolerance for "absurd" and "unjust" results.[167] But such effects, at least if they are not traceable to political ideology,[168] are the products of an approximated positivism—a positivism which treats plain meaning as presumptively controlling despite its defects rather than as command from which deduction is possible.

T.V.A. v. Hill[169] provides perhaps the best example of the possibility of approximation. In *Hill*, suit was brought to enjoin completion of the Tellico Dam, a federal project, on the ground that completion of the dam would impound the waters of a river inhabited by the snail darter, an endangered species of fish, and would cause the extinction of the species by destroying its habitat. The Endangered Species Act provided in relevant part that "federal departments and agencies shall . . . utilize their authorities in furtherance of the purposes [of the Act] . . . by taking such action necessary to insure that actions authorized, funded, or carried out by them do not jeopardize the continued existence of . . . endangered species and threatened species or result in the destruction or modification of habitat of such species. . . ."[170]

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of ordinary meaning. It is at least questionable that they wholly control perception. *Cf.* THE AIMS OF INTERPRETATION, *supra* note 3, at 49 (distinguishing meaning and significance). And if it is a fact that they wholly control perception, the importance of that fact lies less in its power as a basis for criticizing the Burger Court than in its power to deny the possibility of law as distinct from the mere exercise of political power. *See generally* Nowak, *supra* note 45.

166. Professor Moore's arguments appear to be addressed to that rhetoric, taken (by Professor Moore) literally. *See* Moore, *supra* note 34, at 281.

167. *See, e.g.*, Fiss & Krauthammer, *The Rehnquist Court*, NEW REPUBLIC, Mar. 10, 1982, at 14, 20; Note, *supra* note 34, at 904-07.

168. *See infra* text accompanying notes 284-413 for discussion of this possibility.

169. 437 U.S. 153 (1978).

170. Endangered Species Act, Pub. L. No. 93-205, § 7, 87 Stat. 892 (1973) (amended 1978, 1979, 1980) (current version at 16 U.S.C. § 1536 (1982).

On the assumption that the snail darter was an endangered species, the Court concluded that the "plain meaning" of the statute required enjoining completion of the Tellico Dam, despite its recognition that construction of the dam commenced some years prior to enactment of the Endangered Species Act, that Congress continued to appropriate funds for the project following that enactment, that the dam was virtually complete at the time suit was brought, and that the consequence of its holding, absent new congressional action, would be the waste of many millions of dollars in incurred construction costs.[171] The Court bolstered its plain meaning analysis with references to legislative history indicating congressional rejection of proposed statutory language which would have rendered protection of endangered species a priority subordinate to the primary purposes of an agency or department.[172] The Court therefore concluded that the plain meaning of the statute was consistent with a congressional intent "to halt and reverse the trend toward species extinction, whatever the cost."[173]

The crucial issue of application in *Hill* was whether the completion of the Tellico Dam was within the meaning of the words "actions authorized, funded, or carried out" by federal agencies. Resolution of that issue required, despite the Court's literalist rhetoric, a choice between possible meanings of "actions." That term could be argued to mean prospective actions (construction decisions not yet made at the time of enactment), actions constituting some change in the status quo (continued implementation of an existing plan is not an action), actions the abandonment of which would not require waste of substantial funds, actions the benefits of which do not outweigh the benefits of the continued existence of an endangered species, or any action.[174]

The Court chose the last of these meanings by rejecting resort to inquiry into questions of the absurdity or reasonableness of the consequences of its choice and by referring instead to its perception of ordinary usage in the linquistic context of the language of the statute read as a whole. To the Court, that language appeared both broad and mandatory and contained no explicit reference to the question of the consequences of its mandatory command.[175]

171. 437 U.S. at 173.
172. 437 U.S. at 176-84.
173. 437 U.S. at 184.
174. *See* 437 U.S. at 205 (Powell, J., dissenting).
175. *See* 437 U.S. at 187-88.

It is true that the Court resorted to legislative history in search of congressional intent, but it did not purport to seek an intent about the resolution of the case before it; rather, it sought merely to confirm its perception of the broad and mandatory character of the words of the statute.[176] It is equally true that the term "actions" in the statute is susceptible to the alternative interpretations suggested above; the Court had a choice between interpretations and there is no guarantee that completion of the Tellico Dam is within the necessary or intrinsic meaning of "actions" even when that term is read in the linguistic context of the statute as a whole. But the fact remains that the choice made by the Court was made on the basis of a set of criteria—ordinary meaning as confirmed by legislative history—which had the positivistic consequence that the "unreasonable" effects generated by plain meaning were left to the Congress to resolve.

If the Court's conclusion in *Hill* is objectionable, the objection is not viably that the broad interpretation the Court gave the language of the Endangered Species Act lacks support in the evidence of legislative history or that completion of the Tellico Dam is not within some core meaning of the term "actions." The viable objection, rather, is that the Court should have considered the consequences of a literal interpretation, and that objection is not an objection to the possibility of literalism.

B. *The Objection From The Fictional Character of Legislative Intent*

If the Burger Court relies on ordinary meaning as expressive of or the best evidence of legislative intent,[177] its literalism is in fact a device for ascertaining author's meaning. From the normative perspective of the Burger Court, the potential advantage of legislative intent is obvious: if it can be ascertained, it ensures legislative supremacy. The crucial question for present purposes is whether objections to legislative intent as a means to achieving these ends preclude resort to intent.

Although legislative intent and legislative purpose are often used interchangeably in judicial opinions, both potentially refer to a number of distinct concepts. For present purposes, these distinct concepts may

176. It is interesting to note that Justice Powell's dissent cites the absence of a specific congressional intent with respect to questions of the abandonment of projects as a reason to reject the Court's interpretation. 437 U.S. at 207-09 (Powell, J., dissenting).

177. *See* cases cited *supra* note 67.

be labeled (1) legislative intent as the inconsequential admission of the interpreter, (2) legislative intent as the subjective desires of the legislature or of particular legislators discovered by the interpreter, (3) legislative intent as the immediate intent attributed to the legislature by the interpreter, (4) legislative purpose as the ultimate objective attributed to the legislature by the interpreter. In academic discourse, these distinct concepts are often treated as mutually exclusive categories in arguments which seek to establish that only one of the categories can exist or that only one is judicially usable.[178] The most typical of such arguments is that there is no such thing as a collective subjective intent and that courts must therefore attribute a purpose to the legislature as an act of creation.[179] It is submitted here, however, that each such concept represents a factual possibility in at least some cases and that judicial reliance upon one or another of such factual possibilities is a function of the evidence available in a given case and of the interpeting court's underlying normative view of the relationship between itself as a reader and the legislature as an author of the statute interpreted.

1. Legislative Intent As Inconsequential Admission

It is sometimes conceded that texts, including statutes, are the products of intentional acts without attributing anything of importance to the concession.[180] Legislative intent is in this sense analagous to the concept of a voluntary act in the law of torts or crimes; it says nothing about motive or objective and is therefore ignored as a subject of inquiry or basis for argument in an interpretation. This version of legislative intent therefore renders such an intent inconsequential.[181]

The concession theory of legislative intent has both factual and normative sources. It is likely to be at least tacitly employed in a case in which none of the usual forms of evidence from which other

178. *Cf. Forum of Principle, supra* note 71, at 476-500 (postulating alternatives and insisting upon a choice between them).

179. *See, e.g.*, L. FULLER, *supra* note 17, at 86; R. KEETON, VENTURING TO DO JUSTICE 81-82 (1969); Bishin, *supra* note 137; *Forum of Principle, supra* note 71, at 476-500; Moore, *supra* note 34, at 246-70; *Statutory Interpretation, supra* note 12.

180. *See Statutory Interpretation, supra* note 12, at 871; Radin, *A Short Way With Statutes, supra* note 12, at 410-11. This view is particularly evident in the writings of some literary theorists (and anti-theorists). *See Chain Gang, supra* note 3, at 563; Knapp & Michaels, *supra* note 118, at 725-30.

181. *See My Reply to Fish, supra* note 3, at 308-10, 313.

concepts of intent or purpose are discovered or implied supply an intelligible answer. A court, given such a factual state of the evidence, might rely on the ordinary meaning of the language of the statute as the best (or only) reliable evidence of Congressional intent.[182] The court might alternatively seek to limit the reach of the ordinary meaning of the statute on the theory that, if there is no discoverable intent or purpose, the statute should be presumed on a form of clear statement principle to be merely precatory.[183] Or the court might treat the absence of a discoverable intent as a delegation of law making authority to the judiciary by invoking, for example, the attribution of purpose concept and defining the attributed purpose in the most general terms available.[184] Which of these responses to the absence of evidence a court chooses is a function of its normative view; given the Burger Court's view, it is more likely to choose the first or second than the third.

An alternative source of the inconsequential admission version of legislative intent is underlying normative view itself. To the extent that an interpreter adopts a stance of extreme reader contextualism—that meaning is wholly a function of reader perspective—he requires a means of neutralizing the common perception that authors write intentionally. The inconsequential admission serves this function by denying either that the content of the conceded intent is discoverable or, if discoverable, its importance. This normative view is inconsistent with the view attributed here to the Burger Court, but it is important to recognize that the Burger Court can come to a similar conclusion in a given case from factual assumptions rather than normative assumptions.

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182. This is not to suggest that the court in such a case will not seek a legislative intention. It suggests that the court will imply an intention from its understanding of the words of the statute. And that understanding may itself be influenced by the intentions the court thinks it would be reasonable, just and not absurd for a legislator to entertain. The possibility also suggests, however, that there may be a meaning to the words of a statute apart from the meaning inferred by reference to the intention with which a legislature enacted the statute. *Cf.* Knapp & Michaels, *supra* note 118, at 726 (criticizing Hirsch on the ground that Hirsch's notion of author's intention is really a notion of information about author's intention).

183. *See* Pennhurst State School & Hosp. v. Halderman, 451 U.S. 1 (1981).

184. A candidate for an instance of such a technique is the Supreme Court's resolution of the choice of law issue in Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957).

2. Legislative Intent As Subjective Intent Discovered By The Interpreting Court

The subjective intent concept might be taken to mean one of three things: (1) the objectives, hopes, or fears of individual legislators or of the Congress as a collective body which motivated passage of the legislation; (2) the factual situations or hypothetical cases in the minds of individual legislators or in the mind of the Congress as a collective body which motivated passage of the legislation; or (3) the meaning attributed to the words of the statute by individual legislators or the Congress as a collective body at the time of passage. The third of these possibilities, although framed as a subjective perception of the "plain meaning" of language, may perhaps be viewed as influenced, if not controlled, by elements of the first two possibilities.

Critics of subjective legislative intent theories employ a number of well worn descriptive arguments in attacking such theories. Because proposed legislation can become an authoritative statute only by formal collective action, subjective intent must refer to a collective subjective intent—at most, the subjective intent of a legislative majority (in combination, perhaps, with the subjective intent of the President who signed, or declined to veto, the legislation). There is, however, no such thing as a collective mind capable of entertaining any of the stated versions of subjective intent.[185] Even if collective intent is to be taken as some combination of the subjective intents of individual legislators who voted in favor of the legislation, the result, aside from insurmountable difficulties in discovering such an intent,[186] is likely to be unintelligible. The hopes, fears and objectives of individual legislators include not only the laudatory (or perhaps not so laudatory) general welfare objectives of the sponsors but also such states of mind as ignorance, indifference, vote trading and personal political advantage.[187] The factual situations (and their resolution) in the minds of individual legislators are likely to be distinct, inconsistent and of no help to a court confronted with a case never contemplated by a majority of legislators or even by one legislator.[188]

185. *See, e.g., Forum of Principle, supra* note 71, at 488; *Statutory Interpretation, supra* note 12, at 870.

186. *See, e.g.*, Brest, *The Misconceived Quest For the Original Understanding*, 60 BOSTON U.L. REV. 204, 212-17 (1980); Moore, *supra* note 34, at 266.

187. *See* MacCallum, *supra* note 156, at 756-62.

188. *See, e.g., Forum of Principle, supra* note 71, at 48; Moore, *supra* note 34, at 266-69;

A variation on this theme is the argument that it is inherently impossible to combine the preferences of individual legislators into a coherent group decision, in part because agenda control precludes ordering of individual preferences in terms of

The meaning of the words of the statute in the minds of the legislators at the time of passage may differ from legislator to legislator and is, like other versions of subjective intent, subject to an insurmountable burden of discovery. Even if discoverable, the meaning assigned the words of the statute by legislators is in any event of no help in the task of application because the plain meaning of language cannot itself serve to establish the link between language and fact essential to application.[189] Indeed, unless the legislature had the resolution of the particular case before the court "in mind" at the time of passage, it cannot be said to have had any intent whatsoever about application of the statute to that case.[190]

Aside from these descriptive objections to subjective intent, there is a normative objection. The normative premise underlying the search for subjective legislative intent is that courts in a democracy ought to follow the "will" of the legislative sovereign. The normative objection to that premise is that it treats law as whim. The legislature ought to be treated as passing laws, not its desires, and the concept of law in a democracy is at least more complex than mere legislative desire.[191]

The relevance of these arguments about subjective legislative intent for the present inquiry into the methodology of the Burger Court is two-fold. The Burger Court often inquires into legislative history (albeit usually to bolster an interpretation founded upon literal meaning) in a fashion suggestive of inquiry into subjective intent[192] and the Burger Court's normative view may be characterized as resembling the view underlying inquiry into subjective intent.[193] It is therefore necessary to identify similarities and dissimilarities between the Burger Court's approach and subjective intent theory and to defend that approach against both the descriptive and normative arguments outlined above.

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the intensity of those preferences and in part because evidence of operation of the mechanisms for avoiding these difficulties (e.g., logrolling) are not judicially discoverable. *See* Levine & Plott, *Agenda Influence and its Implications*, 63 VA. L. REV. 561 (1977); Easterbrook, *supra* note 4, at 587-88.

189. *See* Moore, *supra* note 34, at 270.

190. *See* Jones, *Statutory Doubts and Legislative Intention*, 40 COLUM. L. REV. 957, 967 (1940); Payne, *The Intention of the Legislature in the Interpretation of Statutes*, 8 CURRENT LEGAL PROBS. 96, 101 (1956); *Statutory Interpretation, supra* note 12, at 869-70.

191. *See, e.g.*, Moore, *supra* note 34, at 257; *Statutory Interpretation, supra* note 12, at 871.

192. *See, e.g.*, American Tobacco Co. v. Patterson, 456 U.S. 63 (1982); United States v. Turkette, 452 U.S. 576 (1981).

193. *See* T.V.A. v. Hill, 437 U.S. 153 (1978).

(a) The Descriptive Objection

These tasks are approached here by means of an hypothetical case. The Equal Pay Act of 1963 provides that it is unlawful for an employer to pay unequal compensation on the basis of sex "for equal work on jobs the performance of which requires equal skill, effort and responsibility" unless such unequal compensation is paid pursuant to a seniority system, a merit system, a system which measures earnings by quantity or quality of production or unless the differential is "based on any other factor other than sex."[194] In 1962, the Kennedy administration had proposed legislation prohibiting sex discrimination in compensation "for work of comparable character on jobs the performance of which requires comparable skills."[195] The administration bill was amended on the floor of the House of Representatives by deleting the "comparable" language and inserting equal work language,[196] but the bill was not passed. In 1963, the bill which became the Equal Pay Act was reintroduced in a form which omitted the "comparable character" and "comparable skill" language of the administration's original proposal and retained the "equal work" language of the 1962 amended bill.[197] The legislative history of the 1963 legislation includes statements by sponsors and proponents of the bill that their reason for rejecting a comparability standard was that such a standard would permit government regulation, by means of administratively or judicially imposed standards of job comparison, of questions of pay equity.[198]

Suppose that a particular airline compensates its pilots at a rate five times the rate it compensates its flight attendants and that the composition of its pilot workforce is entirely male and the composition of its flight attendant workforce is entirely female. Assume further that the airline has on its own initiative undertaken a job evaluation study which indicates that pilots should, on the basis of a comparison of skill, effort and responsibility, be paid twice the compensation of flight attendants. The airline has not, however, followed this

194. 29 U.S.C. § 206(d)(1) (1976).

195. H.R. 8898, 87th Cong., 1st. Sess. (1962) and H.R. 10266, 87th Cong., 2d Sess. (1962) in *Hearings Before the Select Subcommittee on Labor of the House Committee on Education and Labor on H.R. 8898*, 10266, 87th Cong., 2d Sess. 2-10 (1962).

196. 108 CONG. REC. 14767-69 (1962).

197. *See* 109 CONG. REC. 9197 (1963) (remarks of Rep. Goodell, co-sponsor of the bill); 109 CONG. REC. 9195-96 (1963) (remarks of Rep. Frelinghuysen).

198. *See* 109 CONG. REC. 9196 (1963) (Rep. Frelinguysen); 109 CONG. REC. 9208-09 (1963) (Rep. Goodell). *See also* Corning Glass Works v. Brennan, 417 U.S. 188, 199-201 (1974).

recommendation. A flight attendant employed by the airline sues the airline under the Equal Pay Act claiming that the airline's refusal to follow the recommendations of its own job evaluation is attributable to intentional sex discrimination: but for the gender of flight attendants, the recommendation would be followed. On the stipulation that pilot jobs and flight attendant jobs are unequal, the defendant airline's motion for summary judgment is granted and this result is affirmed on appeal.

On the assumption that the Supreme Court reviewed this hypothetial case,[199] two of its potential approaches are of present interest. The Court might conclude that the plain meaning of the language of the statute precludes liability; the jobs in question are not equal. It might bolster this conclusion with references to the legislative history in which legislators emphasized that the statute would reach sex based differentials only in cases in which the equal work standard was satisfied. Alternatively, the Court might conclude, again with appropriate references to the statements of legislators, that Congress intended to prohibit intentional sex discrimination in compensation and that Congress intended to qualify this prohibitory intent only by precluding resort to compensation standards imposed by government. The reason for the equal work standard, fear of government regulation, is absent in the hypothetical case because the plaintiff relies on the inference of discrimination generated by the defendant's failure to adhere to its own job evaluation study. The plaintiff's action should therefore proceed, at least so long as the plaintiff relies on direct evidence of intentional discrimination and does not seek to impose an externally developed standard of pay equity on the employer.[200]

What should be made of these alternative potential references to legislative history in the hypothetical case? The cynical answer is that the Court manipulates legislative history to bolster predetermined results and that it can do so for precisely the reason that subjective legislative intent is indeterminate. A less cynical and more viable answer is that a court that resorts to legislative history in an effort to

199. The hypothetical case resembles County of Washington v. Gunther, 452 U.S. 161 (1981), but that case was decided as a question of the interpretation of Title VII of the Civil Rights Act of 1964.

200. *Cf. id.* at 166 (adopting such a standard for Title VII purposes). For a discussion of this rationale, see Cox, *Equal Work Comparable Worth And Disparate Treatment: An Argument For Narrowly Construing County of Washington v. Gunther*, 22 DUQ. L. REV. 65, 105-14 (1983).

find congressional intent confronts all of the difficulties of interpretation faced in interpreting a statute when it seeks to interpret legislative history.[201]

There is no doubt that legislative history provides no relief from the difficulties of the task of interpretation, but what is interesting in the hypothetical is the plausibility of the practice. That is, it is plausible that the legislative history be given either of the interpretations suggested as potential resolutions of the case and it is plausible that the legislative history be taken as evidence of the subjective intent of the legislature. Moreover, suggesting plausibility in each of these senses is not equivalent either to suggesting that the Court has attributed whatever intent it desires to the Congress or to suggesting that the Court has discovered a subjective congressional intent about the facts of the case before the Court. It is true that a majority of the Court chooses one or another of hopefully plausible interpretations of the "state of mind" of the Congress, but it does so on the basis of its reading of the statements of congressmen in combination with its intuitions about the ordinary meaning of words like "comparable" and "equal." It does not necessarily attribute an intent wholly formulated outside these statements, and it does not necessarily attribute an intent or purpose on the basis of its moral judgment about what intent or purpose best fits its conception of the good society. Rather, it chooses a subjective intent on the basis of its estimate of a balance of probabilities given the evidence before it.

It is tempting to argue that, because the Court chooses between interpretations of intent and interprets the statements of legislators, the thing it seeks to discover cannot be subjective legislative intent. That argument is persuasive if what is meant by "subjective intent" is the "true" intent in the collective mind of a legislative majority. But such a definition is so confined that it ensures the success of the argument. A court self-consciously seeking the intent of the legislature in the evidence of legislative history surely seeks the legislature's state of mind in some sense. The question is whether this sense may be given a content which does not suffer from the improbabilities exposed by the descriptive critique of subjectivism.

The key to the question of content lies in what some have termed the delegation theory of subjective legislative intent: the legislature delegates to a committee, or the committee's staff or the sponsor of legislation the tacit authority to construct legislation, and it is the

201. *See* DICKERSON, *supra* note 7, at 137-97.

intent of these "agents" which is the relevant intent.[202] As so formulated, the theory suffers from two defects: there is neither a formal delegation in fact nor a basis in the democratic theory which motivates resort to legislative will for relying on the intent of agents.[203] But the traditional formulation adopts from the law of agency notions resembling the concepts of actual or apparent authority. If the delegation theory has validity as a description of plausible legislative practice, the relevant analogy from the law of agency is ratification of an unauthorized act with notice or knowledge of the act.[204]

This version of delegation is plausible because, absent substantial floor amendment or compromise within conference committee, most of the work of the Congress in formulating a statute is undertaken by sponsors and committees.[205] It is surely absurd to think that the individual members of Congress who vote in favor of legislation have a single motivation or a single set of hypothetical cases in mind at the time they vote, and it is therefore absurd to assume that a court seeking the subjective intent of Congress is seeking the resolution of the case before that court in the collective mind of the Congress at the time of passage. But it is not absurd to assume that the members of Congress who voted for legislation shared a concept of the effect, purpose, and limitations of proposed legislation and an understanding of the political compromise reflected in that proposed legislation at the time of their vote, that they derived this concept from the obvious sources available to them, the sponsors and committee reports, and that they acted on that concept.[206]

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202. *See* S.E.C. v. Robert Collier & Co., 76 F.2d 939, 941 (2d Cir. 1935); HURST, *supra* note 48 at 37-38; McCallum, *supra* note 156 at 780-84.

203. *See, e.g.*, Bishin, *supra* note 137, at 14-15; Brest, *supra* note 186, at 215; Moore *supra* note 34, at 267.

204. *See* Jones, *Extrinsic Aids In The Federal Courts*, 25 IOWA L. REV. 737 (1939); Landis, *supra* note 8, at 889. *Cf. Civil Rights Act, supra* note 4, at 38-39 (postulating the possibility of "conventions" to which legislators might be judicially held, but rejecting actual existence of such conventions).

205. *See* DICKERSON, *supra* note 7, at 71-73; HURST, *supra* note 48, at 37.

206. *See* HURST, *supra* note 48, at 34-37. *Cf.* L. HAND, THE BILL OF RIGHTS 18-19 (1979) ("I cannot believe that any of us would say that the 'meaning' of an utterance is exhausted by the specific content of the author's mind at the moment.") MacCallum, *supra* note 156, at 771-73 (arguing that there can be a generalized intent which counts as an intent regarding specific instances even where those instances were not themselves contemplated). *Cf.* WITTGENSTEIN, *supra* note 138, at 33e, (raising this question).

Notice that is is irrelevant for purposes of the ratification model that some legislators voted for the statute for political reasons or other "unworthy" motives. What counts is that there was a general subjective understanding of the effect of the statute and the objectives the statute was designed to achieve and that legislators, whatever their motives, voted for the statute knowing of that general understanding. It is the general understanding the court seeks, not the secret preferences in the

Nor is it absurd for a court, with due caution for the limitations of legislative history,[207] to attempt to grasp the concept or concepts in the minds of legislators in an effort either to verify its intuitions about the plain meaning of the language of a statute or to clarify plain meaning where the court is unsure of its intuitions.[208] The degree to which a court that makes such an effort can be confident of its conclusions is no doubt a matter of the volume and quality of the evidence from which it infers subjective intent, but the possibility of low volume and questionable quality does not guarantee that the object of the effort is illusory.

Shared concepts in the minds of legislators at the time of enactment must be distinguished from the hopes or wants of individual legislators regarding legal results in particular cases yet to be decided, even if the evidence of legislative history includes statements about the proper resolution under a proposed statute of cases closely resembling a case before a court post-enactment.[209] The subjective intent of Congress in the form it is used here is that meaning or sense in which legislators expected the words used to be understood;[210] it

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minds of legislators. *See* United States R.R. Retirement Board v. Fritz, 449 U.S. 166, 179 (1980).

207. *See* DICKERSON, *supra* note 7, at 137-97.

208. Although it is sometimes said that extrinsic evidence of legislative intent will be examined only where ambiguity is discovered, Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384, 395-97 (1951) (Jackson, J., concurring), the ease with which ambiguity may be discovered or manufactured renders the statement a questionable description of judicial practice. *See* United States v. American Trucking Assoc., Inc., 310 U.S. 534 (1940); Murphy, *Old Maxims Never Die: The "Plain Meaning" Rule And Statutory Interpretation In The "Modern" Federal Courts* 75 COLUM. L. REV. 1299, 1315 (1975).

209. *See* de Sloovere, *Extrinsic Aids In the Interpretation of Statutes*, 88 U. PA. L. REV. 527 (1940). *Cf.* Landis, *supra* note 8, at 887 n.5 (legislature's hypothetical provides basis for reasoning from similarities).

210. *See Forum of Principle, supra* note 71, at 483-84; MacCallum, *supra* note 156, at 757-63. Dworkin relies on Grice for this formulation of one of the alternative psychological states he discusses. *See* Grice, *Utterer's Meaning and Intentions*, 78 PHIL. REV. 147 (1969); Grice, *supra* note 44, at 225; Grice, *Meaning*, 66 PHIL. REV. 377 (1957). In oversimplified form, Grice argues that the meaning of a speaker's statement is the effect the speaker intended the statement to have on an audience—e.g., the beliefs the speaker intended to induce in an audience. Dworkin treats this notion as the speaker's expectations about what an audience would understand a speaker would have expected it to understand. *Forum of Principle*, supra note 71, at 483-84. He also appears to treat the notion as synonymous with or at least similar to "abstract meaning" or "concept" and therefore perhaps as similar to ultimate legislative purpose. *See id.* at 489-90. It is however doubtful that Grice was referring to the ultimate objectives of a speaker. *See* Moore, *supra* note 34, at 250-51. As used here, expectations refer neither to "hopes" about particular

is not the will of Congress regarding the proper legal result in the case before a court post-enactment. The latter understanding of subjective intent suffers both from the evidentiary difficulty that there is seldom evidence of what Congress thought to be the proper legal result in a case before the court post-enactment and from the difficulty that the hopes or wants of individual legislators regarding particular applications of a statute are of problematic value in understanding a collectively enacted text.

A legislative history which includes statements about resolution of hypothetical cases under a statute is useful as evidence of the sense in which the Congress used statutory language for the reason that examples are often helpful as a means of communicating an understanding.[211] That such cases are also evidence of a sponsor's or committee's hopes about hypothetical applications of a statute known to Congress at the time of enactment should not divert attention from the version of subjective legislative intent that more often than legislative hopes has plausible content; legislators can share an understanding of the sense in which proposed statutory language is used, even if they disagree about the potential significance of that language in the context of potential facts.[212]

Shared concepts in the minds of legislators at the time of enactment must also be distinguished from legislative purpose understood as aim or objective. It is arguable that aims or objectives, because often stated in sufficiently abstract terms to ensure agreement about aims, are shared concepts in the minds of legislators.[213] Indeed, shared aims, like hypothetical applications postulated in legislative history, are evidence of the sense in which legislators expected statutory language to be understood. Legislative objectives are nevertheless far more abstract than the relatively concrete sense in which legislators expect the statutory language used will be understood. Neither shared aims nor shared expectations constitute an intent about the correct application of a statute to the facts of a case before a court post-enactment. But a shared expectation about how statutory language will be understood is normally more concrete than a shared objective,[214]

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applications nor to ultimate ends; it is a notion both more concrete than objectives and more abstract than a hope regarding particular applications.

211. *Cf. A Note on Statutory Interpretation, supra* note 8, at 887 n.5 (Court may reason from legislature's hypothetical cases in applying a statute).

212. *See* MacCallum, *supra* note 156, at 771-75.

213. *See* LEVY, supra note 113, at 30-32.

214. *But cf. Forum of Principle, supra* note 71, at 489 (apparently treating expectation as abstract intent).

because statutes which do more than delegate broad lawmaking authority to an administrative agency or court establish the means by which objectives are to be achieved, and these means are often indirect and inefficacious.[215] Indeed, shared aims may be inconsistent with shared expectations because the abstract terms in which aims are formulated often ensure that a statute is enacted to serve objectives which are incompatible in the context of particular cases.

If it is correct to believe it plausible that legislators can collectively share expectations about how statutory language will be understood, that legislators can collectively share an understanding of the abstract objectives of legislation, and that a court may infer these expectations and understandings from available evidence, there is nevertheless a difficulty presented, not by the implausibility of subjective legislative intent, but from the necessity of choice between plausible intents. At a minimum, a court confronted with credible evidence of legislative expectations must choose between those expectations and legislative aims as potential reference points in application of a statute in the context of the facts of particular cases.

The hypothetical Equal Pay Act case illustrates each of these points. Either of the postulated legislative states of mind, the intent to insist upon the equal work standard and the aim of precluding governmental regulation of pay equity, are plausible interpretations of the legislative history of the Equal Pay Act. Indeed, it seems probable that congressmen had both concepts in their minds at the time of passage, and it seems probable that at least most never contemplated a case in which these intentions might lead to distinct results. Both concepts are, moreover, subjective legislative intents in the only sense in which intent can be a fact discovered by a court:

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215. The Burger Court's treatment of implied private causes of action suggests the point made in the text. Its fairly consistent refusal to imply private causes of action from regulatory statutes reflects (1) an unwillingness to assume that incomplete legislative schemes may be made more rational, reasonable and just by judicial supplementation without upsetting the "irrationality" of the legislative compromise comprising such legislation; (2) a distrust of the Court's capacity to determine an appropriate level of enforcement; (3) an assumption that the incomplete character of the statutory text conveys a message of incompleteness not to be altered absent some clear evidence of a contrary congressional assumption; and (4) a notion, derived expressly from separation of powers doctrine, that the legitimate scope of statutory enforcement is the scope, however incomplete or ineffectual, "democratically" determined. *See, e.g.*, Middlesex County Sewage Auth. v. National Sea Clammers Ass'n., 453 U.S. 1 (1981); California v. Sierra Club, 451 U.S. 287 (1981); TransAmerica Mortgage Advisors v. Lewis, 444 U.S. 11 (1979); Touche Ross & Co. v. Redington, 442 U.S. 560 (1979); Universities Research Ass'n. v. Coutu, 450 U.S. 754 (1981); National R.R. Passenger Corp. v. National Ass'n. of R.R. Passengers, 414 U.S. 453, (1974).

they are characterizations inferred from available evidence. It is true that neither concept constitutes the legislature's subjective will regarding the resolution of the case before the Court, and it may therefore be permissible to claim that a court looks to legislative history to discover what the statute means rather than what the legislature meant,[216] but it is at least difficult to treat the thing inferred as other than an intent.[217] Furthermore, both concepts supply reasons for adopting one or another interpretation of the Equal Pay Act. It is true that the Court must choose between interpretations of the statute and between alternative characterizations of the subjective intent of the Congress in the hypothetical case. But this truth does not alter the further descriptive truth that the Court might choose to treat the subjective intent it selects as the more probable intent or even the more moral intent as a good reason for its decision because it *is* the subjective intent of the legislature.

The final point illustrated by the hypothetical case is that the problem of application is not resolved by adopting an interpretation of the Equal Pay Act, even an interpretation supported by reference to subjective intent. Subjective intent could resolve the problem of an application only if it could be shown that the Congress had a collective intent about the proper resolution of the problem whether the flight attendants in question may sue the airline in question. Application continues to require an argument by which the facts of the case are characterized as within or without the meaning assigned the statute by interpretation. Indeed, the Burger Court's notion that statutory language is the best evidence of congressional intent may be read as a recognition that the problem of application is not resolved by assigning a meaning to statutory language, even if that assignment entails a reference to subjective intent.[218] That is, the notion may be read as a rejection of the possibility that Congress had a discoverable "will" with respect to the case at hand and therefore as relying instead on the Court's sense of the meaning of statutory language as that meaning is informed by congressional intent inferred from legislative history.

(b) The Normative Objection

If the preceding argument has validity, there is a descriptively viable content to subjective legislative intent. On that assumption,

216. *See* Holmes, *supra* note 44, at 418, 419.

217. *See* de Sloovere, *The Equity and Reason of a Statute*, 21 CORNELL L. Q. 591, 599-600 (1936); de Sloovere, *supra* note 139, at 542-43.

218. *Cf.* Moore, *supra* note 34, at 268 n.249 (one can be sure of legislative agreement only with respect to the words of the statute itself).

the normative question must be confronted: ought subjective legislative intent be treated as a good reason for an interpretation? In large measure, the force of the normative attack on subjective intent has been dissipated by the descriptive argument made above. Only a committed ideologue of one stripe or another could characterize either the intent to insist upon the equal work standard of the Equal Pay Act or the aim of precluding government regulation of questions of pay equity a mere whim of the sovereign not entitled to be characterized as law. Moreover, the descriptive argument recognizes the necessity of judicial inference and choice and the reality of judicial argument from an inferred legislative intent to an interpretation of a statute. To the extent that the normative argument against subjective intent is an objection to a judiciary passively complying with a legislative sovereign's will regarding the resolution of a particular case, the descriptive argument presented here in support of subjective intent excludes such passivity as a possibility.

However, there may be more to the normative argument than this. The normative argument may be formulated as an objection to the treatment of subjective legislative intent as a good reason for an interpretation: law consists of the statute, not the intents underlying the statute;[219] if intent or purpose is a part of the interpretive enterprise, the concept of law requires that intent or purpose be attributed by the judge rather than discovered in the whims of legislators.[220] If this is the normative argument, it adopts a peculiarly narrow definition of law[221] undeniably inconsistent with the purported practice of the Burger Court.

The hypothesized Equal Pay Act case illustrates both the Burger Court's practice and the broader definition of law implicit in its normative view. The probable Burger Court interpretation[222] of the Equal Pay Act is that the plain meaning of the statute requires equal work and that this plain meaning is supported by a congressional intent to insist upon the equal work standard as a bulwark against government attempts at regulating pay equity. The Court's probable

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219. There is one sense in which this claim is unassailable: legislative intent should not be employed as the basis for decision if it is inconsistent with the statute as written because the legislature can only speak by constitutional means, and the constitutional means of communication is enactment. *See* Addison v. Holly Hill Fruit Products, Inc., 322 U.S. 607, 617 (1944).

220. *See* Moore, *supra* note 34, at 257-65; *Statutory Interpretation, supra* note 12, at 871.

221. *See* DICKERSON, *supra* note 7 at 75; HURST, *supra* note 48 at 38-40.

222. *See* County of Washington v. Gunther, 452 U.S. 161, 181-204 (1981) (Rehnquist, J., dissenting).

application of the statute in the hypothetical case is that pilots and flight attendants clearly engage in work involving unequal effort, skill and responsibility, that the inequality in fact of their work is supported by the job evaluation they introduced as evidence, and that a job evaluation criterion for determining the equality question is supported by legislative history indicating a congressional intent to incorporate the peculiar standards of job evaluation.[223]

Four important aspects of this hypothesized analysis should be noticed. First, the analysis emphasizes the ordinary meaning of language and supplements ordinary meaning with references to legislative intent consistent with that meaning. Second, the analysis ignores the "absurd result" that flight attendants are precluded from attempting to prove intentional sex discrimination[224] in favor of giving effect to the equal work standard and the perceived congressional intent underlying that standard. Third, the analysis has both a meaning ascertainment component influenced by a characterization of subjective congressional intent (the statute requires equality of work, not merely the absence of a threat of government regulation) and an implicit application component not resolved by reference to the necessary meaning of the words of a statute (there is no guarantee that the factual characteristics of pilot and flight attendant jobs are within or without the meaning of the word "equal").[225] Application is nevertheless aided by reference to congressional intent; job evaluation standards or practices supply a criterion for judging the question of the equality of the factual characteristics of the two jobs.

Finally, even the congressional intent to incorporate job evaluation standards merely aids judgment regarding the question of application by narrowing the potential range of meanings to be assigned the word "equal" in the statute. It does not guarantee that pilot jobs and flight attendant jobs are unequal. The task of application therefore remains a function of a judgment structured by the meaning assigned the word "equal" by the process of ascertaining meaning—perhaps by a judgment derived by means of a shared perception that pilot jobs and flight attendant jobs are within some core of the meaning of the word "unequal" as that core is understood by a "community" of job evaluators.

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223. *See* Corning Glass Works v. Brennan, 417 U.S. 188, 201-10 (1974).

224. *See* County of Washington v. Gunther, 452 U.S. 161, 178-79 (1981).

225. With respect to the distinction between meaning and application, see *supra* notes 56, 139. With respect to the claim that a statement of legislative intent is not self executing in its application to the facts of a case see Moore, *supra* note 34, at 269-70.

What distinguishes the hypothesized analysis of the Burger Court from the analysis implicit in the extreme version of the normative anti-subjectivism argument is that the latter would insist that the court *supply* the intent or purpose which informs the meaning of the statute. A court is to supply intent by discovering the intention in a statute (as opposed to discovering the legislature's motivation) through a hermeneutic process of determining the intention or intentions which would rationally fit the words of the statute.[226] A court is to supply purpose by attributing to the statute a function within the system of law—an attribution requiring a set of normative assumptions about the objectives of that system.[227]

The use of supplied intent and supplied purpose in the anti-subjectivism argument is the use of discovered subjective intent in the Burger Court's argument: supplied intent and supplied purpose provide good reasons for choosing one interpretation of the meaning of a statute over another and provide a guide to application by stating a goal or objective of the statute which application should further. Supplied intent and purpose, like discovered intent and purpose, do not guarantee that the facts of a case fall within or without the statute.[228] For example, a supplied purpose of precluding government regulation of questions of pay equity does not itself permit a conclusion either that permitting flight attendants to claim sex discrimination in compensation will or that it will not entail government regulation of pay equity because the term "regulation" itself has no necessary meaning which guarantees that the flight attendant's lawsuit falls outside that meaning.

The hermeneutic process of determining the intention in a statute by determining which intention rationally fits the statute is not inconsistent with Burger Court methodology. Indeed, it appears essential to the Burger Court's claim that the language of the statute provides the best evidence of legislative intent. But the Burger Court at least purports to discover the function of a statute within the normative suppositions of the legislature by deriving a subjective intent from legislative history; its normative view precludes an

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226. *See* Moore, *supra* note 34, at 258-61. Moore identifies Learned Hand and Justice Frankfurter as proponents of this view. *Id.* at 262 n.242, citing L. HAND, THE BILL OF RIGHTS 19 (1958); Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 538-39 (1947). It is however, possible to read Hand as more subjectivist in his approach than Moore suggests. *See L. Hand, How Far is a Judge Free in Rendering a Decision?* in THE SPIRIT OF LIBERTY, 103-110 (3d ed. enl. 1960).

227. *See* Moore, *supra* note 34, at 263-64.

228. *Id.* at 270 n.252.

attribution of purpose founded upon of the function of a statute within a court's version of the "good society."

In a sense, of course, this claim cannot stand; the Court must choose between the plausible legislative intents it discovers in legislative history, must argue from the intent it chooses to an interpretation of the meaning of or range of concepts within the meaning of the statute, and must argue from that meaning to an application of the statute to the facts of the case. But the claim can stand as a claim about evidence of the normative suppositions of the Congress, and therefore can stand as a claim to fact finding as fact finding is understood in the judicial process—as inference derived from a balance of probabilities. And because it can make these descriptive claims, it can make the further claim that, while the whim of the legislature is not law, evidence of the normative suppositions of the legislature should constitute the basis upon which the function of a statute is determined.

The normative claim of extreme versions of the critique of subjectivism is that the legislature's understanding of the good society is to be excluded from the definition of law; the judge ought to assign a function to the statute within his version of the good society.[229] The difficulty with this claim is that judicial attribution of purpose mistakes the value structure underlying the judiciary as an institution for law properly defined. That mistake is fundamentally at war with the notion of legislative supremacy precisely because the inherent difficulties of determining the legislative will revealed by the descriptive critique of subjectivism compel a series of judicial choices. Those choices are highly susceptible to justification within the rhetoric of the judicial method—the rhetoric of rationalty, consistency and principle.[230] One difficulty with the rhetoric of the judicial method is that it is no more valid as a description than the rhetoric of judicial passivity in the application of the will of the legislature. That judges ought to seek a rational order of internally consistent neutral principle is perhaps a wholesome objective; that the actual process can be divorced from the political persuasion of real judges is questionable.[231]

There is a more fundamental difficulty with the rhetoric of judicial method: it is a rhetoric, even understood as an unattainable goal to be continuously sought, inconsistent with the mechanism of

229. *See id.* at 263-64.

230. *See* HART & SACKS, *supra* note 15, at 1410-17.

231. *See, e.g.*, Nowak, *supra* note 34. *But see infra* text accompanying notes 316-413.

legislative compromise. The normative suppositions of the legislature can emphatically not be described in terms of internally consistent neutral principle.[232] The rationality of the legislative process is the rationality of the often internally inconsistent political bargain. To define law in a fashion which ignores the rationality of the political bargain is to defeat the notion of legislative supremacy because the very difficulties identified by the descriptive critique of subjectivism present opportunities for the truimph of the rhetoric of judicial method in the guise of interpretation.[233] Attribution of purpose understood as the characterization of a statutory function by reference to the judge's view of the good society[234] renders this defeat explicit: statutory meaning is a matter of judge's meaning. The notion of legislative supremacy thereby becomes estranged, if not divorced, from the operative definition of law.

The definition of law is itself a normative matter; one cannot "disprove" a definition under which the notion of legislative supremacy is estranged. Nevertheless legislative supremacy is a generally shared value rendering a definition of law, under which courts seek self consciously to minimize estrangement through approximation of a "legislative will," not out of order as a definition. Nor, of course, is a definition which divorces legislative supremacy from law. But such a definition cannot exclude its competition by definitional fiat; it is merely a competitor.

3. Legislative Intent As Immediate Intent And Legislative Purpose As Ultimate Purpose: Of Means, Ends, Attribution and Discovery

In the hypothesized Equal Pay Act case discussed above, it was argued that the Burger Court would choose an interpretation that would preclude the flight attendant's cause of action for failure to satisfy the equal work criterion of the statute. This interpretation would be supported in part by choosing the subjective legislative intent that emphasized the equal work requirement as a bulwark against governmental regulation of questions of pay equity. The Burger Court would therefore reject an interpretation of the statute which would treat the equal work criterion as a nonmandatory device for achieving the purpose of precluding such government regulation. The rejected alternative would

232. *See supra* text accompanying notes 99-100.
233. *See* Posner, *supra* note 4, at 819-20.
234. *See* Moore, *supra* note 34, at 263-64.

give effect to the congressional intents both to prohibit discrimination and to preclude regulation of questions of pay equity by permitting the flight attendant's action to proceed and by precluding use of external standards for the valuation of unequal work.[235]

The Burger Court's choice may be described as "literalism" in the sense that the plain meaning of the equal work requirement is enforced under it. The alternative choice may be described as purposive in the sense that the objectives, goals or purposes of the Equal Pay Act are the touchstones for decision under it. The Burger Court's choice enforces the immediate intent of the Congress or the means selected by Congress to achieve the ultimate objectives sought by Congress. The alternative choice enforces directly the ultimate objectives of the statute.[236]

It is possible to question this distinction between statutory means and statutory ends by exploiting ambiguities in the notions of purpose and subjective intent. Purposive interpretation,[237] a methodology traceable to *Heydon's Case*,[238] assigns meaning to a statute by reference to the evil thought to have been targeted by the legislature or to the objective sought by Congress and determines application of a statute to the facts of particular cases by reference to whether the targeted evil is present in the case or whether the congressional objective would be furthered by application.[239] Interpretation and application by reference to purpose may be characterized as interpretation and application by reference to the subjective intent of the Congress in the sense that the evil targeted or objective sought, as these are established by legislative history, are evidence of the sense

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235. *See* County of Washington v. Gunther, 452 U.S. 161 (1981).

236. *See* Cox, *supra* note 200, at 106-114.

237. *See, e.g.*, HART & SACKS, *supra* note 15, at 1413-17; Fuller, *supra* note 44, at 669; *Middle Road, supra* note 5, at 796-800.

238. 30 Co. 7a, 76 Eng. Rep. 637 (Exchequer 1584):

> [F]or the sure and true interpretation of all statutes in general . . . four things are to be discerned and considered:
>
> 1st. What was the common law before the making of the Act.
>
> 2nd. What was the mischief and defect for which the common law did not provide.
>
> 3rd. What remedy the Parliament both resolved and appointed to cure the disease of the commonwealth.
>
> And 4th. The true reason of the remedy; and then the office of all the judges is always to make such construction as shall suppress the mischief, and advance the remedy, and to suppress subtle inventions and evasions for continuance of the mischief, and *pro privato commado*, and to add force and life to the cure and remedy, according to the true intent of the makers of the Act, *pro bono publico*.

239. Some theorists have argued that language conveys no meaning except

in which Congress expected statutory language to be understood.[240] Indeed, one argument favoring purposive interpretation is premised on the notion that legislators are more likely to be aware of and concerned with the general aims of a statute than the details of a statute in voting for or against it.[241] The Burger Court's interpretive strategy is in this sense arguably purposive: it seeks to enforce the purpose the equal work language of the Equal Pay Act "will bear" by inferring a purpose to prophylactically preclude regulation of pay equity by means of an equal work requirement.

However, purposive interpretation and application may also be characterized as resting on the purpose or purposes attributed to the legislature by a court.[242] Attribution of purpose is itself an ambiguous notion. It may be taken to mean the court's "guess" about the purpose entertained by the legislature,[243] in which case it resembles an inquiry into subjective intent in the sense suggested above,[244] or it may be taken to mean the function assigned the statute within a court's perception of the good society,[245] in which case purpose has little to do with what the Congress did and much to do with what a court wants the statute to do. Finally, attribution may be taken to mean merely what must be conceded: a court is necessarily deeply engaged in the selection and characterization of statutory purpose even where it seeks honestly to discover or infer purpose from the evidence

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when considered in light of the purpose with which it is employed. *See* Fuller, *supra* note 44, at 669; Llewellyn, *supra* note 12, at 400; *Middle Road, supra* note 5, at 763. *Cf.* THE AIMS OF INTERPRETATION, *supra* note 3, at 67-68; (meaning is ultimately a matter of speaker's intention rather than convention). Grice, *supra* note 210 (meaning of a sentence is an utterance, utterance meaning is speaker's meaning and speaker's meaning is speaker's intention).

The counterargument is that words have conventional meanings, or, at least, ranges of conventional meanings, independent of speaker's meaning. *See* Black, *Meaning and Intention: An Examination of Grice's Views*, 4 NEW LITERARY HIST. 257 (1973); MacCallum, *supra* note 156, at 757-58; Moore, *supra* note 34, at 252-53.

240. This version of purpose is synonymous with the version of subjective intent advocated here earlier. *See supra* text accompanying notes 186-218.

241. *See* HART & SACKS, *supra* note 15, at 1285-86.

242. *See id.* at 1413-17.

243. *See* HAND, THE BILL OF RIGHTS, *supra* note 226, at 19; Frankfurter, *supra* note 226, at 544.

244. *See* supra text accompanying notes 186-218.

245. *See* Moore, *supra* note 34, at 263-65. *Cf.* R. KEETON, VENTURING TO DO JUSTICE 82 (1969); "I do not understand Hart and Sacks to imply that the purpose to be attributed to the statute need be one that was or even could have been consciously formulated at the time the statute was enacted." The ambiguity of attribution in the Hart and Sacks scheme is suggested by the varying views of commentators on this point. *Compare* KEETON *with Middle Road, supra* note 5, at 785.

of legislative history; given such an honest search, a court cannot behave as a passive conduit for legislative intent.[246]

These ambiguities are complicated by the fact that there are multiple congressional purposes and intents falling both within vertical hierarchies of generality and abstraction and within horizontal spectrums at any given level of generality and abstraction.[247] This is no less true of discovered or inferred subjective intent than of attributed purpose. In the hypothesized Equal Pay Act case, it may be inferred that Congress intended, in descending vertical order, to (1) achieve justice in compensation for women, (2) prohibit disparate treatment of women in compensation, or (3) equalize male and female compensation within equivalent jobs. Congress simultaneously intended a parallel vertical hierarchy of intents: (1) to preclude governmental regulation of compensation, (2) to preclude governmental regulation of compensation standards, or (3) to preclude governmental regulation of compensation standards outside equal work factual contexts.

A court relying on subjective intent, like a court relying on attributed purpose, must choose between hierarchies and must choose which level within a given hierarchy it will employ in argument. When these choices are viewed in the light of the ambiguities of the distinction between discovered or inferred intent and attributed purpose, it is at least difficult to conclude that the distinction between the means selected by Congress and the goals sought by Congress is more than a matter of rhetorical characterization.

It is nevertheless the contention here that the characterization has content and reflects normative distinctions between versions of an interpretive strategy that relies on subjective intent and an interpretive strategy that relies on attributed purpose. This contention rests initially on the distinction between interpretation as ascertaining meaning and interpretation as application of a statute to the facts of particular cases.[248]

As was argued here earlier, the Burger Court tends to rely on subjective congressional intent to inform and very often to confirm

246. A court's perception of intent or purpose is highly influenced by its conscious or unconscious perceptions of the good society even when it conceives of its function as ascertaining the intent or purpose entertained in fact by the Congress. To the extent that judges are capable of suspending their value systems in favor of the attempt to discover intent or purpose outside themselves, the task is in at least degree a matter of inferring purpose or intent from more or less probative evidence. *See* HART & SACKS, *supra* note 15, at 1413.

247. *See, e.g.*, HART & SACKS, *supra* note 15, at 1414; *Statutory Interpretation*, *supra* note 12, at 876; Landis, *supra* note 8, at 785-822; Moore, *supra* note 34, at 250-51.

248. *See supra* text accompanying notes 56, 139.

or support its perception of the "plain meaning" of statutory language; it does not treat such an intent as the intended resolution of the case before it in the mind of the legislature at the time of enactment.[249] Although the Burger Court occasionally employs subjective legislative intent in the sense suggested by *Heydon's Case*[250]—to determine whether application or nonapplication of the statute to the case before it would further that intent or preclude the evil or mischief targeted by the statute[251]—it more often treats the facts of the case before it as within or without the "plain meaning" of the statute as that meaning has, in part by reference to legislative intent, been determined.[252] Such a tendency is the basis for the charge of literalism. Even in those instances in which the Burger Court applies a statute by means of a *Heydon's Case* methodology, it tends to define the intended objective or mischief targeted in terms of the meaning it has assigned to statutory language as the plain meaning of that language rather than in terms of the ultimate objectives or aims of the statute.[253]

These tendencies are in stark contrast to purposive interpretation understood as attributed purpose. *United Steelworkers v. Weber*[254] illustrates this point. *Weber* involved a challenge to a racial preference in an affirmative action plan negotiated by an employer and a union. Under that plan, fifty percent of available positions in a craft training program maintained by the employer were set aside for black workers. The remaining positions were filled on the basis of worker seniority. The plan was challenged by a white worker excluded from the training program who had greater seniority than black workers admitted to the program but insufficient seniority to successfully bid for non-black positions in the program. The plaintiff's challenge was primarily predicated on Section 703(d) of Title VII of the Civil Rights Act of 1964:

> It shall be an unlawful employment practice . . . to discriminate against any individual because of his race . . .

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249. *See supra* note 218, and accompanying text.

250. 30 Co. 7a, 76 Eng. Rep. 637 (Exchequer 1584). *See supra* note 238.

251. *See, e.g.*, First Nat'l. Maint. Corp. v. NLRB, 452 U.S. 666 (1981); United Housing Foundation, Inc. v. Forman, 421 U.S. 837 (1975); NLRB v. Boeing Co., 412 U.S. 67 (1973); Kern County Land Co. v. Occidental Petroleum Corp., 411 U.S. 582 (1973).

252. *See, e.g.*, Mohasco Corp. v. Silver, 447 U.S. 807 (1980); Aaron v. S.E.C., 446 U.S. 680 (1980); Potomac Electric Power Co. v. Director, OWCP, 449 U.S. 268 (1980); Mobil Oil Corp. v. Higginbotham, 436 U.S. 618 (1978).

253. *See* Mohasco Corp. v. Silver, 447 U.S. 807, 815-24 (1980); Ernst & Ernst v. Hochfelder, 425 U.S. 185 (1977). *But see* First Nat'l. Maintenance Corp. v. NLRB, 452 U.S. 666 (1981), discussed *supra* at text accompanying notes 134-35.

254. 443 U.S. 193 (1979).

> in admission to, or employment in, any program established to provide apprenticeship or other training.[255]

A Supreme Court majority, in an opinion written by Justice Brennan, rejected the challenge in a two step analysis. First, although a literal reading of Section 703(d) would prohibit the program, "a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers."[256] Second, the primary congressional concern in enacting the statute, as evidenced by legislative history, was to improve the relative economic position of blacks by opening employment opportunities in occupations traditionally closed to them.[257] As the challenged program was designed to achieve this end by opening opportunities in traditionally segregated craft work positions, it was not within the spirit or intent of the prohibition.[258]

Justice Rehnquist's dissent addressed each of the majority's points. First, the plain language of Section 703(d) prohibited the challenged program: the plaintiff was denied admission to the program "because of" his race.[259] Second, the legislative history indicated that Congress meant what Section 703(d)'s plain language says;[260] sponsors and supporters of the legislation repeatedly responded to the contentions of opponents of the legislation that it would require

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255. 42 U.S.C. § 2000e-2(d) (1976).

256. 443 U.S. at 201 (quoting from Holy Trinity Church v. United States, 143 U.S. 457, 459 (1982)).

257. *Id.* at 202-03.

258. *See, id.* at 204. The majority further argued that Congress addressed the question of racial preferences in Section 703(j) of Title VII by providing that nothing in Title VII "shall be interpreted to require any employer . . . to grant preferential treatment . . . because of a racial imbalance in [a] workforce." 443 U.S. at 205-06. *See* 42 U.S.C. § 2000e-2(j) (1976). Because Section 703(j) did not provide that Title VII was not to be interpreted to "permit" racial preferences to correct racial imbalance in a workforce, "[t]he natural inference is that Congress chose not to forbid all voluntary race-conscious affirmative action." 443 U.S. at 206. This "natural inference" was thought by the majority to be confirmed by legislative history indicating that Section 703(j) wa enacted to satisfy the demands of those congressmen who feared excessive regulation of management prerogatives. *Id.* As the challenged program had been voluntarily adopted rather than governmentally imposed, it fell within the congressional "choice" not to prohibit voluntary affirmative action. *Id.*

On the question of the accuracy of the majority's characterization of the voluntary nature of the challenged plan, see Cox, *The Question of "Voluntary" Racial Employment Quotas And Some Thought On Judicial Role*, 23 ARIZ. L. REV. 87 (1981). For the dissenting opinion's response to the majority's argument, *see* note 261 *infra*.

259. 443 U.S. at 220 (Rehnquist, J., dissenting).

260. *Id.* at 226-52.

racial preferences by stating that the statute prohibited preferences favoring any race.[261]

The Burger Court's approach to the questions of meaning and application is represented by Justice Rehnquist's dissent; the alternative, purposive, approach is represented by Justice Brennan's majority opinion. The differences between the approaches are real and important.[262]

Both opinions purport to rely on subjective legislative intent inferred from legislative history, and the characterizations of intent in both opinions are largely accurate. It is quite likely that supporters of the legislation intended to improve the relative economic position of blacks by opening employment opportunities to them. It is however equally likely that supporters of the legislation intended to prohibit

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261. *Id.* at 248.

Justice Rehnquist further argued that Section 703(j) of Title VII, 42 U.S.C. § 2000e-2(j) (1976), was inserted into the legislation to confirm the view of Title VII's sponsors that racial preferences were not required by Title VII and that the possibility of voluntary preferences was precluded both by the prohibitory provisions of the Act, including Section 703(d), and by the claims of those same sponsors that preferences were precluded by the Act. It was therefore unnecessary to include the term "permit" in Section 703(j). 443 U.S. at 252-53.

262. It is possible to view the difference between the substantive conclusions reached in the two opinions as a matter of the meaning each assigns the term "discrimination" in the statute. That term may either be understood as referring to intentional discrimination (disparate treatment) or as referring to any employer's failure to achieve a distribution of employment opportunities to racial groups proportionate to the representation of such groups in the population. *See, generally* Fiss, *A Theory of Fair Employment Laws*, 38 U. CHI. L. REV. 235, 237-40 (1971). On this view, the majority opinion in *Weber* treats discrimination as referring to disproportionate results and the dissenting opinion in *Weber* treats discrimination as referring to disparate treatment. *Cf. Civil Rights Act, supra* note 4 (arguing that *Weber* involved an issue of a choice between "political theories" of this character, either of which arguably "fits" Title VII).

There is support in Supreme Court case law both for a disproportionate results understanding of discrimination, Griggs v. Duke Power Co., 401 U.S. 424 (1971), and for a disparate treatment understanding of discrimination. McDonald v. Sante Fe Trail Transportation Co., 427 U.S. 273 (1976). The question posed by *Weber*, however, was whether an employer and union could comply with a prohibition of disproportionate results by means of disparate treatment. Section 703(j) of Title VII would preclude, even under the majority opinion in *Weber*, mandatory disparate treatment to achieve proportion. *See supra* note 258. And the Court has in other contexts concluded that "voluntary" disparate treatment to achieve proportion is unlawful. *See* Arizona Governing Committee v. Norris, 103 S. Ct. 3492 (1983); Los Angeles Dep't. of Water & Power v. Manhart, 435 U.S. 702 (1978). Moreover, neither Justice Brennan, who wrote the majority opinion in *Weber*, nor Justice Rehnquist, who wrote the dissent in *Weber*, has been consistent in their choice of meanings for the term "discrimination." *See, e.g.*, Connecticut v. Teal, 457 U.S. 440 (1982) (Brennan, J., majority opinion) (declining to recognize

consideration of race in employment decisions and that the prohibition was perceived as applicable to all races.[263] Although there is evidence in the legislative history that major supporters of the legislation represented to their fellow congressmen that racial preferences designed to maintain racial balance would be prohibited by Title VII,[264] it is perhaps a fair characterization of that history that a voluntary, remedial program designed to open employment opportunity in traditionally segregated employment positions was not specifically addressed.[265]

The crucial distinction between the Brennan and Rehnquist opinions in *Weber* is the use made of these various intents. Brennan's majority opinion rests on the most generalized and abstract of the alternative intents legitimately inferrable from the legislative history—the intent to improve the relative economic position of blacks by opening employment opportunities. That opinion then employs this intent in the classic mode of purposive interpretation: because the challenged program furthered the objective of the statute, its prohibition was not intended. In the terminology of *Heydon's Case*, the mischief targeted by the statute was barriers to black employment opportunity, and the challenged program was not within this mischief because it did not entail such a barrier. What is interesting in this tactic is that it ignores the question of meaning in favor of the question of application. Brennan's opinion dismisses the language of Section 703(d) as the mere "letter" of the statute and proceeds to the question whether legislative objectives would or would not be furthered by application of the statute's prohibition to the program in question.[266]

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proportionate distribution of promotion opportunities as a defense to disparate impact liability); General Electric Co. v. Gilbert, 429 U.S. 125 (1976) (majority opinion by Rehnquist, J.) (rejecting a disparate treatment claim where employer's benefit plan proportionately distributed benefits to men and women as groups).

In view of these inconsistencies, the claim that *Weber* involved an issue of a fundamental choice between plausible conceptions of the concept of discrimination, *Civil Rights Act, supra* note 4, is of doubtful viability. Because the justices who composed the majority in *Weber* would a least generally treat the term "discrimination" in the statute as including the disparate treatment conception, that opinion is best understood as an instance in which the Court chose to enforce its understanding of ultimate statutory aims in preference to its understanding of the means chosen by Congress to achieve those aims.

263. *See* 443 U.S. at 239-52 (Rehnquist, J., dissenting).

264. *See* 443 U.S. at 238 (Rehnquist J., dissenting).

265. *See* Schatzki, *United Steelworkers v. Weber: An Exercise in Understandable Indecision*, 56 WASH. L. REV. 56, 66-67 (1980).

266. *See* 443 U.S. at 201-04.

By contrast, Rehnquist's dissent begins with the "letter" of the statutory language, assigns that language a meaning and resorts to legislative history in an effort to support that meaning. It is true that Rehnquist treats the program in issue as within the mischief targeted by the statute and therefore relies on the congressional intent to prohibit racial discrimination understood as disparate treatment as an argument favoring application of the prohibition to the facts of the case, but this argument was not made in Rehnquist's opinion in the form of the efficacy of application in furthering congressional objectives. It was made, rather, in the form of a virtual restatement of the statutory language: the program in question is a racial preference within the congressional intent to prohibit discrimination. In the terminology of *Heydon's Case*, the "mischief" targeted by the statute was racial discrimination, and the program in issue entailed racial discrimination simplicitor.[267]

Contrasts between Brennan's approach and Rehnquist's approach in *Weber* are evident as well in the distinction between attributed purpose and discovered or inferred intent. Although both approaches relied on legislative history and made legitimate claims to support from subjective congressional intent, there are significant differences in the levels of generality and abstraction selected by the justices and therefore significant differences in the degree to which it may be said that the intents relied upon in the opinions were either attributed or discovered.

The source of both the abstract intent employed by Brennan and the more concrete intent employed by Rehnquist was the legislative history; both justices legitimately claimed that the intent they favored was entertained by Congress and discovered in the record left by Congress. Moreover, both justices had a choice of intents; neither intent can be said to have constituted the true intent or sole relevant intent except by reference to some normative scheme by which truth and relevance might be judged. If judicial discretion can be confined, it is confined by a consistently applied normative scheme by which an appropriate level of abstraction is defined—a normative scheme itself but one of several alternatives from which a choice must be made. But a consistent choice of abstract and general intent—the ultimate aims or objectives of the statute in Brennan's opinion in *Weber*—leaves far more room for an application of a statute consistent with a court's view of how a statute is to fit within its vision of the good society than a consistent choice of the ordinary meaning of statutory language as the best evidence of congressional intent.

267. *See* 443 U.S. at 220 (Rehnquist, J. dissenting).

This claim should not be understood as suggesting that judicial discretion is confined by a choice of concrete intent and unconfined by a choice of abstract intent. The fact that there is choice compels a conclusion that there is an inevitable judicial discretion. The argument that courts attribute purposes to statutes, if understood as an argument that courts have a choice in every case between concrete congressional intent and abstract congressional intent is therefore unassailable. Under that understanding, the Burger Court no doubt always attributes purposes by selecting among alternative intents discovered in legislative history.

There is however a sense in which attribution of purpose does not mean merely recognition of judicial choice; it may also be understood as a reference to the degree to which a court is free from the constraints of the statute in applying that statute to achieve its objectives. A court attributes purpose in this sense when it conceives of its task as resolving the case before it in the manner best calculated to accomplish the aims it discovers and quite legitimately characterizes as the intent of Congress. Such a court employs a presumption that Congress acted "reasonably" in passing legislation;[268] the general and abstract objectives of legislation are likely to be thought reasonable from both legislative and judicial perspectives. And such a court is thereby freed of the problems posed by the "letter" of the statute where the letter seems incompatible with the efficacious pursuit of statutory aims.[269] Purpose is attributed rather than discovered by such a court because, although the source of the court's characterization of the aim of the statute may well be legislative history, the statute is applied as if it were an internally consistent, rational instrument for achieving that aim.

The difficulty with this approach from the point of view of the Burger Court is that statutes are not internally consistent, rational instruments for achieving their aims; they are the irrational products of political bargains achieved through compromising incompatible aims.[270] On such a premise, the best evidence of congressional intent

268. *Cf.* HART & SACKS, *supra* note 15, at 1157 (rebuttable presumption to this effect).

269. *But cf. id.* at 1412 (a court should never give a statute a meaning its words will not bear).

270. *See generally, e.g.*, Easterbrook, *supra* note 4; Posner, *supra* note 4; Posner, *supra* note 108. Judge Posner distinguishes between categories of legislation—e.g., public interest legislation and narrow interest group legislation—but treats these categories as matters of degree in a legislative spectrum; even pure public interest legislation is the product of political compromise.

is statutory language because statutory language represents the political compromise that achieved passage; it is the single item of evidence that enactment guarantees was collectively intended.[271] Application of the statute is therefore to be achieved by reference to the plain meaning of the statute or to the most concrete aim supported by that plain meaning, because it is the Court's function to approximate the compromise reached rather than the ultimate objectives supposed to underlie that compromise.[272] It is in this sense that Rehnquist's dissent in *Weber* advocates enforcement of the means chosen by Congress rather than the aims sought by Congress. Given that Justice Brennan's understanding of congressional aims was accurate, the statutory means to those ends was a prohibition of racial discrimination supportable by a more concrete and no less accurate understanding of congressional intent—that racial discrimination is, as such, an evil to be prohibited.

Enforcing political compromise cannot, of course, mean determining what political compromise would be reached in the case before the court; subjective congressional intent understood as congressional expectations about how statutory language will be understood is not

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271. *Cf.* Moore *supra* note 34, at 268 n.144 (one can be certain only that statutory language itself was intentionally agreed upon).

272. It is often possible to view particular legislation as stating merely a set of objectives which courts are to pursue by making up the means by which the objectives are to be achieved. The usual example given of such instances of delegation to the judiciary is the Sherman Act. *See, e.g.*, Easterbrook, *supra* note 4, at 544; If there are such statutes, Congress cannot be said to have enacted a compromise regarding means; it has at most enacted a compromise regarding ends.

One difficulty with this theory is that the ambiguity, vagueness and open textured character of language is always available as source for an argument that a statute is a delegation of common law making authority. *See* Miller, *Statutory Language and the Purposive Use of Ambiguity*, 42 VA. L. REV. 23 (1976). A second difficulty is that the theory relies on and seeks to encourage the common law method on the assumption that the common law method, although it rests upon values of process, is substantively neutral. The substantive neutrality of common law method is at least questionable, and the history of interpretations of antitrust statutes suggests such doubts. *Compare* United States v. Arnold Schwinn & Co., 388 U.S. 365 (1967) *with* Continental T.V., Inc. v. G.T.E. Sylvania, Inc., 97 S. Ct. 2549 (1977).

It is nevertheless no doubt the case that every statute entails a degree of delegation of law making authority; some degree of judicial choice in interpretation is inevitable. On that premise, the Sherman Act, understood as a statute which delegates law making authority, illustrates the difficulties of purposive interpretation. It is surely possible to disagree about whether the aim of the Sherman Act is the elimination of combinations and restraints which are economically inefficient or the aim is instead the elimination of centers of excessive economic power whether or not such power is economically inefficient.

the congressionally intended resolution of a case not before Congress at the time of enactment.[273] Enforcing political compromise must therefore mean enforcing the concept or concepts enacted, the sense in which statutory language was used by Congress, by reasoning from that concept or by seeking to ensure that the concept is made operative in the context of the facts of a case before the court. What distinguishes purposive application from enforcement of political compromise is therefore not a matter of concrete legislative intention understood as a collective belief about appropriate application. The distinction, rather, is between seeking that resolution of a case that seems best calculated to further congressional objectives and that resolution that seems to best fit the relatively concrete sense in which Congress used statutory language.

The ultimate distinction between the Burger Court's approach to the matters of legislative intent and purpose and its critics' approach to those matters therefore remains normative, for it is the necessary supposition underlying the view that legislation is to be applied to achieve its ends as they are understood under a reasonableness criterion that the political compromise underlying the statute is not to be enforced unless consistent, within the context of the facts of a particular case or class of cases, with those ends. That supposition requires a normative understanding of the function of a legislature and the function of a court radically different than the understanding that compels enforcement of political compromise.

This is not to suggest that such a radically different understanding is illicit. Indeed, that understanding is the fundamental premise of the third regime across the spectrum of viewpoints within the third regime. Courts are to behave in a "statesman-like" manner by giving effect to purpose,[274] by utilizing purpose as the source of judge-made law[275] and by ensuring the reasonable, rational and just development of law in a dynamic society.[276] Courts adopting such an understanding are thought to thereby ensure the success of legislative programs by declining to adopt stingy interpretations which defeat the purposes underlying statutes.[277] If there is a difficulty in such an undertaking, it is in its failure to identify successful limits on

273. *See supra* text accompanying notes 209-12.

274. *See, e.g.*, HART & SACKS, *supra* note 15, at 1410-17.

275. *See, e.g., Common Law and Legislation, supra* note 8; *Statutes and the Sources of Law, supra* note 8.

276. *See generally Calabresi, supra* note 26.

277. *See, e.g.*, Cohen, *"Judicial Legisputation" and the Dimensions of Legislative Meaning*, 36 IND. L.J. 414, 418 (1961); Posner, *supra* note 4, at 821, *Common Law and Legislation, supra* note 12; *Middle Road, supra* note 5, at 789-822.

technique. That difficulty is important because enforcement of purposes understood as the abstract aims entertained by Congress in enacting a statute may as easily occur from the perspective of an ideologically conservative or ideologically libertarian court as an ideologically liberal or ideologically radical court; purposive interpretation risks the breakdown of the no doubt fragile distinction between law and politics. This is the reason that the third regime constantly debates alternative proposals for such limitations on judicial license as "the purposes the words of the statute will bear,"[278] "interpretive community"[279] and "best fitting" political theory.[280] It is also the reason for the Burger Court's distrust of purposive interpretation: the Burger Court both distrusts the legal process school's claim that purposive interpretation and reasoned elaboration can be politically neutral[281] and disagrees with the normative vision of active judicial role implicit in that claim.[282]

The question posed by this discussion of the distinction between the Burger Court's approach to purpose and intent and the legal process or new legal process school's approach to purpose and intent is whether the Burger Court's claim that its approach serves political neutrality can be sustained. The discussion has argued that the Burger Court's approach is not precluded by descriptive claims of impossibility, but the argument has simultaneously recognized that judicial choice is an inherent aspect of the enterprise. That recognition leaves the Burger Court open to the charge that its approach is as vulnerable to the intrusion of political perspective as the approach it rejects. Indeed, a rejection of purposive interpretation and focus upon relatively concrete congressional intent will generally have the consequence of limiting the scope of operation of a statute—the statute's "domain"[283] will be confined in comparison to its potential domain under a purposive regime. Such a consequence is arguably attributable to hostility to the substantive merits of federal regulatory schemes.

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278. *See* HART & SACKS *supra* note 15, at 1412.

279. *See* Fiss, *supra* note 3.

280. *See Forum of Principle, supra* note 71.

281. *See, e.g.*, United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166 (1980); Potomas Electric Power Co. v. Director, Office Workmens Compensation Programs, 449 U.S. 268 (1980); Consumer Product Safety Comm'n. v. GTE Sylvania, Inc., 447 U.S. 102 (1980).

282. *See, e.g.*, University Research Ass'n. Inc. v. Coutu, 450 U.S. 754 (1981); Strycker's Bay Neighborhood Council, Inc. v. Karlen, 444 U.S. 223 (1980); Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519 (1978).

283. *See* Easterbrook, *supra* note 4.

III. THE OBJECTION FROM THE NORMATIVE CHARACTER OF FORMALISM

A. *Legal Formalism And Its Critics*

The objection from the normative character of formalism is best introduced by a summary of the argument thus far made here. It should by now be obvious that the Burger Court's underlying normative view is a version of legal formalism. Legal formalism may be defined as any legal theory that maintains a distinction, at least within the context of statutory law, between rule making and rule application: rules are made by legislatures through a political bargaining process that compromises inconsistent purposes, policies and values; rules are applied by judges through a politically neutral process distinct from compromise and characterized by reasoning from premises supplied by the preexisting compromise embodied in statutory rules.[284] "Political" for present purposes means a normative judgment or decision about the wisdom, efficacy or morality of the substantive content of a statutory rule or proposed rule, as distinguished from a normative judgment or decision about the wisdom, efficacy or morality of alternative conceptions of the judicial function in implementing statutes generally.

There are distinct versions of formalism which differ descriptively in the degree to which they adhere to the rigidity of the distinction between rule making and rule application. That descriptive difference is illustrated by distinctions between the first and third regimes. For the first regime, conclusions in particular cases are to be deduced from statutory rules without regard to the consequences of such application either to the parties to the litigation or to society.[285] For the third regime, conclusions in particular cases are to be creatively derived from the projection of the underlying purposes of legislation within the factual context of the case at hand; the consequences of application for the parties to the litigation and for society are therefore to be expressly considered in terms both of the purposes underlying legislation and of competing and independent purposes and values.[286]

The first regime's objection to the third is that purposive interpretation is indistinguishable from the essentially legislative process

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284. *See, e.g.*, Kennedy, *supra* note 27, at 354-77; Moore, *supra* note 34, at 154-61; Tushnet, *supra* note 27, at 782-86; Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 563, 564-67 (1983).

285. *See, e.g.*, Kelsen *supra* note 9; Thomas, *Statutory Construction When Legislation Is Viewed As A Legal Institution*, 3 HARV. J. LEGIS. 191 (1965).

286. *See, e.g.*, HART & SACKS, *supra* note 15, at 1410-17; FULLER, *supra* note 44.

of choice between or compromise of competing purposes, policies and values because it necessarily requires a judicial choice between and within the hierarchies of purposes underlying a statute.[287] The normative premise underlying this complaint is essentially skeptical: courts ought not to make such choices because values—the purposes, aims or interests potentially served by legislation—are arbitrary and subjective. As choices between values cannot be resolved by reason, such choices are for the democratic legislature.[288] This, indeed, is the Burger Court's critique of the third regime implicit in its literalism, occasionally explicit in its views of itself and of Congress and described in the immediately preceding section of this paper.[289]

The third regime's objection to the first is that the deduction from statutory rules central to the first regime's understanding of statutory language is implausible because, even if statutory language has an ordinary meaning, the political compromise embodied in statutory language cannot be adequately duplicated in the context of application by reference to that language.[290] It cannot be duplicated for the reasons earlier surveyed here: the legislature cannot in any discoverable sense be said to have contemplated resolution of the case before the court and the frailties of language are such that there is no guarantee that the facts of that case are within or without the necessary meaning of statutory language. The normative premise underlying the third regime's reliance on purpose is that courts are legitimately creative law makers responsible for symmetry within an internally consistent, principled understanding of law.[291]

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287. *See supra* text accompanying notes 270-82. *Cf.* Kennedy, *supra* note 27, at 295-98 (registering this complaint from the distinct perspective of what is termed in the present article the second regime).

288. *See* Kennedy, *supra* note 27, at 362-63 (so describing the first regime). This aspect of the first regime is perhaps best represented by Oliver W. Holmes, Jr., despite his rejection of deduction in favor of "experience" as the mechanism of judicial decision. *See generally* G.E. WHITE, THE AMERICAN JUDICIAL TRADITION, 156-60 (1976); White, *The Integrity of Holmes Jurisprudence*, 10 HOFSTRA L. REV., 633 (1982); White, *The Rise and Fall of Justice Holmes*, 39 U. CHI. L. REV. 51 (1971).

289. *See supra* text accompanying notes 270-82. In a sense, then, the Burger Court seeks to adhere to the legal positivist's separation of "is" from "ought": statutes are facts to be found and applied by courts; the substantive content of statutes is a matter of morality or values of no concern to the judge.

290. *Cf.* Kennedy, *supra* note 27, at 377-91 (arguing that social and political change, in combination with the unpredictability of change, renders duplication of political compromise impossible and mechanistic application likely to alter political power within the legislature). This argument has some features in common with the argument that legal rules ought to be left open-ended to account for change. *See, e.g.*, Traynor, *The Limits of Judicial Creativity*, 29 HASTINGS L.J. 1025 (1978); Traynor, *Statutes Revolving In Common Law Orbits*, 17 CATH. U.L. REV. 401 (1968).

291. *See e.g.*, DWORKIN, *supra* note 4, at 87-88 (demanding consistency of principled

That premise is perhaps best illustrated by the third regime's response to the complaint that choices must be made within and between hierarchies of statutory purposes. Such choices may be made in a manner distinct from legislative process and are therefore distinguishable from ad hoc political decision because constrained by a shared understanding of the political theory that best fits either the text of a statute or the background principles of political morality underlying the system of law.[292] Alternatively, if there is no agreed upon background morality from which an internally consistent system of law may be derived,[293] courts may permissibly employ a common law methodology,[294] with its emphasis on common sense, practical philosophy, balancing and distrust of axiomatic systems of thought,[295] and they are constrained in this enterprise by standards of craftsmanship[296] or by the suppositions of interpretive communities[297] in a degree that distinguishes judicial interpretation from open-ended political compromise.

This description of competing positions within formalism suggests that the Burger Court's normative view may be placed on a spectrum on which it occupies a position rather closer to the first than the third regime. If the Burger Court does not believe in a pristine positivism,[298] it nevertheless believes that it exercises law making discretion only within "gaps" in the fabric of statutory law,[299] and is

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judicial decision making); Wechsler, *supra* note 17 (same). *But see* Wellington, *supra* note 4 (treating judicial task as discovery and application of community's presumably inconsistent moral principles).

292. *See, e.g., Law as Interpretation, supra* note 3; Dworkin, *supra* note 71, *Civil Rights Act, supra* note 4.

293. What links Professor Dworkin's thought to the tradition of the third regime is his emphasis upon rejection of ad hoc judgment. He insists that judicial decision in any given case be related to an internally consistent system of principle. *See* DWORKIN, *supra* note 4, at 87-88.

294. *See generally* Wellington, *supra* note 4. *Cf.* LEVY, *supra* note 113, at 27-33 (identifying similarities and dissimilarities between common law reasoning and statutory interpretation.)

295. *See, e.g.*, Lehman, *How To Interpret A Difficult Statute*, 1979 WIS. L. REV. 489, 493-95; Moore, *supra* note 34 at 292-94 (judges apply statutes through a process of balancing moral and linguistic intuitions); Shiffrin, *Liberalism, Radicalism, And Legal Scholarship*, 30 U.C.L.A. L. REV. 1103, 1192-1217 (1983). This view generally relies on Aristotle's notion of practical philosophy as the ability to determine what is right in particular cases as distinguished from knowing a way of knowing what is right. *ARISTOTLE NICHOMACHAEAN ETHICS* Bk. VI, chs. 5-11.

296. *See, e.g.*, Hart, *Foreward: The Time Chart of the Justices*, 73 HARV. L. REV. 84 (1959); Wechsler, *supra* note 17.

297. *See Objectivity and Interpretation, supra* note 3.

298. *See supra* text accompanying notes 158-76.

299. *See*, B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS, 129 (1921): "[Courts]

chiefly distinguishable in its approach from its predecessor by its reluctance to fill such "gaps."[300] The argument made here in defense of that position has thus far been that the position is plausibly held within that spectrum as an approximation, despite its defects, of the first regime's positivism and that the defects of the third regime render it merely a more or less persuasive competitor rather than a decisive victor within that spectrum. The choice between the first and third regimes is a matter of inclination having more to do with the values of the critic than with the necessary superiority of purpose over language. Indeed, one suspects that most lawyers, including the justices of the Burger Court, tend to move more or less at will between degrees of the first and third regimes in an eclectic effort to accommodate their internalization of the values of both.[301]

There is, however, so far absent from this scheme an accommodation of the second regime. Legal realism and neo-realism attack both the first and third regimes by claiming that neither language, nor intent, nor purpose or principle constrains judicial decision.[302] Statutory meaning is a function of individual perspective;[303] the intent, purpose or principle underlying both statutes and judicial precedent is indeterminate because there is always a choice of purposes or principles which equally "fit" or support them;[304] there is no intelligible moral order

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have the right to legislate within gaps, but often there are no gaps." *See also* So. Pacific Co. v. Jensen, 244 U.S. 205, 221 (1961) (Holmes, J., dissenting): "I recognize without hesitation that judges do and must legislate, but they can do so only interstitially; they are confined from molar to molecular motions."

300. On this characterization, the Burger Court is no less "realistic" than a Cardozo or a Holmes in recognizing that it "must legislate." *See supra* note 299. It simply exercises this authority by declining to exercise it in a fashion which would alter the status quo, particularly where the status quo appears to entail less judicial intrusion into private orderings than its alternative. *See infra* notes 385-401 and accompanying text.

301. *Cf.* Lehman, *supra* note 295 at 501 (judges, in guise of positivism, utilize such notions as legislative intent as metaphors with which to exercise practical wisdom); Kennedy, *supra* note 5 (lawyers are constantly torn between "altruism" and "individualism" because they are committed to the contradictory premises of both). Tushnet, *supra* note 27, at 785-86 (we may live in a world of tension between the notions of mutual dependence and individualism in which only a continuous dialogue is possible).

302. *See, e.g.*, Kennedy, *supra* note 5, at 1766-67; Tushnet, *supra* note 27; Unger, *supra* note 284, at 564-73; *Statutory Interpretation, supra* note 12.

303. *See, e.g.*, Cohen, *supra* note 46, at 240-41; Llewellyn, *supra* note 12, at 396-97 (distinguishing judicial personality types and their resulting attitudes toward creativity in judicial decision).

304. *See, e.g.*, Cohen, *supra* note 92, at 215-19; Tushnet, *supra* note 27, at 810-18. *See also supra* text accompanying notes 117-283.

underlying the legal system because no such theory is compatible with the actual content of legal doctrine at any point in time.[305] Law, including statutory interpretation understood as application of statutory rules, is therefore indistinguishable from radically indeterminate and ad hoc political judgment.[306] At most, judges are constrained by the sociological fact that they are selected from relatively narrow socio-economic strata within the population and are therefore likely to share a relatively predictable world view.[307] Even if judges do not decide on the basis of their breakfast menu, and decide instead on the basis of constraints defining what arguments will be heard, these constraints are supplied by predominant culture rather than legal theory—a predominant culture itself so internally inconsistent as to render statutory application indeterminate.

The standard third regime response to this argument is to concede its validity in degree, but to claim that purposive interpretation places sufficient constraints independent of political perspective on the judge to permit a distinction between law and politics.[308] Alternatively, the third regime argues that the "contraditions" which generate indeterminacy of application[309] discovered in the "liberal state" by neo-realists are better described as "tensions" generating a healthy dynamism in American law.[310] The Burger Court's response, in keeping with the standard response of neo-positivists to the second regime's argument, is to concede that judges must legislate within "gaps"[311] or "penumbras,"[312] but to deny that statutory application within vast areas of non-gaps or core meanings is other than compliance with the sovereign legislature's "command."[313]

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305. Unger, *supra* note 284, at 567-73. *See* Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 465, 470-73 (1897).

306. *See, e.g.*, Levinson, *supra* note 3. Unger, *supra* note 284, at 572-73.

307. *See, e.g.*, Nowak, *supra* note 34; Tushnet, *supra* note 27 at 822-24. *Cf.* Wellington, *supra* note 4 (treating judicial task as discovery and application of the community's moral values).

308. *See*, HART & SACKS *supra* note 15, at 1225, 1414-17. *Cf. Law as Interpretation, supra* note 3, at 543-46 ("fit" as a constraint on judge's political theory).

309. *See, e.g.*, Kennedy, *supra* note 5 (contradiction between individualism and altruism); Tushnet, *supra* note 27, at 785 (contradiction between individualism and "communitarian assumptions of conservative social thought"). *Cf.* Levinson, *supra* note 3, at 395 n.87 (describing "tension" between creativity and objectivity in *Objectivity and Interpretation, supra* note 3).

310. *See* Shiffrin, *supra* note 295, at 1203-06, 1211-15; White, *Law as Language: Reading Law and Reading Literature*, 60 TEX. L. REV. 415, 441-45 (1982).

311. *See supra* note 299.

312. *See* Hart, *supra* note 44, at 607.

313. *See, e.g.*, Potomac Electric Power Co. v. Director, Office Workmens Compensation Programs, 449 U.S. 268 (1980); Mobil Oil Corp. v. Higginbotham, 436 U.S.

An interesting feature of this summary of competing arguments is that the postulated positions both partially share and partially dispute controverted ground. The Burger Court's approximated positivism may facially appear grounded in a faith in the certainties of language, but its insistence upon enforcing legislative decision and disinclination to make law within the "gaps" it occasionally perceives in these decisions has as its source a profound skepticism not unlike the second regime's skepticism about an intelligible moral order underlying the legal system. It is a mistake to assume that approximated positivism is either naive or the product of docility;[314] it is rather quite possibly cynical.[315] The distinction between the Burger Court and the second regime is that the former purports to allocate decision making authority to the legislature and the latter insists upon the judge's moral responsibility for his "applications" of statutes. The second and third regimes share a common skepticism about the viability of the Burger Court's claim that it merely complies with congressional decision, but vigorously dispute the third regime's claim of access to a politically neutral methodology.

B. *Reader Perspective, Normative View and Politics*

What is of crucial importance to the present discussion in this summary is the claim made by realism against both the Burger Court's approximated positivism and the third regime's neutral process: both are inescapably normative because a judge's political perspective controls statutory interpretation and application.[316] There is one sense in which this claim is nearly trivial. The Burger Court's attempt to

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618 (1978).

314. For examples of this charge, *See, e.g.*, FRANK, *supra* note 12, at 19-23; Llewellyn, *supra* note 12, at 396-97. *Cf.* G. GRAFF, LITERATURE AGAINST ITSELF: LITERARY IDEAS IN MODERN SOCIETY 23 (1979) (describing the rhetoric of the battle between proponents of stable textual meaning and proponents of readers meaning from the point of view of the latter as a contrast in part between "docility" and "risk".)

315. The obvious example is Justice Holmes, *See* authorities cited *supra* note 288. For a claim that the Burger Court exhibits such skepticism, *see* Note, *supra* note 34, at 901.

316. Realism here refers both to the legal realist's attacks on legal positivism in the 1930's and to contemporary neo-realist attacks, from a variety of distinct perspectives, on the Burger Court's approximated positivism, on the traditional legal process school and on what Professor Weisberg terms the "new legal process" school. Weisberg, *supra* note 21. Examples of claims of "reader perspective" made by original legal realists are Llewellyn, *supra* note 12 and *Statutory Interpretation, supra* note 12. For more contemporary examples, *see* Moore, *supra* note 34; Nowak, *supra* note 34. Examples of neo-realist claims of reader perspective include Kennedy, *supra* note 5; Levinson, *supra* note 3; Tushnet, *supra* note 27.

approximate positivism is inescapably a normative choice of a controversial definition of judicial role; that is the whole point of emphasizing here its underlying normative view as the real content of its "literalism."[317] The claim is in this sense trivial because any choice made at this level is normative: a decision to approximate positivism and therefore to minimize judicial law making or to approximate reasoned elaboration of statutory purpose and therefore to expand judicial law making is political in the sense that methodology reflects distinct political conceptions of the judicial function.

To the extent, then, that advocates of reader perspective as the source of statutory meaning intend only to argue that positivists will apply statutes positivistically,[318] there is both no reason to disagree nor a reason to think such an argument threatening. It is only the fact that there are large numbers of anti-positivists in the legal culture that renders such an argument interesting. It renders the argument interesting because the meanings discovered in statutes by the Burger Court will, as discoveries derived from a controversial perspective, be themselves controversial even within the legal culture. The Court's legitimacy as an interpreter of statutes—its justification independent

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318. *See Statutory Interpretation and Literary Theory, supra* note 1, at 682-90. Abraham, relying on Stanley Fish, and Fish, argue both that readers create the texts they read by encountering a text in a "situation" and that readers are not free to make up whatever meaning they idiosyncratically desire because they are "embedded" in "interpretive communities"—communities whose practices are internalized by the reader and govern his perceptions of meaning. FISH, *supra* note 3, at 303-71. *See* KUHN, supra note 58, at 35-51. Neither is therefore a legal realist if realism is taken as a position which claims that judicial decision is idiosyncratic.

The claim that interpretations are enabled by interpretive communities may mean only that a literalist will read literally, an intentionalist intentionally, etc. *See Chain Gang, supra* note 3, at 556-59. It might also mean, however, that an interpretive community's shared beliefs *within* its interpretive posture (*e.g.*, a belief in the virtues of individualism and evils of government regulation within a positivist posture) encounter text and construct it within situations. The first of these possibilities has been in this article treated as the "choice" of an underlying normative viewpoint, and it is in this sense that the article concedes that such a normative viewpoint governs interpretation that the possibility is treated as "trivial." *Cf. My Reply to Stanley Fish, supra* note 3, at 295 (respecting the practices of an interpretive community provides a very weak constraint on subjective interpretation). The second possibility is not trivial, because it implies that there cannot be a politically neutral statutory application even on the assumption of an underlying normative viewpoint. The latter claim appears to be the claim of advocates of "critical legal studies" because they treat formalism as crucially linked to individualism and individualism as generating particular substantive recommendations.

of raw power for imposing with the force of the state its interpretations on litigants and potential litigants—will therefore be controversial insofar as that legitimacy is dependent upon agreement about methodology and the underlying normative position that generates methodology.

If, however, this is all that is meant by the claim that law is indistinguishable from politics, it exaggerates its case. There is no doubt that controversial methodology threatens legitimacy; that has repeatedly occurred as a phenomonon, albeit primarily with respect to constitutional methodology, throughout the Court's history.[319] But the Supreme Court's perceived legitimacy remains generally intact despite the attacks of those critics whose disagreement with methodology are often couched as a prediction of the Court's impending loss of the American public's esteem.[320] It may be that no one is capable of relativism at the level of argument about methodology or normative perspective,[321] but relativism has been the governing stance at the level of perceived legitimacy.[322] The fact of the matter is that agreement about methodology is not crucial to legitimacy so long as methodology is not perceived by the legal culture, as "off the wall."[323] And the Burger Court's methodology is merely controversial; it is not "off the wall."

However, there is a sense in which the reader perspective claim does constitute a non-trivial threat to the Burger Court's underlying normative view. The claim may be stated as an argument that the Burger Court's normative perspective is not substantively neutral; approximated positivism is necessarily political because perception of "plain meaning" is a function of political perspective.[324] An example of this claim is a potential characterization of Justice Rehnquist's understanding of the term "discrimination" in the statute in issue in *Weber*.[325]

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319. Examples include both the original legal process school's attacks on the Warren Court, *e.g.*, Wechsler, *supra* note 17, and recent efforts to restrict the Supreme Court's jurisdiction with respect to, for example, the abortion issue.

320. *See* Kurland, *Forward: Equal in Origin and Equal in Title to the Legislative and Executive Branches of the Government*, 78 HARV. L. REV. 143, 175 (1964).

321. *See* FISH, *supra* note 3, at 740-41 (a belief that belief controls meaning is itself a belief entailing commitment).

322. There are exceptions to this generalization; critical legal studies adherents and other deconstructionist scholars are engaged in an attack upon legitimacy through an attack on methodology. *See, e.g.*, Tushnet, *supra* note 27; Unger, *supra* note 284. *See also* Cover, *Nomos and Narrative*, 97 HARV. L. REV. 1 (1983).

323. *See Chain Gang*, *supra* note 3, at 556-67.

324. *See* Levinson, *supra* note 3, at 392-402.

325. *See supra* text accompanying notes 226-31.

Although "discrimination" might be understood either as referring to disparate racial treatment or to disparate allocation of benefits between racial groups, Rehnquist's dissent in *Weber* assumes only the former meaning.[326] It is possible to characterize that understanding as the product of a particular political theory internalized by Rehnquist: a libertarian philosophy would regard race an illicit consideration in employer decision making and would regard redistribution of opportunities on the basis of a principle of proportion among racial groups as anathema. Alternatively, Rehnquist's understanding of "discrimination" may be characterized as dependent upon his general distaste for governmental intrusion into private orderings and desire to minimize the impact of regulation on such orderings; he will therefore assign the term that meaning he perceives as generating the least regulatory impact.[327]

Similar characterizations may be made of the Burger Court's resolution of the bargaining issue in *First National Maintenance Corporation*.[328] Partial closure of a business is less likely to be treated as a mandatory subject of bargainig by a court that places a high value on managerial prerogatives than by a court that places a high value on union participation in decision affecting employee interests in job security. Moreover, the contrast between the literalism of Justice Rehnquist's dissent in *Weber* and the purposive approach that marked the Burger Court's analysis in *First National Maintenance* may be viewed as evidence that approximated positivism is merely a device more often than not compatible with a particular substantive political perspective; positivism will be abandoned in favor of a search for purpose where positivism threatens that perspective.

If these claims are viable, neither the Burger Court's underlying normative view nor its approximated positivism may be said to explain its interpretations; both constructs are merely devices by which it enforces its substantive political values. Moreover, determinacy of statutory application is implausible if these claims are viable;

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326. *See supra* text accompanying note 226.

327. This, indeed, is the explanation enjoying the most empirical support in the cases, for Rehnquist does employ distinct understandings of the term "discrimination" in ways consistent with an anti-regulatory objective. *See, e.g.*, Los Angeles Dept. of Water & Power v. Manhart, 435 U.S. 702, 725-28 (1978) (Burger, C.J., joined by Rehnquist, J., dissenting); General Electric Co. v. Gilbert, 429 U.S. 125 (1976). The anti-regulatory bias in Rehnquist's dissent in *Weber* is apparent when it is recognized that Rehnquist believed (quite reasonably) that the employer adopted the plan challenged in that case under pressure from the Labor Department. *See* United Steelworkers v. Weber, 443 U.S. 193, 223, 225-26 n.6 (1979) (Rehnquist, J., dissenting).

328. *See supra* text accompanying notes 134-35.

"plain" statutory meaning in different cases will both be a function of shifting majorities on a court composed of justices with distinct substantive perspectives[329] and be independent, in the thought of a single justice, of the politically neutral concept or principle invoked in prior cases as justification for his earlier decisions.[330]

The threat posed by this version of the attack on Burger Court literalism as necessarily normative is that it undermines the Burger Court's claim to the normative ideals of legal formalism; literalism, even as approximated positivism, cannot claim that it defers to a legislative sovereign if its interpretations are in fact reflections of its substantive political values.

A potential line of response to the realist claim is to distinguish power and propriety. To the extent that empirical observation confirms the claim,[331] observation merely suggests that the Supreme Court has the power to impose its substantive political opinions as interpretations, not that the Burger Court's rhetoric or effort to realize that rhetoric is "wrong."[332] But the realist claim from reader perspective is stronger than generalization from observation; it is that reader perspective understood as substantive political position necessarily governs interpretation.[333]

It is therefore necessary to confront the realist's strong claim directly by denying it in sufficient degree to render the Burger Court's position plausible and therefore to affirm, ironically in view of the Burger Court distrust of the legal process school, the significance of

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329. This possibility may be inherent in a collective decision making body composed of persons whose distinct perspectives cause them to prefer distinct principles as grounds for decision. *See* Easterbrook, *supra* note 100; Farago, *supra* note 100.

330. *See* Tushnet, *supra* note 27, at 813-18 (judicial decisions are so open-ended that there are many principles to choose from as the explanation of such decisions; therefore, we do not know what proposition case 1 stands for until case 2 tells us). *But see My Reply to Stanley Fish, supra* note 3, at 306 (there is a distinction between interpretation as an act of seeking that justification of past legal decisions which best fits those decisions and the invention of the best present decision for prospectively ordering some aspect of human activity).

331. *See supra* note 327. This same point may be made, however, about those justices who do not share the Burger Court's normative view. Indeed, Justice Rehnquist and Justices Brennan and Marshall may at this level be viewed as the most similar in approach of the justices of the current Supreme Court.

332. *See* Hart, *supra* note 44, at 607-08.

333. *See, e.g.*, Brest, *The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship*, 90 YALE L.J. 1063 (1981); Brest, *supra* note 3, at 770-73; Levinson, *supra* note 3, at 386-88; Nowak, *supra* note 34; Tushnet, *supra* note 27, at 822-24.

the form of judicial decision over the results reached by such decision. The denial will again rely on the distinction between interpretation and application.[334]

C. *Interpretation and Application Revisited*

Recall that interpretation as it has been defined in this paper is the ascertainment of the meaning of statutory language in the context of enactment; it entails a narrowing of the concepts or range of concepts potentially conveyed by that language.[335] Under the methodology attributed here to the Burger Court, that narrowing process occurs by reference both to the ordinary meaning of words in the linguistic context of the statute read as a whole and by reference to the context of enactment as the latter is evidenced by the most concrete expressions of congressional intent in legislative history.[336] To illustrate by use of a popular example in recent commentary, the statement "keep off the grass" has a wide range of possible meaning in the abstract.[337] Its potential range of meaning is narrowed once the context of enactment is admitted in evidence: the statement has one range of meaning if it appears on a sign in a public park and another meaning if it appears in a (questionably drafted) drug abuse control statute. A similar process occurred in the examples thus far employed in this paper. The Court declined to narrow the term "actions" in the Endangered Species Act in *T.V.A. v. Hill* because legislative history convinced the Court that Congress intended a broad range of meaning.[338] The term "equal" in the Equal Pay Act is judicially understood to mean "equal" as equality is understood by job evaluators.[339] The term "discrimination" in Title VII was understood by Justice Rehnquist in *Weber* as meaning disparate racial treatment.[340]

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334. *See supra* text accompanying notes 56, 139 and *supra* notes 138-139.

335. *See supra* text accompanying notes 56, 139.

336. *See supra* text accompanying notes 139-42, 249-82.

337. *See* Graff, *supra* note 139, relying on *Searle, supra* note 44, at 117-36; Grice, supra note 210. One potential use of the "keep off the grass" example is to claim that the statement means nothing until used by someone in a context and, therefore, to claim that speaker's intention is conceptually necessary to meaning. The counterargument is that language conventions grant the statement at least a range of meaning; the statement does not in fact mean nothing absent evidence of an intention. *See supra* note 44.

338. *See supra* text accompanying notes 169-77.

339. *See supra* text accompanying notes 223-26.

340. *See supra* text accompanying note 259.

Application of a statute entails specifying the significance of the statute[341] in the context of the facts of a particular case and may be understood as asking what a court's use of ascertained meaning should be. The methodology by which that question is answered may alternatively be conceived as determining whether the facts of the case are within or without the core of ascertained meaning, as determining whether application would further congressional purpose, or as determining by means of complex moral and linguistic judgments whether ascertained meaning and the facts of the case ought to be linked by a premise supplied by the judge in completing a syllogism.[342] It was for example necessary to determine whether completion of the Tellico dam was an "action" within the ascertained meaning of the Endangered Species Act in *Hill*; whether flight attendant and pilot jobs were within the ascertained meaning of "equal" in the hypothesized Equal Pay Act case and whether the affirmative action plan at issue in *Weber* entailed prohibited discrimination.

It is crucial for present purposes to further recall that, although the distinction between interpretation and application often becomes indistinct in practice, the reasons judicially given for the use of evidence are distinct in the context of interpretation and the context of application. For example, the function of reliance on purpose or intent in ascertaining meaning is distinct from the function of reliance on purpose or intent in application. Intent or purpose may be used as a reason to infer a particular range of concepts conveyed by congresssional use of statutory language or may be used as a reason for a particular judicial use of that language in the context of a case. To illustrate: The term "discrimination" in Title VII means disparate treatment if the congressional intent inferrable from legislative history was to use "discrimination" to invoke such a conception; discrimination does not mean disparate treatment in the context of an affirmative action plan because the Supreme Court concluded in *Weber* that the congressional purpose to improve black employment would not be furthered by such an application. Notice that the Supreme Court's conclusion has the effect, by virtue of the doctrine of precedent, of constraining future applications of Title VII, but this constraint has no

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341. *Cf.* Burns, *Law as Hermeneutics: A Response to Ronald Dworkin in* THE POLITICS OF INTERPRETATION, *supra* note 3, at 317-19 (there can be no interpretation of law which is not simultaneously an application to a concrete situation); Graff, *supra* note 139, at 411-12 (distinguishing epistemological problem of how to determine what a text means from ethical problem of application); AIMS OF INTERPRETATION, *supra* note 3, at 85-92 (distinguishing meaning from significance).

342. *See generally* Moore *supra* note 34.

effect on ascertained meaning; the term "discrimination" in Title VII continues to mean, at least in part, disparate treatment.

It is finally necessary to recall that, although meaning may be use in the sense that one cannot know the meaning of statutory language without knowing the use of statutory language, this does not defeat the distinction between interpretation and application postulated here. Even if knowing meaning is knowing use, there are two uses of statutory language: the prospective and directive use of that language by a legislature and the concrete use of that language by a court within the situation of a case. A court, no doubt as an exercise of judgment or of "practical wisdom" gained from experience within a community of rule interpreters and rule appliers, must both know how to use statutory language in constructing an understanding of prospective and directive congressional use and know how to use statutory language by specifying its significance within the circumstances of a case.[343]

D. *Substantive Political Perspective and Interpretation*

If it is true that the mechanism that enables a court to assign a range of meaning to statutory language by excluding some potential meanings as inappropriate to the context of enactment or to the use made of that language by the legislature is a sense of propriety supplied by shared membership in a community, the proposition does not require rejection of Burger Court literalism. The Burger Court's literalist claims are not claims that words have a single, necessary range of meaning either independent of context or independent of

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343. *See supra* notes 138-39 and accompanying text. The use understanding of meaning is Wittgenstein's, and is often stated as the proposition that one cannot know the meaning of a rule without knowing how to apply it. The difficulty with this formulation for present purposes is that it immediately suggests (in the fashion Wittgenstein was criticizing) application within the fact situation of a case. "Application" does not however mean only the real world concrete example of application in a case; the term does not correspond to that example. It may also be "used" to mean what the text here refers to as interpretation. There are at least two uses of a rule. *See* Luban, *supra* note 139, at 640.

A court exercises "practical wisdom" gained from its experience in interpretation and application because neither of these functions is itself completely rule governed. *See* ARISTOTLE, NICHOMACHAEON ETHICS Bks. 5-6. Even metarules about these functions merely inform and perhaps constrain the process, they cannot ultimately direct it. Llewellyn, *supra* note 12. *See* Luban, *supra* note 139, at 639 (relying on Kant) (knowing the relevance of a rule to a situation cannot be governed by a meta-rule concerning the relevance of the rule, because one then requires a further meta-rule about when the rule concerning relevance is relevant, and one then encounters an infinite regress).

shared understandings of practices within a community of "normal speakers of the English language." The question posed by the strong realist argument, however, is whether the Burger Court's assignment of a range of meaning to statutory language—its understanding of that language—is dependent as well upon a substantive ideology that may or may not have been shared by Congress.

A substantially damaging piece of evidence suggesting that the Burger Court's understanding of statutory language is dependent upon substantive political ideology is that there can be disagreement about the meaning to be assigned congressional use of language. It is, for example, possible to believe that Congress meant, by its use of the term "discrimination" in Title VII, that racial groups were not to be deprived of proportionate shares of the employment pie or that employers were not to consider race in dividing that pie or that both of these conceptions were within the congressional use of the term.[344] It is also possible that ideology understood as the alternatives of "individualism" and "altruism"[345] or of welfare statism and *laissez faire*[346] are responsible for these beliefs. Indeed, interpretation's dependence upon inference from available evidence suggests that it is inevitably uncertain. The less evidence available and the more uncertain the inference, the more likely it is that disagreement about perceived meaning will follow from distinct political perspectives. That appears to be the case, for example, in constitutional interpretation.[347]

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344. *Compare, e.g.*, Blumrosen, *The Group Interest Concept, Employment Discrimination and Legislative Intent: The Fallacy of Connecticut v. Teal*, 20 HARV. J. LEGIS. 99 (1983) *with*, Wilson, *A Second Look at Griggs v. Duke Power Co.: Ruminations on Job Testing, Discrimination, and the Role of the Federal Courts*, 58 VA. L. REV. 844 (1972).

345. *See generally*, Kennedy, *supra* note 5.

346. *See* Note, *supra* note 34.

347. The age of the Constitution and the consequent differences between the culture in which it was originally drafted and the culture within which its interpreters are embedded may be viewed as generating insurmountable difficulties for an effort at identifying the meaning of that document in the context of its enactment. *See, e.g.*, Brest, *supra* note 186; *Forum of Principle, supra* note 71, at 471-99; Tushnet, *supra* note 27, at 793-97. Old statutes may be viewed as presenting the same difficulty. *Cf.* Kennedy, *supra* note 27. To the extent that a court may imaginatively enter the world of an old legislature for the purpose of identifying "original intent", the present significance of such an intent may be both indeterminate and therefore subject to distinct assessments by different judges. Tushnet, *supra* note 27 at 798-804. *Cf.* AIMS OF INTERPRETATION, *supra* note 3, at 38-42, 46-49 (arguing that past meaning in a distinct culture may be ascertained, but that the significance of this past meaning is subject to dispute).

These considerations do not, however, compel the realist's strong claim that an assigned range of meaning is necessarily a matter of substantive political perspective for the simple reason that the claim requires a counter-factual conclusion that it is not possible to perceive a meaning with which one disagrees. The Burger Court's normative ideal of approximated positivism is plausible as an explanation of its behavior despite arguable lapses because it is in fact possible for the Court to understand a meaning with which it disagrees.[348] It is possible, even given that the mechanism by which comprehension of meaning occurs is shared values and practices, because the values and practices shared by a language community are of a general and fluid character. If agreement about the concrete specifics of values and practices were crucial to communication, there could only be incomprehension, not disagreement.[349] It is therefore possible to distinguish the judicial power to invent a meaning from the correct practice under the ideal of approximated positivism—the practice of inferring from available evidence the meaning of the congressional use of statutory language.

The proof of the possibility lies in the mode of argument employed in statutory application. Such argument often assumes a

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It is nevertheless the case that it is possible to ascertain with no doubt problematic exactitude the meaning of an old constitution or old statute in the context of enactment; it would otherwise be unnecessary to construct elaborate normative arguments about why such meanings should be ignored (such as Dworkin's argument that the constitutional framers enacted concepts and contemporary interpreters must supply conceptions. DWORKIN, *supra* note 4, at 134-36). Such arguments presuppose an understood meaning thought currently inconvenient or currently immoral. The real question posed by the problem of the old constitutional or statutory text is the problem of current significance. *Cf.* AIMS OF INTERPRETATION, *supra* note 3, at 46-49 (making this claim with respect to old literary texts).

348. *See* United Steelworkers v. Weber, 443 U.S. 193, 216 (1979) (Burger, C.J. dissenting). *But cf.* Weisberg, *How Judges Speak: Some Lessons On Adjudication In Billy Budd, Sailor With An Application To Justice Rehnquist*, 57 N.Y.U. L. REV. 1, 64-69 (1982) (formalism as concealing impulses of judge).

Professor Dworkin finds the possibility that a judge could disagree with the interpretation that judge adopts "perplexing": it is not possible to distinguish a judge's choice of the principle of political morality which best fits a statute from the judge's morality. *Civil Rights Act, supra* note 4, at 42. This observation was however made on the assumption that the statute and available evidence of the context of its enactment did not supply an answer to the case before the judge. *Id.* For examples of instances in which Burger Court justices have perceived and voted to enforce meanings with which they apparently disagreed, see, e.g., Jacksonville Bulk Terminals v. International Longshoremen's Assoc. 102 S. Ct. 2673, 2687 (1982) (O'Connor, J. concurring); Complete Auto Transit, Inc. v. Reis, 451 U.S. 401, 417-24 (1981) (Powell, J. concurring); Albemarle Paper Co. v. Moody, 422 U.S. 405, 441-49 (1975) (Rehnquist, J. concurring).

349. *Cf.* AIMS OF INTERPRETATION *supra* note 3, at 151-52 (distinguishing a general

meaning ascertained from the context of enactment and directs its attention to the question whether that meaning ought to be enforced. Moreover, this ought question is answered by reference to reasons independent of the meaning assumed to have been ascertained from statutory language and the context of its use:[350] application of that meaning would or would not further the "spirit" or purpose of the statute, would or would not generate absurd, unreasonable or unjust results, would or would not impinge upon fundamental independent values and therefore should or should not be subject to a clear statement requirement.

These arguments and counter-arguments do not express disagreement about the range of meaning of statutory language understood in the context of its congressional use; rather, they express disagreement about the wisdom, efficacy or morality of enforcing that meaning in the context of the court's use of that language to resolve a case. There was in the example of the *Weber* decision no disagreement that "discrimination" was used by Congress to include disparate treatment or even that the affirmative action plan there in issue entailed disparate treatment. Rather, there was disagreement about whether that use ought to be the Court's use of the term "discrimination" in the context of affirmative action plans.[351] Moreover, there is often no disagreement about the meaning of congressional use of language where that language and evidence of the context of its enactment fails to significantly narrow the range of concepts identified as statutory meaning. *First National Maintenance Corporation* is an example.[352] There was no disagreement in that case that congressional

structure of practice from the relatively concrete "paradigms" of "perspectivism").

350. *See* Graff, *supra* note 139, at 411-12. *Cf.* DICKERSON, *supra* note 7, at 238-61. Although Dickerson advocates the distinction between interpretation and application borrowed here, he conceives of the problem of application as arising where the meaning ascertained by the process of interpretation "fails to dispose of the case at hand". *Id.* at 238. His view therefore resembles Dworkin's notion that the moral perspective of the judge controls where statutory language and evidence of the context within which it was enacted do not supply an answer. Application as it is understood here includes the notion that the case before a court does not appear resolved by ascertained meaning, but includes as well the possibility that ascertained meaning produces an inconvenient or immoral result.

351. It would not be accurate to say that disagreement about the lawful character of an affirmative action quota is disagreement about congressional intent about that issue unless evidence regarding the context of enactment addressed the issue. Nor, however, is it accurate to say that disagreement about the lawful character of an affirmative action quota is disagreement about the meaning of congressional use of the term discrimination: such a quota entails disparate treatment as that concept is understood by the community of normal speakers of English. Disagreement, rather, is about whether the meaning of discrimination inferred from congressional use ought to be suspended in favor, *e.g.*, of attributed congressional purpose.

352. 452 U.S. 666 (1981), discussed *supra* at text and notes 134-35.

use of "terms and conditions of employment" in identifying mandatory subjects of bargaining was so open-ended as to potentially include any subject affecting the employment relationship. Indeed, that use is judicially treated by justices of diverse political persuasions as an act of delegation of law making authority.[353] Disagreement about mandatory subjects of bargaining therefore typically ignores congressional use and focuses entirely on the question of what use a court ought to make of statutory language in the context of application.

Argument made in the context of application is, in short, typically argument either about disagreement with ascertained meaning or argument that ignores ascertained meaning on the ground that it is not usable or that its implications are so broad that independent values (as they are perceived by the Court) are threatened by it. Both modes of argument assume an ascertained meaning and therefore assume a capacity to interpret objectively—that is, independently of substantive political perspective. Indeed, the fact that such arguments are used necessitates the plausibility of such a capacity; absent the capacity, there is no need to ask ought questions about judicial use of statutory language.

E. *Substantive Political Perspective And Application*

If statutory meaning can be identified independently of substantive political perspective, the argument just made nevertheless strongly suggests that statutory application cannot be independent

353. *See, e.g.*, N.L.R.B. v. International Longshoremen's Ass'n., 447 U.S. 490 (1980); NLRB v. Retail Store Employees Union, Local 1001, 447 U.S. 607 (1980). It is however controversial whether the delegation has in operation been to the National Labor Relation Board or to the courts; the Supreme Court has not been consistent in its deference to Board "expertise." *Compare* N.L.R.B. v. City Disposal Systems, 104 S. Ct. 1505 (1984); N.L.R.B. v. Transportation Management Corp., 103 S. Ct. 2469 (1983) *with* American Ship Building Co. v. N.L.R.B., 380 U.S. 300 (1965).

It is possible to view the history of Supreme Court interpretation of the Labor Act as a sustained refusal to apply the Act in a fashion consistent with the radical premises of the Congress that first enacted the Wagner Act, Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-41*, 62 MINN. L. REV. 265 (1978), or, at least, as application from a political perspective that gives the Labor Act a content fundamentally different than the content implicit in radical versions of congressional use of the language Act. *See, e.g.*, J. ATKINSON, VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW (1983), Klare, *Labor Law As Ideology: Toward a New Historiography of Collective Bargaining Law*, 4 INDUS. REL. L.J. 450 (1981); Stone, *The Post-War Paradigm in American Labor Law*, 90 YALE L.J. 1509 (1981). On this view, the Labor Act (at least in its original Wagner Act version) ought to be given a literal interpretation. The Court's failure to do so might be attributed to its incapacity even over time to perceive a meaning inconsistent with a non-radical political perspective, but its repeated statements over time that the Labor Act cannot be construed literally (even where post-Wagner Act anti-union provisions were in issue)

of substantive political perspective.[354] The strong realist claim may therefore be understood as insisting that judicial use as distinguished from congressional use of statutory language is necessarily political.

The Burger Court's literalism, in service of its underlying normative view, is supposed to obviate this charge through the claim that application is a matter of approximating the identified meaning of statutory language in the context of the facts of a case. For example, the Burger Court's choice of the most concrete congressional intent consistent with identified meaning (as distinguished from the more abstract aims of a statute) as a device by which to judge application is supposed to limit the possibility that the substantive political perspective of judges will distort the substantive political perspective of the Congress which enacted a statute. The efficacy with which that intent would be furthered by application, rather than the efficacy with which ultimate aims would be furthered, is the measure of the extent to which the political compromise underlying the statute is approximated in the case.[355] If this practice was consistently followed, it would express a particular normative perspective regarding judicial function, but would be politically neutral regarding statutory application.[356]

There are, however, three reasons to believe that the Burger Court's applications of statutes have not been politically neutral. If they have not been politically neutral, that is at least evidence that the court's literalism cannot be politically neutral. The first reason is that the Burger Court is in fact not consistent in its practice; it does not invariably follow the strategy attributed to it here.[357] The second is that there are instances in which there is not a single identified meaning to be applied, but a number of inconsistent identified meanings to be applied in a case.[358] A conclusion that the Court is capable of grasping a meaning with which it disagrees does not exclude the possibility that it may grasp a number of meanings only some

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suggests instead that it was perfectly capable of perceiving a meaning with which it disagreed. *See*, Local 761, International Union of Electrical Workers v. NLRB, 366 U.S. 667 (1961).

354. *Cf.* AIMS OF INTERPRETATION, *supra* note 3, at 86-87 (distinguishing meaning from significance within a situation).

355. *See supra* text accompanying notes 249-67.

356. *See supra* text accompanying notes 270-83.

357. *See supra* text accompanying notes 36-38.

358. *Cf., e.g.*, Cohen, *supra* note 92, at 30-32 (choice of different rules as explanations of past decisions); Tushnet, *supra* note 27, at 811 (choice of alternative principles underlying prior case equally supporting that case).

of which invoke its disagreement. An arguable example of this difficulty is *Weber*. There is apparently general agreement among the justices of the Supreme Court that Congress used the term "discrimination" in Title VII to mean both disparate treatment and the unjustified disparate impact on protected racial groups of race-neutral employment criteria.[359] These meanings of "discrimination" include concepts with which it is possible to disagree, and the problem in *Weber* may be viewed as a conflict between meanings requiring a judicial choice between them in applying Title VII to an affirmative action plan.[360]

The third reason to believe that application has not been politically neutral is that the Burger Court's approximated positivism is incomplete; the Court retains the option and occasionally exercises the option to refuse to apply a statute where application would produce absurd, unreasonable or unjust results and to impose a clear statement requirement where fundamental values are threatened by application.[361] Indeed, these options may be crucial to the possibility of communication. If language has meaning only by virtue of shared reactions to text—a set of assumptions shared by both speakers and listeners or a set of rules understood by players in a language game[362]—then both the relevance and degree of relevance of that meaning within the context of the factual situation of a case is a judgment made as well on the basis of shared assumptions. A court's interpretation of the facts of a case is also enabled by its assumptions,[363] and application of identified meaning within the context of a set of interpreted facts is enabled by shared assumptions about what it is reasonable and not absurd to understand the significance of identified meaning to be in that context.

The common judicial perception that a legislature could not have intended that a court apply identified meaning in a factual context in which application would produce an absurd result[364] illustrates this

359. *See, e.g.*, Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975); Griggs v. Duke Power Co., 401 U.S. 424 (1971).

360. *See supra* note 262.

361. *See supra* text accompanying notes 86-95.

362. *See supra* text and note 138.

363. The dependence of one's understanding of facts upon one's assumptions and therefore one's values is as probable as the dependence of one's understanding of text upon such assumptions. *See, e.g.*, J. FRANK, COURTS ON TRIAL, 316-21 (1949); Frank, *Words and Music, supra* note 2, at 1272-78. The positivist's assumption that fact and value are separable is no doubt threatened by this realization, but it is not wholly defeated. If assumptions can be shared, and the "fact" of human communication suggests that they are, separation remains in degree plausible.

364. *See, e.g.*, Church of the Holy Trinity v. United States, 143 U.S. 457 (1892);

point. What enables a court to plausibly make such a claim is that both it and its audience share assumptions about what an absurd result looks like.[365] The difficulty is that only some assumptions are shared. Other assumptions are controversial. It may therefore be difficult to distinguish politically neutral considerations of proper judicial function from the substantive political preferences furthered by application in explaining at least some judicial opinions. It is, for example, difficult to determine whether Burger Court decisions enforcing separation of powers values are best explained by a politically neutral desire to "reinforce the institutional responsibility" of Congress or by "a hostility to the substance of congressional programs."[366] A similar difficulty arises in contexts in which distinct regulatory regimes seem relevant to a dispute but provide different answers about resolution of the dispute.[367] In such circumstances a court is compelled to choose between alternative substantive values, and may be viewed as necessarily making that choice on the basis of its preferences.

The fundamental values the Burger Court employs in invoking clear statement requirements or in postulating unreasonable results are both shared by significant communities and controversial.[368] To the extent therefor that the Court demands clear statements or invokes unreasonable result as a reason for suspending its positivism, it has arguably imposed its substantive political perspective in the context of application, whether or not that perspective is shared.

How, then, can the Burger Court's normative view of its role be defended as plausible? If the criterion for a successful defense is satisfaction of the aspirations of that normative view, it cannot be defended. Political perspective colors a court's judgment about the significance of a statute in the context of the facts of a case and application of statutory language within such a context requires a judgment about significance. The defense must proceed again, then, from an argument about approximation.[369]

United States v. Kirby, 74 U.S. (7 Wall) 482 (1868); Riggs v. Palmer, 115 N.Y. 506 (1889).

365. *See* LIEBER, LEGAL AND POLITICAL HERMANEUTICS, *supra* note 156, at 17-22.

366. Luneburg, *supra* note 34, at 269.

367. *See, e.g.*, N.L.R.B. v. Bildisco & Bildisco 104 S. Ct. 1188 (1984); Connell Constr. Co., Inc. v. Plumbers Local 100, 421 U.S. 616 (1975).

368. An example is federalism and the weight properly assigned that value. *See generally*, Bator, *The State Court and Federal Constitutional Litigation*, 22 WM. & MARY L. REV. 605 (1981).

369. *Cf.* WITTGENSTEIN, *supra* note 138, at 41e-42c (inexact explanation is not an unusable explanation). Wittgenstein is often cited for the propositions that subjectivity and indeterminacy are inherent in language—a rule cannot fully explain how it is to be used. Tushnet, *Legal Scholarship: Its Causes and Cure*, 90 YALE L.J. 1205, 1217 (1981).

F. *Approximated Political Neutrality in Interpretation and Application*

Both a court's interpretation of a statute and a court's application of a statute are subject to characterization as the products of that court's normative perspective about its role as a court or to characterization as the product of that court's substantive political perspective about the desirability of particular legislation. It has been the thesis of this article that the Burger Court's tendencies are legitimate expressions of the first of these characterizations. The question is whether these tendencies are necessarily expressions of the second of these characterizations on the assumption that the second characterization will at least often be plausible as an explanation of any judicial decision.

This question will be approached here through a variation on a well-worn parable popular in academic discussions of statutory interpretation.[370] Assume that a city ordinance prohibits "dogs" in a city park. A policeman arrests five persons for violating this ordinance: a defendant in possession of a Greyhound bus in the park; a defendant in possession of a cat in the park; a defendant in possession of a stuffed toy St. Bernard in the park; a blind defendant in possession of a seeing eye dog in the park; and a defendant in possession of a Great Dane in the park. Moreover, the last of these defendants is sued civilly by a plaintiff injured when he fell as a consequence of the Great Dane's energetic effort to convince the plaintiff to play a game of "catch."

The Burger Court is of course unlikely to confront cases arising from alleged violations of the postulated ordinance, but the parable serves as a vehicle for exploring the Burger Court's tendencies and the relationship of those tendencies to substantive political perspective. It is used here to make the following general argument about approximated political neutrality: the fundamental error made by the strong realist claim that substantive political perspective controls application is that it equates the probable mechanism by which meaning is comprehended—a set of shared understandings, concepts or values of a rather general and largely fluid character—with the

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Wittgenstein also argued, however, that rules are useable; it is possible to make judgments about the competent or incompetent use of rules within a language game. *See* Easterbrook, *supra* note 4, at 533-34 n.2; Michelman, *Politics as Medicine: On Misdiagnosing Legal Scholarship*, 90 YALE L.J. 1224, 1227 (1981).

370. *Cf., e.g.*, Brest, *supra* note 186, at 207-10 (automobiles in the park); *Forum of Principle, supra* note 71, at 478-82 (same); Hart, *supra* note 44, at 607 (same); Fuller, *supra* note 44, at 663 (same).

relatively concrete and specific character of ideological positions within that set.[371] It therefore mistakenly concludes that the dependence of comprehension of meaning upon a shared but fluid structure of practices and values compels the dependence of application of that meaning upon concrete ideological position. Although substantive political perspective colors judicial judgment about the significance of statutory language in the context of the facts of a case, the degree to which it can be said to control application is a matter not of the inevitability of its control, but of the evidence available to support or refute its influence in particular cases. Because it is possible to perceive a meaning with which one disagrees—and because the adversary system is largely designed to realize that possibility—it remains possible for the Burger Court to aspire to neutrality within the context of particular cases, albeit within the framework of its normative view of its role. It therefore remains incumbent upon critics to resort to argument from evidence rather than argument from the determinism of perspective.

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371. Although it is possible to view some statutes as enacting a general concept which contains within it the seeds of alternative conceptions, *Forum of Principle, supra* note 71, it is also possible to turn this notion on its head: what enables communication is that readers within a community share a set of general concepts but recognize the alternative conceptions possible within that set. Readers are therefore capable of recognizing a particular conception when specified in a statute. Concepts are on this account "outside" text; conceptions are "inside" text.

Which of these accounts "best fits" a particular case is dependent upon the specificity of the statute in question. The inverted account nevertheless at least often describes the process postulated in this paper: A court first seeks to share the legislature's understanding of the problem addressed by a statute by learning from the context of enactment the set of relatively general concepts in the minds of legislators. And a court is by virtue of the understanding it comes to share capable of identifying which of a number of possible conceptions was in fact enacted even if it disagrees with the conception enacted. Moreover, the court's view of the significance of that conception within the factual situation of the facts before it is at least highly influenced by the enacted conception: that conception becomes in application itself a general concept which limits the possibilities of the more specific conception the court writes in resolving the case.

Moreover, Wittgenstein can be read as taking a view consistent with this explanation. His concern was in part that of avoiding the tyranny of language—the tyranny of one's first reaction to language from the perspective of a reader caught up in that reader's identification of a word with a particular real world "thing" WITTGENSTEIN, *supra* note 138, at 47e. Avoidance of that tyranny requires a willingness to be open to use—an openness to recognizing that a word has meaning only within the context of the author's use of that word. That openness requires transcending the tyranny of one's immediate assumptions and the sharing of a set of distinct assumptions. Within the context of that distinct set of assumptions—the approximate assumptions of the author—one can seek to specify a relatively specific conception invoked by the word. But openness itself requires some set of even more general assumptions;

1. Political Decision As Decision By Reference To The Substantive Political Perspective of the Judge

The range of concepts conveyed by the language of the ordinance, as narrowed by evidence of the context of enactment, would place limits on the potential scope of application of the ordinance. Assume that the term "dog" is narrowed at least to the notion of "living, non-human animal." On that assumption, a judge's "linguistic intuitions" about the term "dog" in the context of enactment would cause him to dismiss the cases against the bus driver and the toy possessor and therefore to create "gaps." Neither buses nor toys in the park are regulated. If we further assume that the judge's political position is that use of city parks ought to be wholly unregulated, may we conclude that his decisions were necessarily political?

It is important that this question be taken seriously.[372] It is conceivable that a Greyhound bus may be a "dog." Evidence of the context of enactment discloses that local usage in the city in question is that buses are "dogs" and that the city council was concerned with bus fumes and disruptive tourists in the park when it enacted the ordinance. A judge of the indicated political persuasion could credibly be accused of a political decision (even if that decision was framed in terms of "fair notice" and "plain meaning") if this was the state of the evidence. The reason that the judge who dismisses the bus and toy cases where this is not the evidence seems not to have made a political decision despite the coincidence of his political views with that decision is a series of shared assumptions about the meaning of "dog" in the context of its enactment and the failure of a bus and a toy to correspond with that meaning. The judge has a political perspective and must determine the significance of a meaning within a situation, but it is possible to make a judgment that substantive political perspective is not responsible for determination.[373] It is possible to make that same judgment about the case of the defendant arrested for possession of the Great Dane in the park even if the judge is known to detest dogs: the fact that his distaste for dogs coincides with his decision to apply the ordinance does not necessarily render his decision political if political decision is understood as decision by reference to the judge's particular political preference regarding the issue before him.

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otherwise the success of the effort is in substantial doubt. In short, one proceeds from concepts to conceptions, but concepts as used here are outside text, not within it, and although concepts are crucial to communication of meaning, conceptions are not.

372. On the importance of context to meaning, *see supra* text accompanying notes 138-48.

373. *See. My Reply to Stanley Fish, supra* note 3, at 306.

This, of course, is not the only possible understanding of a characterization of a decision as political. If political decision is understood instead as decision by reference to the judge's normative view of his function, the judge's decision regarding buses, toys and Great Danes is of course political and is necessarily so whichever stance he takes regarding his role. Moreover, the judge's normative view of his function is linked to and is no doubt an expression of a complex collection of values forming a controversial understanding of the good society. His decision regarding application of the ordinance is therefore a product of this complex collection of values in the limited sense that the set of possible decisional outcomes he will perceive as plausible is constrained by a conception of role that expresses that complex collection of values.[374] Application of an ordinance prohibiting dogs in the park to a bus in the park is implausible because the judge's conception of function renders it implausible and the judge's conception of function is enabled by the complex collection of values supporting it.

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374. It is of course possible to view this complex collection of values as the "political" evil to be attacked. For example, the critical legal studies argument that law is ideology may be interpreted, not as a claim that judges decided directly by reference to their political preferences, but, rather, that judges decide by reference to an internalized value structure characterized by "alienation", "hierarchy," "hegemony", "authoritarianism", "contradiction", "individualism", etc. This is the structuralist aspect of the argument. It emphasizes the dependence of subjective perception on a socially conferred fund of meanings, the function of preconception and myth in reconciling discontinuities in those meanings, and structural similarities between political and economic organization and legal doctrine. *See, e.g.*, Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFFALO LAW REV. 205 (1979). These notions appear similar to those of Merleau-Ponty and Sartre and are linked to the "structuralism" of Levi-Strauss and Piaget. *See* Gordon, *New Developments in Legal Theory* in THE POLITICS OF LAW 281 (D. Kairys ed. 1982). *Cf.* C. LEVI-STRAUSS, TOTEMISM (R. Needham trans. 1963); M. MERLEAU-PONTY, PHENOMENOLOGY OF PERCEPTION (C. Smith trans. 1962); J. PIAGET, THE CONSTRUCTION OF REALTY IN THE CHILD (M. Cook trans. 1955); J.P. SARTRE, CRITIQUE OF DIALECTICAL REASON (A.S. Smith trans. 1976).

The neo-marxist aspect of the argument postulates the possibility of overcoming the internalized fund of values and perceptions postulated by the structuralist aspect of the argument and further offers in place of the positivist structure thought currently extant a "non-alienated" and "humane" consciousness. Why this alternative consciousness does not constitute merely an alternative belief structure from which a judge possessing it sees the world and defines his role within the world is not obvious. Nor is it obvious why alternative legal doctrines would not be generated by such a consciousness and would not operate to legitimate the state of affairs generated by such a consciousness, and would not operate to cause the population to submit to that state of affairs through an internalization of such a consciousness. That a positivist legal world is not an objective "given" compelled by history or culture seems obvious, as does the proposition that the legal world is something we create from a fund of

The decision the judge reaches remains nevertheless politically neutral in the only sense in which a decision regarding application of the ordinance can be politically neutral. The decision is not made directly by reference to the compatibility of the ordinance with the judge's complex collection of values. Rather, it is made by reference to the understanding of judicial function yielded by that complex collection of values. The judge must evaluate the significance of the ordinance within the situation confronting him by reference to his understanding of his function and of the society in which he performs his function. The judge's practical wisdom—his capacity to evaluate significance—is enabled by his values. But an exercise of practical wisdom does not require an evaluation of the wisdom of the ordinance. A judge convinced that buses ought to be banned from the park is nevertheless capable of dismissing the case against the bus possessor.

The case of the cat in the park is more difficult. It is conceivable that "dog" was used by the city council in the context of enactment to mean animals or pets. Assume, however, that the judge knows only that the city council enacted an ordinance prohibiting "dogs" in the park. A judge inclined to attribute purposes might well conclude that the cat possessor has violated the ordinance: the purpose of the ordinance is to preclude the evils of non-human animals in the park and application of the ordinance to the cat possessor would further this purpose. A judge inclined to adopt a literalist stance might conclude instead that a cat is not within the ordinary meaning of "dog;"[375] if the city council wishes to regulate cats, it must fill the "gap" created by a literal interpretation by saying so. If the literalist judge is known to believe that use of parks should be unregulated, is his decision political? Certainly it is possible that the decision is political, just as it is possible that the decision of the purposive judge who dislikes cats is political. But an interpretation of the judge's decision which suggests that it rests on the judge's particular preference regarding park use is implausible precisely because one of the shared values of the community is that the judge ought not to decide on the basis of his particular preferences regarding the issues before him. Absent substantial evidence suggesting that the judge has in fact breached that norm, there is a disinclination to believe such an interpretation. In effect, a presumption favoring compliance with the norm structures one's sense of plausible interpretations of the judge's behavior.

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shared meanings. But acceptance of these propositions yields only a sense of the contingent character of our understanding of the legal world, it does not compel or even recommend a "humane" or "non-alienated" understanding.

375. *See* Easterbrook, *supra* note 4, at 535.

A more plausible interpretation of the judge's decision is that he decided by reference to his conception of his function and that his conception is controversial. The literalist judge declined to apply the ordinance to the cat possessor because he had a passive conception of his role and the purposive judge applied the ordinance to the cat possessor because he had a more active conception of his role. Both of these alternative conceptions are potentially linked to alternative substantive political positions regarding regulation of park use. The purposive judge's purposive stance is compatible with a position favoring regulation of park use and the literalist judge's literalist stance is compatible with a position opposing regulation of park use. But neither a purposive stance nor a literalist stance is so compelled by substantive political position that purposive meaning is inaccessible to the judge who is opposed to regulation or that literal meaning is inaccessible to the judge who favors regulation. Nor is either stance so compelled by substantive political position that it cannot be adopted and followed by a judge independently of substantive political position. Indeed, the independence of judicial conception of role from particularized political position is what enables entertaining the norm of neutrality and entertaining a presumption of compliance with the norm. Notice, however, that inherent in the postulate of independence are the assumptions that the judge's decision occurs within alternative and controversial conceptions of role and that the set of possible decisions within one conception is distinct from the set of possible decisions within the competing conception.

2. Political Decision As The Political Character Of The Decision.

The blind defendant's possession of a seeing eye dog presents the most difficult of the postulated cases. Application of the ordinance to that defendant would arguably produce an unjust, unreasonable and absurd result. Such characterizations have a number of potential sources: the shared values of the community, legislation compelling accommodation of the handicapped (even if this legislation is "irrelevant"), the views of the judge on the question of accommodation of the handicapped. A judge faced with the seeing eye dog case will be tempted to conclude either that the city council would not have intended application of the ordinance or that he ought to exercise his independent responsibility as a judge to create a "gap" in the ordinance by exempting seeing eye dogs.[376]

It is probable that the city council never contemplated the question of seeing eye dogs when it passed the ordinance. It is possible

376. *See supra* text accompanying notes 148-57.

that it would have exempted such dogs had it contemplated the question. But the judge cannot know what the city council would have done in the case absent evidence that it was considered, and a seeing eye dog, unless "dog" was used in the ordinance to mean "bus," is a "dog" as the range of concepts conveyed by that term has been thus far specified. Even a judge inclined to purposive interpretation will have difficulty excluding seeing eye dogs from the meaning of the ordinance: seeing eye dogs, even if generally well behaved, exhibit many of the characteristics of dogs generally, and it will be difficult to conclude that only those characteristics not exhibited by seeing eye dogs constitute the evil targeted by the ordinance.

A judge tempted to dismiss the case against the blind defendant faces a further difficulty. His perception of absurdity, unreasonableness and injustice may not be universally shared. The anti-dog lobby that sought passage of the ordinance may include persons who prize peace, quiet and sanitation in the park over the justice of access by blind persons to the park. The political allies of that lobby might even include persons prejudiced against blind persons, persons afflicted with dog phobias and persons allergic to dog hair, and all such persons may value their access to the park over a blind person's access. Exemption of seeing eye dogs therefore requires a decision that the value of access by blind persons to the park is a more important or better value than the values held by the anti-dog lobby and its allies.

A literalist judge whose normative view of his role rendered him tolerant of injustice and absurdity might conclude that the blind defendant violated the ordinance. A non-literalist judge whose normative view of his role rendered him intolerant of injustice and absurdity might conclude that the blind defendant did not violate the ordinance. In what senses may these conclusions be said to be substantively "political"?

There are senses in which departure from the "plain meaning" of the ordinance is inherently political. (Notice that an exemption of the seeing eye dog is a departure; the non-literalist judge cannot claim that seeing eye dogs are not within the understood meaning of "dog" and cannot claim that seeing eye dogs do not exhibit the evils targeted by the ordinance). One sense in which departure is necessarily political is that the judge must be sufficiently offended by the prospect of application to the blind defendant to perceive injustice and absurdity, but this condition would not be difficult to satisfy even for a judge who prefers a park free of dogs to a park to which blind persons have access. It is possible to perceive a meaning (here injustice) with

which one disagrees.[377] And perception is not political decision; a judge can perceive injustice and nevertheless refuse to depart from the ordinance.

A second sense in which departure is necessarily political is that it requires a decision that makes a choice between or compromises competing interests and competing political perspectives and is therefore political in character because the judge cannot claim that he applies the ordinance; he must self-consciously make law. This is so even if the judge has no substantive political stake in the outcome: he is equally indifferent to dogs in the park and to the access of blind people to the park. The instant the non-literalist judge decides to depart from the ordinance, he has made a choice between competing substantive political perspectives. That choice might be made on the basis of his preference or might be made (if he is indifferent) on the basis of his perception of what the city council or a majority of citizens would think right in the circumstances, but that choice is in either event political in the sense that it is an accommodation of political perspectives rather than an application of an existing political compromise.[378]

Does the literalist judge make a political decision in this sense when he refuses to depart from the ordinance? It may be argued that he does. Application of the ordinance to the blind defendant is a victory for the anti-dog lobby and a defeat for the blind people's lobby. Moreover, this victory and defeat cannot be related to any specific feature of the political compromise reflected in the ordinance because it is stipulated that there is no evidence that the city council considered the issue of seeing eye dogs.[379]

It is, however, not accurate to say either that the meaning of the ordinance in the context of its enactment is irrelevant to the blind defendant's case or that the political victory of the anti-dog lobby over the pro-dog lobby is not enforced by application of the ordinance to the blind defendant. The literalist judge who is as personally indifferent to dogs in the park and blind people's access to the park as his non-literalist colleague does not decide on the basis of what he thinks best in the circumstances or what he thinks the city council would do in the circumstances or what he thinks a majority of citizens would believe right in the circumstances. It is true that the effect of his application is a political victory for the anti-dog lobby and is

377. *See supra* text accompanying notes 348-53.
378. *See* Kennedy, *supra* note 27, at 397 n.65.
379. *See id.* at 380.

therefore an allocation of political bargaining chips; the blind persons' lobby must now expend political capital in seeking a city council amendment to the ordinance. But the literalist judge's decision was based on the ascertainable political compromise reflected by the statute as that compromise stands and despite the fact that that compromise did not contemplate the interest of blind people. The source of the literalist judge's decision in the case was the ordinance, even though the source of his decision to rely on the ordinance was his belief structure or the belief structures of the community in which he is "embedded."

A distinction has been made here between the cases of the bus, toy, cat and Great Dane and the case of the seeing eye dog. The political character of judicial decision in the former cases was said to be a matter of judgment dependent upon whether there is evidence supporting a conclusion that the judge decided on the basis of substantive political considerations. The latter case was said to be inherently political for the non-literalist judge because the decision to depart from the ordinance necessarily requires a decision political in character even when made by a judge politically indifferent to the issue. However, it is quite possible to stipulate evidence from which to credibly infer that a literalist judge has made a political decision in the seeing eye dog case. All that is required is to postulate language in the ordinance the meaning of which cannot be narrowed by evidence of the context of enactment. Assume that an indifferent literalist judge is confronted with some basis in the language of the ordinance or in its legislative history for an exemption from the ordinance. The ordinance, for example, states that dogs are prohibited in the park except where "necessary," and there is no evidence from which the possibilities of that term might be limited. The literalist judge is now faced with a hard case in the sense that he is likely to perceive the case as both morally and linguistically difficult.

The postulated exemption confronting the indifferent literalist judge renders his decision inherently political for the same reason that the indifferent non-literalist judge's departure from an ordinance not containing such an express exemption is necessarily political: in both instances the judge is, by his decision or by express invitation, left at large to formulate a political accommodation on the basis of a choice between competing values.[380] The situation in which the

380. This is the case with respect to many statutes the meaning of which in the context of enactment is relatively open-ended. It is of course possible to claim that all statutes are open-ended, but it is also possible to make judgments about degree of open-endedness. *See* Frank, *supra* note 2; at 1265.

literalist judge finds himself—in particular, the degree to which evidence of meaning in the context of enactment fails to limit the possibilities of statutory language—may necessitate decision of a inherently political character even for a judge indifferent to the substantive merits of his political alternatives. Indeed, the judge is confronted in such a situation with a choice nearly as political in character as the choices confronting judges in a common law lawmaking context. But these facts are, again, mere evidence of political decision. Such evidence is not always present and cannot therefore establish that judicial application of a statute is universally political either in the sense of the character of such decision or in the sense of a judge's substantive political perspective.

It is, in short, possible to meaningfully distinguish a literalist judge from a non-literalist judge on the ground that the former *seeks* to avoid substantive political decision. Even though it must be conceded that there are instances in which statutory language makes political decision unavoidable, it is possible to make judgments about the constraining force of language and of legislative history on the basis of available evidence. It may be true that there are no "easy cases" in the rather technical sense that even the literalist judge must in every case supply a minor premise for his deductive syllogism by means of an act of characterization the source of which is the judge (or of the community in which the judge is "embedded"). A seeing eye dog is a dog only if the judge characterizes it as a dog. But it is not true that the literalist judge is always as at large as the non-literalist judge; the literalist judge's conception of his role confines his sense of plausible characterization to a degree that makes meaningful his claim to enforcement of a pre-existing (even if incomplete) political bargain.

There remains, however, the argument that any departure from literalism renders all decisions within a scheme of literalism political:[381] once the literalist judge concedes the possibility of an intolerably absurd or unjust result, he must both ask himself the intolerable result question in every case and must choose between application and departure in every case. Moreover, that choice is rather expressly stated in terms of the degree to which the judge is offended by application: the judge's political perspective determines the absurdity and injustice question.

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381. *See, e.g.*, Kennedy, *supra* note 27, at 391; Moore, *supra* note 34, at 280-81.

The argument fails, however, because the fact of choice—an inevitable fact in an American judicial tradition that has always assumed the possibility of departure from plain meaning in instances of absurd and unjust results[382]—does not establish that the choice made in a particular case was political; it is merely evidence of that characterization. A judge who tends to be tolerant of absurd and unjust results may no doubt be influenced by a substantive political perspective that makes him insensitive to injustice and absurdity. Indeed, a substantive political perspective defines that which is absurd and unjust even if that substantive political perspective is universally shared.[383] But it remains possible for a judge's normative understanding of role to trump his substantive political perspective—it is possible for a judge to disagree with ascertained meaning and to perceive a result as unjust and absurd and nevertheless to believe himself bound by that meaning most of the time. To the extent that such a judge concedes the possibility of an intolerably unjust result and therefore the possibility that he is not bound by ascertained meaning some of the time, he has only approximated his understanding of role, but his inconsistency is merely inconsistency and inconsistency is merely evidence of substantive political decision incompatible with that understanding of role. It is therefore possible for a literalist judge to exempt blind people possessing seeing eye dogs from the ordinance on Tuesday, to dismiss the case against the cat possessor on the ground a cat is not a dog on Wednesday, to dislike cats, like dogs and be generally opposed to regulation of use of the park and simultaneously to legitimately claim a literalist's normative view.

3. Political Decision As Making Or Refusing to Make Law

The last of the hypothesized cases raises a question whether a judge should borrow the ordinance prohibiting dogs in the park to establish the civil liability of the possessor of the Great Dane when the latter is sued for injuries resulting from the Great Dane's exuberance. A state court judge exercising general jurisdiction is commonly thought to have a creative role in developing the common law in such circumstances, and the use of at least statutes as bases for common law decision is commonly thought appropriate as an instance of deference to legislative authority.[384] Indeed, a judge who declines

382. *See* cases cited *supra* note 90.

383. It is possible to argue that subjectivity is confined by requiring that only relatively narrowly defined "principles" may serve as the basis for a court's partial nullification of a statute. *See* Wellington, *supra* note 4, at 262-64. *But see* Brest, *supra* note 27, at 1068-73.

384. *See Common Law and Legislation, supra* note 8.

to consider statutory law as a source of relevant policy in formulating common law rules risks characterization as jealously preserving his anti-democratic common law lawmaking authority. What however is the relevance of that criticism to instances in which the Burger Court has declined to make interstitial federal common law to further the policies of federal legislation?

The difficulties with such criticism from the perspectives of Burger Court literalism are two: federal court authority to make federal common law ought to be highly limited,[385] and federal court use of federal regulatory schemes to create private causes of action designed to more effectively enforce such schemes cannot be traced to congressional judgments.[386] Judicial creativity in service of effective enforcement ignores the obvious possibility that the political compromise giving rise to a regulatory scheme included a compromise about the efficacy with which the scheme was to be enforced.[387]

It is apparent that express judicial creation of a cause of action and the borrowing of a technically irrelevant statute to inform the content of a common law cause of action are judicial decisions political in character as the term "political" has been understood here. Whether or not such decisions may be properly dressed in the rhetoric of principled, consistent and reasoned judicial methodology and therefore distinguished from the mechanisms of political compromise in the legislature, they are decisions which accommodate and compromise contending interests through imposition of controversial perspectives. The more interesting question is whether a refusal to create is "political."[388]

There is a sense in which a refusal to create is of course substantively political. The values upon which the Burger Court declines to

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385. *See, e.g.*, City of Milwaukee v. Illinois and Michigan, 451 U.S. 304 (1981).

386. *See* Touche Ross & Co. v. Redington, 442 U.S. 560 (1979).

387. *See*, Easterbrook, *supra* note 4, at 541-42. This notion is rather expressly recognized in federal labor law preemption doctrine, Teamsters Local 20 v. Morton, 377 U.S. 252 (1964), in Labor Act doctrine regarding the consequences of unprotected employee activity, N.L.R.B. v. Insurance Agents Int'l. Union, 361 U.S. 477 (1960), and in Labor Act doctrine regarding remedies. H.K. Porter Co. v. N.L.R.B., 397 U.S. 99 (1970).

388. *Cf.*, Corbin, *Jural Relations and Their Classification*, 30 YALE L.J. 226, 237 (1921) (a rule of law which permits is as much a rule of law as a rule which commands); Hohfeld, *Some Fundamental Legal Conceptions As Applied in Judicial Reasoning*, 23 YALE L.J. 16, 42 n.59 (1913) (same); Kennedy, *supra* note 5 (form is substance); Glennon & Nowak, *A Functional Analysis of the Fourteenth Amendment State Action Requirement*, 1976 SUP. CT. REV. 221 ("state action" as substance).

extend federal regulatory schemes beyond their ascertained meaning are federalism and the separation of powers. Both values are "objective" in the sense that it cannot be denied that both values are a part of a constitutional tradition, but the essential question is how much federalism and how much separation will the Supreme Court demand. Its demand is a function of its political perspective; "giving content to our fundamental values"[389] is a process dependent upon the value Supreme Court justices place on often incompatible fundamental values.[390] Nor can the political perspective that places a high value on federalism and separation be wholly excused as a mere incident to a normative perspective regarding judicial role. It is possible to derive the judicial passivity that often accompanies the values of federalism and separation from a normative literalism, but both such values at least often require an activism inconsistent with Supreme Court deference to congressional law making.[391]

There is however another sense in which the refusal to create within the context of the substantive values of federalism and separation is not political: the refusal is not necessarily expressive of a judicial hostility to the substantive merits of congressional regulatory schemes. It is possible for a judge to decline to effectively enforce a regulatory scheme with which he agrees or about which he is indifferent within a doctrinal structure that values federalism and separation. It is possible because a statute's scope of permissable operation may be established by reference to that doctrinal structure and without reference to the substantive merits of the statute's objectives or to the substantive merits of the means the statute invokes to achieve those objectives.

There is, however, yet another sense in which it may be claimed that a refusal to make law is necessarily political. The effect of such a refusal is to preserve the status quo, and the status quo, because often the product of private orderings within a structure of judge-made law, is inherently the product of some normative perspective about the proper functioning of the good society.[392]

The invocation of a statute as a reason for judicial decision imposes a choice on a court. The court must either require the party

389. Fiss, *supra* note 23, at 9-17.

390. *See, e.g.*, Levinson, *supra* note 3; Brest, *supra* note 3.

391. *See, e.g.*, National League of Cities v. Usery, 426 U.S. 833 (1976); Stone v. Powell, 428 U.S. 465 (1976).

392. *See* Kennedy, *supra* note 5, at 1752-66.

invoking the statute to show that the legislature has authorized judicial action or require the party against whom the statute is invoked to show that the legislature has not authorized judicial action. The former allocation tends to restrict the statute's scope of operation and the latter to expand that scope of operation.[393] In instances where the legislature has failed to specify a decision—the case where it is claimed that a private cause of action should be implied from a federal regulatory scheme—the former allocation will always have the substantive result that the status quo, often the status quo as it has been privately formulated within a regime of state law, is preserved.[394] Such a substantive result is the product of a judicial choice between alternative allocations of the burden of persuasion, and that choice cannot be grounded upon legislative decision—it is stipulated that the legislature has made no decision. It is therefore tempting to conclude that the criterion by which the choice is made is political: because the Burger Court cannot claim that it defers to a non-existent congressional decision, it defers in fact to private orderings or to state law from a hostility to governmental intrusion or, at least, to federal regulation.[395]

In part, this claim merely repeats the claim that the value the Burger Court places on federalism and separation of powers is a substantive political decision. It is, however, also a claim that any meta-rule regarding judicial treatment of a statute's scope of operation—both a meta-rule that confines a statute to its ascertained meaning and a meta-rule that draws on the statute as a source of policy or principle for judicial decision in contexts outside that meaning—is necessarily political because the choice between alternative meta-rules is made by reference to alternative and controversial visions of the good society. However, the fact that it is a meta-rule—a rule governing a generic judicial attitude toward statutes independent of the particular policy content of any given statute—renders decisions within the structure of a choice of meta-rules politically neutral for the same reason that decisions within a structure that places great value on federalism are politically neutral.[396] The structure is itself not politically neutral; it is an expression of underlying beliefs about the wisdom, efficacy and morality of governmental action. But decisions made within the structure are reached

393. *See* Easterbrook, *supra* note 4.

394. Lindgren, *Social Theory and Judicial Choice: Damages and Federal Statutes*, 28 BUFF. L. REV. 711, 727-35 (1979). *See* Sante Fe Industries, Inc. v. Green, 430 U.S. 462 (1977).

395. *See* Note, *supra* note 34, at 908-12.

396. *See supra* text accompanying notes 390-91.

by reference to the structure rather than by reference to the judge's view of the substantive merits of statutory schemes.

It is obvious that the political character of the choice between meta-rules is the normative character of the choice between alternative versions of the role of courts, legislatures and statutory text.[397] The latter choice is perhaps intrinsically linked to substantive political perspective in the sense, at least, that any given version of judicial role reflects a controversial version of the good society.[398] It has been the argument here that it is possible despite that linkage to distinguish between the inevitably normative character of a court's perspective regarding its role and the potentially political character of a court's perception of the meaning of a particular statute and the significance of that meaning in the context of the facts of a case, but it cannot be denied that substantive political vision generates the structure within which judgments about the political neutrality of particular statutory applications may be made. The "neutral principle" of judicial restraint adopted by the Burger Court—like the "neutral principle" of tolerance of absurd and unjust results—can be employed in a politically neutral fashion; judgments about the neutrality of such a principle's employment may be made on the basis of available evidence. But neutral principles are not themselves politically neutral; they are linked to and supported by controversial political arguments.

This admission brings us, however, to a point made earlier regarding the triviality of the claim that the Burger Court's approximated positivism is necessarily normative.[399] The fact that the Burger Court applies statutes within a normative and controversial perspective does not defeat the Court's claim to the status of a mere agent of a congressional sovereign unless that claim is understood in its strongest and most absurd sense. The claim retains viability in the weak sense that the Court can behave as a more or less faithful agent on the controversial premise that it ought to behave as an agent.[400]

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397. *See supra* text accompanying notes 61-76.

398. *See generally, e.g.*, Kennedy, *supra* note 5; Tushnet, *supra* note 27.

399. *See* text and notes 316-23 *supra*.

400. *But cf. My Response To Stanley Fish, supra* note 3, at 298-303 (it is not possible to distinguish a skeptical argument outside a practice from a moral or political argument within that practice); Knapp & Michaels, *supra* note 118, at 739-43 (it is not possible to be in a position of seeing our beliefs without believing them). There are senses in which the claim that one cannot stand outside of a practice supports the point made in the text here and senses in which the claim undermines that point. The notion underlying Dworkin's claim, a notion Dworkin shares with both Stanley Fish and Knapp and Michaels, is that interpretations are plausible only because they

The fact that its agency status cannot grant it the innocence of the automaton—that it is ultimately responsible for its understanding of the functions it performs within such a conception of its role—does not necessitate a conclusion that it cannot behave in a fashion consistent with that understanding. And there is no basis—other than the equally controversial premise that the court ought not to behave as an agent because to do so is inconsistent with alternative political visions—for the argument that the Burger Court's vision is "wrong."[401]

CONCLUSION

It is quite possible that a normative view regarding judicial role is the product of a substantive political perspective regarding the nature of the good society. Legal formalism may, for example, be the product of "individualism." It is therefore quite possible that the Burger Court's response to any particular statute will reflect its

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are connected to or embedded in some "practice" or political theory. This article assumes that notion has force in the context of application within a situation, and argues here that, if one assumes that the point of statutory application is to behave as an agent, one can in degree succeed in behaving as an agent. The article is skeptical, however, in the sense that it denies that there is an objective basis for concluding either that one should or that one should not entertain the postulated assumption.

The claim that one cannot stand outside of a practice may mean that skepticism is impossible because it requires a claim of knowledge its point is to deny: to say that objectivity is impossible is to make a claim that objectivity is objectively impossible. Skepticism in this form is therefore internally inconsistent. But the internal inconsistency of skepticism merely defeats skepticism's claim to a status above the fray. Skepticism understood as a denial of the possibility of objectivity assumes that the point of interpretation or application is objectivity because skepticism requires a target. Such an assumption cannot itself be verified within a skeptical system of thought; skepticism, like its competitors, requires a leap of faith it cannot validate.

The internal inconsistency of skepticism does not however defeat skepticism's alternative claim to being a position that can be held simultaneously with a non-skeptical position. The fact that skepticism in the form "knowledge is mere belief" is itself merely a belief does not preclude entertaining that belief. It is in fact quite possible to have a position about how a court ought to interpret and apply statutes and simultaneously to believe that neither one's own position nor its competitors can be shown to be correct. It is moreover possible to simultaneously believe that "napalming babies" is evil and to recognize that assertion as merely a belief. *See* Leff, *supra* note 117. Indeed, this capacity is a chief characteristic of twentieth century consciousness; it requires an extraordinary medieval arrogance to be not simultaneously amused and terrified by the frailties of one's beliefs and the dependence of one's perceptions upon these beliefs. The dilemma faced by a twentieth century consciousness is the dilemma of the necessity of exercising power by acting on belief—a dilemma made more acute in proportion to one's power over others and therefore made very acute in the case of the judge.

401. *See, e.g.*, Arnold, *Professor Hart's Theology*, 73 HARV. L. REV. 1298 (1960); Leff, *supra* note 117.

substantive political perspective: ideological hostility to federal regulatory schemes may be expressed in terms of the values of judicial neutrality in enforcing congressional political judgments.

There are, however, two reasons to think this possibility of limited force as a ground for criticism. First, the Burger Court's ideals, if consistently pursued, limit the capacity of substantive political perspective to control adjudication. If it is possible to perceive a meaning with which one disagrees, adjudication by reference to plain statutory meaning limits the extent to which substantive political perspective can be the real ground for decision. This does not mean that substantive perspective is without force; it may control allocation of a burden of persuasion regarding the relevance and significance of statutory meaning. But the Burger Court's stated ideals act to preclude the "judicial creativity" necessary to gutting a regulatory scheme even if they permit limiting that scheme to its minimum content.

Second, even if it is true that substantive political perspective controls adjudication, that observation merely eliminates the judicial claim to neutrality; it says absolutely nothing about what view of the good society ought to prevail. Indeed, if the observation is correct in its premise that formalism reflects a particular individualist understanding of the good society, it constitutes merely a basis for predicting the probable triumph of that perspective: persons entertaining the perspective possess the power to impose it.[402] To the extent that the observation makes an additional claim to a normative critique of the Burger Court's substantive political perspective, it is reduced to an assertion that the Court's values are simply "wrong;" a claim to which the Court has a complete and irrefutable defense in the form of a counterassertion: "no, they are not."

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402. It is true that a part of this power is the claim to neutrality, but it is at least doubtful either that exposure of the reality of judicial freedom in law reviews will significantly undermine this source of power or that exposure would make any difference to the prospects for alternative substantive political values. Indeed, successful exposure such that the American public became aware of the substantive political basis for judicial decision could only undermine the judicial power base from which critics of the Burger Court's substantive political views have any hope of imposing their own political perspective.

ARTICLES

BRIBERY AS A "REAL" DEFENSE AGAINST A HOLDER IN DUE COURSE

LOIS REGENT DRISCOLL*

I. INTRODUCTION

Bribery[1] is an ancient evil. Egypt's legal system, which goes back "beyond 4000 B.C.,"[2] has left relics of specific pronouncements by King Thutmose III dated about 1500 B.C.[3] condemning partiality on the part of a judge.[4] Egyptian King Harmhab's Edict for Judges,[5] written about

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1. Bribery is an unusually complex molecule and involves careful and extensive separate study. *See generally*, E.A. ROSS, SIN AND SOCIETY (1907); W.M. REISMAN, FOLDED LIES: BRIBERY, CRUSADES AND REFORMS (1979) containing a bibliography of over 180 sources including United Nations and Congressional papers and law review articles; N.H. JACOBY, P. NEHEMKIS, and R. EELLS, BRIBERY AND EXTORTION IN WORLD BUSINESS: A STUDY OF CORPORATE POLITICAL PAYMENTS ABROAD (1977); R.L. SMITH, THE TARNISHED BADGE (1965); THE KNAPP COMMISSION REPORT ON POLICE CORRUPTION (1972); D. BOULTON, THE GREASE MACHINE: THE INSIDE STORY OF LOCKHEED'S DOLLAR DIPLOMACY (1978); R.W. GREENE, THE STING MAN: INSIDE ABSCAM (1981); J. LEVY-CAEN, DE LA CORRUPTION DES EMPLOYES: EN DROIT FRANÇAIS ET EN DROIT ANGLAIS (1934); L.R. DRISCOLL, *The Illegality of Bribery: Its Roots, Essence, and Universality*, CAPITAL U.L. REV. (to be published February 1985).

2. J. WIGMORE, A PANORAMA OF THE WORLD'S LEGAL SYSTEM 11 (Library Ed. (1936).

3. *Id.* at 16.

4. "It is an abomination of the god to show partiality. This is the teaching: thou shalt act alike to all, shalt regard him who is known to thee like him who is unknown to thee, and him who is near to thee like him who is far . . ." *id.* at 16-17, quoting from instructions recorded on the tomb of chief judge Rekhmire purporting to have been pronounced by King Thutmose III, citing the translation from J.H. BREASTED, 2 ANCIENT RECORDS OF EGYPT § 666-670 (1907), at 52, n.c., 53.

5. King Harmhab's Edict, set forth by Wigmore, *supra* note 2, at 15-16, in part inveighs: "I have sailed and traveled throughout the entire land. I have sought out two judges perfect in speech, excellent in character, skilled in penetrating the innermost thoughts of men, and acquainted with the procedure of the palace and the laws of the court . . . I have said to them, 'You shall not take money from one party and decide without hearing the other; for how could you sit as judges upon other men's deeds when one among you is himself committing an offense against justice? The penalty for such an offense shall be death.' And I the king have decreed this, that the laws of Egypt be bettered, and that suitors may not be oppressed. For I

1300 B.C.,[6] on penalty of death, even more expressly and absolutely prohibits a jurist from taking money from a party to a lawsuit.[7]

Almost as old as bribery itself is the law of commercial paper. The first known negotiable instrument dates back to about 2100 B.C., around the time of the reign of King Hammurabi.[8]

The laws pertaining to bribery and commercial paper are not only ancient, but each is an integral part of our present everyday lives. On a single average business day recently in the United States, it is reported that over 100 million checks valued at over $50 billion were written.[9] As for the prevalence of bribery today, the post-Watergate scandals involving Lockheed Aircraft's countless millions of dollars in payment abroad,[10] and the incredible videotaped "Abscam"[11] operations at home, depict bribery as quotidian today as garden weeds, the common cold and TV soap operas.

1. Bribery Laws

Although they apparently have very little deterrent effect, we have anti-bribery laws aplenty[12] on the books. The founding fathers

Id. (citing at 52, n.b., 53, the translation in BREASTED, *supra* note 4, Vol. 3 § 23.)

6. *Id.* at 18. Harmhab is said to have married the aunt-in-law of King Tutankhamen. *Id.*

7. *See supra* note 5.

8. The bearer note reads, "5 shekels of silver, at the usual rate of interest, loaned by the Temple of Shamash and by I. Company, to Idin and his wife, are payable with interest on sight of the payors at the market-place to the bearer of this instrument." WIGMORE, *supra* note 2 at 69 (citing the German translation in M. SCHORR, URKUNDEN DES ALTABABYLONISCHE ZIVIL-UND PROZESSRECHTS, (No. 58) at 88 (1913). *Id.* at 95, n.e.

9. REILING, THOMPSON, BRADY and MACCHIAROLA, BUSINESS LAW TEXT AND CASES 393 (1981).

10. BOULTON, *supra* note 1 at xiv. Senator Church, investigating Lockheed Aircraft, is quoted as stating, "The bribes and the payoffs associated with doing business abroad represent a pattern of crookedness that would make, in terms of its scope and magnitude, crookedness in politics look like a Sunday school picnic by comparison." *Id.* at 266.

11. "Abscam" was short for Abdul scam and involved a two-year investigation operated through a dummy corporation on Long Island called Abdul Enterprises, Ltd. which resulted in bribery indictments of, among others, Philadelphia Congressman Michael J. Myers; Representative Raymond F. Lederer (D-Pa.), a member of the House Ways and Means Committee; Representative John W. Jenrette, Jr. (D-S.C.), a member of the House Appropriations Committee; Representative Richard Kelly (R-Fla.); Representative Frank Thompson, Jr. (D-N.J.), Chairman of the House Administration Committee and the subcommittee on Labor-Management Relations; and Representative John M. Murphy (D-N.Y.). GREENE, *supra* note 1, at 5-6.

12. "There is law aplenty on the books," but the real question is the extent of "commitment to consistent and vigorous enforcement, which is, of course, the key to the enforcement of antibribery laws and indeed to any meaningful response to white-collar crime." REISMAN, *supra* note 1 at 160.

so deplored bribery that, except for treason, it is the only crime specified in the Constitution as an impeachable offense.[13] Bribing another's employee to influence him to perform his duties improperly ("commercial bribery"[14]) is a common law offense,[15] is prohibited by specific criminal statutes in at least half our states[16] and, in the rest, may constitute wrongful conduct under the common law, or under one or a combination of those states' various general criminal

13. U.S. CONST., art. II, § 4 provides for impeachment of the president, vice-president, and all civil officers for "Treason, Bribery, or other high Crimes and Misdemeanors." As to this provision, Prof. Reisman says, "It should be no surprise that the first modern experiment in popular government fixed so sharply on bribery as a fundamental violation of the trust the people were putting in an elected leader. In this constellation of expectations, bribery is a form of treason." *Id.* at 3-4.

14. Commercial bribery has been defined as the "bribing of another's employees for the purpose of inducing the employees to act in their employment in some way favorable to the briber's interest." D.B. DOBBS, HANDBOOK OF THE LAW OF REMEDIES 700 (1973). It has also been described as "an offense of bribing an employee, servant, or agent, with the intent to influence him in his relation to his employer, master or principal." 1 A.L.R. 3d 1350, 1352-53 (1965). 12 AM. JUR. 2d 759 (1964) defines it as "the act of giving or receiving a gift for the purpose of influencing any agent to improperly discharge a duty entrusted to him by a private individual or corporation." The history of various statues prohibiting commercial bribery is described in Perrin v. United States 444 U.S. 37 (1979). "Commercial bribery was generally treated under the rubric of the law of 'master and servant' since it involved deceit of the employer practiced jointly by the external briber and the employee as well as contractual violations by the employee. But the Federal Trade Commission viewed commercial bribery as an unfair trade practice." REISMAN, *supra* note 1 at 176, n.3. *See also* United States v. Pomponio, 511 F.2d 953 (4th Cir. 1975).

15. "The common law offense of bribery has been defined as follows: 'whenever a person is bound by law to act without any view to his own private emolument, and another by a corrupt contract engages such person on condition of the payment or promise of money or other lucrative consideration to act in a manner which he shall prescribe, both parties are by such contract guilty of bribery' (14 Halsbury's Laws (3rd Ed.) 213; 2 Douglas Election Cases 400)." I WORDS AND PHRASES, *Bribery* 185 (2d ed. 1969).

16. *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-2605 (Supp. 1983-84); ARIZ. GEN. CORP. LAW § 10-136 (1977); COLO. REV. STAT. § 18-5-401 (1978); CONN. GEN. STAT. §§ 53a-160, 53a-161; HAWAII REV. STAT. § 708-880; ILL. REV. STAT. Ch. 28 §§ 29A-1—20A-3; KAN. STAT. ANN. § 21-4405; KY. REV. STAT. §§ 518.030; LA. REV. STAT. ANN. 14:73; MASS. GEN. LAWS, Ch. 271 § 39; MICH. STAT. ANN. § 750-150; MO. REV. STAT., title 38 § 570.150; NEB. REV. STAT. § 28-710; NEV. REV. STAT. §§ 613.110, 613.120; N. H. REV. STAT. § 638.7; N.J. STAT. ANN. §§ 2C:21-10 through 2C:21-15; 2C:41-1 through 2C:41-6.2 (1979); N.Y. PENAL LAW §§ 180.00—180.08; N.C. GEN. STAT. § 14.353; PA. CONS. STAT. ANN. title 18 § 4108; R.I. GEN. LAWS §§ 11-7-3—11-7-5; S.C. CODE § 16-17-540; TEX. PENAL CODE ANN. § 32.43 (1974 and Supp. 1984); UTAH CODE ANN. § 76-6-508 (1978); VA. CODE § 18.2-444 (1982); WASH. REV. CODE ANN. §§ 49.44.060, 49.44.070 (1962); WIS. STAT. § 134.05. Commercial bribery may also violate other criminal statutes in these states, and their common law; furthermore, in other states, it may violate the common law and various of their other criminal statutes. *See infra* note 17.

Arizona, Colorado, Kansas, New Hampshire, New York and Texas provide for felony violations under certain circumstances. In other states, commercial bribery violations constitute misdemeanors.

statutes.[17] Federal statutes providing a second layer of enforcement supplementing state authority to prosecute commercial bribery have recently proliferated.[18]

The earliest commercial bribery[19] statutes passed in the United States were enacted just after the turn of the century.[20] They represented a legislative response to the then alarming spread of commercial bribery and its viciousness, dishonesty, and "demoralizing tendencies."[21] New York's first commercial bribery statute, passed in 1905,[22] was expanded

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17. *See, e.g.,* CAL. PENAL CODE §§ 484, 504, 506, 508, 639 and 639a; IDAHO CODE ANN. § 18-2402; MONT. CRIM. CODE §§ 94-2306—2309; N.M. CRIM. CODE § 30-16-6 (general criminal fraud statute); OHIO REV. CODE §§ 2913.02, 2921.13, 2913.43(A), 2921.21(A), 2923.03, 2921.22(A), 2905.12(C), 2905.11; OR. REV. STAT. § 165.080 (falsifying business records); OKLA. REV. STAT. 21 § 421 (conspiracy), 21 § 1640; WYO. REV. STAT. § 6-7-315.

18. *See Perrin, supra* note 14; the Federal Trade Commisison Act, as amended, 15 U.S.C. § 45(a)(1)(2) (1982); the Mail Fraud statute, 18 U.S.C. § 1314 (1982); the Robinson-Patman Act, 15 U.S.C. § 13 (1982); the Travel Act, 18 U.S.C. § 1952 (1982); the Hobbs Act, 18 U.S.C. § 1951 (1982); the Racketeer Influenced Corrupt Organization Act ("RICO"), 18 U.S.C. § 1962 (1982); the Bank Secrecy Act, 31 U.S.C. § 1059(2) (1982); the Wire Fraud statute, 18 U.S.C. § 1343 (1982). There are also a large number of federal statutes prohibiting not only such activities as bribing a Congressman (18 U.S.C. §§ 204-205), a bank examiner (18 U.S.C. §§ 212-213) or any other federal "public official" (*see* 18 U.S.C. § 201(a)), but criminalizing "graft" and "conflict of interest" (18 U.S.C. §§ 201-211) even as to former employees (*id.*) and partners of employees (*id.*). As to what commissions or fees are unlawful under the Robinson-Patman Act, *see* 42 A.L.R. FED. 276 (1979). *See also* 55 AM. JUR. 2d *Monopolies* §§ 17, 162, 163, 800, 801 (1971); as to cases dealing with federal kick-back statutes (41 U.S.C. §§ 51-54 (1982)), *see* 17 L.Ed.2d 919 (1967). Any consignee or consignor of property delivered for interstate transportation may not receive money or any valuable consideration as a rebate or offset against regular charges for transportation. *See* § 1(3) of the Elkins Act, 49 U.S.C. § 41(3). A briber may be prosecuted for his activities in aiding a bank officer who violates 18 U.S.C. §§ 371 and 215. U.S. v. Michael, 456 F. Supp. 335 (D.C.N.J. 1978). *See also* Continental Management, Inc. v. U.S., 527 F.2d 613 (Ct. Cl. 1975) as to civil sanctions, and cases collected at 12 AM. JUR. 2d 750, *Bribery, Under Federal Statutes* § 4 (1964).

As to the Foreign Corrupt Practices Act (15 U.S.C. §§ 78a, 78m) see ARKIN, DUDLEY, EISENSTEIN, RAKOFF, RE AND SIFFERT, 5 BUSINESS CRIME: CRIMINAL LIABILITY OF THE BUSINESS COMMUNITY, ch. 18 and, generally, JACOBY, NEHEMKIS AND EELLS, *supra* note 1; BOULTON, *supra* note 1.

19. *See supra* note 14.

20. *See* 1 A.L.R.3d 1353 (1978). As to the constitutionality of commercial bribery statutes generally, see Annot., 1 A.L.R.3d 1350, 1357 (1978); State v. Brewer, 375 U.S. 9 (1963).

21. The words of Sirkin v. Fourteenth St. Store, 124 App. Div. 384, 387, 108 N.Y.S. 830, 832 (1st Dept. 1908).

22. New York's original commercial bribery statute was Sec. 384r of its then Penal Code, which provided: *"Corrupt influencing of agents, employees or servants.*— Whoever gives, offers or promises to an agent, employee or servant, any gift or gratuity

in 1909[23] and became § 439 of the former New York Penal Law, which thereafter was pared down[24] and cast into two separate statutes.[25] A further 1976 amendment bifurcated the crime into degrees, rendering the first degree a class A misdemeanor.[26] The most recent amendments raised the penalties in all four commercial bribery statutes, so that commercial bribing and bribe receiving in the first degree for the first time in New York's history may constitute class E felonies.[27]

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whatever, without the knowledge and consent of the principal, employer or master of such agent, employee or servant, with intent to influence his action in relation to his principal's, employer's or master's business; or an agent, employee or servant who without the knowledge and consent of his principal, employer or master, requests or accepts a gift or gratuity or a promise to make a gift or to do an act beneficial to himself, under an agreement or with an understanding that he shall act in any particular manner to his principal's, employee's or master's business; or an agent, employee or servant, who, being authorized to procure materials, supplies or other articles either by purchase or contract for his principal, employer or master, or to employ service or labor for his principal, employer or master, receives directly or indirectly for himself or for another, a commission, discount or bonus from the person who makes such sale or contract, or furnishes such materials, supplies or other articles, or from a person who renders such service or labor; and any person who gives or offers such an agent, employee or servant such commission, discount or bonus shall be guilty of a misdemeanor and shall be punished by a fine of not less than ten dollars nor more than five hundred dollars, or by such fine and by imprisonment for not more than one year." 1905 N.Y. Laws 225.

23. N.Y. PENAL LAW § 439 (1909), amended 1930 N.Y. Laws 882, c. 409. 1953 N.Y. Laws 2455 c. 891, § 7 was from Penal Code 1881, § 384r, added 1905 N.Y. Laws 225 c. 136, § 1.

24. N.Y. PENAL LAW §§ 180.00, Commercial bribing, and 180.05, Commercial bribe receiving were passed by 1965 N.Y. Laws 2343 c. 1030. *Id.* at 326, 330. The new statutes deleted the former § 439 penalties which rendered a seller who gave a present to a purchasing agent and the agent both guilty of a crime even in the absence of any intent or agreement that the agent's conduct would thereby be influenced.

25. *See supra* note 24.

26. Effective September 1, 1976, pursuant to 1976 N.Y. Laws, c. 458, §§ 1 and 5. Prior to that time, both commercial bribing and commercial bribe receiving were class B misdemeanors not split into different degrees. *See* 1965 N.Y. Laws 2420, c. 1030.

27. The most recent amendments were effective September 1, 1983, and were passed by 1983 N.Y. Laws 2048, c. 577 § 1. N.Y. PENAL LAW § 180.08 entitled "Commercial bribe receiving in the first degree" provides:

> An employee, agent or fiduciary is guilty of commercial bribe receiving in the first degree when, without the consent of his employer or principal, he solicits, accepts or agrees to accept any benefit from another person upon an agreement or understanding that such benefit will influence his conduct in relation to his employer's or principal's affairs, and when the value of the benefit solicited, accepted or agreed to be accepted exceeds

2. Definition of Bribery

Bribery has almost as many definitions as does the word "evil" or "immorality." The subject requires separate and extensive study, not here undertaken. For our purposes, we must keep in mind that bribery is always associated with gross corruption.[28]

The verb "to bribe" is derived from and originally was defined as "to steal."[29] Bouvier's 1914 Law Dictionary defines a briber simply as "a thief."[30] One workable modern definition of bribery is "the act or practice of giving, offering, or taking rewards for corrupt practices."[31] It is applied both to the one who gives and to the one who receives.[32]

The difference between "commercial bribery"[33] and the bribery of public officials has to do with the position held by the bribe-receiver. In commercial bribery, he works for a private, rather than a public, employer. The bribery of public officials is far graver, since it involves the prostitution of a public trust.

The essence of the act of bribery is the giving of a gift or benefit *for the purpose of corruptly influencing an agent to discharge his duties improperly.* In that sense, it is the antithesis of honest pay received for an honest day's work. It is dishonest pay received secretly to perform the dishonest bidding of the briber, in breach of the bribe-receiver's duty toward his principal or employer, be such principal or employer a public or private commercial entity.

When a briber gets "his man" (the bribe-receiver) within a system of justice, politics, some branch of commerce, or within another's

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one thousand dollars and causes economic harm to the employer or principal in an amount exceeding two hundred fifty dollars. Commercial bribe receiving in the first degree is a class E felony.

N.Y. PENAL LAW § 180.08 (McKinney 1975 and Supp. 1983-84). *See also* New York companion statutes: § 180.00 Commercial bribing in the second degree; § 180.03 Commercial bribing in the first degree; § 180.05 Commercial bribe receiving in the second degree; related statutes in Article 180, N.Y. PENAL LAW.

28. See McConnell v. Commonwealth Pictures Corp., 7 N.Y.2d 465, 199 N.Y.S.2d 483, 166 N.E.2d 494 (1960); DRISCOLL, *supra* note 1.

29. THE CENTURY DICTIONARY AND CYCLOPEDIA, AN ENCYCLOPEDIC LEXICON OF THE ENGLISH LANGUAGE, Vol. 1 (1911).

30. The definition, in its entirety, reads: "BRIBOUR. One who pilfers other men's goods; a thief. *See* 28 Edw. II. c.1." BOUVIER'S LAW DICTIONARY 3d rev. 8th ed. 395 (1914).

31. THE WEBSTER'S NEW ENCYCLOPEDIC DICTIONARY OF THE ENGLISH LANGUAGE, UNABRIDGED 226 (1977); *see also* DRISCOLL, *supra* note 1.

32. *Id.*

33. *See supra* note 14 and 27.

business, "his man" has been "bought" and is thus "owned" by the briber, although he officially works for another. What follows is a boring-from-within betrayal process. Through "his man" the briber gets what he wants from the employer and, to that extent, secretly controls and thereby also "owns" the employer. The briber thus "steals" the services and loyalty of the agent or employee from the employer. Viewed in this light, bribery has been characterized not only as different from, but possibly worse[34] than any other species of crime, and has been described as a form of "treason."[35]

II. SCOPE OF ARTICLE

One recent case required the superimposing of the complex legal problems involved with bribery onto the clockwork of the law of commercial paper. The case was *Bankers Trust v. Litton Systems, Inc.*,[36] decided in 1979 by the United States Court of Appeals for the Second Circuit, applying New York law. There, apparently for the first time, a court was asked to decide whether bribery was a "real"[37] defense against a holder in due course.[38] The court found it was not a "real" but a "personal"[39] defense, to be treated the same as fraud in the inducement.[40]

This article analyzes the *Bankers Trust* decision and suggests, in the interests of justice and in furtherance of the general public

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34. "Bribery is thus different from other species of crime—worse, if you like—but there is no reason to assume that bribery does not have its operational code." REISMAN, *supra* note 1, at 2.

35. *See supra* note 13. Bribery is offensive and antithetical to our basic economic philosophy insofar as it interferes with our need to maintain competitive conditions. *See, e.g., Continental Management, supra* note 18. Since maintenance of competition "is not viewed as a tampering with nature in favor of one class or another but as a type of conservation, a fidelity to an essentially necessary state of nature," bribery is the antithesis of our most fundamental policies and goals. REISMAN, *supra* note 1, at 41. In contrast to American economic philosophy which is founded upon the maintenance of free competition, consider Joe Bonanno's description of the economic philosophy of organized crime. As a main objective, it seeks to establish and maintain a strict system of monopolies. In his words, "If two Family members are bakers, they are not allowed to own bakeries on the same block, for that would be bad for both their businesses. They would be competing against each other." J. BONANNO with S. LALLI, A MAN OF HONOR, THE AUTOBIOGRAPHY OF JOSEPH BONANNO 79 (1983).

36. 599 F.2d 488 (2d Cir. 1979).

37. *See infra* note 80 as to "real" defenses.

38. *See infra* Part III.

39. *See infra* note 80 as to "personal" defenses.

40. 599 F.2d at 493. Fraud in the inducement is fraud as to the nature of the transaction as contrasted to fraud in the execution (or "essential" fraud) which is fraud as to the nature of the instrument.

policy interest which New York has always had in condemning criminal bribery, the court could and should have gone the other way. In any event, the analysis clarifies that even if *Bankers Trust* is applicable to the particular facts of that case, it does not purport to, nor should it be construed as standing for the general principle that bribery is not a "real" defense good against the holder in due course of a negotiable instrument.[41]

III. HOLDER IN DUE COURSE IN THE LAW OF COMMERCIAL PAPER: PHILOSOPHY AND TECHNICAL PREREQUISITES

To cope with the issue of whether bribery is a good defense in a civil action by a holder in due course, a basic understanding of the underlying doctrines and the technical requirements of attaining holder in due course status is necessary.

1. Philosophy

The holder in due course has been said to be the "emperor of bona fide purchasers."[42] The precursor of the concept of bona fide or good faith purchaser appears primitively and as an ungerminated seed, as early as 2250 B.C. in the Code of Hammurabi.[43] The first known

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41. *See infra* note 83 as to the definition of "instrument."

42. WHITE AND SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE 456 (1972). The holder in due course is "one of the few purchasers in Anglo Saxon jurisprudence who may derive a good title from a chain of title that includes a thief in its links." *Id.* at 459.

43. Sections 9-12 of this earliest Code provide:

> 9. If any one lose an article, and find it in the possession of another: if the person in whose possession the thing is found say "A merchant sold it to me, I paid for it before witnesses," and if the owner of the thing say "I will bring witnesses who know my property," then shall the purchaser bring the merchant who sold it to him, and the witnesses before whom he bought it, and the owner shall bring witnesses who can identify his property. The judge shall examine their testimony—both of the witnesses before whom the price was paid, and of the witnesses who identify the lost article on oath. The merchant is then proven to be a thief and shall be put to death. The owner of the lost article receives his property, and he who bought it receives the money he paid from the estate of the merchant.
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> 10. If the purchaser does not bring the merchant and the witnesses before whom he bought the article, but its owner bring witnesses who identify it, then the buyer is the thief and shall be put to death, and the owner receives the lost article.
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> 11. If the owner do not bring witnesses to identify the lost article, he is an evil-doer, he has traduced, and shall be put to death.
>
> 12. If the witnesses be not at hand, then shall the judge set a

negotiable instrument[44] is likewise of Hammurabian vintage, although the fertile idea[45] of transferability and negotiability did not appear in European law until thousands of years later in the late middle ages.[46]

By the mid-1700's, however, our current basic principles of the law of commercial paper were clearly laid down in the decisions of English courts.[47] In 1758, Lord Mansfield in the seminal case of *Miller v. Race*[48] set forth the essential elements of the holder in due course doctrine.[49]

The theory enunciated in *Miller v. Race* was that if *T* steals money from victim *V*, *V* has a good cause of action against *T* to recover the money. But if *T* has used the money and it eventually finds it way into the hands of, for example, merchant *M*, who took it for goods sold, *V* cannot recover the money from *M*.

Substituting bearer paper[50] for cash, if *T* steals bearer paper from *V*, *V* cannot recover the instrument if it passes through commerce

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limit, at the expiration of six months. If his witnesses have not appeared within the six months, he is an evil-doer and shall bear the fine of the pending case. Code of Hammurabi, B.C. 2250, Pamphlets, V1421, 12182. Association of the Bar of the City of New York Library.

44. *See supra* note 8.

45. WIGMORE, *supra* note 2, at 69.

46. *Id.*

47. W. BRITTEN, BILLS AND NOTES 9 (2d ed. 1961).

48. 1 Burr. 452, 97 Eng. Rep. 398 (K.B. 1758).

49. In *Miller, supra*, note 48 a demand promissory note in the amount of 21 pounds 10 shillings was made payable to William Finney or bearer. Finney mailed the note to one Bernard Odenharty on December 11, 1756, but it was lost in a mail robbery. Miller was an innkeeper who took the note for value on December 12th, in the usual course of his business; but when he applied to the bank for payment, Race, the bank clerk, refused either to pay the note or to redeliver it to Miller, because the bank had been asked to stop its payment. Miller sued in trover for wrongful conversion. Because he had taken the instrument for full and valuable consideration, and in the usual course of his business and without any notice or knowledge that it had been stolen, Miller prevailed. He was, although that term was not specifically coined, a "holder in due course."

50. The law of commercial paper in the United States is embodied in the Uniform Commercial Code (UCC). Louisiana has adopted only Articles 1, 3, 4, 5, 7 and 8 of the UCC. UCC 1978 Official Text with Comments, Table 1, XLIII, n.3. The New York UCC statutes are referred to as "UCC" followed by a section number. All quotes of the text of the UCC statutes have been taken from the UCC 1978 Official Text, *supra*. The UCC has been applied in bankruptcy proceedings (In re United Thrift Stores, 363 F.2d 11, 14 (3rd Cir. 1966)) and "is generally considered to be the federal law of commerce." In re Quantum, 397 F. Supp. 329, 336, n.2 (D.C. Virgin Islands D. St. Croix 1975), citing In re King-Porter Co., 446 F.2d 722, 732 (5th Cir. 1971).

As to "bearer paper," UCC § 3-111 provides, "An instrument is payable to

and finds its way into the hands of one we now call a holder in due course;[51] also, the issuer[52] should ordinarily be liable to pay the holder in due course if sued for the amount of the instrument.

Put another way, we have a general rule of law that "no one can transfer a better title than he himself possesses:[53] *Nemo dat quod non habet.*"[54] But one of the exceptions to this rule arises out of the law merchant as to negotiable instruments.[55] If such an instrument passes to that "highly refined species of bona fide purchaser"[56] known as a holder in due course, he will take the instrument "free of conflicting title claims to the instrument itself"[57] and, more importantly for our purposes, free of almost all defenses of prior parties with whom he has not dealt.[58] The holder in due course is accorded this extraordinary protection not because of his "praiseworthy character"[59] but to facilitate all commercial transactions and encourage and assure the free flow of negotiable instruments in commerce. The law desires unfettered negotiability of instruments and to that end assures that a holder in due course acquires the right to collect on instruments he buys on the market without the need for any "elaborate investigations"[60] of the process and background leading up to the

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bearer when by its terms it is payable to (a) bearer or the order of bearer; or (b) a specified person or bearer; or (c) 'cash' or the order of 'cash,' or any other indication which does not purport to designate a specific payee." *See also* UCC § 3-805.

51. *See* UCC § 3-302.

52. "Issue" means the first delivery of an instrument to a holder or remitter. UCC § 3-102(1)(a). "Issuer" is not used in the UCC. The issuer of a draft or check (see UCC § 3-104(2)(b)) is denominated a "drawer" (*see, e.g.,* UCC §§ 3-104(1)(b), 3-110(1)(a)), and the issuer of a note is denominated a "maker." *Id.* "Issuer" is used throughout to encompass either a "drawer" or "maker."

53. Whistler v. Foster, 14 Common Bench (N.S.) 248, 257-258, 43 Eng. Rep. 441, 444-45 (1863).

54. *Id.*

55. *Id.* Since negotiable instruments are "part of the currency," they "are subject to the same rule as money: and if such instrument be transferred in good faith, for value, before it is overdue, it becomes available in the hands of a holder, notwithstanding fraud which would have rendered it unavailable in the hands of a previous holder." *Id.* The law of "negotiable instruments" in the United States today is known as the law of Commercial Paper and is embodied for the most part in UCC Article 3. *See also* UCC § 1-103.

56. WHITE AND SUMMERS, *supra* note 42, at 456.

57. *Id.*

58. The holder in due course takes free of all defenses of a party with whom he has not dealt except those potent defenses (commonly known as the "real" defenses) described in the UCC. *See* UCC § 3-305(2).

59. *Supra* note 36, *Bankers Trust* at 599 F.2d at 494 citing Gilmore, *The Commercial Doctrine of Good Faith Purchase*, 63 YALE L.J. 1057 (1954).

60. *Id.*

issuance of those instruments. Any requirement to look beyond the face of the instruments would be time-consuming and would thereby impede their free flow.[61] Protection of the holder in due course traditionally has been likened to keeping "oil in the wheels of commerce."[62] Without the lubrication afforded by the holder in due course doctrine, it is said that "those wheels would grind to a quick halt."[63]

2. Some Basic Technical Prerequisites

To be a "holder in due course" of an instrument,[64] a person must at least be a "holder" as defined in UCC § 1-201:[65] he must not only be in possession of the instrument, but it must have been properly issued[66] or negotiated[67] to him. An instrument payable to order[68] and delivered to a transferee cannot be further negotiated or enforced by the transferee without indorsement.[69] Without such an indorsement, there is an incomplete negotiation. One given unindorsed order paper is a mere contract assignee. He stands in the shoes of his assignor and is incapable, until he attains the status of a "holder"[70] of acquiring the rights accorded to holders under UCC § 3-301.[71] *A fortiori*, such a transferee, because he is not a holder, cannot attain the rights of a holder in due course. One to whom order paper has been delivered without indorsement has the specifically enforceable right to have the

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61. The holder in due course is entitled to rely "on the contract rights of one who offers [the contract or instrument] for sale or to secure a loan." *Id.*

62. WHITE AND SUMMERS, *supra* note 42, at 457.

63. *Id.*

64. *See infra* note 83 as to the definition of "instrument."

65. "Holder" is "a person who is in possession of a document of title or an instrument or a certificated investment security drawn, issued, or indorsed to him or his order or to bearer or in blank." UCC § 1-201(20). *See also* UCC § 1-201(5) as to definition of "bearer."

66. *See supra* note 52 as to the definition of "issue."

67. "Negotiation is the transfer of an instrument in such form that the transferee becomes a holder. If the instrument is payable to order it is negotiated by delivery with any necessary indorsement; if payable to bearer it is negotiated by delivery." UCC § 3-202(1).

68. UCC § 3-110(1) in part provides: "An instrument is payable to order when by its terms it is payable to the order or assigns of any person therein specified with reasonable certainty, or to him or his order, or when it is conspicuously designated on its face as 'exchange' or the like and names a payee. . . ." *See also* UCC § 3-805.

69. The right of indorsement is covered in UCC § 3-201. The types of indorsements and their effect are important throughout Article 3 of the UCC, and are treated in detail, especially in UCC §§ 3-202 through 3-206.

70. *See supra* note 64.

71. Whether or not he is the owner, a holder of an instrument may transfer or negotiate it and, except as otherwise provided in UCC § 3-603, discharge it or enforce payment in his own name. *See* UCC § 3-301(3).

unqualified indorsement of his transferor:[72] he may demand the indorsement and, should it fail to be forthcoming, apply to a court of equity for a decree directing the transferor unqualifiedly to indorse.[73] Negotiation is complete only when the indorsement is made, until which time the law provides no presumption even that the transferee owns the instrument.[74] Upon receiving the indorsement, the transferee becomes a holder and thereby may be able to achieve the status of holder in due course.

Bearer paper,[75] in contrast to order paper,[76] may be properly and completely negotiated by delivery alone,[77] and is the closest thing to cash in the world of commercial paper. As we saw in *Miller v. Race*,[78] it can move from hand to hand without so much as the tip of a pen touching it.

UCC § 3-305 provides that a holder in due course will take the instrument free from claims to it on the part of any person[79] and free from what we commonly call "personal defenses"[80] of any party with whom he has not dealt.

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72. UCC § 3-201(3).

73. *Id.*

74. *Id.* A recent British case shows the broad general correlation of the UCC provisions to long-standing English law. To attain the rights of a holder or holder in due course, the court explains, "the holder of the bill must, if it be payable to order, obtain an indorsement and . . . he is affected by notice of a fraud received before he does so. Until he does so, he is merely in the position of the assignee of an ordinary chose in action, and has no better right than his assignor. When he does so, he is affected by fraud which he knew of before the indorsement." Bank of Cyprus v. Jones, Q.B., February 24, 1984 (12th para. of decision) quoting Whistler v. Foster, *supra* note 53.

75. *See supra* note 50 as to "bearer paper."

76. *See supra* note 68.

77. *See* UCC § 3-202(1) at *supra* note 67.

78. *Supra* notes 48, and 49.

79. UCC § 3-305(1).

80. Some of the "personal defenses" are set forth in UCC § 3-306. By "personal" defenses we mean all those which are not "real" defenses. UCC § 3-305 sets forth the real defenses, as follows:

> To the extent that a holder is a holder in due course he takes the instrument free from (1) all claims to it on the part of any person; and (2) all defenses of any party to the instrument with whom the holder has not dealt except (a) infancy, to the extent that it is a defense to a simple contract; and (b) such other incapacity, or duress, or illegality of the transaction, as renders the obligation of the party a nullity; and (c) such misrepresentation as has induced the party to sign the instrument with neither knowledge nor reasonable opportunity to obtain knowledge of its character or its essential terms; and (d) discharge in insolvency proceedings; and (e) any other discharge of which the holder has notice when he takes

There are five elements required for a "holder" to be a holder in due course, all of which are set forth in UCC § 3-302.[81] One must be

1. A holder[82] of a
2. Negotiable instrument,[83] who takes it for
3. Value[84] and in
4. Good faith[85] and
5. Without notice[86] that it was overdue or has been dishonored or of any defense or claim to it on the part of any person.[87]

One who is not himself a holder in due course because he cannot fulfill all the substantive (and substantial[88]) requirements of UCC § 3-302 may nevertheless attain the rights of a holder in due course if he took the instrument from a holder in due course.[89] In that way, for example, an instrument transferred as a gift may give an eligible donee[90] the same rights the donor had.[91] If the donor was a holder in due course, the donee normally attains his rights. There is yet one

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the instrument.

81. UCC § 3-302 provides: "A holder in due course is a holder who takes the instrument (a) for value; and (b) in good faith; and (c) without notice that it is overdue or has been dishonored or of any defense against or claim to it on the part of any person." UCC § 3-302(1). *See also* UCC § 9-206.

82. UCC § 3-302(1); *see also* UCC § 1-201(20), UCC §§ 3-305, 3-306, 3-202(1). *Cf.* UCC § 9-206 where this term is inapplicable.

83. For UCC Article 3 purposes "instrument" means negotiable instrument. UCC § 3-102(1)(e). *Cf.* UCC § 9-206 at text corresponding to note 93 *infra*. *See also infra* note 97.

84. UCC § 3-302(1)(a); *see also* UCC §§ 3-303, 9-206, 1-201(44), 4-208, 4-209 and WHITE AND SUMMERS, note 42 *supra*, at 465-71.

85. *Id.* at 471-72; UCC § 3-302(1)(b); UCC § 9-206.

86. UCC § 3-302(1)(c); UCC § 9-206; *see* UCC §§ 1-201(25), 3-304; WHITE AND SUMMERS, *supra* note 42, at 472-77.

87. UCC § 3-302(1)(c). *See also* UCC §§ 3-305, 3-306. UCC § 9-206 requires only that the assignee take his assignment "for value, in good faith, and without notice of a claim or defense . . . ."

88. At first blush the requirements listed in UCC § 3-302(1) may seem straightforward. Several of these elements, however, "are but doors which open onto breath-taking vistas of complex statutory and decisional law." WHITE AND SUMMERS, *supra* note 42 at 458.

89. *See* UCC § 3-201 as to the Code's "shelter" provisions.

90. *Id. See infra* note 91.

91. A transferee who has himself been a party to any fraud or illegality affecting the instrument or who had notice of a defense or claim against it as a prior holder cannot improve his position and benefit by the shelter provisions. *See* UCC § 3-201(1). Otherwise, the transferee obtains holder in due course rights if the transfer was by a holder in due course. Official Comment 2, UCC § 3-201.

more way of acquiring the rights of a holder in due course, and that is covered by UCC § 9-206 which pertains to assignees of certain buyers or lessees of non-consumer goods.[92] UCC § 9-206 in part provides:

> Subject to any statute or decision which establishes a different rule for buyers or lessees of consumer goods, an agreement by a buyer or lessee that he will not assert against an assignee any claim or defense which he may have against the seller or lessor is enforceable by an assignee who takes his assignment for value, in good faith and without notice of a claim or defense, except as to defenses of a type which may be asserted against a holder in due course of a negotiable instrument under the Article on Commercial Paper (Article 3). A buyer who as part of one transaction signs both a negotiable instrument and a security agreement makes such an agreement.[93]

In the *Bankers Trust*[94] case, we therefore see the term "holder in due course" applied to the assignee of a lease[95] (meaning one coming under the provisions of UCC 9-206). "Holder in due course" under Article 3 of the Uniform Commercial Code speaks only to a holder of a negotiable instrument. "Instrument" itself, under Article 3, means a "negotiable instrument;"[96] and "holder in due course" in both UCC §§ 3-302 and 3-305 speaks to holders of an "instrument," meaning a negotiable instrument.[97] The holder in due course, under current law,[98] is a bona fide purchaser of a negotiable instrument, or one having those rights by virtue of the shelter provisions of UCC § 3-201;[99]

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92. Goods are "consumer goods" if they are bought or used primarily for household, family or personal purposes. *See* UCC § 9-109(1); Laurel Bank & Trust Co. v. Mark Ford, Inc., 182 Conn. 437, 438 A.2d 705, 707 (1980).

93. UCC § 9-206(1). Note that Louisiana has not adopted Article 9 of the UCC. *See supra* note 50.

94. *Supra* note 36.

95. 599 F.2d 491.

96. *Supra* note 83.

97. Under Article 3 of the UCC the most acute of preliminary questions in determining whether one should be accorded the exalted status of a holder in due course is whether he holds a negotiable instrument. *See* definitions in UCC §§ 3-104(1) and 3-105, 3-112. The presumption is against negotiability, since all technical statutory requirements must be met before an instrument will be deemed "negotiable." Under Article 3, one can be a holder in due course only of a negotiable instrument; however, an assignee may also attain the rights of holder in due course under UCC § 9-206.

98. Governed in all states in the United States by the UCC. Louisiana, however, has not passed UCC Article 9. *See supra* note 50.

99. *See supra* note 91.

but he may also acquire the rights of a holder in due course as an assignee of a contract or lease of non-consumer goods, under the supplementary provisions of UCC § 9-206.[100]

The key import of the holder in due course doctrine, for our purposes, is that one with holder in due course status takes free of all defenses of any party with whom he has not dealt except "real" defenses. These "real" defenses are only those few rare and potent ones described in UCC § 3-305(2)(a) through (e).[101] The "personal" defenses are all others.[102]

Most of the litigation involving holders in due course has nothing to do with the claims or defenses to which they are subject. Rather, the cases pivot on whether holder in due course status has been established. Once it is shown that a defense exists, the person claiming the rights of a holder in due course has the burden of establishing all the elements set forth in UCC § 3-302.[103] Only if he sustains this often weighty burden does he attain the rights of a holder in due course; and only then does the question of whether the defense is "real" or "personal" become an issue.[104]

IV. ILLEGALITY AS A "REAL" DEFENSE

UCC § 3-305 provides that any holder in due course is subject to the real defense of illegality, but only "such . . . illegality of the transaction, as renders the obligation of the party a nullity."[105] Whether the "illegality" is or is not of such a degree of severity as to render the obligation of the party a nullity and void is "primarily a matter of local concern and local policy."[106] It is therefore left to "the local

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100. *See supra* text corresponding to note 93.

101. *See supra* note 80.

102. *Id. See also* UCC § 3-306; Official Comment 5 to UCC § 3-306.

103. UCC § 3-307(3).

104. *See supra* note 80. The term "real" defense is pre-Code in origin, is not used in the UCC, but connotes those defenses set forth in UCC § 3-305(2)(a) through (e).

105. UCC § 3-305(2)(b). *See* text of statute *supra* note 80.

106. Official Comment 6 to UCC § 3-305 states:

> Duress is a matter of degree. An instrument signed at the point of a gun is void, even in the hands of a holder in due course. One signed under threat to prosecute the son of the maker for theft may be merely voidable, so that the defense is cut off. Illegality is most frequently a matter of gambling or usury, but may arise in many other forms under a great variety of statutes. The statutes differ greatly in their provisions and the interpretations given them. They are primarily a matter of local concern and local policy. All such matters are therefore left to the local law. If under that law the effect of the duress or the illegality is to make the

law"[107] to resolve. If under local law the effect of the illegality is "to make the obligation entirely null and void, the defense may be asserted against a holder in due course. Otherwise it is cut off."[108] The example proffered by the Official Code Commentators is, "Illegality is most frequently a matter of gambling or usury, but may arise in many other forms under a great variety of statutes."[109]

When we deal with such illegality as renders the obligation of the party a nullity,[110] it is well to keep in mind that an instrument normally is given for an "underlying obligation."[111] That is, the issuer most frequently uses it to pay for some obligation. Ordinarily,[112] unless otherwise agreed, the obligation to pay is *suspended* until the instrument is due or presented.[113] If it is dishonored, an action may be maintained *either* on the instrument or the obligation.[114]

1. "Illegally Void": Definitions and Difficulties

The word "illegality" does not refer to the violation of criminal statutes alone. A contract is "illegal," the Restatement tells us, "if either its formation or its performance is criminal, tortious, or otherwise opposed to public policy."[115] The word "illegality" in UCC §

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obligation entirely null and void, the defense may be asserted against a holder in due course. Otherwise it is cut off.

107. *Id.*

108. *Id. See also* the broad scope provisions of UCC § 1-103.

109. *Id.*

110. UCC § 3-305(2)(b).

111. *See* UCC § 3-802.

112. But not if a bank is a drawer or primarily liable on the instrument: *see* UCC § 3-802(1) and (1)(a).

113. *See* UCC § 3-802(1)(b). The word "suspended" is intended to include suspension of the running of the statute of limitations (UCC § 3-122). Official Comment 3 to UCC § 3-802.

114. UCC § 3-802(1)(b). *See* UCC § 3-601 and Official Comment 3 to UCC 3-802 as to discharge of the obligor.

115. RESTATEMENT OF CONTRACTS § 512 (1932). See also Hanley v. Savannah Bank & Trust Co., 208 Ga. 585, 68 S.E.2d 581 (1952) (agreement by mother to surrender possession of her infant to get a benefit under a will void); *cf.* Andrews, *The Stork Market: The Law of the New Reproduction Technologies,* 70 A.B.A.J. 50 (1984); Coleman, *Surrogate Motherhood: Analysis of the Problems and Suggestions for Solutions,* 50 TENN. L. REV. 71 (1982); Randon v. Toby, 52 U.S. (11 How.) 493 (1850) (in state where slavery tolerated, buying and selling of slaves not illegal.) "It is impossible to define with accuracy what is meant by public policy for an interference and violation of which a contract may be declared invalid. It may be understood in general that contracts which are detrimental to the interests of the public as understood at the time fall within the ban." Pope Manufacturing Co. v. Gormully, 144 U.S. 224, 233-234 (1892). "We are not required to look exclusively to statutory enactments in determining questions of public policy. Constitutions and statutes are evidence of the general public

3-305(2)(b), therefore, is broader than it may first appear, but at the same time narrower: it is wide enough to encompass contracts which are not only criminal but merely tortious[116] or "contrary to the best interests of citizens as a matter of public policy"[117] whether or not there has been any proper expression about it;[118] but the illegality under UCC § 3-305 must be such as renders the obligation of the party, under local law, void.

There does exist a general rule that an illegal contract is "void."[119] But, not surprisingly, the rule has a vast number of exceptions.[120] Furthermore, many statutes which use the word "void" permit a court to refuse enforcement of an entire contract, but also permit excision of an offensive clause and enforcement of the remainder of the contract.[121] Hence, although these statutes contain the word "void,"

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policy of a state; but when confronted with questions of general public policy, as defined in the books, the courts go beyond express legislation and look to the whole body of law—statutory, common, and judicial decisions." Holland v. Sheehan, 108 Minn. 362, 367, 122 N.W. 1, 3 (1909).

116. For example, it has been held in New York that to bargain to commit a tort is illegal. Reiner v. North American Newspaper Alliance, 259 N.Y. 250, 257 (1932).

117. Anaconda Federal Credit Union No. 4401 v. West, 157 Mont. 175, 178, 483 P.2d 909, 911 (1971).

118. *Id.* For example, it might be against public policy to enforce a contract provision providing that a party will not interpose the defense of usury, the statute of limitations, or failure of consideration. *Pope Manufacturing, supra* note 115 at 235. *See also* Gellhorn, *Contracts and Public Policy*, 35 COLUM. L. REV. 679 (1935).

119. RESTATEMENT OF CONTRACTS §§ 598, 607 (1932).

120. *See id.*, § 236(a); RESTATEMENT OF (SECOND) CONTRACTS § 229(a) (1973); 4 WILLISTON ON CONTRACTS (3d ed. 1961) § 620; J. CALAMARI AND J. PERILLO, THE LAW OF CONTRACTS (2d ed. 1977) 785-799; Symcox v. Zuk, 221 Cal. App. 2d 383, 34 Cal. Rptr. 462 (1963). Usury, "Blue Sky" or other remedial statutes passed to protect a certain class of people sometimes give the plaintiff within the protected class a valid cause of action against a defendant who, by statute, is deemed the wrongdoer. 15 WILLISTON ON CONTRACTS (3d ed. 1972) §§ 1754, 1755, 1756; 6A CORBIN ON CONTRACTS § 1540 (1963). An agreement illegal because of its wrongful purpose may nevertheless give rise to a valid cause of action by an innocent party if only one of them had an illegal purpose. RESTATEMENT OF (SECOND) CONTRACTS § 602. *See also infra* note 121.

121. *See, e.g.*, UCC § 2-302 as to unconscionable contracts or clauses. New York also has a large number of statutes which declare a covenant, promise, agreement or understanding in, or in connection with or collateral to a contract or agreement to be void: *See* N.Y. GEN. OBLIG. LAW § 5-322.1 (McKinney 1978) entitled, "Agreements exempting owners and contractors from liability for negligence void and unenforceable; certain cases;" § 5-321 entitled, "Agreements exempting lessors from liability for negligence void and unenforceable;" § 5-311 entitled, "Certain agreements between husband and wife void;" § 5-301 entitled, "Certain employment contracts void;" § 5-322 entitled, "Agreements exempting caterers and catering establishments from liability for negligence void and unenforceable;" § 5-323 entitled, "Agreements exempting building service or maintenance contractors from liability for negligence void and unenforceable;" § 5-325 entitled, "Garages and parking places;" § 5-326 entitled, "Agreements exempting

whether the illegality would be such as to render the obligation of the party a nullity would be left to judicial interpretation.[122]

For example, one of New York's[123] most encompassing statutes of frauds[124] starts, "Every agreement, promise or undertaking is void, unless it or some note or memorandum thereof be in writing. . . ."[125] Yet the term "void" here means only unenforceable (rather than even voidable). The lack of a writing if not timely pleaded as an affirmative defense is waived.[126] It is equally clear everywhere else outside New York[127] that an oral contract within the purview of a given statute of frauds is not "illegal"[128]: it is neither "criminal nor offensive to general policy"[129] but at worst a contract "lacking a couple of legal chromosomes."[130] This, despite the fact that "void" or "no action shall be brought"[131] habitually appear in these various statutes of fraud.

Corbin cautions that the common meaning of "void" is "total absence of legal effect,"[132] but that even in the term "void contract"

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pools, gymnasiums, places of public amusement or recreation and similar establishments from liability for negligence void and unenforceable;" § 5-324 entitled, "Agreements by owners, contractors, subcontractors or suppliers to indemnify architects, engineers and surveyors from liability caused by or arising out of defects in maps, plans, designs and specifications void and unenforceable;" § 5-511 entitled "Usurious contracts void;" § 5-331 entitled, "Certain covenants and restrictions in conveyances and other agreements affecting real property void as against public policy;" § 5-415 entitled, "Certain transfers of property in pursuance of lottery, void;" § 5-501 entitled, "Rate of interest, usury forbidden;" § 5-413 entitled, "Securities for money lost at gaming, void;" § 5-401 entitled, "Illegal wagers, bets and stakes;" § 5-417 entitled, "Contracts, agreements and securities on account of raffling, void;" § 5-331 entitled, "Certain covenants and restrictions in conveyances and other agreements affecting real property void as against public policy."

122. It has been said, for example, that "An act or contract neither wrong in itself nor against public policy which has been declared void by statute for the protection or benefit of a certain party, or class of parties, is voidable only. U.S. v. New York & Porto Rico S.S. Co., 239 U.S. 88, 36 S. Ct. 41, 42, 60 L. Ed. 161; Weede v. Iowa Southern Utilities Co. of Delaware, 231 Iowa 784, 2 N.W.2d 372, 397, 398." BLACK'S LAW DICTIONARY, 1745 (4th ed. 1968).

123. There is "no common law statute of frauds. Each state has its own statute." J. DAWSON, W. HARVEY AND S. HENDERSON, CASES AND COMMENTS ON CONTRACTS, 951 (4th ed. 1982).

124. N.Y. GEN. OBLIG. LAW § 5-701 (McKinney 1978).

125. *Id.* § 5-701(a).

126. Sanger v. French, 157 N.Y. 213, 51 N.E. 979 (1898).

127. DAWSON, HARVEY AND HENDERSON, *supra* note 123, at 967.

128. *Id.*

129. *Id.* at 968.

130. *Id.*

131. Section 4 of the original 1677 statute of frauds uses the words "no action shall be brought." *See id.* at 952 setting forth the statute.

132. I CORBIN ON CONTRACTS (1963) § 7 p. 15. "One who says that an agreement

there is an intrinsic self-contradiction.[133] "Contract" by definition always includes "some element of enforceability."[134] He thus prefers "void agreement" to "void contract."[135]

As to voidness, Corbin emphasizes the cruciality of judicial interpretation stating, "Even if a statute expressly declares an agreement to be illegal or void, justice requires and the courts have continually decided that the effect of such a statute upon a particular case must depend upon the circumstances of that case. The words of the statute will be interpreted in the light of the purpose of the statute, with due regard to the result that will be reached by the interpretation."[136]

Thus, as the *New Howard*[137] case emphasizes: "An instrument which a statute, *expressly or through necessary implication declares void*, strictly speaking is a simulacrum only. It is without legal efficacy. It cannot obligate a party or support a right."[138] So that even though the word "void" is not used, an agreement may be void by statutory *implication.*

Most criminal statutes ordinarily stick to the knitting of describing what conduct they prohibit. Hence, most never get to "void" or "voidable" at all, words which languish in the more civilized world of contracts. Taking one example at random, "Robbery" in § 160.10 of the N.Y. Penal Law[139] sets forth the elements of the crime and then affixes its statutory classification: "Robbery in the second degree is a class C felony."[140] There the statute ends. It does not speak to

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or promise is 'void' usually supposes that it has no legal operation whatever, being in many cases quite unaware that a number of important legal relations have been created." *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.* at 17.

137. New Howard Mfg. Co. v. Cohen, 207 A.D. 588, 202 N.Y.S. 449 (1st Dept. 1924).

138. *Id.* at 202 N.Y.S. 451, emphasis added. The *New Howard* court explains why an instrument issued in defraud of creditors was not void, although a crime was involved under the then Bankruptcy Law, because the statute did not specify the instrument was to be treated as void. The holding is unremarkable because the crime involved was criminal fraud in the inducement, rather than the real defense of fraud in the execution; the statute had been amended to excise a previously included "void" provision; and bankruptcy laws are not a matter of local state public policy. All *New Howard* holds is that fraud in the inducement may be criminal, but still not a real defense against a holder in due course.

139. McKinney's *supra* note 23, at Book 39, 201-202.

140. *Id.* at 202.

whether a contract to commit robbery, or one induced by, tainted with, connected to, or resulting from such robbery is "void" or "voidable." The same applies to almost all other criminal statutes, including New York's commercial bribery statutes.

2. Criminal Illegality as "Penalized" in a Civil Action

Ultimately, determining whether the obligation under UCC § 3-305 is "illegally void" is a judgmental and labeling challenge. It is a buck envisioned to be passed to the local court, where it stops. It is the local court's function to perceive and implement local public policy. Thus, in a civil action, the court has inherent power to control the interpretation and application of criminal statutes, insofar as it expounds upon and teaches both the litigants and the public as to the meaning and impact of criminal statutes. And, by the very nature of a civil proceeding, it does so in a swift and effective manner, unimpeded by the constrictions inherent in criminal prosecutions. This power is especially effective in the sphere of commercial bribery. Bribery is all about money, and money is what the civil court has the power to give or not to give.

Thus, what is crucial to the vortex of our topic is that the punishment set forth in any penal statute is not the exclusive or even most effective "price" or penalty for that crime. Irrespective of any fines or sentences imposed upon a conviction beyond a reasonable doubt in a criminal case, in a civil action the court can find the illegal conduct mandates a forfeiture of property.

This was the jurisprudential feat performed in *Riggs v. Palmer*,[141] now a legend in American legal folklore. In his dissent[142] in *Riggs*,

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141. The *Riggs* maxim set forth, "No one shall be permitted to profit by his own fraud, or to take advantage of his wrong, or to found any claim upon his own iniquity, or to acquire property by his own crime. These maxims are dictated by public policy, have their foundation in universal law administered in all civilized countries and have nowhere been superseded by statutes." Riggs v. Palmer, 115 N.Y. 506, 511-512 (1889). Although *Riggs* is frequently cited by American courts as the source of these maxims, their origin is much older. That one may not profit from his own wrong has been found to be one of some 214 maxims of Edmund Wingate published in London in 1658. Simpson, *The Rise and Fall of the Legal Treatise: Legal Principles and the Forms of Legal Literature*, 48 U. OF CHIC. L. REV. 632, 645 (1981). But their ultimate source has been traced back to "Ulpian in *Digest* 50.17.134.1 where it appears as *nemo ex delicto meliorem suam conditionem facere potest.*" *Id.* This Digest was compiled by Domitus Ulpianus, a Phoenician born about A.D. 170. J. MUIRHEAD, THE INSTITUTES OF GAIUS AND RULES OF ULPIAN xiii (1880).

142. 115 N.Y. at 519.

Judge Gray anguished, "What power or warrant have the courts to add to the respondent's penalties by depriving him of property? The law has punished him for his crime and we may not say that it was an insufficient punishment."[143] In a superb exposition of advanced justiciary, the majority exhibited just what power the civil court had. The power to do justice, as *Riggs* demonstrates, is almost boundless.

That the Legislature understood civil courts would and should exact penalties in addition to those imposed by criminal statutes is evidenced by rarely cited language contained in the criminal statutes themselves. Present N. Y. PENAL LAW § 5.10, derived from an 1881 statute[144] predating *Riggs* specifically provides:

> (3) This chapter does not bar, suspend, or otherwise affect any right or liability to damages, penalty, forfeiture or other remedy authorized by law to be recovered or enforced in a civil action, regardless of whether the conduct involved in such civil action constitutes an offense defined in this chapter.[145]

Riggs never cited this statute's predecessor. A civil court does not need statutory language as authority for its power to "penalize" persons seeking to take advantage of illegal bargains.

From the 1889 Adam's rib holding in *Riggs*, over 70 years later was wrought the Eve we see in *McConnell v. Commonwealth Pictures Corporation.*[146] Both cases are cited in *Bankers Trust.*[147]

When Elmer Palmer murdered his grandfather, *Riggs* held he forfeited his legacy under his grandfather's will.[148] When Fred McConnell allegedly bribed a producer's agent to get the film distribution contract for Commonwealth, he forfeited his right to collect under his commissions contract.

In McConnell's suit for an accounting, the defense was that he should not be permitted access to the court because he had bribed an agent of Universal Pictures to obtain the contract for Commonwealth. The court held the issue was not "whether the acts alleged in the defenses would constitute the crime of commercial bribery."[149]

143. *Id.*

144. N.Y. PENAL LAWS § 5.10(3) (McKinney 1975) is derived from N.Y. PENAL LAW 1909 §§ 23, 24, 37, all of which were derived from the Penal Code of 1881. *See supra* Historical Note, McKinney's note 23, Book 39, p. 15.

145. *Id.* at 14-15.

146. *See supra* note 28.

147. 599 F.2d at 491, 492.

148. Riggs v. Palmer, *supra* note 141.

149. 7 N.Y.2d at 470.

McConnell's motion to strike the defenses for insufficiency was treated as his constructive admission[150] of those facts. McConnell thereby was deemed an unworthy plaintiff, seeking to take advantage of his own wrong, and to acquire property by his own crime. He could not recover commissions for having obtained a bribery-induced contract. The power of *Riggs* was upon him. But the court said "all" they were doing was "labeling the conduct described in these defenses as gross corruption depriving plaintiff of access to the courts of New York State."[151] McConnell may not have been indictable, no less "convictable" beyond a reasonable doubt in a criminal case. It made no difference. He nevertheless was heavily penalized by the judgment in the civil case. Commonwealth was left with its bountiful windfall, enjoying the fruits of the contract McConnell had brought to them. McConnell wound up with nothing for all his efforts.[152]

And it was the *McConnell* decision which barred one of the plaintiffs from summary judgment in the *Bankers Trust* case,[153] which we now examine.

V. FACTS AND RATIONALE OF *BANKERS TRUST V. LITTON*[154]

Litton, the defendant, had decided to buy some photocopiers.[155] Angelo Buquicchio, a salesman who worked for Royal, a division of one of Litton's subsidiaries, recommended Litton lease the photocopiers from Regent Leasing, an outside entity.[156] Regent was to buy the equipment from Royal and then lease it to Litton. Neither Royal nor Litton knew Buquicchio would be making money in this transaction.[157] Regent's president when later deposed admitted that he paid money

150. Words used in Flegenheimer v. Brogen, 284 N.Y. 268, 272 (1940).

151. 7 N.Y.2d 471.

152. McConnell originally got $10,000 from Commonwealth. Taking the defenses as true, he gave the producer's agent $10,000. He was to get 20% of certain recouped gross receipts realized on the distribution of 40 Western and four serial motion pictures, simultaneously with further payments Commonwealth was obliged to make to the producer. Lower court in *McConnell* at 1 Misc.2d 751, 752 (Sup. Ct. 1955). Commonwealth had originally counterclaimed for the return of this $10,000 but never appealed its being brushed aside in the lower court. McConnell never received anything other than the first $10,000 which he allegedly used for the bribe.

153. Motion for summary judgment by plaintiff Regent denied, in reliance on *McConnell*, 599 F.2d at 491.

154. *See supra* note 36.

155. 599 F.2d at 490.

156. Regent was entirely independent of either Litton or Royal. *Id.*

157. *Id.*

to several Royal people, "particularly Buquicchio, so they would push leases generally and Regent's leases specifically."[158] To finance its purchases, Regent had borrowed money from the plaintiff banks, assigning the Litton leases as security.[159] The leases contained a provision allowing assignment and a clause providing the assignees' rights would be independent of any claims or offsets of Litton as against Regent.[160] When Litton defaulted, a suit was started by the banks and Regent, followed by motions for summary judgment. The heart of the defense was that the bribery of Royal's employees rendered Litton's obligation null and void. The Second Circuit affirmed the District Court's holding that the payments to Buquicchio "could constitute a defense against Regent."[161] However, it was not a good defense against the banks as UCC § 9-206 holders in due course. Under New York law, the court concluded, "a holder in due course may treat a contract inducted by illegal bribery as merely voidable."[162] To analyze the court's reasoning, the argument of the court has been broken down into three tiers, to show its progression, then each tier is separately treated, *infra.*

The substance of the court's reasoning was as follows:
TIER 1. In using the word "nullity" in UCC § 3-305, the "Legislature intended to provide a defense against a holder in due course only in cases where the obligation sued upon is void on its face (*e.g.* a wagering contract or a contract to perform an illegal act). . . ."[163]
TIER 2. "An examination of bribery-induced contracts suggests that New York holds such contracts to be 'void.'"[164] "Confusion in the use of the words 'void' and 'voidable' is common."[165] Chiefly the difference becomes important only where property is transferred to a holder in due course.[166] Since the New York cases on illegal contracts induced by commercial bribery do not involve holders in due course, one may assume "void" was used loosely, "without regard to its importance

158. *Id.*
159. *Id.* This was not the usual "leveraged" lease transaction. Had it been, query as to whether plaintiffs would have been denied holder in due course status, having "dealt" with Litton. UCC § 3-305(2).
160. *Id.*
161. *Id.* at 491 relying on *McConnell, supra* note 28.
162. *Id.* at 492.
163. *Id.* at 491. These were the observations of the court below which were quoted with approval.
164. *Id.*
165. *Id.*, quoting from RESTATEMENT OF CONTRACTS § 475, comment b (1932).
166. *Id.*

when a holder in due course enters the picture."[167] A voidable contract may be ratified, while a void transaction cannot.[168] "*Sirkin v. Fourteenth Street Store* . . . suggests that the court meant the contract to be truly 'void' because it "could not be ratified. . . ."[169] *TIER 3.* However, the policy supporting the New York cases is one precluding recovery to a wrongdoer.[170] Where an innocent holder in due course "is suing upon an illegal contract, the policy argument is inapplicable because the plaintiff has done no wrong for which it should be penalized."[171] "Bribery which induces the making of a contract is much like fraud which has the same result . . ."[172] Since fraud in the inducement is a personal, not a real, defense under UCC § 3-305(2), "the same treatment should be given to a contract induced by bribery."[173] Denying recovery to holders in due course would probably

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167. *Id.*

168. *Id.* at 492 quoting from RESTATEMENT OF CONTRACTS § 475, comment b (1932).

169. *Id.*, referring to *Sirkin, supra* note 21.

170. *Id.*, citing *inter alia*, RESTATEMENT OF CONTRACTS § 598, comment a, (1932); 14 WILLISTON ON CONTRACTS § 1630A (3d ed. 1972); Riggs v. Palmer, *supra* note 141, *McConnell, supra* note 28; Riener, *supra* note 116.

171. *Id.* at 492-93.

172. *Id.* at 493.

173. *Id.* Here the court refers to RESTATEMENT OF CONTRACTS § 577, "Illustrations 4 & 11 (1932)." *Id.* Referring to this authority, one sees § 577 is entitled, "Bargains to Defraud or Harm Third Persons." The following rule is then set forth: "A bargain performance of which would tend to harm third persons by deceiving them as to material facts, or by defrauding them, or without justification by other means is illegal." The RESTATEMENT continues:

> *Comment: a.* Cases falling within the rule stated in the Section would generally, but not always involve the commission of a tort and therefore fall within the rule stated in § 571.
>
> *b.* The tendency of the performance to deceive or otherwise harm others sometimes necessarily follows from the character of the performance promised, but in other cases the performance promised may be used innocently or may be used in such a way as to harm or defraud others. In such cases it is the purpose so to use the performance that makes the bargain illegal. The purpose may be entertained by one or by both parties to the contract. If entertained by one only, the other party may recover for a breach of the contract (see § 602). If an improper purpose is entertained by both parties to the contract, neither can recover. Illustrations 4 and 11 cited by *Bankers Trust* set forth:
>
> 4. A desires to by land from B at a low price. C is aware of facts which, if told B, will induce him to refuse to sell for such a price. A promises C $500 if C will not tell B the facts in question. C does not tell B. The agreement is illegal.
>
> 11. A agrees with B to pay B $500 if B causes a legislative investigation of the affairs of a corporation. A's purpose is to depress

not "have an appreciable effect on the frequency of commercial bribery. Moreover, the holder in due course concept embodies important policies which must be weighed against the policy of holding void, contracts induced by bribery."[174]

Taking these three points in order:

COMMENT AS TO TIER 1. This statement appears misleading. If the obligation sued upon is void on its face (*e.g.*, indicates it is a wagering contract or a contract to perform an illegal act, the examples proffered by the court), there could not be a holder in due course. The holder would take with "notice"[175] that the obligation is illegal and, having notice of a defense, he would be unable to establish his status under UCC § 3-302(1)(c). He might also have trouble in sustaining his burden of establishing his good faith.[176]

Even a "small" irregularity which should have been spotted on the face of an instrument will bar establishment of holder in due course status. Thus, in a typical "notice" case, a man had signed both his name and his wife's name, placing his initials after the wife's signature on a note. When the purchasing bank sued on it, failure of consideration was raised as a defense. The bank could not establish it was a holder in due course because of the "irregularity" of the initials next to the one signature. On appeal, the finding was affirmed.[177]

UCC § 3-304 itself specifies that the purchaser has notice of a claim or defense if "(a) the instrument is . . . *so irregular as to call into question its validity*, terms or ownership or to create an ambiguity as to the party to pay; or * * * (2) the purchaser has notice that the *obligation of any party is voidable* in whole or in part, or that all parties have been discharged."[178] It thus appears that any contract illegal on its face could not, by definition, pass to a holder in due course.

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the value of the shares and to obtain profit from selling short. B causes the investigation and produces the desired result. The bargain is illegal.

Neither of these illustrations seems apposite to acts prohibited under the New York Commercial Bribery statutes in that the parties to whom money is offered in these examples is not an employee or agent of the victim of the fraud. The crime of commercial bribery has at its heart the necessary element that the bribe-receiver is an employee or agent. Thus, commercial bribery is a far graver act than fraud. Its "treason" element (*see* n. 13 *supra*) is the essence of the crime, and that element is missing in both these illustrations.

174. 599 F.2d at 493.

175. *See* UCC §§ 3-302, 3-304, 9-206; *see also* UCC § 1-201(25) as to when a person has "notice" of a fact.

176. "Notice" and "good faith," although hardly identical, "appear in the cases and in the flesh as first cousins." WHITE AND SUMMERS, *supra* note 42, at 471.

177. Arcanum National Bank v. Hessler, 69 Ohio St.2d 549, 433 N.E.2d 204 (1982).

178. UCC § 3-304 (emphasis added).

The concept makes good sense. The "would-be holder in due course"[179] simply "does not deserve to take free of such defenses, for he could have refused to take"[180] the instrument or proffered transaction.

More importantly, as to Article 3 instruments, a check or simple promissory note might be issued by A, a debtor, payable to L, a loan-shark, as follows:

July 27, 1984

FOR VALUE RECEIVED, I promise to pay to the order of L the sum of ..... $5,000.00 payable in 30 days.

(Signed) A

If this instrument were given in return for a $4,000 loan made by L to A on July 27, 1984, in New York the note could be truly void as criminally usurious[181] and the usury defense would be a real defense against a holder in due course.[182] Furthermore, the note could also be usurious and truly void in New York were it given for a loan at interest in excess of 16% per annum (although it would not be criminally usurious[183]). Thus, it would be void in the hands of a holder in due course, even though no criminal statute was violated.[184] To boot, in New York a usurious transaction is "not so utterly void"[185] that it

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179. White and Summers explain the rationale of UCC § 3-304:

> A party can acquire notice of a defense in a variety of ways. He can observe that the instrument is crudely altered; he can see that its date for payment has already passed; he can note that it has been stamped 'paid,' or he may even have actual knowledge of a contract defense of the drawer or maker. In all such cases a would-be holder in due course does not deserve to take free of such defenses, for he could have refused to take the instrument.

Id., *supra* note 42, at 471.

180. *Id.*

181. N.Y. PENAL LAW §§ 190.40, 190.42. This would not apply to certain exempt transactions, such as any loan or forbearance in the amount of $2,500,000 or over as provided in GOL 5-501(6)(b) and would not apply in several other exceptions outlined in the GEN. OBLIG. *See* GEN. OBLIG. §§ 5-501 through 5-531.

182. Sabine v. Paine, 223 N.Y. 401, 119 N.E. 849 (1918), cited by *Bankers Trust*, 599 F.2d at 493.

183. GEN. OBLIG. §§ 5-501, 5-511.

184. Sabine v. Paine, *supra* note 182.

185. Smith v. Marvin, 27 N.Y. 137, 143 (1863); Graham v. Weiss, 3 Misc. 2d 28, 30, 149 N.Y.S.2d 676, 678 (Sup. Ct. 1958).

cannot be ratified. To the extent that a debtor repays any portion of the loan, he is deemed to have ratified[186] the transaction and cannot recover, except to the extent of any amount in excess of the legal rate of interest.[187] If he had paid nothing and was sued, the defense of usury would be good, even as against a holder in due course, who could not collect on such a void instrument.

What is important is that, as the illustration of the note indicates, there is nothing "on its face" to show its void nature. If the same note in New York were issued in payment of an illegal gambling debt,[188] the illegality would be a good defense against a holder in due course since the instrument, although it has no remarkable facial defects, is void.

It is also clear that while UCC § 9-206[189] validates the type of waiver of defense clause involved in *Bankers Trust*, the statute works only when the assignment is taken for value, in good faith, and without notice of a claim or defense.[190] The assignment remains subject to the same defenses as may be asserted against a holder in due course of an instrument under UCC Article 3.[191]

The statement that the word "nullity" in UCC § 3-305(2)(b) was intended "to provide a defense against a holder in due course only in cases where the obligation sued upon is void on its face," hence seems unsupportable.

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186. *Id.*

187. GEN. OBLIG. § 5-513.

188. *See* GEN. OBLIG. Title 4 and, *e.g.*, GEN. OBLIG. § 5-413. As to the illegal voidness of instruments issued for gambling purposes, see Hotel Riveria, Inc. v. First National Bank and Trust Company of Oklahoma, 580 F. Supp. 122 (W.D. Okla. 1983); Gulf Collateral, Inc. v. Morgan, 415 F. Supp. 318, 322 (S.D. Ga. 1976); National Recovery Systems v. Mazzei, 123 Misc.2d 780, 475 N.Y.S.2d 208 (Sup. Ct. 1984) (a gambling debt will not be enforced in New York unless it was valid where incurred). *See also*: Hendrix v. McKee, 281 Or. 123, 575 P.2d 134 (1977); Miller v. Radikopf, 394 Mich. 83, 228 N.W.2d 386 (1975) (agreement to split proceeds of winning Irish Sweepstakes ticket enforced as non-offensive to public policy).

189. *See supra* text corresponding to note 93.

190. UCC § 9-206. United Counties Trust Co. v. Mac Lum, Inc., 643 F.2d 1140 (5th Cir. 1981) (assignee found to have had "notice" was subject to defense of failure of consideration); First National Bank of New Jersey v. Reliance Elec. Co., 668 F.2d 725 (3d Cir. 1981) (assignee did not meet good faith and absence of notice requirements and could not benefit from waiver of defense clause); Personal Finance Co. v. Meredith, 39 Ill. App. 3d 695, 350 N.E.2d 781 (1976) (if plaintiff had actual notice of complaints it would not have been holder in due course); Laurel Bank & Trust Co. v. Mark Ford, Inc., 438 A.2d at 105, *supra* note 92 (assignment is subject to all defenses of a type assertable against a holder in due course under UCC Article 3).

191. *Laurel Bank*, 438 A.2d at 705, *supra* note 92.

COMMENT AS TO TIER 2. As to whether a bribery-induced contract is truly void in New York in that it may not be ratified, the *Sirkin*[192] wording adverted to by the court is as follows:

> . . . this is not a case in which the rule of ratification, applicable to ordinary contracts induced by fraud, should be applied. The public policy of our state forbids the ratification, as well as the making of such a contract. Usually private contracts concern only the parties thereto, and it is optional with a person who has discovered that he has been defrauded whether to ratify the contract or to rescind it. There is ordinarily, at least, no general public policy involved in such cases.[193]

Sirkin is New York's classic commercial bribery case. It was a simple action to recover some $1,500 for hosiery and wrappers sold to the defendant, a Manhattan department store. The defense was that Sirkin had paid a bribe to the store's purchasing agent; hence, the store should not have to pay for the goods delivered and accepted under the bribery-induced contract. The court found the defense sufficient.[194] The store was able to keep the goods without having to pay for them. The moral was simple: One who commits commercial bribery forfeits his right to collect on the business he bribed to get. The civil judgment had a remarkable penalty; and there was no problem about establishing guilt beyond a reasonable doubt.[195] *Sirkin* held the bribery-induced contract illegally void because it was induced by the commission of a crime. (The Penal Law's first stated general purpose in New York is to "proscribe conduct which unjustifiably and inexcusably causes or threatens substantial harm to individual or public interests."[196])

A litmus test of voidness has to do with whether a given contract may be ratified.[197] *Sirkin* finds the bribery-induced contract may

192. *See supra* note 21.

193. *Id.* 124 App. Div. at 391, 108 N.Y.S. at 835.

194. The *Sirkin* dissent insists New York's then commercial bribery statute (§ 384r, text *supra* note 22) failed to set forth the contract was void (*Bankers Trust* also so states); that it was voidable only, since it was a legal contract merely bribery-induced (*Bankers Trust* also so states); and that (echoing the Gray dissent in *Riggs*) the criminal statute fixed a penalty and the court may not impose additional punishment for its violation. *See* 124 App. Div. at 395, 108 N.Y.S. at 838. *Cf.* N.Y. PENAL LAW § 5.10(3).

195. *See McConnell, supra* note 28. The same general notion is seen in the New York statute allowing one who receives unsolicited goods to treat them as an "unconditional gift." N.Y. GEN. OBLIG. LAW § 5-332(1).

196. *See* N.Y. PENAL LAW § 1.05(1).

197. *See Bankers Trust* at 599 F.2d 492.

not be ratified because it involves criminal conduct. The general rule is if the act done was a civil act, it may be ratified; "but no authority is to be found that an act which is itself a criminal offense is capable of ratification."[198] Ratification is a doctrine which applies when the following four elements are present: (1) the *principal is disclosed* sufficiently to be capable of later identification and (2) the agent acts without or in excess of his authority and (3) the ratification is of the entire act and not of a part and (4) the principal knows all the facts of importance when he ratifies.[199] Ratification is generally a contracts and torts doctrine.[200]

Although a forgery may be "ratified,"[201] the Official Code Commentators make clear that what is meant is "adopted" and, if that is done, the word "ratified" is merely used to indicate the adoption of retroactive.[202] They further caution that, "While the ratification may be taken into account with other relevant facts in determining punishments, it does not relieve the signer of criminal liability."[203]

Note that in forgery, by the forger's very act of passing off the signature as the principal's, the forger purports to act as, and therefore for, a principal; furthermore, ratification of the forgery is never forced, but voluntary. One of the necessary elements of ratification is that the agent purport to act for a principal. In the criminal bribery agreement, the agent does not purport to act for the principal. As to this, Corbin says "an agreement by two parties for the doing of acts that both know to be a felony would have no legal operation and be 'void' although the acts themselves, when performed, would have very important legal effects indeed."[204] (If the resulting bribery-induced contract is illegally void,[205] forcing a ratification down the throat of the already victimized principal seems incongruous. If he cannot ratify

198. Brook v. Hook, L.R. 6 Ex. 89 (Exchequer 1871). Since one cannot commit a crime by ratifying what is already done, the rule that subsequent ratification is equivalent to prior authorization cannot be applied to criminal cases. Cook v. Commonwealth, 141 Ky. 439, 132 S.W. 1032 (1911).

199. A.L. SAINER, THE SUBSTANTIVE LAW OF NEW YORK 6 (1972).

200. *Id.* at 7; W. SEAVEY AND L. HALL, CASES ON THE LAW OF AGENCY 314 (1956).

201. UCC § 3-404. *See also* United States v. Davis, 125 F. Supp. 696 (W.D. Ark. 1954) (making payments on a note which the makers denied they signed not deemed a "ratification").

202. Official Comment 3 to UCC § 3-404.

203. *Id.*

204. I CORBIN ON CONTRACTS § 7 p. 16.

205. *Sirkin, supra* note 21; ". . . an agreement to divide the profits of a fraudulent scheme, or to carry out some object, in itself not unlawful, by means of an apparent trespass, breach of contract or breach of trust, is unlawful and *void.* (POLLOCK ON CONTRACTS, 342; SALMOND & WINFIELD, CONTRACTS p. 145); *Harrington v.*

voluntarily, passing the transaction to a holder in due course cannot coerce ratification.)

Under the general doctrine of *respondiat superior*, a principal has been held criminally liable for a slander committed when a manager of its store accused a customer of stealing.[206] One thus easily discerns that the rule which prevents "ratification" of criminal acts is founded not only on public policy considerations, but on a concern for protecting a principal from being ensnared into liability for an unauthorized criminal act.

There is also to be considered where a person harmed by the crime has power to control whether prosecution for the crime shall or shall not be brought. As *Sirkin*[207] had implied "Insofar as an act constitutes a private wrong the injured individual is free to make a settlement with the wrongdoer, or to forgive him entirely without any reparation. But the general rule is that a private individual has no power to ratify, settle or condone a public wrong even if it was a wrong which injured his person or harmed his property."[208] Any ability he has to ratify would come only if there is a specific exception to the general rule and only in the exact manner provided by that exception.[209] For example, in New York, the owner of property cannot, by accepting complete restitution, forgive the crime of larceny or embezzlement.[210] A larceny victim may contract with the thief for repayment of his loss, but not if the contract includes an express or implied promise that the victim will refrain from initiating a criminal prosecution: A person commits the crime of compounding a crime if

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Victoria Graving Dock Co., 3 Q.B.D. 549.)" *Reiner, supra* note 116 at 260-261; emphasis added.

206. Gillis v. Great Atlantic & Pacific Tea Co., 223 N.C. 470, 27 S.E.2d 283 (1943).

207. *Supra* note 21.

208. R. PERKINS, CASES AND MATERIALS ON CRIMINAL LAW AND PROCEDURE 517-18 (1952).

209. *Id.*, citing Commonwealth v. Heckman, 113 Pa. Super. 70, 172 Atl. 28 (1934). Without the specific exception, a rape victim could not "ratify" the rape by forgiving the act. *Id.*, citing Commonwealth v. Slattery, 147 Mass. 423, 18 N.E. 399 (1888). It was "even beyond the power of mother's love to wipe out the criminal guilt of a son who maliciously burned her barn." *Id.*, citing State v. Craig, 124 Kan. 340, 259 Pac. 802 (1927). *Cf.* People v. Gould, 70 Mich. 240, 38 N.W. 232 (1888) (prosecution for seduction by false promise of marriage discharged after parties' marriage).

210. N.Y. PENAL LAW § 215.45 (McKinney 1975). *See also* Breaker v. State, 103 Ohio St. 670, 134 N.E. 479 (1921); Fleener v. State, 58 Ark. 98, 23 S.W. 1 (1893). In New York, it is an affirmative defense to the crime of compounding a crime that acceptance of restitution was in the reasonable belief that the amount was not in excess of the amount due. *Id. See,* however, *infra* note 211.

he agrees to accept any benefit upon an understanding that he will refrain from initiating prosecution for a crime.[211]

These, then, are some of the broad and complex concepts underlying the statement in *Sirkin* that a bribery-induced contract may not be ratified. If that statement is true, it would give the bribery-induced contract what *Bankers Trust* calls "a characteristic of true voidness."[212]

One case not cited by *Bankers Trust* is *Babcock v. Warner,*[213] which squarely faced the question of whether a bribery-induced contract may be ratified. The court held the contract was not capable of such ratification as to enable one to recover under it. However, this decision did not involve a holder in due course, and thus may not have affected the last and most crucial step of the court's reasoning in *Bankers Trust.*

COMMENT AS TO TIER 3. The turning point of the *Bankers Trust* holding occurs when the court stops examining the character of the bribery-induced contract (after finding New York law holds such contract to be void), and then turns away to examine the character of the plaintiff. It is here the decision appears to run two different reasons together, perhaps "even reasons of different types."[214] A holder in due course of an instrument issued for an illegal gambling debt, or of a usurious instrument (even one not criminally usurious) in New York is an innocent non-wrongdoer;[215] yet he is precluded from recovery precisely because these instruments are treated as illegally void. A holder in due course for the same reason may not recover if there was such fraud in the execution as to constitute a real defense under UCC § 3-305.[216] In applying UCC § 3-305 to real defenses such as illegal gambling, usury, or fraud in the execution, the policy of New York has not at all been concerned with the preclusion of wrongdoers from recovery. Holders in due course by definition are not wrongdoers as to the instrument or obligation.

The Williston rules relied on by *Bankers Trust*[217] that "An innocent plaintiff may recover on an illegal agreement which is not

211. N.Y. PENAL LAW § 215.45(1) (McKinney, 1975); Davis v. Mathews, 361 F.2d 899, 902 (1966).

212. 599 F.2d at 492.

213. Babcock v. Warner Bros. Theatres, Inc., 240 App. Div. 466, 270 N.Y.S. 765 (1934).

214. Summers, *Two Types of Substantive Reasons: The Core of a Theory of Common-Law Justification,* 63 CORNELL L. REV. 707, 715 (1978).

215. *See, e.g.,* requirements of UCC §§ 3-302, 3-303, 3-304, 3-201, 3-307(3) and 9-206(1).

216. *See* UCC § 3-305(2)(c) and Official Comment 7 to UCC § 3-305.

217. *See supra* note 36, *Bankers Trust,* 599 F.2d at 493, n.2.

declared void by statute"[218] and that "a holder in due course may recover on a negotiable instrument originally given as part of an illegal transaction"[219] hardly dispose of the illegality complications under UCC § 3-305. The holder in due course indeed may recover—if the illegality is not such as to render the obligation void. But if the obligation is void, he may not. Williston does not mandate anything to the contrary, and that is the only possible interpretation to be given his rules; otherwise, the letter and philosophy of UCC § 3-305(2)(b) codifying illegality as a real defense would itself be a nullity.

In denying recovery to holders in due course of illegally void instruments, the New York courts refuse to validate void *transactions*, notwithstanding the innocence of the *party* seeking their enforcement. *Sirkin*[220] is clear that the court would not lend its aid to the "enforcement of this *contract*,"[221] stating:

> The Legislature has not expressly declared either that the contract to pay the bribe or the contract induced by the bribe is void or unenforceable. A contract, however, made in violation of a penal statute, although not expressly prohibited or declared to be void, is prohibited, void, and unenforceable, whether executory or executed (Griffith v. Wells, 3 Denio, 226; Barton v. Port Jackson and N.T.P.R. Co., 17 Barb. 397).[222]

In order to focus on the voidness issue in *Bankers Trust*, it is necessary to examine the transactions involved in that case, since there were three different contracts which need to be separated out.

V. BRIBERY AND ITS THREE BASIC CONTRACTS

The three basic contracts involved in *Bankers Trust* are typical of all commercial bribery contracts. They are as follows:

A. *The Employment Contract:* The contract between the employer or principal and the bribe-receiver who is an employee, agent, or fiduciary.[223] [In *Bankers Trust* this was the contract between

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218. *Id.*

219. *Id.*

220. *Supra* note 21.

221. 124 App. Div. at 388, 108 N.Y.S. at 834; emphasis added.

222. *Id. See also* State ex rel Bradford v. Cross, 38 Kan. 696, 17 P. 190 (1888) (if the state could prove bribery at the trial, a contract for the sale of school lands would be declared void and the state would not be required to return the bribe money).

223. N.Y. PENAL LAW §§ 180.00, 180.03, 180.05 and 180.08 (McKinney 1975). The employment contract in connection with bribery involving public servants would be

Royal and Buquicchio and the other employees who were bribed.[224]]

B. *The Bribery Contract:* The bribery agreement between the bribe-receiver and briber,[225] made in breach of the fiduciary duty owed under the Employment Contract. Its purpose is to obtain the Resulting Contract. [In *Bankers Trust* this was the agreement between Regent and the Royal employees, particularly Buquicchio.[226]]

C. *The Resulting Contract:* The bribery-induced contract between the principal and the briber or a third party.[227] [In *Bankers Trust*, this was the lease entered into between Litton and Regent.[228]]

ANALYSIS

A. Under the Employment Contract, the employee, agent or fiduciary owes a duty of loyalty and good faith to the employer or principal.[229]

B. The Bribery Contract itself is illegal and surely absolutely void in New York. Whether the employer or principal is a public

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the government instrumentality. *See* N.Y. PENAL LAW § 10(15) (McKinney 1975) definition of "public servant." *See also* § 200.40 as to "party officer," and §§ 200.45, 200.50 as to bribe giving and bribe receiving for public office.

224. *See* 599 F.2d at 490.

225. Extortion is not per se denominated as a defense to commercial bribery, as it is in the bribery of either public or labor officials. No cases have been found involving the use of extortion, duress or coercion as a defense to a civil action involving bribery or commercial bribery. If coercion is employed by one of the parties, however, such conduct would itself be criminal in New York. *See* N.Y. PENAL LAW §§ 135.60, 135.65, 135.70, 135.75 (McKinney 1975).

226. 599 F.2d at 490.

227. New York has held such contracts to be void. "An examination of the language in the New York decisions on the enforceability of bribery-induced contracts suggests that New York holds such contracts to be 'void.' *Sturm v. Truby*, 245 App. Div. 357, 361, 282 N.Y.S. 433, 437 (4th Dept. 1935); *Sirkin v. Fourteenth Street Store*, 124 App. Div. 384, 393, 108 N.Y.S. 830, 837 (1st Dept. 1908), *cited with approval in McConnell v. Commonwealth Pictures Corp.*, 7 N.Y.2d 465, 470, 166 N.E. 494, 497, 199 N.Y.S.2d 483, 486 (1960); and *Shemin v. A. Black & Co.*, 32 Misc.2d 1046, 225 N.Y.S.2d 805 (Sup. Ct. N.Y. Co. 1962), *rev'd on procedural grounds*, 39 Misc.2d 354, 240 N.Y.S.2d 622 (1st Dept. 1963)." Bankers Trust, 599 F.2d at 492.

228. 599 F.2d at 490.

229. *Continental Management, supra* note 18; Levy-Caen, *supra* note 1 at 107-09, *citing* Rothschild v. Brookman, 2 Dow & Cl, 188 (1831); Pariente v. Lubbock, 20 Beav. 588 (1885); Andrew v. Ramsay, 2 K.B. 635 (1903). This is implicit in the agreement between them, "since the undertaking is to advance the interests of the principal in accordance with the principal's desires. It is not the agent's business that is carried on, but that of the principal . . ." Seavey and Hall, *supra* note 200 at 3; *see generally*, Muris, *Opportunistic Behavior and the Law of Contracts*, 65 MINN. L. REV. 521 (1981); Summers, *The General Duty of Good Faith—Its Recognition and Conceptualization*, 67 CORNELL L. REV. 810 (1982).

institution or a private entity, both parties are engaging in criminal conduct and are *in pari delicto*.[230] There is no "victim" in this two-party agreement; hence, there is no possibility of "ratification." Since both parties' conduct is criminal and they are equally at fault, we do not have a "voidable" contract such as one resulting from fraud in the inducement, where the victim is allowed time to decide whether he wishes to elect to ratify or rescind. Instead, we have a situation like The Highwayman's case:[231] two criminals engaged in an illegal agreement, neither having a cause of action against the other for breach of their void agreement.

If the characterizing of this Bribery Contract is not excessive, assume a $10,000 check were issued by *B*, a bribe-giver payable to the order of *A*, a bribe-receiver. Were this check negotiated to a holder in due course who sued *B*, and *B* claimed such illegality of the instrument as to render his obligation a nullity (the "real" defense of illegality), this defense should be good.[232]

No cases have been found on this point either in the United States or, going as far back as 1945, in Great Britain. The holding in *Bankers Trust* might be improperly misconstrued as authority for

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230. Clark v. United States, 102 U.S. 322 (1880); RESTATEMENT OF CONTRACTS § 598 (1932). Generally if a contract is illegal, neither party may recover on it and the parties are left where they stand on the theory that the court will not grant aid to either wrongdoer. *Id.*; Hedla v. McCool, 476 F.2d 1223 (9th Cir. 1973) (collecting general illegality cases). One who bribes or attempts to bribe a judge or other public official or agent is guilty of moral turpitude. *See* United States v. Manton, 107 F.2d 834 (2d Cir. 1938), *cert. den.* 309 U.S. 664 (1940); In re McNally, 252 App. Div. 550, 300 N.Y.S. 459 (1938) (attorney convicted of commercial bribery disbarred because acts involved moral turpitude). *Cf.* Singleton v. Foreman, 435 F.2d 962 (5th Cir. 1970) (complaint seeking return of jewelry deposited to secure illegal contingency fee agreement in divorce case stated a valid claim); Liebman v. Rosenthal, 185 Misc. 837, 57 N.Y.S.2d 875, *aff'd* 269 App. Div. 1062, 59 N.Y.S.2d 148 (2d Dept. 1945) (jewelry given in France to one purporting to be a friend of Portuguese Consul to be used as bribe for visas to help plaintiff and his family escape Nazis during World War II: complaint for return of jewelry withstood motion for summary judgment, since plaintiff was defrauded, not in pari delicto, and not guilty of moral turpitude); Aikman v. City of Wheeling, 120 W. Va. 46, 195 S.E. 667 (1938) (recovery allowed although restitution check proffered on condition that payee suppress criminal prosecution). *See also, generally*, Gellhorn, *Contracts and Public Policy*, 35 COLUM. L. REV. 679 (1935).

231. *See* McMullen v. Hoffman, 174 U.S. 639 (1899) which refers to this as a "real" case. *Id.* at 654.

232. Lord Mansfield cautions that this is true even though illegality "sounds at all times very ill in the mouth of the defendant." Holman v. Johnson, 1 Cowp. 341, 343 (1775). Also a "person who is guilty of illegality or fraud, and knows that he cannot sue himself, is likely to hand over the instrument to some other person to sue for him." Bank of Cyprus, *supra* note 74.

the proposition that bribery would be a personal and not a real defense against the holder in due course of such an instrument. *Bankers Trust* does not so hold and in any event should not be so construed.

The following examples are proffered to indicate why bribery should be a "real" defense if an instrument is issued in payment of the bribe, although it has passed to a holder in due course:

EXAMPLES

Dramatis Personae:

B: Briber

J: Dishonest Judge who agrees to accept bribe

A: Dishonest Agent who agrees to accept bribe

H: Holder, or possible Holder in Due Course

V: Victim of fraud in the inducement

1. *B* promises to pay Judge *J* $25,000 if *J* will decide a case to be heard tomorrow in *B*'s favor. *J* decides the case in *B*'s favor, but never receives the $25,000 and sues *B* for breach of contract. *J* cannot recover if *B* pleads illegality. The parties are *in pari delicto* and the agreement is illegally void.[233]

2. *B* pays *J* $25,000 cash in return for *J*'s agreement to decide a case to be heard tomorrow in *B*'s favor. *J* accepts the money but decides the case against *B*. *B* sues *J* for return of his money. *B* is denied access to the courts and cannot recover.[234]

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233. *See supra* notes 230-32.

234. Womack v. Maner, 227 Ark. 789, 301 S.W.2d 438 (1957) (no recovery of bribe money paid to a county judge to prevent plaintiff from being punished for gambling); Riggs v. Palmer, *supra* note 141; *McConnell, supra* note 28. Query as to what effect a claim of extortion would have on the plaintiff's rights in such a case. The Reviser's Notes to the Revision of the N.Y. PENAL LAW explain:

> Even though the victim of an extortion, he [the briber] is still guilty of bribery by virtue of conferring a benefit upon a public servant or a labor official 'upon an agreement or understanding that' the latter's decision or action will thereby be influenced' (N §§ 180.15, 200.00). Out of obvious equitable considerations, the new bill arbitrarily restores the coerced 'bribe giver's' defense (N §§ 180.20, 200.05).

Fourth Interim Report of the State of New York Temporary Commission on Revision of the Penal Law and Criminal Code, Leg. Doc. (1965) No. 25 at 43. Extortion might conceivably throw the case into a Liebman-type situation (*see* Liebman v. Rosenthal, *supra* note 230) allowing recovery if plaintiff were not deemed guilty of moral turpitude. *See generally*, N.Y. PENAL LAW §§ 35.05 (McKinney 1975); William J. Davis, Inc. v. Slade, 271 A.2d 412 (1970) (landlord under illegal lease deemed not guilty of moral

3. *B* pays *J* $25,000 cash in return for *J*'s agreement to decide a case to be heard in *B*'s favor. *J* accepts the money and decides the case in *B*'s favor. *B* sues *J* to get his money back. *B* is denied access to the courts and cannot recover.[235]

4. *B* gives *J* his personal check for $25,000 made payable at *J*'s request to the order of "Cash," in exchange for *J*'s promise to decide a case to be heard tomorrow in *B*'s favor. An hour later, *J* takes the check and gives it to *H*, in payment for a good used car. *H* gives *J* the car. The check is dishonored. (*B* may have stopped payment because he has decided to abandon his crime; or he does not trust *J*; or he just does not have that much money in his checking account.) *H* sues *B* on the instrument. *B* pleads illegality as a defense. Assuming *H* can prove his holder in due course status, *B*'s defense should nevertheless be good. The transaction, bribing a judge, is a felony and void.[236]

(a) *If the defense is not good against a holder in due course*: *H* could recover from *B* on the instrument, leaving *J* with the car. The dishonest judge will profit from his crime. If *B* sues *J*, he cannot as a wrongdoer have access to the courts to get his money back.[237] As between *B* and *J*, we have more of an interest in having the bite of the law felt by *J*, who is in a position of public trust and who may again be encouraged to accept bribes; but the result instead is that *B*, the briber is forced to carry out a crime and to pay; and *J*, the corrupt judge, keeps the benefit of his illegal bargain.

(b) *If the defense is good against a holder in due course: H* could not collect from *B* if *B* pleads illegality as a defense. This would not

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turpitude entitled to recover in quasi-contract); *see also* Aikman, *supra* note 230; Singleton v. Foreman, *supra* note 230.

235. *See supra* note 234.

236. *Id.*

237. The obligation to pay a bribe to a judge cannot but be a nullity. The original agreement was by two parties for doing of acts that both knew to be a felony and would have no legal operation and be void. *See* text corresponding to *supra* note 204 ". . . no man may be permitted to profit from his own wrongdoing in a court of justice." Glus v. Brooklyn Eastern Terminal, 359 U.S. U.S. 231, 232 (1959); Stone v. Freeman, 298 N.Y. 268, 82 N.E.2d 571 (1948); Womack v. Maner, *supra* note 234. Courts are closed "to one who would prove his own wrongdoing as a basis for his supposed 'rights.' " Carr v. Hoy, 2 N.Y. 2d 185 (1957); *Sirkin*, 108 N.Y.S. 830; *McConnell*, 7 N.Y. 2d 465; *Reiner*, 259 N.Y. 250; *Riggs*, 115 N.Y. 506; *Holman*, 1 Cowp. 341; Certa v. Wittman, 35 Md. App. 364, 370 A.2d 573 (1977); Androws v. Coulter, 163 Wash. 429, 1 P.2d 320 (1931); Lanley v. Devlin, 95 Wash. 171, 163 P. 395 (1917).

leave *H* without remedy. He has two perfectly valid causes of action against *J*:

[1] *An action for goods sold and accepted in the amount of $25,000*;[238] and

[2] *An action on the instrument for breach of warranty.*[239] In this case, *J* breached his warranty on transfer that there would be no defense good against him. If *B* had a good defense of illegality, *H* could collect the $25,000 from *J* for breach of this warranty. This result leaves *B* not having to pay the bribe money and complete the crime, and *J*, feeling the bite of the law, having to pay for his car with his own money.

If, as is customary, H had asked for J's indorsement, albeit no indorsement is necessary to transfer bearer paper:[240] *J* would have made this warranty that there was no defense good against him to *H* and any subsequent holder taking in good faith.[241] Even if *J* had given a "without recourse" indorsement, *H* (and any subsequent holder taking in good faith)[242] would still have a good breach of warranty cause of action against *J*: the "without recourse" indorsement merely narrows the no defense warranty[243] to a warranty that *J* had "no knowledge of" a defense good against him. In the example proffered, *J* had actual knowledge of a defense good against him, having taken the instrument in payment of a bribe, and would thereby be liable for breach of this warranty.

5. Same facts as in 4, except that *J* has extorted[244] the money from *B*, who gave *J* the same $25,000 check made out to "Cash" at *J*'s behest. *J* uses it to pay for the car and, when the instrument is dishonored for any of the reasons suggested in 4 above, *H* sues *B*.

(a) *If the defense of bribery is not good against a holder in due course:* the victim of the extortion would have to pay *H*. *J* might keep his car and profit from his crime. Although in New York extortion is a defense to a criminal bribery charge involving a public servant

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238. "Unless otherwise agreed where an instrument is taken for an underlying obligation . . . the obligation is suspended. . . . If the instrument is dishonored action may be maintained on either the instrument or the obligation . . ." UCC § 3-802.

239. "Any person who transfers an instrument and receives consideration warrants to his transferee" *inter alia* that "no defense of any party is good against him." UCC § 3-417(2)(d).

240. UCC § 3-202(1).

241. UCC § 3-417(2).

242. *Id.*

243. UCC § 3-417(3).

244. *See supra* note 234.

or labor official, *B*'s case against *J* is not clear cut. Equitably, he should recover. But no case has been found holding *B*, as a briber, would not be denied access to the courts and precluded from recovering against *H*.

(b) *If the defense of bribery is good against the holder in due course: H* can collect against *J* on either of his two causes of action set forth in 4(b)[1] and [2] above.

6. Same facts as in 4, except that the bribe-taker is not a judge but *A*, an employee who has accepted the $25,000 check made out to "Cash" in exchange for his promise to have his employer give a contract to *B*. *A* now goes to *H* and buys the same car, giving *H* the check. *B* has second thoughts and stops payment, maybe because he does not trust *A*, has decided to abandon his crime, or maybe because he just does not have that much money in his checking account. In any event, the check is returned to *H* dishonored. *H* sues *B* on the instrument.

(a) In states where commercial bribery under these circumstances is a felony,[245] *B*'s defense without doubt should be a real defense against *H*. The defense should also be good in all other states because (1) The instrument is issued in direct contravention of those states' commercial bribery statutes and thus is criminal in nature. The underlying obligation (to pay a bribe) must be regarded as void. Both parties are guilty of moral turpitude and are *in pari delicto*. Neither is capable of ratifying his void agreement or criminality; or (2) The instrument is issued in direct contravention of those states' other criminal statutes, or is a common law offense or repugnant to the public policy of these states. This would again leave *H* with his two good causes of action set forth in 4(b)[1] and [2] above against *A*, the bribe-taker.

(b) *If the illegality is not a good defense against H: B* would have to pay *H* and again *A*, the bribe-taker, profits from his crime or takes advantage of his own wrong and keeps the car. (Should *B* sue *A*, he would be denied access to the courts as a wrongdoer, since courts will ordinarily not assist a briber to recover bribe money paid.[246])

Contrast the following fraud in the inducement example:

7. Victim *V* gives *A* his personal check for $25,000 made payable at *A*'s request to the order of "Cash" in exchange for an emerald ring which *A* has represented to be "worth over $30,000." *A* transfers

245. *See, e.g., supra* note 16.
246. Womack v. Maner, *supra* note 234.

the check to *H* in return for a good used car which *H* delivers to *A*. *V* finds out from an appraiser that the ring is "a nice ring worth about $500," and immediately stops payment on his check. *H* sues *V*. *V* shows he has a defense of fraud in the inducement. *H* establishes he is a holder in due course. *V* will have to pay *H*, since fraud in the inducement is a personal defense. *V*'s obligation to pay is voidable only, not void. However, *V* has a good cause of action against *A*. He is not denied access to the court because he is guilty of a crime, moral turpitude, or is trying to profit from his own crime or take advantage of his own wrong. As a victim of a fraud, in New York *V* is entitled either to ratify or rescind the voidable contract and, to fraud damages.[247] Thus, the wrongdoer is not left with the fruits of his misdeed.[248]

In *McConnell v. Commonwealth*,[249] had the alleged bribe to the producer's agent been in the form of McConnell's $10,000 check eventually taken by a holder in due course, it is inconceivable to the writer that New York courts would not have held bribery to be a real defense, if McConnell had pleaded illegality in an action by the holder in due course.[250]

Because the Uniform Commercial Code has built in warranties on transfer and presentment,[251] the instrument issued to pay a bribe should be treated as truly void, coming from an illegally void, unratifiable two-party agreement, with no redeeming features between parties to a crime who are *in pari delicto*. Otherwise, for the first time, bribe-takers could accept instruments and, by merely negotiating to a holder in due course, the instrument would metamorphose into a legal obligation to commit a crime and pay a bribe.

If bribery is treated as a real defense, the illegal Bribery Contract is left to unwind, so that no money is paid out on it.

C. The Resulting Contract, of the type involved in *Bankers Trust*, is more complex. It is, however, the *raison d'être* of the Bribery Contract. In that sense, it is also the *corpus delicti* of the criminal bribe. The Resulting Contract is the bag of loot The Highwayman[252] sought

247. *See* N.Y. CIV. PRAC. LAW § 3002(e).

248. The opposite result occurs if bribery is not a real defense. *See supra* examples 4(a), 5(a), 6(b).

249. *Supra* note 28.

250. It is black letter law that one who has timely withdrawn from his wrongful act stands clear. McConnell would have been allowed to say he turned back from his wrongful intentions. If he so pleaded, the reason would not be important; the turning back is paramount. *See* Aikman v. City of Wheeling, *supra* note 230.

251. UCC § 3-417.

252. *See supra* note 231.

to have apportioned, or the body of the poisoned grandfather in *Riggs v. Palmer*[253]—the entity which will give the criminal the fruits of his crime.

Like a check given in payment of a bribe, the Resulting Contract is legal on its face. But under its gloss is a dough composed of breach of fiduciary duty, corruption, crime, some larceny, conspiracy, theft, betrayal, embezzlement, mendacity and "treason,"[254] held together by the grease of the briber's lubrication payments and droplets of fraud. Its flavor is different from a transaction resulting from fraud in the inducement because of the existence of the Employment Contract. At the moment of making the criminal Bribery Contract, there simultaneously occurs a breach of fiduciary duty under the Employment Contract. Those two misdeeds then merge with the briber's crime. The Resulting Contract is thus born with two bad genes coming from the bribe-receiver, linked with the bad gene of the briber's crime. Is it void or voidable? *Sirkin*[255] said it was void; *Bankers Trust*, voidable only, in the hands of a holder in due course.

Since a holder in due course, by definition, is a non-wrongdoer as to the obligation or transaction, that cannot be a reason for treating as voidable a bribery-induced contract which for over 75 years in New York has been condemned as illegally void.

As *Sirkin* observed, quoting Chief Justice Marshall: "Where the contract grows immediately out of, and is connected with, an illegal

253. *Supra* note 141.

254. *See supra* note 13.

255. *See supra* text corresponding to note 222. If it is void, how many void contracts are there floating around which parties abide by? The validity of the contract which McConnell allegedly bribed to get for Commonwealth was never questioned. Query as to what would have happened if Universal, whose agent was bribed, breached and pleaded the illegality.

In 1981, the *McConnell* case was invoked in a landlord's summary proceeding for some $27,000 in unpaid rent under the lease of a Brooklyn warehouse. The tenant, Prudential Lines, Inc., pleaded the landlord had bribed its vice-president and board member to obtain the lease. It took the position, therefore, that although the lease had four more years to run, it should not have to pay anything and should be permitted to collect rents from its subtenant for the balance of the lease. The court disagreed, stating (1) neither *Sirkin* nor *McConnell* required the wrongdoer without compensation to provide goods or services *in futuro*; and (2) since the bribe-taker was their own agent, the parties were *in pari delicto*. As to where this would leave the parties, the court sidestepped. Prudential had adverted to pending actions it had commenced against the landlord in State and Federal courts. In view of the nature of summary proceedings, the court found Prudential should pay its rent and be relegated to having its commercial bribery problems resolved in the pending plenary actions. McKeon v. Prudential Lines, Inc., 108 Misc.2d 873, 438 N.Y.S.2d 960 (N.Y. City Civ. Ct., Kings Co. 1981).

or immoral act, a court of justice will not lend its aid to enforce it. And if the contract be, in fact, one connected with the illegal transaction, and growing immediately out of it, though it be, in fact, a new contract, it is equally tainted by it."[256]

Under New York law, the bribery-induced contract has been held and appears to be truly, not loosely, illegally void. If it cannot be perceived as truly void, however, one might consider treating it like an instrument which is fraudulently taken prior to issuance. The "voidness" issue is thereby avoided. The defense in that case would be that because the instrument or assignment was bribery-induced, it was never voluntarily delivered or issued into commerce. Hence, there cannot be a holder in due course. The same occurs where the payee's signature on order paper is forged. There can be no holder, and hence no holder in due course.[257] This principle has not impeded commerce; nor has the law that fraud in the execution or other illegally void transactions[258] may be asserted as real defenses against a holder in due course.

Infancy, or such duress or incapacity as renders the obligation a nullity, and discharge in insolvency proceedings are all real defenses under UCC § 3-305.

Had *Bankers Trust* held bribery to be a real defense, the plaintiff banks would have had a good cause of action against their assignor for breach of the implied warranty that the assignment was valid and that there would be no defense which would impede their obtaining a judgment on it.[259]

Much of the mystique surrounding the sacred rights of a holder in due course has recently been dispelled. In consumer sales, even prior to the Federal Trade Commission Act mandates[260] the holder in due course doctrine had ceded to the reality that consumer notes

256. 124 App. Div. 394, 108 N.Y.S. at 837.

257. "No party can ever be a holder of an order instrument stolen prior to indorsement by the owner of the instrument." WHITE AND SUMMERS, *supra* note 42 at 459.

258. For example, in Alabama a contract to issue stock in exchange for a promissory note was held truly void and it was found that "the illegality voids the instrument, even in the hands of a holder in due course." General Beverages v. Rogers 216 F.2d 413, 417 (10th Cir. 1954).

259. *See* Friedman v. Schneider, 238 Mo. App. 778, 186 S.W.2d 204 (1945); RESTATEMENT OF CONTRACTS 2d § 333(2); Lonsdale v. Chesterfield, 99 Wash.2d 353, 662 P.2d 385 (1983).

260. Thereunder, contracts must carry a ten-point bold face notice that the holder takes subject to the consumer's claims and defenses. *See* 16 C.F.R. § 433.2 (1976).

ordinarily did not course through the long and fast streams of commerce. They rarely went beyond their first transferee. Institutions like the plaintiffs in *Bankers Trust* which finance the purchase of non-consumer goods likewise tend to be first and last transferees. Hence, the overriding necessity for enveloping the holder in due course in his traditional protective mantel does not exist to the same degree under UCC § 9-206 as it does for negotiable instruments.

As one with the rights of an Article 3 holder in due course, however, it seems clear that the UCC § 9-206 assignee remains subject to any real illegality defense under UCC § 3-305, whether or not the assigned transaction is "void on its face."[261]

CONCLUSION

Although a holder in due course may take a good title from a chain which has a thief in its links,[262] the bearer instrument which passed via a thief to the holder in due course in *Miller v. Race*[263] was legally issued.[264] It is only such legally issued instruments which the law need seek to protect. Instruments or agreements growing out of such criminality as would render them void require condemnation as a transaction—regardless of whether the plaintiff is a holder in due course. That is the *raison d'être* of the real illegality defense under UCC § 3-305.

In *Bankers Trust* the court was invited not to aid illegality but to condemn it.[265] The court, however, sent its regrets. It may thus have left the impression that in New York bribery is not as bad—since it is not as illegally void—as usury or gambling, which are real defenses. Yet usury is a real defense even in instances where the amount charged does not attain the level of criminality; and gambling run by the state is not illegal. Hence, they do not appear to be more serious in nature than illegal commercial bribery.

From time to time, the legalization of capital punishment, and of various crimes such as the sale of addicting drugs, prostitution, pornography and adultery is discussed and considered. Usury and gambling are included in those discussions. Bribery is not. It cannot

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261. *See* Bankers Trust, 599 F.2d at 491; and *supra* text corresponding to notes 175-91.

262. *See supra* note 42.

263. *See supra* note 49.

264. *See supra* note 52. *Contra* UCC § 3-207(1)(c) as to illegal negotiation.

265. Selango United Rubber Estates, Ltd. v. Cradock, 2 All. E.R. 1073 (1968), at text of decision corresponding to court's n.185.

be legalized precisely because its essence is antithetical to structure. It does to legal, commercial, or societal fiber what termites do to wood, consuming and destroying from within.[266] If bribery is to be deterred, it is the decisions of civil courts which have great influence as a deterrent. Principals who are victimized by commercial bribery require, especially in a UCC § 9-206 case, as much, if not more protection from courts, as the holder in due course.

It may be true, as *Bankers Trust* opined, that its holding will not have "an appreciable effect on the frequency of commercial bribery."[267] One could also speculate that had the court seen fit to hold the other way, such a decision might have had an appreciable effect on reducing commercial bribery—how much of an effect is impossible to guess, since all bribery arrangements are always made and kept completely shrouded in secrecy.

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266. A handbook written by an 18th Century Ottoman statesman observed: "Bribery is the beginning and root of all illegality and tyranny, the source and fountain of every sort of disturbance and sedition, the most vast of evils, and the greatest of calamities. It is the mine of corruption than which there is nothing whatever more calamitous . . . " JACOBY, NEHEMKIS AND EELLS, *supra* note 1, at 254 n.4; DRISCOLL, *supra* note 1.

267. 599 F.2d at 493.

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CHILDREN AND PORNOGRAPHY: AN INTEREST ANALYSIS IN SYSTEM PERSPECTIVE

WILLIAM GREEN*

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ILLUSTRATIONS

PREFACE

The sexual exploitation of children is an object of public concern. State and federal governments have enacted child obscenity and pornography statutes to protect children from abuse in the production of pornography and from harm in the sale of obscene materials.

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These enactments have raised free speech, due process, and privacy questions. This article will examine how these issues have been judicially resolved. In general, it will argue that the crucial factor in judicial resolution is the weight courts have given to free speech interests. In this regard, it will argue that courts have more easily resolved child pornography production issues by defining them as conduct unprotected by the first amendment. At the same time, this article will argue that courts have had greater problems in resolving obscenity and child pornography distribution issues, because of the greater importance they have attached to the free speech interests of children, parents, and other adults.

Part I will provide a framework for the analysis of these issues. Part II will examine the legal regulation of children as recipients of pornography: the evolution of a children's obscenity standard in *Ginsberg v. New York*[1] and *Erznoznick v. City of Jacksonville*[2] and the creation of a child-based indecency standard for broadcasting in *Federal Communications Commission v. Pacifica Foundation.*[3] Part III will examine the legal regulation of children as actors in the production of pornography, via the Supreme Court's decision in *New York v. Ferber,*[4] and its impact on appellate and trial courts. Part IV will draw some conclusions about these judicial decisions, their impact on the public and private interests involved, and the issues that remain to be decided.

I.

ANALYTICAL FRAMEWORK: THE PORNOGRAPHY SYSTEM AND PARTICIPANT INTERESTS

Systems theory is a useful framework for understanding the involvement of children in the pornographic marketplace. A system is a set of structured interactions that converts resources (inputs) into products (outputs) for distribution to consumers.[5] The pornography industry,[6] represented in Figure 1 below, is a system which takes human and financial resources and creates sexually appealing products in the form of pictures, magazines, books, and movies which are

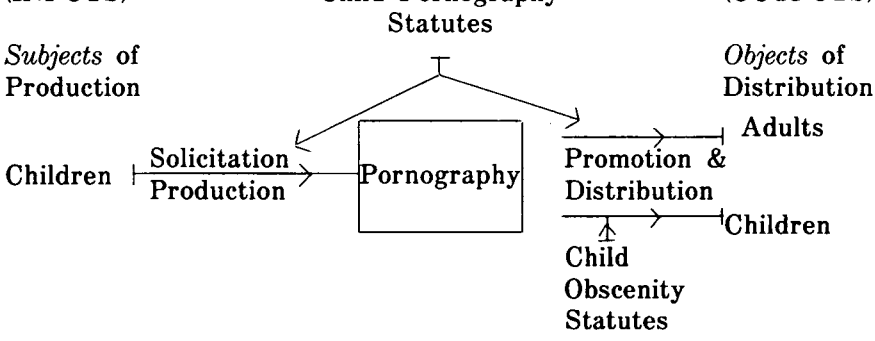
1. 390 U.S. 629 (1968).
2. 422 U.S. 205 (1975).
3. 438 U.S. 726 (1978).
4. 458 U.S. 747 (1982).
5. Easton, *An Approach to the Analysis of Political Systems*, 9 WORLD POLITICS 383-400 (1957).
6. The President's Commission on Obscenity and Pornography reported that "a monolithic smut industry does not exist; rather there are several distinct markets (films, books, magazines) and submarkets which distribute a variety of erotic materials." Lockhart, *Report of the Commission on Obscenity and Pornography* 7 (1970).

distributed through bookstores, the mail, theatres, and television to adult and children consumers.

The pornography business is composed primarily of two groups: producers and distributors. Producers create the product using both child and adult subjects. In the case of child pornography, the producers are those people who coerce or entice children into participation, and also those who participate with them in and record their sexual behavior. Distributors market the product. Obscene and indecent materials are sold to both children and adults, but adults are the principal consumers of child pornography. Therefore, children are involved in the pornography industry's input and output functions as its subjects and objects; they are actors, resources for the production of pornography, and consumers, recipients for the distribution of indecent and obscene materials.

FIGURE 1

CHILDREN, THE PORNOGRAPHY SYSTEM, AND THE LAW



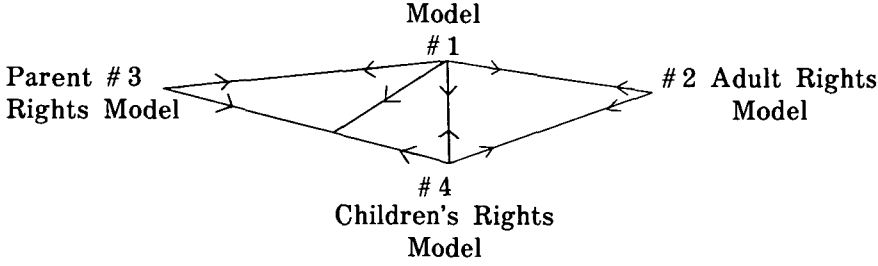
This youthful participation has become a matter of public concern. As a consequence, state and federal governments have passed two types of legislation to protect children: obscenity and child pornography statutes.[7] Child pornography statutes are input-oriented: they permit the prosecution of the producers of child pornography. Obscenity statutes (output-oriented) are of two types. One type, child obscenity statutes, outlaw distribution to juveniles. The other, child

7. Most states control the distribution of obscene material by statute. In Kentucky the advertising, promotion and distribution of obscene material is prohibited by Ky.Rev.Stat. §§ 531.050, .060, .020; using minors to distribute obscene material by § 531.040; and the distribution of obscene materials to minors by § 531.030. Most states also control child pornography. For a recent comprehensive list, see *Ferber*, 458 U.S. at 749. In Kentucky, the production and distribution of child pornography controlled by Ky. Rev. Stat. § 531.300.

pornography statutes, permit the prosecution of persons involved in the promotion and sale of child pornography in order to eliminate the sexual abuse of children in its creation.

Obscenity prosecutions under federal and state statutes have raised fundamental questions about private and public interests. The participant interests in these cases are expressed in terms of the four models which are represented in Figure 2 below.

FIGURE 2
PARTICIPANTS' LEGAL INTEREST MODEL



The Government Interests Model (#1) recognizes four interests. First, the state has an interest in the health, safety, morals, and general welfare of all its citizens, but it uses this police power primarily on behalf of its adult citizens.[8] Second, "[t]he State also has an independent interest in the well-being of its youth."[9] Under its *parens patriae* and police powers it has the authority to protect the welfare of children from abuses from anyone. It may also use these powers to override parental decisions in order to protect individual children from neglect or abuse and to promote the general public's health and safety.[10] Third, there is the state's interest in supporting "the parent's claim to authority in their own household to direct the rearing of their children."[11] Fourth, there is the state's interest in safeguarding and strengthening the family and the relationships among parents and children.[12]

8. The police power is the basis for state obscenity and child pornography statutes. *Id.* The fedeal government also has a "police power" under its postal and commerce powers to regulate obscenity and child pornography. *See infra* note 28.

9. *Ginsberg*, 390 U.S. at 640.

10. Prince v. Massachusetts, 321 U.S. 158 (1944) (state child labor law upheld as applied to a child distributing religious materials) and Jacobsen v. Massachusetts, 197 U.S. 11 (1905) (state compulsory vaccination of children upheld in spite of religious objections of parents).

11. *Ginsberg*, 390 U.S. at 639.

12. H.L. v. Matheson, 450 U.S. 398 (1981) (states requirement that physician provide notice to parents of a minor's abortion decision).

The Adult Rights Model (#2) recognizes that the vast array of constitutional rights that people have against the exercise of governmental power are conferred principally upon adults.[13] As a result, this model distinguishes between adult rights and those selected constitutional rights recently extended to minor children under Model #4. The Adult Rights Model also acknowledges that when adults become parents, they gain additional rights under Model #3.

The Parent Rights Model (#3) recognizes the personal interest of parents in the care of their children free from state interference. The Court has acknowledged the primary responsibility of parents to direct the upbringing of their children[14] as an aspect of liberty protected by the due process[15] and free exercise clauses.[16] Moreover, the Parent Rights Model recognizes that parents share an interest with their children in an autonomous family relationship.[17]

The Children's Rights Model (#4) recognizes that minor children have rights against the state. The Court has recently extended to minors an interest in equal protection against racial discrimination in education,[18] in procedural due process in juvenile court adjudication[19] school disciplinary proceedings,[20] in freedom of speech,[21] and, even as

13. Constitutional rights in full force are generally conferred only upon people who have achieved their majority, though the Supreme Court has made recent minor alterations in this view. *See infra* notes 18-23.

14. Pierce v. Society of Sisters, 268 U.S. 510, 534-35 (1925) (state statute requiring children to attend public school violated parent's right to educational choice for children).

15. Meyer v. Nebraska, 262 U.S. 390 (1923) (state statute restricting private school teaching to English violated parent's due process right to have children taught German).

16. Wisconsin v. Yoder, 406 U.S. 205 (1972) (state compulsory school attendance law infringed upon the religious convictions of Amish parents).

17. Smith v. Organization of Foster Families for Equality and Reform (OFFER), 431 U.S. 816 (1977) (state procedures for removing children from foster homes intruded upon privacy rights of the foster family) and Moore v. City of East Cleveland, 431 U.S. 494 (1977) (city zoning ordinance violated the privacy of the extended family).

18. Brown v. Board, 347 U.S. 483 (1954) (state statutes requiring or permitting racial segregation in educational facilities violated equal protection rights of children).

19. Minors' rights in criminal proceedings include protection against coerced confessions, Gallegos v. Colorado, 370 U.S. 49 (1962); the right to notice, counsel, confrontation, cross-examination, and not to incriminate oneself, In re Gault, 387 U.S. 1 (1967); the prohibition against double jeopardy, Breed v. Jones, 421 U.S. 519 (1975), and the requirement of proof beyond a reasonable doubt, In re Winship, 397 U.S. 358 (1970).

20. Goss v. Lopez, 419 U.S. 565 (1975) (public school suspension of students without notice and hearing, violates their due process rights).

21. Tinker v. DesMoines School District, 393 U.S. 503 (1969) (school regulation forbidding the wearing of armband violated student's free speech right).

against their parents, in personal privacy to make decisions about contraception[22] and abortion.[23] At the same time, the Children's Rights Model also recognizes the minor's due process interest in the family relationship, because of an interest in receiving parental guidance.[24]

The Supreme Court's decisions in cases involving children and pornography have turned upon its evaluation of Model #1 governmental interests and the Model #2, #3, and #4 first amendment, due process, and privacy rights of adults, parents, and children. Parts II and III of this analysis will examine how the Court's decisions in cases involving children as participants in the creation and consumption of pornography have affected these participant interests.

II

CHILDREN AS CONSUMERS

Government regulation of the involvement of children with pornography began, not with the creation of the product, but with its distribution. The following analysis will examine the child obscenity standard developed in *Ginsberg v. New York*[25] and *Erznoznick v. Jacksonville*[26] and the child-based broadcast indecency standard created in *Federal Communications Commission v. Pacifica Foundation.*[27]

Child Obscenity Standard

Federal and state governments regulate the distribution of obscene material. Federal statutes restrict the importation, mailing or communication of obscene materials.[28] States have general obscenity statutes which impose criminal penalties on those who distribute

22. Carey v. Population Services Internat'l, 431 U.S. 678 (1977) (state law restricting sale of contraceptives to minors violate their right to privacy).

23. Planned Parenthood v. Danforth, 428 U.S. 52 (1976) (state statute requiring written consent by parents or spouse to a woman's abortion decision violates her right to privacy).

24. *See supra* note 17.

25. 390 U.S. 629 (1968).

26. 422 U.S. 205 (1975).

27. 438 U.S. 726 (1978).

28. The Tariff Act is 19 U.S.C. § 1305 (1976). The basic postal statute, 18 U.S.C. § 1461, prohibits the knowing use of the mails for the mailing or delivery of obscene materials. Another postal statute, the Anti-Pandering Act, 39 U.S.C. § 4009 (1976), leaves the matter of erotic arousal at the sole discretion of the individual postal patron. The FBI Statute, 18 U.S.C. § 1462 (1976), prohibits the use of common carriers for the importation or interstate transportation of obscene materials and 18 U.S.C. § 1465 (1976) prohibits the interstate transportation of obscene material for sale or

obscene material.[29] The Supreme Court has generally upheld these statutes, because it has found that obscenity as a class of speech is not entitled to any constitutional protection because it is without redeeming social value.[30]

Whether the material is obscene is determined by an internal test first announced in *Roth v. United States*[31] and later elaborated in *Miller v. California.*[32] It is a test based solely on the anticipated effect of the material on the average adult. It requires the trier of fact to apply contemporary community standards to an examination of the material alleged to be obscene and to determine whether the work taken as a whole describes sex in a patently offensive way; appeals to the prurient interest in sex; and lacks serious literary, artistic, political, or scientific value. If the material passes the test, it is obscene.[33]

Obscenity under the *Roth-Miller* test is also a constant concept, because the intentions of the distributor, the manner of distribution, and the identity of the recipients are unimportant. Commercial distribution of obscene material to adults is unprotected by the first amendment. As the Court said in *Paris Adult Theatre v. Slaton:* "commercial exploitation of depictions, descriptions, or exhibitions of obscene conduct. . . falls within a State's broad power to regulate commerce and protect the public environment."[34]

Whether pornographic materials, non-obscene for adults, would be obscene for children was not considered by the Court until the appearance of an external test for obscenity. In *Ginsburg v. United States*[35] and *Mishkin v. New York*,[36] the Court announced the concept of variable obscenity: the circumstances of distribution could make obscene material which was otherwise protected expression. *Redrup v. New York*[37] extended the concept by holding that the obscenity of material would also depend upon whether it was pandered or sold

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distribution. The FCC Statute, 18 U.S.C. § 1464 (1976), prohibits the use of radio or television to utter "obscene, indecent, or profane language."

29. *Supra* note 7.

30. Roth v. U.S., 354 U.S. 476 (1957) (later elaborated in Miller v. Cal., 413 U.S. 15 (1973)).

31. 354 U.S. 476 (1957).

32. 413 U.S. 15 (1973).

33. *Id.* at 24.

34. 413 U.S. 49, 68-69 (1972).

35. 383 U.S. 463 (1966).

36. 383 U.S. 502 (1966).

37. 386 U.S. 767 (1967).

to juveniles.[38] Whether material was obscene for children, however, involved more than just a conflict between a child's right to free expression and the public interest in morality. The sale of pornography to children raised other questions. Could the government's interest in the protection of children qualify the right of parents to educate their children and the right of adults to protected materials? The Court addressed this question initially in *Ginsberg v. New York*[39] and *Erznoznick v. City of Jacksonville*[40] which will be examined below.

Ginsberg v. New York

Could a state prohibit the sale of printed material to minors defined as obscene on the basis of its appeal to them, though it would not necessarily be obscene to adults? Justice Brennan, speaking for the majority in *Ginsberg*, found that it was reasonable for a state to conclude that a minor's exposure to such material might be harmful and to enact a statute such as New York's which "simply adjusts the definition of obscenity to social realities by permitting the appeal of this type of material to be assessed in terms of the sexual interest . . . of minors."[41]

Two state interests justified a limitation on the availability of obscene material to minors. One was the state's "independent interest in the well-being of its youth."[42] The other interest supported "the parents' claim to authority . . . to direct the rearing of their children."[43] It is clear that the statute was more than merely supportive, because it denied parents, if they wished, the right to allow their children to have uninhibited access to books and magazines.[44] Nonetheless, Justice Brennan claimed that the statute did not "bar parents who so desire[d] from purchasing the magazines for their children."[45] Therefore, *Ginsberg* did not explicitly discuss the rights of adults, but one could assume that if the statute did not bar parental purchases, it would not impair an adult's right of access to a bookstore or theatre.

Erznoznick v. City of Jacksonville

Could a city in the exercise of its police power prohibit the exhibition of non-obscene nudity in drive-in movies visible from "any

38. *Id.* at 769.
39. *Ginsberg*, 390 U.S. at 629.
40. *Erznoznick*, 422 U.S. at 205.
41. *Ginsberg*, 390 U.S. at 638.
42. *Id.* at 640.
43. *Id.* at 639.
44. *Id.* at 674 (Fortas, J., dissenting).
45. *Id.* at 639.

public street or public place" in order to protect children?[46] Justice Powell, speaking for the Court in *Erznoznick* agreed that the city could "adopt more stringent controls on communicative materials available to youths."[47] At the same time, the city had to acknowledge that even though the first amendment rights of minors were not co-extensive with those of adults, "minors [were] entitled to a significant measure of First Amendment protection"[48] which included the right to view non-obscene nudity.

The Jacksonville ordinance, judged by this standard, was fatally overbroad as applied to children, because it was not directed against sexually-explicit nudity, but forbade all nudity in outdoor films. "All nudity," Justice Powell said, "cannot be deemed obscene even as to minors. . . ." under the *Ginsberg* obscenity standard.[49] Non-obscene speech could not be suppressed "solely to protect the young from ideas or images that a legislative body thinks unsuitable for them."[50] Thus *Erznoznick* acknowledged the post-*Miller* validity of the *Ginsberg* child obscenity standard, but it did not discuss whether public exhibitions not obscene to adults could be restricted, because they were obscene to children.

The Child-Based Indecency Standard

The federal government also regulates the distribution of non-obscene material. Federal statutes restrict the mailing and broadcast of indecent material. The Supreme Court first upheld this governmental action in *Rowan v. United States Post Office Department*[51] where it approved of the Anti-Pandering Act, 19 U.S.C. § 4009,[52] which leaves the matter of erotic arousal at the sole discretion of the individual postal patron who has the right to obtain from a post office a prohibitory order against the advertiser even though the material was not obscene by any objective standard.

The Court's decision in *Rowan* is, however, rather limited in its application. It upheld only the right of an adult to make a personal

46. *Erznoznick*, 422 U.S. at 205.
47. *Id.* at 212.
48. *Id.*
49. *Id.* at 213.
50. *Id.* at 213-14.
51. 397 U.S. 728 (1971).
52. Section 4009 permits a person who has received "a pandering advertisement which offers for sale matter which the addressee in his sole discretion believes to be erotically arousing or sexually provocative" to request the post office to issue an order directing the advertiser to refrain from further mailings. 19 U.S.C. § 4009 (1976).

judgment about a mailed advertisement. Moreover, it did not consider whether the child had a right to refuse offensive material, whether the parents had discretion under section 4009(g) to determine what material a child may receive,[53] nor whether the state's *parens patriae* power could prevail over parental discretion.[54] These issues, along with the free speech-rights of adults, were addressed in the much wider context of radio broadcasting.

Federal Communications Commission v. Pacifica Foundation

Could the FCC regulate radio broadcasts non-obscene for children? The issue was raised one afternoon when WBAI, a Pacifica Foundation radio station, broadcast George Carlin's "dirty words" monologue. The FCC, acting on a complaint from a listener, concluded that the monologue "depicted sexual and excretory activities and organs in a manner patently offensive by contemporary standards for the broadcast medium"[55] and was prohibited as indecent under 18 U.S.C. § 1464.[56] The Court of Appeals reversed.[57] On appeal, the Supreme Court upheld the Commission, 5 to 4.[58]

Justice Stevens in his opinion for the Court read the statutory language's prohibition on the use of "any obscene, indecent, or profane language by means of radio communication" in the disjunctive;[59] determined that indecent meant "nonconformance with accepted standards of morality";[60] and then agreed with the Commission's conclusion that indecent language was used in the Pacifica broadcast.[61]

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53. Section 4009(g) allows the post office to include in any prohibitive order "the names of any minor children who have not attained their nineteenth birthday and who reside with the addressee." 19 U.S.C. § 4009(g) (1976).

54. The Supreme Court has never ruled on whether there is any limit to a parent's discretion in determining what reading material a child may bring into the home, though *Ginsberg* suggests that the state has an interest to see children are safeguarded from abuse.

55. In re A Citizen's Complaint Against Pacifica Foundation Station WBAI(FM), 56 F.C.C.2d 94 (1975).

56. 18 U.S.C. § 1464 (1976).

57. 556 F.2d 9 (D.C.Cir. 1977).

58. *Pacifica*, 438 U.S. 726. A majority opinion written by Justice Stevens was joined by four members of the Court: Chief Justice Burger and Justices Blackmun, Powell and Rehnquist. Justice Powell joined by Blackmun concurred in part in the opinion and the judgment. Justice Brennan, joined by Marshall, dissented on constitutional grounds. Justice Stewart, joined by Brennan, White, and Marshall, dissented on statutory grounds.

59. *Id.* at 739-40.

60. *Id.* at 740.

61. *Id.* at 741.

Justice Stevens found no constitutional barrier to the FCC's authority to impose a time regulation on the indecent radio broadcast.[62] Two characteristics of the broadcast media justified this regulation of indecent speech: the impact of the broadcast media on an adult's privacy in the home and the media's easy accessibility to children.[63]

The *Pacifica* decision is noteworthy, because it is the first instance in which the Court has upheld the federal government's power to restrict non-obscene speech. One commentator observed: "the *Pacifica* Court tacitly embraced a general or national standard of decency" for broadcasting.[64] The Court offered two justifications, but the privacy rational is flawed. "[C]hanneling indecent broadcasts . . . cannot possibly protect that interest . . . [, because] it will do nothing to aid the unwilling adult listeners who randomly tune in at night."[65] As a consequence, the protection of young children is the only interest advanced by the Court which can justify the regulation of broadcast indecency. This interest, however, makes major alterations in the rights of children, their parents, and other adults in their access to non-obscene broadcasting.

The Court had recognized the government's interest in the well-being of youth by adopting a children's obscenity standard in *Ginsberg*. In broadcasting, however, the Court assumed that *Ginsberg* was insufficient, because the *Pacifica* decision "allows the government to prevent minors from gaining access to materials that are not obscene."[66] In doing so, *Pacifica* also disregards the admonition in *Erznoznick* that "speech that is [not] . . . obscene as to youths . . . cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks [are] unsuitable for them."[67]

The Court recognized in *Ginsberg* the governmental interest in supporting parental authority. Justice Stevens, citing *Ginsberg*, claimed that the Court's interest in preventing children from hearing offensive broadcasts supported "the parents' claim to authority in their own household."[68] Like *Ginsberg, Pacifica* restricts the rights of those parents who may find it desirable to expose their children to the Carlin monologue.[69] However, *Pacifica* goes one step further. The offensive

62. *Id.* at 750-51.
63. *Id.* at 748-50. *See also id.* at 755-61 (Powell, J., concurring).
64. *The Supreme Court, 1977 Term*, 92 HARV. L. REV. 57, 157 (1978).
65. *Id.* at 160.
66. *Pacifica*, 438 U.S. at 767 (Brennan, J., dissenting).
67. *Id.* at 768. (Quoting *Erznoznick, supra* note 46).
68. *Id.* at 749. (Quoting *Ginsberg, supra* notes 11 & 41).
69. *Id.* at 770 (Brennan, J., dissenting).

material will be available to parents only at times when children are not likely to be in the listening audience.[70]

The Court's decision in *Ginsberg* did not impair the access of adults to books, magazines, records, and movies. This physical separation of the audience is not possible in the broadcast media. As a consequence, *Pacifica* raised the question as to whether the FCC's action violated the principle of *Butler v. Michigan*; government may not regulate the distribution of pornography to children in a manner that prevents adults from gaining access to protected materials and, thereby, "reduces the adult population . . . to reading only what is fit for children."[71] The *Pacifica* majority claimed that the regulation of indecent broadcasting did not violate the principle of *Butler*. The Commission's decision had not closed all broadcasting to indecent speech.[72] Adults, Justice Powell said, may hear the monologue "during late evening hours when fewer children are likely to be in the audience."[73] Moreover, the FCC ruling did not restrict adult use of alternative forums. "Adults who feel the need may purchase tapes and records or go to the theatres and nightclubs to hear these words."[74] Justice Powell in his concurring opinion was more cautious. "Butler. . . is not without force," he said, "but it is not sufficiently strong to leave the Commission powerless to act. . . in this case."[75]

Implications of Pacifica

What *Pacifica* means is unclear. Justice Stevens claimed that the Court's review was limited to the Commission's decision "that the Carlin monologue was indecent as broadcast."[76] Justice Brennan was profoundly disturbed by the implications of the majority's action: it was the product of "acute ethnocentric myopia."[77] His dissent raised three questions about the meaning of *Pacifica*.

What will a broadcast indecency standard mean and what will be its effect? Justice Brennan argued that there will be greater problems than those encountered in defining obscenity. Indecency is a less precise term. Moreover, he claimed that its implementation would destroy cultural diversity, because a decency standard would

70. *Id.* at 768 (Brennan, J., dissenting).
71. 352 U.S. 380, 383 (1957).
72. *Pacifica*, 438 U.S. at 750.
73. *Id.* at 760 (Powell, J., concurring).
74. *Id.* at 750 n. 28. *See also id.* at 760 (Powell, J., concurring).
75. *Id.* at 760 (Powell, J., concurring).
76. *Id.* at 735. *See also id.* at 755-56 (Powell, J., concurring).
77. *Id.* at 775.

be likely to be a reflection of the will "of the dominant culture's . . . thinking, acting, and speaking."[78]

What does "as broadcast" mean? Justice Brennan argued for a narrow view of the Court's holding. Since,

> "the FCC insists [in its brief] that it desires only the authority to reprimand a broadcaster on facts analogous to those presented in this case . . . [the opinions of Stevens and Powell] do no more than permit the Commission to censor the afternoon broadcast of the 'sort of verbal shock treatment'. . . involved here."[79]

Pacifica may, however, have a wider meaning. As one commentator argued, the Stevens and Powell opinions "authorized time zoning . . . when the broadcast: (1) uses language offensive to most people in depicting sexual or excretory activities; (2) uses that language not incidentally, but repetitively; (3) is aired at a time of day when children are likely to be in the audience; and (4) is likely to influence children."[80] That *Pacifica* may have this wider meaning was not foreclosed by Stevens when he said that whether the playing of the monologue in the late evening would be permissible "is an issue neither the commission nor this Court has decided."[81]

What guidance did *Pacifica* provide the FCC? Justice Brennan complained that the privacy and children rationales were "plagued by a common failing: the lack of principled limits on their use . . . ."[82] Neither the Stevens nor the Powell opinions, he says, "serve to clarify the extent to which the FCC may assert the rationales as justification for expunging from the airways protected communication the Commission finds offensive."[83] Indeed, Stevens' opinion in which Powell concurred suggested no limitation on future FCC decisions. As Stevens said:

> [t]he Commission's decision rested entirely on a nuisance rationale under which context is all important. The Concept requires consideration of a host of variables. The time of day [,] . . . [t]he content of the program in which the language is used will affect the composition of the audience,

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78. *Id.* at 777.
79. *Id.* at 771.
80. *Supra* note 64, at 162.
81. *Pacifica*, 438 U.S. at 750 n. 28.
82. *Id.* at 770.
83. *Id.*

> and the differences between radio and television, and perhaps closed circuit transmission, may also be relevant.[84]

These questions Justice Brennan raised six years ago have not been answered. No broadcaster has challenged the non-renewal of his license by the Commission because of indecent material in its programming. As a consequence, neither the courts of appeal, nor the Supreme Court have had the opportunity to say what *Pacifica* means besides the Commission's finding "that the Carlin [radio] monologue was indecent as broadcast."[85] What has captured judicial attention in the years since *Pacifica* has been child pornography.

III. CHILDREN AS ACTORS

Child pornography, the visual or printed depiction of a minor child engaged in explicit sexual conduct, became the subject of government attention after disclosures of a widespread market in 1977 revealed the inadequacy of existing legislation.[86] Federal and state obscenity laws did not reach the producers of child pornography, only its distributors.[87] Moreover, "punishment [of distributors] under obscenity statutes was not severe enough to reflect the aggravating circumstances of child abuse involved in child pornography."[88] Furthermore, state sexual offense and child abuse statutes did not reach the producers of child pornography, because they failed to apply to the abusive acts involved and the penalties they provided were too weak.[89] As a consequence, federal and state legislation was enacted "to protect children directly from physical abuse in pornography and indirectly by suppressing obscene material that might encourage further abuse . . . ."[90] by imposing criminal liability on all the participants in the child pornography system. The following analysis will examine these federal and state child pornography statutes and then turn its attention to the Supreme Court's child pornography decision, *New York*

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84. *Id.* at 750.

85. *Pacifica*, 438 U.S. at 735, 755, 756.

86. Note, *Child Pornography: A New Role for the Obscenity Doctrine*, 1978 U. ILL. L.F. 711, 713-15 (1978).

87. Virtually all child pornography is obscene under current standards. S. Rep. No. 438, 95th Cong. 1st Sess., 12 (1978).

88. Note, *Child Pornography: A New Role for the Obscenity Doctrine, supra* note 86, at 715.

89. *Id. See also* Comment, *Protection of Children from Use in Pornography: Toward Constitutional and Enforceable Legislation*, 12 U. MICH. J.L. REF. 295, 302 (1979).

90. Moore, *Child Pornography, the First Amendment, and the Media: The Constitutionality of Super-Obscenity Laws*, 4 COMM/ENT 125 (1978-79).

v. Ferber,[91] the cases that preceded it and the impact it has had on trial and appellate courts.

Child Pornography Legislation

The federal Protection of Children Against Sexual Exploitation Act of 1977[92] regulates the interstate aspects of child pornography in two ways. First, the statute regulates conduct involved in the solicitation-production of child pornography without regard to its obscenity. Section 2251 forbids parents and other persons from employing children as models for the production of sexually explicit material for interstate shipment.[93] Section 2254, more broadly applicable, makes punishable the "causing of a minor to engage in sexual conduct for commercial exploitation."[94] Second, section 2252 regulates distributors by prohibiting obscene child pornography from being shipped in interstate commerce and received for distribution and sale.[95]

State statutes, like the federal act, usually contain 'production offenses' that directly regulate the conduct of those who solicit or procure children, and 'dissemination offenses' which "attempt to curb sexual abuse [indirectly] by dampening economic supply and demand for sexual depictions of children."[96] This state legislation is not based on any uniform act.[97] Consequently, there are considerable variations in the use of an obscenity standard in state child pornography statutes. Figure 3 presents four types of state statutes with examples of each.

States like Illinois (#1) apply an obscenity definition to both solicitation-production and distribution activities.[98] States like Florida (#2) follow the federal statute and dispense with an obscenity standard for solicitation-production offenses, but impose one on distribution offenses.[99] However, no state reverses this approach (#3). States like New York and Kentucky (#4) dispense with an obscenity requirement for all child pornography offenses.[100] These statutes prohibit all

91. 458 U.S. 747 (1982).

92. P. L. No. 95-225, 92 Stat. 7 (1978).

93. 18 U.S.C. § 2251 (1978).

94. 18 U.S.C. § 2423 (1978). Section 2243 also amended the Mann Act to cover males.

95. 18 U.S.C. § 2252 (1978).

96. Note, *Child Pornography: A New Role for the Obscentity Doctrine, supra*, note 86, at 725-26.

97. Note, *Child Pornography Legislation*, 17 J. FAM. L. 505, 531 (1978-79).

98. Ill. Ann. Stat. ch. 38, § 11-20a (Supp. 1978). Now repealed and replaced by § 11-20.1.

99. Fla. Stat. Ann. § 847.014 (Supp. 1978). Now repealed and replaced by § 847.071.

100. Ky. Rev. Stat. §§ 531.300-.370 (Supp. 1978) and N.Y. Penal Law §§ 263.00-.25

speech that contains explicit sexual depictions of children. However, the statutes which incorporate an obscenity requirement (#1 & 2) often define it in terms of variable obscenity.[101] As one commentator explained: "[U]se of the variable obscenity provision seems the only possible way to arrive at a finding of obscenity for material that depicts children . . ., because [it is the sexually deviant pedophile not] the average adult presumably [who] would . . . find sexual depictions of children appealing to his prurient interest."[102]

FIGURE 3

USE OF OBSCENITY DEFINITIONS IN CHILD PORNOGRAPHY STATUTES

		Application to Solicitation & Production Offenses: Yes	Application to Solicitation & Production Offenses: No
Application to Distribution Offenses	Yes	1 Illinois	2 Florida
	No	3	4 NY & KY

Child Pornography Decisions

Were these child pornography statutes constitutional? In four early cases, state statutes were challenged primarily on first amendment and due process grounds. In two of these cases the defendants claimed that the statutes were vague and that they were also overbroad, because they contained no obscenity requirement for production offenses.

In a Florida case, *Griffin v. State*,[103] the defendant pled no contest to charges of procuring and using a minor in the production of obscene photographs. On appeal he contended that the Florida Statute

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(McKinney Supp. 1978).

101. Variable obscenity evaluates the sexual depictions of children or other susceptible groups including sexually deviant pedophiles when it appears from the character of the material or the circumstances of its distribution to be directed at such audiences.

102. Note, *Child Pornography: A New Role for the Obscenity Doctrine*, *supra* note 86.

103. 396 So.2d 152 (Fla. 1981).

§ 847.014, which made it unlawful "to procure a minor to perform or participate in any photograph, motion picture, exhibition, show, representation or other production, in whole or in part, which depicts sexual conduct, sexual excitement, or sadomasochistic abuse [and to produce same] involving a minor," was void for vagueness.[104] The Florida Supreme Court held "the statute is impervious to attack on grounds of vagueness, as a person of common intelligence has adequate notice of the conduct proscribed."[105] The court also dismissed the argument that the material could not be found obscene, because the statute failed to incorporate the *Miller* test: "the statute . . . does not proscribe constitutionally protected speech or activities, but . . . specific conduct relating to minors."[106] Since the statute had been constitutionally applied, the court found the defendant did not have standing to challenge the statute for overbreadth.[107]

In a Kentucky case, *Payne v. Commonwealth*,[108] the defendant had been convicted of sodomy, sexual abuse, and using a minor in a sexual performance.[109] On appeal, he contended that the prohibition in Kentucky Revised Statutes 531.310 on "the use of minors in actual or simulated 'acts of . . . homosexuality or lesbianism' [was] unconstitutionally vague,"[110] because it was unclear whether the activity prohibited included "such seemingly innocuous activity as 'two females embracing or two males standing with their arms around each other.' "[111] The Supreme Court of Kentucky replied: "[t]he definitional section [of the statute] read as a whole, coupled with a reference to any standard dictionary should provide the ordinary person of common sense a clear enough indication of the type of acts prohibited."[112] The Court then went on to consider the appellant's argument that the statute was overbroad because it prohibited constitutionally protected conduct. The Court distinguished between statutes in terms of the degree of constitutional scrutiny protecting a minor from actual

104. Fla. Stat. § 847.014 (1977).

105. *Griffin*, 396 So. 2d at 154.

106. *Id.* at 155.

107. *Id.* at 155-56.

108. 523 S.W.2d 867 (Ky. 1981).

109. In *Payne* the defendant had been convicted in Fayette Circuit Court of sodomy, sexual abuse, and using a minor in a sexual performance. "Seven of the twenty counts of using a minor in a sexual performance [were] predicated upon appellant's act of videotaping a sexual performance by boys under the age of sixteen years. The remaining thirteen counts . . . [were] predicated upon appellant's act of taking photographs of a juvenile less than sixteen years of age engaged in sexual conduct." *Id.* at 869.

110. *Id.* at 871. (Quoting Ky. Rev. Stat. § 531.310 (1978)).

111. *Id.*

112. *Id.*

use in a sexual performance and those dealing with the distribution of materials portraying those sexual performances. Statutes such as K.R.S. 531.310 which "protect children from the conduct of being used in a sexual performance"[113] do not give rise to free speech considerations involved in the sale of child pornography.[114] As a consequence, "[a]ny overbreadth problems must be considered then in light of the less favored position of conduct in the constitutional framework."[115] *Erznoznick* required that the statute's "deterrent effect on legitimate expression [must be] both real and substantial."[116] Applying the *Erznoznick* test, the court concluded that "[a]ny deterrent effect on legitimate expression" of the photographed and videotaped conduct of minors engaged in sexual performances could "not be said to be real and substantial."[117]

These two decisions by the Florida and Kentucky Supreme Courts suggested that the procurement and production offenses of state statutes were not susceptible to vagueness and overbreadth challenges, because the statutes gave adequate notice to a person of common intelligence and the proscribed conduct was not protected speech. At the same time, two other state statutes which made distribution an offense were challenged in federal court on first amendment and due process ground with different results.

In a Texas case, *Graham v. Hill*,[118] a movie theatre and bookstore manager was prosecuted for violating the Texas Penal Code, section 43.25 which made it unlawful for a person to sell, distribute, or possess for sale or distribution "any motion picture or photograph showing a person younger than 17 years of age observing or engaging in sexual conduct."[119] The defendant filed a motion for summary judgment on the grounds of the statute's unconstitutional overbreadth. The federal district court granted the motion. Section 43.25 was overbroad, because it failed to include "the most basic requirement—that. . .the photograph or motion picture be obscene. (citations omitted) As a result. . .its deterrent effect on protected conduct is both real and substantial, especially considering the severe sanctions for violation of the statute."[120]

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113. *Id.*
114. *Id.*
115. *Id.* at 872.
116. *Id.*
117. *Id.*
118. 444 F. Supp. 584 (W. D. Tex. 1978).
119. Tex. Penal Code Ann. § 43.25(a) (Vernon 1977) (statute amended in 1979).
120. *Graham*, 444 F. Supp. at 592, 593.

In a New York case, *St. Martin's Press v. Carey*,[121] the state legislature had passed a child pornography statute which contained both production and dissemination offenses. Section 263.15 made it unlawful "to promote a sexual performance by a child when. . . he produces, directs, or promotes any performance which includes sexual conduct by a child less than sixteen years of age."[122] Shortly before its effective date, St. Martin's requested an injunction against its enforcement. The publisher claimed that section 263.15 would prohibit their publication, distribution, advertisement, and sale of the book *Show Me!*, because it was unconstitutionally broad. St. Martin's claimed that *Show Me!* was not obscene, but that section 263.15 would prohibit its publication. The publisher argued that the statute applied to motion pictures or photographs of children involved in sexual conduct whether or not they were obscene.[123] St. Martin's also claimed that section 263.15 was unconstitutional, because it was a denial of due process. New York, the publisher claimed, may prevent, its children from being exploited, but that purpose had no rational application to *Show Me!*, because the book was produced in Germany between 1969 and 1973.[124]

The district court granted the preliminary injunction, because of the statute's apparent overbreadth[125] and because the book which clearly fell within the statute might be protected first amendment speech,[126] and as a consequence, its removal from the marketplace would cause irreparable harm to the publisher's constitutional rights.[127] The court was, however, more persuaded by the publisher's due process argument. It agreed that New York could not make criminal "the dissemination of photographs of children taken outside the United States some years before the effective date of the statute."[128] On appeal, the decision was reversed, because the Second Circuit found that the suit did not involve a case or controversy where there was a lack of state prosecutorial activity[129] and the book did not come within the statutory language for due process reasons. 'We fail to see," the Court of Appeals concluded, "how the New York legislature has any legitimate concern with German children in the years before 1973 . . ."[130]

121. 605 F.2d 41 (2nd Cir. 1979), 440 F. Supp. 1196 (S.D.N.Y. 1977).
122. N.Y. Penal Law § 263.15 (Consol. 1977).
123. 440 F. Supp. at 1199 (S.D.N.Y. 1977).
124. *Id.*
125. *Id.* at 1206.
126. *Id.* at 1205.
127. *Id.* at 1203.
128. *Id.* at 1205.
129. 605 F.2d 41, 45 (2d Cir. 1979).
130. *Id.* at 44.

New York v. Ferber

When the United States Supreme Court considered the child pornography issue for the first time, the major constitutional issue was whether a state "consistent with the First Amendment [could] prohibit the dissemination of material which shows children engaged in sexual conduct regardless of whether the material is obscene."[131] The case, *New York v. Ferber*, involved a bookstore owner who had been convicted of promoting the sexual performance of a child under the same statute that had been at issue in *St. Martin's Press*: section 263.15.[132] Ferber had argued that the statute was unconstitutionally overbroad, because it did not contain a requirement that the child's performance be obscene.[133] This time, however, the overbreadth challenge came before the state supreme court with a different result. The New York Court of Appeals reversed the conviction because the statute would "in many, if not all, cases prohibit the promotion of materials which are traditionally entitled to constitutional protection from government interference under the First Amendment."[134] On appeal, the United States Supreme Court reversed the judgment unanimously.[135]

Justice White, writing for the Court, first identified the state's interest in regulating child pornography. "The state's interest in 'safeguarding the physical and psychological well-being of a minor' is 'compelling.'"[136] Prevention of sexual exploitation and abuse of children, he said, "constitutes a governmental objective of surpassing importance."[137] The New York statute's regulation of distribution was an appropriate means to promote the state's interest. "The advertising and selling of child pornography provides an economic motive for . . . [its] production. . . ."[138] Moreover, its distribution "is intrinsically related to the sexual abuse of children [, because]. . .the materials produced are a permanent record of the children's participation and the harm to the child is exacerbated by their circulation."[139] At the

131. *Ferber*, 458 U.S. at 754.

132. People v. Ferber, 96 Misc.2d 669, 409 N.Y.S.2d 632, 634 (N.Y. Sup.Ct. 1978).

133. 52 N.Y.2d 674, 677, 422 N.E.2d 523, 524, 525 (N.Y. 1981).

134. 422 N.E.2d at 525.

135. *Ferber*, 458 U.S. 747 (1982). A majority opinion written by Justice White was joined by four members of the Court: Chief Justice Berger and Justices O'Connor, Powell, and Rehnquist. Separate concurrences were written by Justice Brennan joined by Marshall, Justice Stevens, and Justice O'Connor. Justice Blackmun concurred in the result.

136. *Id.* at 756, 757.

137. *Id.* at 757.

138. *Id.* at 761.

139. *Id* at 759.

same time, the value of permitting children to appear in pornographic films and photographs was "exceedingly modest, if not deminimus."[140] In these circumstances, where the evil to be restricted "so overwhelmingly outweighs the expressive interests, if any at stake," a content-based classification was permissible.[141] Justice White concluded:

> When a definable class of material, such as that covered by § 263.15, bears so heavily and pervasively on the welfare of children engaged in its production, we think the balance of competing interests is clearly struck and that it is permissible to consider these materials as without the protection of the First Amendment.[142]

How could child pornography be regulated? Justice White found that the *Miller* obscenity standard could not be used, because it was an output-oriented standard which focused on the harm the material posed to society and not an input-oriented standard which applied to the psychological harm inflicted on the child. As he stated concisely:

> [T]he question under the *Miller* test of whether a work, taken as a whole, appeals to the prurient interest [or is patently offensive to] the average person bears no connection to the issue of whether the child has been physically or psychologically harmed in the production of the work . . . . It is [also] irrelevant to the [abused] child . . . whether or not the material. . . has a literary, artistic, political, or social value.[143]

Miller's community standard test was also inapplicable to the evaluation of child pornography. "It would be equally unrealistic to equate a community's toleration for sexually oriented material with the permissible scope of legislation aimed at protecting children from sexual exploitation."[144]

Child pornography would be judged by a separate four-part test: (1) adequate definition of the offensive sexual conduct, (2) visual depiction, (3) the minority of the subject, and (4) the knowledge of the defendant. According to Justice White, "the conduct to be prohibited must be adequately defined by the state law [,] . . . limited to works that visually depict sexual conduct by children below a specified age [, and with] . . . some element of scienter on the part of the defendant."[145]

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140. *Id.* at 762.
141. *Id.* at 763, 764.
142. *Id.* at 764.
143. *Id* at 761.
144. *Id.* at 761 n.12.
145. *Id.* at 764, 765.

The New York child pornography statute met this test. The conduct and context were sufficiently limited. Section 263.15 forbade the performance by a minor of "actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, sadomasochistic abuse, or lewd exhibition of the genitals. . . .[in] any play, motion picture, photograph or dance, or any other visual performance exhibited before an audience."[146] The statute also forbade the knowing promotion of "sexual performances by a child under the age of sixteen by distributing material which depicts such performances."[147]

What remained to be addressed was the claim that the statute was unconstitutionally overbroad, because it prohibited the distribution of medical and educational materials that portrayed adolescent sex in a non-obscene manner. In response, Justice White said that where conduct and not merely speech is involved, *Broadrick v. Oklahoma*[148] had held that "the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep."[149] Applying *Broadrick*, he said that *Ferber* was "the paradigmatic case of a state statute whose legitimate reach dwarfs its arguably impermissible applications."[150] Section 263.15 might forbid the distribution of material with serious literary, scientific, or educational value, but "these arguably impermissible applications [would] amount to [no] more than a tiny fraction of the material within the statute's reach."[151] As a consequence, section 263.15 was not substantially overbroad.[152]

In sum, *Ferber* upheld a New York and Kentucky-type child pornography statute[153] which dispenses with the obscenity requirement for the promotion and distribution of visual child pornography. What then of the *Miller* standard of obscenity? *Miller v. California* remains applicable to all obscene sexual representations of children in books, magazines, pamphlets, and oral recordings, but not visual materials.[154] However, the concurring opinions in *Ferber* suggest that the Court

146. *Id.* at 751.
147. *Id.* at 749.
148. 413 U.S. 601 (1973).
149. *Ferber*, 458 U.S. at 770 (Quoting *Broadrick*, 413 U.S. at 613).
150. *Id.* at 773.
151. *Id.*
152. *Id.*
153. *See* Figure 3 in text, at 456.
154. Note, *Child Pornography: A New Exception to the First Amendment—New York v. Ferber*, 10 FLA. ST. U.L. REV. 684, 696-97 (1983).

did not necessarily dispose of the *Miller* LAPS test when it decided that overbreadth challenges to child pornography statutes must meet *Broadrick's* demanding real and substantial test. Justice O'Connor stated: "the Court does not hold that New York must accept material with serious literary, scientific, or educational value."[155] Justice Brennan, joined by Marshall, went even further when he said: "depictions of children that in themselves do have serious literary, artistic, scientific, or medical value, would not violate the First Amendment."[156] Justice Stevens, however, saw no reason for the Court to discuss the matter, because there had been no claim that the material at issue in *Ferber* had any socially redeeming value.[157] In spite of these reservations, the *Ferber* child pornography test would be likely to dispose of almost all first amendment overbreadth and vagueness challenges. The decision did not, however, directly address two issues raised in pre-*Ferber* cases: the privacy rights of parents and adults and the due process right implicated by the exercise of the state's police power on behalf of children in foreign jurisdictions.[158]

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155. *Ferber*, 458 U.S. at 774 (O'Connor concurring).

156. *Id.* at 776 (Brennan with Marshall concurring).

157. *Id.* at 777 (Stevens concurring).

158. Two prosecutions under the federal Protection of Children Against Sexual Abuse Act of 1978, 18 U.S.C. 2423, 2251-53, will not be examined in the text but briefly mentioned here.

U.S. v. Langford, 688 F.2d 1088 (7th Cir. 1982) involved the issue of whether a prosecution under section 2252 was properly venued in the sending state and the jury was properly instructed to apply that state's community standard. The Seventh Circuit rejected the appellant's argument that the community standards of the receiving jurisdiction should apply, because it interpreted the appellants argument as an attack on the validity of the venue statute for federal obscenity cases, 18 U.S.C. § 3237(a) which "authorizes federal obscenity cases to be venued in either the sending jurisdiction, the receiving jurisdiction, or in any jurisdiction through which the mailed obscenity moves." *Id.* at 1094. The court found that this expansive view of section 3237(a) reflected a congressional interest "in protecting minors in . . . each and every aspect of the illicit pornographic scheme" to which the Supreme Court had given its support in *Ferber* (458 U.S. at 1095).

U.S. v. Nemuras, 567 F. Supp. 87 (D.Md. 1983) involved the issue of whether sexually explicit photographs, here defined as lewd exhibition of the genitals in section 2253, were taken with the knowledge that they would be distributed in interstate commerce in violation of section 2251. The court found that the evidence was clear that the photographs were distributed in interstate commerce. Therefore, the "sole issue" was whether the photographs were lewd. "In the court's view . . . lewd photographs of children [were] those in which the child is depicted as half or partially clothed, posed in such a way as to depict or suggest a willingness to engage in sexual activity or a sexually coy attitude." *Id.* at 89. The court then found that the photographs fit within its definition and upheld the defendant's conviction. *Id.* at 90.

Impact of Ferber

State child pornography prosecutions have continued since *Ferber*. Defendants in these cases have continued to raise overbreadth, vagueness, substantive due process, and right to privacy arguments. What impact *Ferber* has had will be examined at two levels: first at the trial court level in Kentucky in the distribution case of *Commonwealth v. Mikesell*[159] and at the state appellate court level in one distribution case, *People v. Enea*,[160] and two production cases: *State v. Shuck*[161] and *State v. Jordan*.[162]

a. In Trial Court

What is the impact of *Ferber* at the trial court level in a jurisdiction with a child pornography statute analogous to New York's? A Kentucky prosecution for the distribution of child pornography, *Commonwealth v. Mikesell*,[163] will serve as an illustration. In *Mikesell*, the Lexington-Fayette Urban County police had established a fictitious organization, the Kentucky Adolescent Center (KyAC) to identify persons involved in child pornography.[164] In its letters to suspects, KyAC was presented as a non-profit clearing house for putting members in touch with each other for the purpose of producing, trading, and selling child pornography.[165] The defendant, Donald Mikesell, responded to the solicitation and in a meeting in a local hotel room agreed to loan an undercover police detective his collection of magazines, photographs, and films.[166] A month later, Mikesell wrote the detective complaining that he had received no material from him in exchange for the loan, asking for the return of his material, and an end to their relationship.[167] Instead, a prosecution was initiated under the Kentucky child pornography statute which prohibits the "distribution of matter portraying a sexual performance of a minor."[168] Mikesell

159. Comm. v. Mikesell, No. 83-CR-208 Fayette Cir. Ct., Ky. June 8, 1983 (Angellucci, J.) (order overruling defendant motion to dismiss the indictment on constitutional grounds).

160. 665 P.2d 1026 (Colo. 1983).

161. 661 P.2d 1020 (Wash. App. 1983).

162. 665 P.2d 1280 (Utah 1983).

163. *Mikesell* (court's order), No. 83-CR-208.

164. *Id.* at 2.

165. *Id.*

166. *Id.* at 3.

167. *Id.*

168. Ky. Rev. Stat. § 531.340(1) (1978). The Kentucky child pornography statute which prohibits "distribution of matter portraying a sexual performance of a minor" provides in relevant part:

did not dispute that the material portrayed "a sexual performance by a minor" as the phrase was used in the statute,[169] but in his attempt to dismiss the charges challenged the statute on constitutional grounds: its overbreadth and its intrusion on his right to privacy.

The Fayette Circuit Court first turned its attention to the defendant's two overbreadth arguments. Mikesell argued that under K.R.S. 531.300(1), distribution required the "transfer of possession" of the materials.[170] However, the statute was inapplicable here, because his "loan" of material was not commercial distribution, but merely a transfer of custody, "a non-commercial delivery for temporary examination."[171] Mikesell also argued that K.R.S. 531.300(1) could only protect Kentucky minors from involvement in the production of pornography. Here, however, the statute was overbroad, because "the pictures were taken of persons outside Kentucky and at a time prior to the enactment (in 1978) of K.R.S. 531.300."[172] His "loan" of a picture "long since produced, duplicated, sold, and circulated about the country . . .," he concluded, "did not make it a more or less permanent record."[173]

The Court dismissed the defendant's overbreadth arguments. The loan of the material was a transfer of possession as defined by K.R.S. 500.080(14), because it involved a transfer of "actual physical possession . . . or control over a tangible object."[174] No transfer of interest in property was required. Therefore, when the defendant transferred possession, it was an act in violation of the statute.[175] The Court also found unpersuasive, in light of *Ferber,* the defendant's argument that he loaned material produced outside Kentucky. In *Ferber*, the Supreme Court had concluded: "'it is often impossible to determine where such

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A person is guilty of distribution of matter portraying a sexual performance of a minor when, having knowledge of its content and character, he:
(a) sends or causes to be sent into this state for sale or distribution; or
(b) brings or causes to be brought into this state for sale or distribution; or
(c) in this state, he: (1) exhibits for profit or gain; or (2) distributes; or (3) offers to distribute; or (4) has in his possession with the intent to distribute, exhibit for profit or gain or offer to distribute, any matter portraying a sexual performance by a minor.

169. Ky. Rev. Stat. § 531.300(4), (6) (1978).

170. *Mikesell*, No. 83-CR-208 at 5 (Memorandum for Defendant on Consitutional Issues).

171. *Id.*

172. *Id.* at 8.

173. *Id.* at 23.

174. *Mikesell* (court order), 83-CR-208 at 4.

175. *Id.*

material is produced' . . . ."[176] *Ferber* also held that since child pornography is not protected by the first amendment, "a state is not barred from prohibiting the distribution of unprotected material produced outside the state."'[177] Moreover, the circuit court dismissed as irrelevant the defendant's contention that the films and photographs were several years old. A principal concern of the Court in *Ferber* had been to uphold a state statute similar to Kentucky's in order to prohibit the continued circulation of the "permanent record" of the child's act in the mass distribution system of child pornography for years after the photographs were taken.[178]

The Fayette Circuit Court then turned its attention to Mikesell's two privacy claims. The defendant argued that his loan of materials was protected by his federal right to privacy. *Stanley v. Georgia*'s right to possess obscene materials applied to him, because 'a hotel is for these purposes the same as a house."[179] Moreover, his loan of the material was not affected by the limitation of the right to receive after *Stanley*.

> In every case limiting the application of *Stanley*, there was a public element present. . . .None of these elements are present here. None of the post-*Stanley* cases have so limited its holding to permit states to constitutionally outlaw a private not-for-consideration loan of any form of communicative materials from one individual to another, conducted at a location in which the lender had a reasonable expectation of privacy.[180]

Mikesell also argued that he was protected by the state's right to privacy announced in *Commonweath v. Campbell*[181] which went beyond the First Amendment rights under the Federal Constitution.[182] This right, he argued, extended to his circumstances, because *Commonwealth v. Smith*[183] made it clear that friends sharing their vices together are entitled to the same protection as an individual acting privately in his home."[184]

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176. *Id.* at 5 (Quoting *Ferber*, 458 U.S. at 766 n. 19 (1982)).
177. *Id.*
178. *Id.* at 5, 8.
179. *Mikesell* (defendant's memorandum), 83-CR-208 at 16 (citing Stanley, 394 U.S. 557, 565 (1969)).
180. *Id.* at 26.
181. 133 KY. 50, 117 S.W. 383 (Ky.App. 1909).
182. *Mikesell* (defendant's memorandum), 83-CR-208 at 17.
183. 163 KY. 227, 173 S.W. 340, (Ky.App. 1915).
184. *Mikesell* (defendant's memorandum), 83-CR-208 at 17.

The Court dismissed Mikesell's federal right to privacy claim on two grounds. First, *Stanley* held that mere possession of obscene materials in one's own home could not be made a crime. The defendant's behavior involved more than mere possession. "[T]he defendant expected to be able to 'borrow' another's collection of child pornography in return for the loan. This could arguably constitute 'consideration' for the loan which would further remove it from the category of 'mere possession'."[185] The Court then concluded that *Ferber* had approved state regulation of the defendant's activity, because "[l]oans made to individuals for the purpose of copying child pornography give the 'permanent record' of the child's act wider circulation for years after the original photograph was taken."[186] Second, the Court found that *Stanley* had not dealt with child pornography. *Ferber* had, however, "ruled that child pornography is not protected by the First Amendment if it involves scienter and the category is suitably limited and described to include only visual depictions of sexual conduct by children."[187] Thus the court concluded that *Ferber* would not allow a defendant's right to privacy to frustrate the government's compelling interest in preventing the sexual exploitation of children.[188] Then the court turned to the defendant's state privacy claim. It was "not unmindful" that Kentucky had a broader right to privacy than under the federal constitution, but it found that the defendant's argument was "grounded primarily on cases which the Court finds inapplicable . . . [because] the Kentucky legislature has recently shown its concern about the protection of children by the passage of the statute in question."[189]

b. In Appellate Courts

The *Mikesell* case never went to trial; the defendant accepted a plea bargain. In the aftermath of *Ferber*, many other child pornography cases have probably been disposed of in a similar manner. Appeals in cases where the defendant was tried and convicted have raised overbreadth and privacy issues similar to those examined in *Mikesell*. They have been rejected in all three reported state cases which will be discussed below.

185. *Mikesell* (court's order), 83-CR-208 at 8.
186. *Id.*
187. *Id.* (Quoting *Ferber*, 458 U.S. at 758 (1982)).
188. *Id.* at 7-8.
189. *Id.* at 9.

In the only distribution case, *People v. Enea*,[190] the defendant claimed on appeal that Colorado statute, section 18-6-403[191] denied him due process, because it was vague. The Colorado Supreme Court dismissed the challenge, because Enea's "bald assertion of vagueness" was insufficient "to overcome the presumption of constitutionality to which the statute is entitled."[192] The Court then turned to the defendant's principal argument: the statute was overbroad, because it prohibited his participation in the sale of non-obscene photographic materials. *Ferber*, the Court said, was dispositive: these materials were unprotected by the first amendment.[193] Since the defendant had made no claim that the materials had artistic, educational, medical, or scientific value, the Court also found it unnecessary to reach the overbreadth issue.[194]

In *State v. Shuck*,[195] the first of two production cases decided since *Ferber*, the defendant argued on appeal that the Washington child pornography statute, chapter 9.68A[196] was unconstitutionally overbroad on its face, because "the preparation of educational materials depicting non-obscene adolescent sex falls within the ambit of the statute."[197] The Washington Court of Appeals answered: *Ferber* made it clear that "given the overriding governmental concern for the physiological, emotional, and mental health of the children involved,"[198] the child pornography statute did not violate the first amendment under the substantial overbreadth rule of *Broaderick*,[199] because it proscribed works of serious educational value.[200]

The other production case, *State v. Jordan*,[201] involved a challenge to the constitutionality of Utah statute, section 76-10-1206.5.[202] The Supreme Court of Utah dismissed the defendant's three constitutional challenges. First, the Court rejected the argument that the state had no right to prohibit acts which were not obscene under the *Miller* test.[203] *Ferber* had rejected the *Miller* standard and then created its own four-part test for child pornography. Judged by the *Ferber* stan-

190. 665 P.2d 1026.
191. Colo. Rev. Stat. § 18-6-403 (Supp. 1980).
192. *Enea*, 665 P.2d at 1027.
193. *Id.* at 1028.
194. *Id.*
195. *Shuck*, 661 P.2d at 1020 (Wash.App. 1983).
196. Wash. Rev. Code Ann. § 9.68A (1981).
197. *Shuck*, 661 P.2d at 1022.
198. *Id.*
199. 413 U.S. 601 (1973).
200. *Shuck*, 661 P.2d at 1022.
201. *Jordan*, 665 P.2d 1280.
202. Utah Code Ann. § 76-10-12065 (Supp. 1981).
203. *Jordan*, 665 P.2d at 1283.

dard, the Utah statute was not substantially overbroad.[204] Second, the Court rejected the claim that the statute invaded the right of privacy of consenting people in their homes. This broad reading of *Stanley v. Georgia*,[205] the Court said, was a "sophistic argument [that] ignores the fact that we are not dealing with two consenting adults in the privacy of their own home."[206] Here the right to privacy could not frustrate the state's compelling interest in protecting minors against sexual exploitation. Third, the Court rejected the claim that the statutory phrase "simulated sexual conduct" was so vague as to deny the defendants due process, because the phrase was sufficiently defined by the statute to warn of the proscribed conduct.[207]

c. Conclusions

This brief survey of post-*Ferber* cases suggests the following tentative conclusions about state child pornography statutes. Courts are unlikely to be receptive to vagueness challenges to either production or distribution offenses. Overbreadth challenges will meet with a similar reception. Courts are unlikely to accept a narrow construction of the distribution offense which would exclude a "loan" of child pornography. Loans are part of the network of commercial distribution. State power to control child pornography produced in other jurisdictions, challenged before *Ferber* on due process grounds, will now be rejected on overbreadth grounds. States are not prohibited from suppressing the distribution of unprotected material. Overbreadth challenges to both production and distribution offenses based on the claim that the child pornography at issue is non-obscene under *Miller* will be rejected, unless the defendant makes a claim that the material has educational, medical, or scientific value. Privacy claims by producers and distributors will not shelter the sexual exploitation of minors. *Stanley* continues to be narrowly construed. Post-*Ferber* courts have said that *Stanley* protects the use of obscene material by consenting adults, not the production of child pornography. *Stanley* also protects merely possession in one's home, it does not extend to the right to receive borrowed or loaned materials, because they are part of the scheme of commercial distribution.

CONCLUSIONS

What is the current status of laws regulating the sexual exploitation of children in the pornographic marketplace? Participation of

204. *Jordan*, 665 P.2d at 1284.
205. 393 U.S. 557 (1969).
206. *Jordan*, 665 P.2d at 1285.
207. *Jordan*, 665 P.2d at 1285-86.

children in the creation of visual child pornography will be judged by the *Ferber* four-part test. Distribution will be judged differently depending upon the subject and form of the material. If it is visual child pornography, irrespective of the identity of its intended audience, it will also be judged by the *Ferber* test. If it is distributed to children in the form of books, magazines, or movies then *Ginsberg* and *Erznoznick* hold that it must be obscene for children. If, however, the material is broadcast by radio and children are likely to be in the audience, then *Pacifica* holds it need be merely indecent to be prohibited, but not necessarily indecent to children.

How has the Supreme Court's response to the sexual exploitation of children affected the legal interests of the participants? There is no adult, parental, or child right (as defined by Models 2, 3, and 4) to produce or distribute child pornography. Adults have no right to exploit those persons incapable of consent, nor do parents have any authority to abuse minor children entrusted to their care. Only the Model 1 governmental interest based on the *parens patriae* and police powers to insure the well-being of children has been recognized by the Court. With obscenity legislation, the Court has recognized that an adult's right to distribute and receive protected materials under Model 2 differs from a child's right under Model 4. A parent has the discretion under Model 3 to purchase obscene material for their children, but none in the receipt of indecent broadcast material. Model 1 governmental interests in the protection of the child and parental assistance have justified a different standard for the sale of obscene material to minors under Model 4 and a restriction on parental discretion under Model 3 in the receipt of indecent broadcast material. However, as *Erznoznick* and *Pacifica* make clear, the Court has yet to confront the implications of that choice for Model 4 adult rights on the public streets and in the broadcast media.

In conclusion, the Burger Court has created two-child based exceptions to the obscenity doctrine since *Miller*, but with entirely different results. Two years after *Ferber*, there are few unanswered questions about the constitutional status of child pornography statutes. Only the issue of whether child pornography may have scientific, medical, or educational value remains to be examined. Six years after the *Pacifica* decision, the opposite circumstance prevails. Justice Brennan's questions remain to be answered by the Commission and the Court. Consequently, no one knows the meaning of a broadcast indecency standard, nor what action the FCC may take to protect the interests of children in the audience.

BROADCAST ADVERTISING UNDER INDIANA'S NEW ATTORNEY DISCIPLINARY RULES

WILLIAM R. BUCKLEY*

Since the days of *caveat emptor* the American consumer has contemplated advertisements with considerable suspicion.[1] At the turn of the century advertising practices were so thoroughly perverted by dishonestly and misrepresentations[2] that the ABA elected in 1908 to prohibit attorneys from commercializing the profession.[3] During subsequent decades significant protective legislation has purified advertising endeavors so that "let the buyer beware" has been slowly superseded by a spirit of "let the seller be fair." As moral turpitude gradually has been expunged from commercials, lawyers have cautiously waded into the shallower advertising waters. Since *Bates v. State Bar of Arizona*[4] many states have amended their ethical mandates to accommodate broadcast advertising. In January 1984, Indiana joined this continuing trend by authorizing attorneys to utilize television commercials.[5]

Despite the promising prospects of these new modifications, many lawyers appraise broadcast commercials with consternation comparable to the Celtic horror of Grendel in the *Beowulf* legend. Past abuses in the advertising industry have etched cavernous skepticism in the

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1. R. ANDERSON & T. BARRY, ADVERTISING MANAGEMENT 478 (1979) [hereinafter cited as ANDERSON & BARRY]; Greyser, *Advertising: Attacks and Counters*, 50 HARV. BUS. REV. 22-28 (March/April 1972); Warne, *Advertising: A Critic's View*, 26 J. MARKETING 10-14 (Oct. 1962).

2. L. GORDON, ECONOMICS FOR CONSUMERS 184-85 (2d ed. 1944). "Untruthful and misleading advertising probably reached its height in the early part of this century. In 1906 it was estimated that 72 percent of newspaper advertising was doubtful and that 32 percent was definitely objectionable." *Id.* at 184.

3. ABA CANONS OF PROFESSIONAL ETHICS Canon 27 (1908). *See also* Annot., 39 A.L.R. 2d 1055, 1056-57 (1955).

4. 433 U.S. 350 (1977).

5. The Indiana Supreme Court adopted the modified ethical rules on January 17, 1984. *See* WEST'S INDIANA CASES, 459 N.E.2d No. 1, at XXVI-XLIX (March 7, 1984); 27 RES GESTAE 588-602 (June 1984).

The amended Code is currently undergoing constitutional challenge in Wilcox and Ogden v. Supreme Court of Indiana, No. 84-82 (S.D. Ind. filed Jan. 19, 1984). To date the court has ruled solely on the Plaintiffs' standing to litigate. Wilcox & Ogden v. Supreme Court of Indiana, No. 84-82 (S.D. Ind. July 12, 1984).

psyche of the bar. However, if one entertains the beast's perspective[6] advertising via the electronic media is much maligned and misunderstood by attorneys. Commercial communication need not become a leviathan if its users are scrupulous.

This article will examine the alterations of the Indiana Code of Professional Responsibility within the broadcast advertising context. Various probable consequences of the new regulations shall be posed, and the processes through which the attorney advertiser must venture will be outlined. Finally, the author will recommend a style of advertising that should survive ethical inspection while helping to excavate the practice of law from the public mire of misconception and mistrust.[7]

HIGHLIGHTS OF THE NEW ADVERTISING RULES

Among the Indiana Supreme Court's revisions in Canon Two were the explicit inclusion of television as a permissible attorney advertising medium and the deletion of geographic limitations to print and radio commercials.[8] No longer must lawyers limit their advertising to the regions in which they live or operate offices, or from which the bulk of their clientele reside.[9] Also, attorneys must preserve a

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6. *See* J. GARDNER, GRENDEL (1971).

7. An examination of the constitutional bases for broadcast advertising is beyond the scope of this article. For outstanding synopses of these issues, see, *e.g.*, L. ANDREWS, BIRTH OF A SALESMAN: LAWYER ADVERTISING AND SOLICITATION (rev. ed. 1981); Whitman & Stoltenberg, *The Present Constitutional Status of Lawyer Advertising—Theoretical and Practical Implications of In Re R.M.J.*, 57 ST. JOHN'S L. REV. 445 (1983); Note, *Attorney Advertising Over the Broadcast Media*, 32 VAND. L. REV. 755 (1979) [hereinafter cited as Note, *Broadcast Media*]; Annot., 30 A.L.R. 4th 742 (1984). For cases clarifying the constitutional protections afforded attorney advertisers, see *In re* R.M.J., 455 U.S. 191 (1982); *In re* Primus, 436 U.S. 412 (1978); Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978); Bates v. State Bar of Arizona, 433 U.S. 350 (1977); Durham v. Brock, 498 F. Supp. 213 (M.D. Tenn. 1980), *aff'd without op. mem.*, 698 F.2d 1218 (6th Cir. 1982). For a general analysis of the effects of broadcast advertising on the public, see Griffin, *Broadcast Advertising: What Has It Done to the Audience?*, 23 WASHBURN L.J. 237 (1984).

An excellent evaluation of current disciplinary developments has been collated by Fisher & Watts, *Professional Responsibility*, in *1983 Survey of Recent Developments in Indiana Law*, 17 IND. L. REV. 283-300 (1984).

8. INDIANA CODE OF PROFESSIONAL RESPONSIBILITY DR 2-101(A) (as amended through April 18, 1984), *reprinted in* the INDIANA RULES OF COURT (1984) [hereinafter cited as THE CODE].

9. Jackson, *An Overview of Ethics and Professional Responsibility*, in INDIANA CONTINUING LEGAL EDUCATION FORUM, LAWYER ADVERTISING RULE CHANGES I-5 (1984) [hereinafter cited as Jackson, *An Overview*]. The elimination of this restriction could pose ethical dilemmas for multistate broadcasting of attorney advertisements. *See infra* notes 44-56 and accompanying text.

copy or recording of commercials for six years after dissemination as well as a listing of dates and carriers of the advertisements.[10] The tension between the solicitation ban and advertising has been relieved by a specific allowance for solicitation through permissible commercials.[11] As with prior versions the Code retains restrictions to advertisement content and format. Commercials cannot contain information that is "false, fraudulent, misleading, deceptive, self-laudatory or unfair"[12] and must be "done in a dignified manner."[13] The scope of facts that may be included in advertisements remains constrained to traditional biographical data, although the new provision's list of permissible examples of subjects for advertising offers guidelines rather than mandates.[14] Attorneys may now indicate that their practice involves specific areas of law.[15] However, lawyers cannot claim specialist status except in the historically acceptable categories of patent, trademark and admiralty law.[16] The trade name prohibition survives,[17] presumably because the "inherently misleading" qualities of such "catchy" or unusual firm names might be amplified through television or radio.[18]

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10. THE CODE DR 2-101(E).

11. *Id.* DR 2-103(E).

12. *Id.* DR 2-101(B). These terms are defined at *id.* 2-101(C).

13. *Id.* DR 2-101(B). According to one commentator, this requirement "is so broad and vague as to be possibly unconstitutional or otherwise incapable of enforcement." Elberger, *New Disciplinary Rules: As They Affect Radio & Television Advertising,* in INDIANA CONTINUING LEGAL EDUCATION FORUM, LAWYER ADVERTISING RULE CHANGES IV-3 (1984) [hereinafter cited as Elberger, *New Disciplinary Rules*].

14. THE CODE DR 2-101(B). The list of "permissible areas" includes lawyers' or firms' names, general fields of law practiced, birth date and place, academic achievements, admission to state or federal bars, public offices held, military service, bar or professional association memberships, technical or professional licenses, foreign language ability, bank references, participation in prepaid or group legal programs, and fee and credit arrangements. *Id.* DR 2-101(B)(1)-(19). One observer suggests that the new rule "seems to leave open the possibility of [advertising] other permissible areas. . . ." Jackson, *An Overview, supra* note 9, at I-21 n.11.

15. THE CODE DR 2-104(A)(2). This provision is subject to the "fraudulent, misleading and self-laudatory" language of DR 2-101. *Id.*.

16. *Id.* DR 2-104(A)(1); Jackson, *An Overview, supra* note 9, at I-3, I-15 to -16; McCray, *Stating of Areas of Practice,* in INDIANA CONTINUING LEGAL EDUCATION FORUM, LAWYER ADVERTISING RULE CHANGES III-1 to -4 (1984).

17. THE CODE DR 2-102(B).

18. Typically unusual firm names have been used merely to attract persons' attention, particulary with media advertising. McGill, *Traditional Methods of Communication,* in INDIANA CONTINUING LEGAL EDUCATION FORUM, LAWYER ADVERTISING RULE CHANGES II-1 (1984). For a concise discussion of trade and firm names, see *id.* at II-1 to -7. Trade names prohibitions have passed constitutional muster. *See e.g.,* Friedman v. Rogers, 440 U.S. 1 (1979).

The new Code could provide the broadcast advertiser with greater flexibility in styling commercials. The previous prohibitions against using photographs, pictorials, background music, or sound effects—what this author terms *pizzazz*—have been deleted from the new provisions.[19] However, this does not license attorneys to inundate the media with typical Madison Avenue hype. Such sight and sound supplements still must be "dignified" and cannot violate the "fraudulent, misleading and self-laudatory" language of DR 2-101. Also, only the attorney herself or a fellow firm member may be pictured within the commercial.[20] The Ethical Considerations are swift to squelch the urge to over-commercialize:

> A lawyer should strive to communicate [advertised] information without undue emphasis upon style and advertising strategems which serve to hinder rather than facilitate intelligent selection of counsel.
>
> The public benefit derived from advertising depends upon the usefulness of the information provided the community or to the segment of the community to which it is directed. Advertising marked by excesses of content, volume, scope, or frequency which unduly emphasized unrepresented biographical information does not provide that public benefit.
>
> The non-lawyer is best served if advertisement's contain no misleading information or emotional appeal. . . .[21]

Given these precepts, attorneys are unlikely to romp about the media like a Disney cartoon. Still, there continues to be considerable apprehension over the prospect of "style-over-substance" attorney advertising. The new rules forebode several probable difficulties which the following sections shall discuss.

POSSIBLE CONSEQUENCES OF THE NEW RULES

A. *The Ogre of "Pizzazz"*

Most critics of lawyer advertising are quick to conjure the unethical prospects of gimmick commercials often associated with questionable late night mail-order television lures. There have been

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19. *Compare* THE CODE DR 2-101(B) (1983) (old rule) *with* THE CODE DR 2-101(B) (1984) (current rule). *See also* Jackson, *An Overview, supra* note 9, at I-2. *See infra* notes 22-43 and accompanying text for additional discussion of *pizzazz*.

20. THE CODE DR 2-101(D)(4).

21. *Id.* EC 2-8(A), 2-10, 2-10(A).

interesting instances in which attorneys have experimented with unusual advertising approaches. In one television commercial a Wisconsin lawyer donned scuba gear, emerged from a lake, and addressed potential bankruptcy clients with a clever attention-getter: "In over your head?"[22] Other tactics have included an attorney who drove a hearse to "dig up" probate customers and another who flew airplane banners at football games.[23] The courts have generally disallowed gimmickry of this variety.[24]

While there is little debate that blatant huckstering is inappropriate for lawyer advertising,[25] the same cannot be said for the employment of *pizzazz* now permitted under the amended Code.[26] Objections to the use of such advertising techniques rely upon the supposition that the potential for misrepresentation is greater with broadcast advertising because of television's subliminal capacities and historical overemphasis of style, as well as the transitory quality of televised messages.[27] However, there is no compelling evidence that the introduction of *pizzazz* into attorney commercials is inherently

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22. Middleton, *The Right Way to Advertise on TV,* 69 A.B.A.J. 893, 893 (1983).

23. Arthur, *New Disciplinary Rules as They Affect In-Person & Third Person Solicitation,* in INDIANA CONTINUING LEGAL EDUCATION FORUM, LAWYER ADVERTISING RULE CHANGES VII-5 (1984) [hereinafter cited as Arthur, *Solicitation*].

24. Bishop v. Committee on Professional Ethics and Conduct of Iowa State Bar Ass'n, 521 F. Supp. 1219 (S.D. Iowa 1981), *vacated & remanded on other grounds,* 686 F.2d 1278 (8th Cir. 1982) (use of contrived drama and background sounds promotional and thus prohibited); Eaton v. Supreme Court of Arkansas, 270 Ark. 573, 607 S.W.2d 55 (1980), *cert. denied,* 450 U.S. 966 (1981) (advertising in discount coupon booklets impermissible); *In re* Duffy, 19 A.D.2d 177, 242 N.Y.S.2d 665 (1963) (use of neon signs at law offices disciplinary violation); *In re* Petition for Rule of Court Governing Lawyer Advertising, 564 S.W.2d 638 (Tenn. 1978) (advertising by handbills, circulars, or billboards prohibited); *In re* Utah State Bar Petition for Approval of Changes in Disciplinary Rules on Advertising, 647 P.2d 991 (Utah 1982) (state restrictions against advertising by billboards or promotional items such as inscribed matchbooks, pens, and pencils, held constitutional); THE CODE EC 2-8, 2-8(A); Arthur, *Solicitation, supra* note 23, at VII-3 VII-5, VII-12 to -13.

25. The authorities generally concur. *See, e.g.,* Bishop, 521 F. Supp. at 1219 (adjectives such as "cut-rate, lowest, give-away, below-cost," and "special" not within First Amendment protection); Capital Broadcasting Co. v. Mitchell, 333 F. Supp. 582, 586 (D.D.C. 1971), *aff'd,* Capital Broadcasting Co. v. Acting Attorney Gen., 405 U.S. 1000 (1972); *In re* Petition, 564 S.W.2d at 638; Note, *Broadcast Media, supra* note 7, at 770.

26. *See supra* notes 19-21 and accompanying text.

27. *See* Capital Broadcasting Co., 333 F. Supp. at 586; Attorney Grievance Comm'n v. Hyatt, Nos. 83-1479, 83-1845 (Prince George's County, Md. Cir. Ct., April 11, 1984), *as summarized in* 1 AMERICAN BAR ASSOCIATION AND BUREAU OF NATIONAL AFFAIRS, ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT, *Current Reports,* at 182-83 (May 2, 1984) [hereinafter cited as ABA/BNA LAWYERS' MANUAL]; *ABA Code of Professional Responsibility Amendments, Report to the Board of Governors of the Task*

misleading.[28] Nor has psychological research demonstrated that subliminal stimuli can alter people's attitudes or behavior.[29] The potential for deception exists in *all* advertising.[30] If the integrity of television advertisements is suspect, it is because commercial enterprises over the years have manipulated the medium in an overzealous attempt to persuade rather than to inform potential customers.[31] Past abuses in product advertising do not necessitate comparable results for lawyers' commercials. Even if attorneys flooded the airwaves with gimmickry, the prospect for mass delusion is remote. Emotional appeal in advertisements best affects viewers for products or services that they frequently purchase or with which the public is most familiar.[32] Since most persons rarely consult an attorney on a regular basis, emotional ploys will have been long forgotten by the time the average person needs legal advice.

Since the Supreme Court warned in *Bates v. State Bar of Arizona*[33] of the "special problems of advertising on the electronic broadcast media,"[34] many members of the judiciary, legislature and bar seem to have concluded that lawyer commericals on radio and televison must receive stricter ethical regulation than print advertisements. But "advertising is advertising irrespective of the device or instrumentality employed."[35] Even the *Bates* Court recognized that most attorneys electing to advertise "will be candid and honest and

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Force on Lawyer Advertising, 46 U.S.L.W. 1, 2 (Aug. 23, 1977); Reed, *The Psychological Impact of TV Advertising and the Need for FTC Regulation,* 13 AM. BUS. L.J. 171 (1975); Note, *Broadcast Media, supra* note 7, at 764, 767-70; Note, *Lawyer Advertising in Kansas: Expanding Marketing of Legal Services,* 21 WASHBURN L.J. 626, 639 (1982) [hereinafter cited as Note, *Kansas Advertising*]. For discussions of subliminal advertising, see ANDERSON & BARRY, *supra* note 1, at 398; *Subliminal Seduction,* 70 A.B.A.J. 25-27 (July 1984).

28. Andrews, *The Model Rules and Advertising,* 68 A.B.A.J. 808, 810 (1982). *Contra,* Bishop, 521 F. Supp. at 1228-29. The Federal Trade Commission has defended the permissability of *pizzazz* approaches in cases in Iowa and Alabama. *See* ABA/BNA LAWYERS' MANUAL, *supra* note 27, *News and Background,* at 47 (Feb. 8, 1984); *Id., News Notes,* at 288 (June 27, 1984).

29. S. DUNN & A. BARBAN, ADVERTISING: ITS ROLE IN MODERN MARKETING 227 (5th ed. 1982) [hereinafter cited as DUNN & BARBAN].

30. Kentucky Bar Ass'n v. Stuart, 568 S.W.2d 933, 934 (Ky. 1978).

31. Note, *Broadcast Media, supra* note 7, at 772.

32. H. BALDWIN, CREATING EFFECTIVE TV COMMERCIALS 9 (1982) [hereinafter cited as BALDWIN].

33. 433 U.S. 350 (1977). For an illustration of the advertisement utilized by the Appellants, see DUNN & BARBAN, *supra* note 29, at 141.

34. Bates, 433 U.S. at 384 (1977).

35. *In re* Petition, 564 S.W.2d at 643. This court specifically rejected the *Bates* "special problems" language. *Id.*

straightforward,"[36] if only to avoid disciplinary sanction. State requirements such as Indiana's six-year-retention-of-commercial rule can easily preserve the fleeting broadcast signal for closer disciplinary scrutiny.[37]

The fear that dramatization, background sound, music, color, animation, and graphics will inevitably distort and mislead suggests a fundamental misunderstanding of the nature of communication. *Pizzazz* opponents apparently assume that viewers will absorb broadcast bilge and become swept away by the commercial Pied Piper's song and dance. In reality very few people are so easily mesmerized by advertisements. Audiences actively assimilate communications by interpreting the data using numerous cognitive processes.[38] Viewers first must receive the message, and often perception is impaired by transient attention spans and myriad distractions.[39] Even with attentive audiences, the recipient of the information tends to retain those facts which most readily conform to existing motives, attitudes, and predispositions.[40] These conceptions are heavily influenced by an individual's education, economic status, geographical orientation, and identification with a certain social class or subculture, religion, race, nationality or ethnic origin.[41] Sociological and psychological studies have indicated how consumers analyze communications prior to adopting or rejecting a new idea. This diffusion process involves several stages: awareness, interest, evaluation, trial, and adoption.[42] Numerous other factors influence the effectiveness of the commercial, such as the perceived expertise and credibility of the communicator and whether the audience is positively or negatively aroused by the

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36. Bates, 433 U.S. at 379.

37. *See generally* Note, *Broadcast Media, supra* note 7, at 770-71; Elberger, *New Disciplinary Rules, supra* note 13, at IV-2.

38. ANDERSON & BARRY, *supra* note 1, at 44-45; Schramm, *Nature of Communication Between Humans,* in THE PROCESS AND EFFECTS OF MASS COMMUNICATION 3-53 (Schramm & Roberts 1971); Greyser, *supra* note 1, at 24.

39. DUNN & BARBAN, *supra* note 29, at 305-07; S. WORCHEL & J. COOPER, UNDERSTANDING SOCIAL PSYCHOLOGY 90 (rev. ed. 1979) [hereinafter cited as WORCHEL & COOPER].

40. BALDWIN, *supra* note 32, at 10-11, 13-14; DUNN & BARBAN, *supra* note 29, at 219, 226-27.

41. DUNN & BARBAN, *supra* note 29, at 235-37; J. KLAPPER, EFFECTS OF MASS COMMUNICATIONS 3 (1961) [hereinafter cited as KLAPPER]. *See generally* E. HEIGHTON & D. CUNNINGHAM, ADVERTISING IN THE BROADCAST AND CABLE MEDIA 113 (1984) [hereinafter cited as HEIGHTON & CUNNINGHAM].

42. DUNN & BARBAN, *supra* note 29, at 234-35, 305-12.

message.[43] Thus, it seems improbable that commercials with *pizzazz* should dupe individuals into impulsively selecting counsel.

B. The Threat of Interstate Transmission

With the introduction of cable networks and satellite communication, television and radio[44] signals frequently transcend state boundaries.[45] Even prior to such regional broadcasting viewers in neighboring states could receive Indiana stations via a standard roof antenna.[46] Many border-city broadcasters openly cater some of their programming to their out-of-state markets.[47] This "spill-over" presents no problems for typical commercial advertising and in fact can boost state-line cross-over consumer purchasing. With attorney advertising, however, interstate broadcast transmissions pose several dilemmas.

Consider the prospect of a Chicago law firm advertising to Gary residents. From the commercial's context, it might not be clear to the layperson that the Chicago counsel could not represent a Hoosier client absent admission to practice in Indiana. Assuming that none of the practitioners of this hypothetical firm was licensed in Indiana, the multistate advertisement could falsely represent that these attorneys could dispense legal advice in our state, posing an unauthorized practice of law scenario. A similar case has arisen in which a New York lawyer not certified in Florida advertised in the state on behalf of his Miami-based offices. The court held that the attorney's commercials tended "to mislead the public into believing he was a member of The Florida Bar" and consequently was an unauthorized practice of law.[48]

Suppose that these hypothetical Chicago lawyers operated affiliate offices in Indiana under the same firm name. Conceivably an interstate commercial could satisfy Illinois' ethical precepts and still

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43. KLAPPER, *supra* note 41, at 3; WORCHEL & COOPER, *supra* note 39, at 73-79, 81-86.

44. Utilizing a television cable system, one can boost FM-radio reception multifold. In this way the author has easily received out-of-state stations based in Illinois, Ohio and Michigan.

45. For example, Indiana viewers at least as far south as Bloomington can receive WGN-Channel Nine (Chicago) with cable television services.

46. Neighboring Kentucky, Illinois, Ohio and Michigan citizens can readily tune in television programming originating from Evansville, Terre Haute, Fort Wayne, or South Bend.

47. *See, e.g.*, WTWO-Channel Two, Terre Haute, Indiana (television newscasts for "Illiana").

48. The Florida Bar v. Kaiser, 397 So. 2d 1132, 1133-34 (Fla. 1981).

violate Indiana Code standards.[49] Other than the possible unauthorized practice complication, it is unclear whether such an out-of-state broadcast could constitute an ethical *faux pas* under our Code, if the Indiana members of the Chicago-based operation did not participate in the improper advertising. Even if no disciplinary breach occurred, arguably such a multistate transmission might provide the Indiana branch with an unfair advantage over competing firms whose advertisements more strictly conformed to the Code's mandates. There is sparse caselaw on this issue[50] but in one instance the New Jersey Supreme Court ruled that such interstate beaming of commercials "could give [a New York firm with New Jersey offices] a substantial competitive advantage" and subsequently disallowed the advertisements.[51]

Another wrinkle is the possibly deceptive aspect of "spill-over" broadcast advertising. Courts have concluded that television and print commercials which appear in several metropolitan areas can mislead the public into believing that an attorney appearing in the commercial personally practices at numerous office locations while he actually is present in name alone.[52] Persons viewing such advertisements could select a firm in one city expecting to be represented by a counselor whose practice is fully restricted to another region out-of-state or across the state.

As a practical matter advertisements which comply with the

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49. For example, Illinois does not prohibit the use of trade names, while Indiana does. *Compare* ILLINOIS CODE OF PROFESSIONAL RESPONSIBILITY DR 2-102 (1984) [hereinafter cited as ILLINOIS CODE] and *Id.* DR 2-102 Comments to Rule 2-102 *with* THE CODE DR 2-102(B).

50. *See generally* Elberger, *New Disciplinary Rules, supra* note 13, at IV-6 to -7 (citing only the New Jersey case below).

51. On Petition for Review of Opinion 475 of the Advisory Comm. on Professional Ethics and DR 2-102(C), 89 N.J. 74, 78-79, 88-89, 444 A.2d 1092, 1094, 1099-1100 (1982), *Appeal dismissed sub nom* Jacoby & Meyers v. Supreme Court of New Jersey, 459 U.S. 962 (1982). This case concerned a New York law firm which was broadcasting into New Jersey at a time when New Jersey prohibited any television advertising. *Id.* at 88-89, 444 A.2d at 1099. The Court recommended reconsideration of that ban. *Id.* at 78, 444 A.2d at 1094.

52. *See, e.g., In re* Sekerez, _____ Ind. _____, 458 N.E.2d 229, 241, 243 (1984) *cert. den.* 83 L.Ed.2d 116, 53 U.S.L.W. 3239 (1984). (lawyer used trade name and own name in print advertising in numerous cities) ("The entire manner of operation of Respondent's legal clinics [with offices in several cities] . . . suggests that there was in fact a great deal of misunderstanding as to the identity, responsibility and status of those practicing and working in the legal clinics."); Attorney Grievance Comm'n v. Hyatt, Nos. 83-1479, 83-1845 (Prince George's County, Md. Cir. Ct., April 11, 1984), *as summarized in* ABA/BNA LAWYERS' MANUAL, *supra* note 27, *Current Reports,* at 182-83 (May 2, 1984).

disciplinary provisions of Illinois,[53] Kentucky,[54] Ohio,[55] and Michigan[56]

53. Illinois permits radio and television advertising so long as the communication is "in a direct, dignified and readily comprehensible manner" and does not "contain any false or misleading statements or otherwise operate to deceive." ILLINOIS CODE DR 2-101, 2-101(a)-(c). Illinois lists eight information categories that the commercial may discuss, as contrasted with Indiana's 19 "suggested" areas. *Compare Id.* 2-101(a) *with* THE CODE DR 2-101(B)(1)-(19). Illinois' and Indiana's classifications encompass virtually the same range of data, however. There is some confusion as to whether the Illinois Rules restrict advertisement elements to the eight classes given in DR 2-101(a) The Code states, "Such [advertising] communication *shall be limited to* one or more of the [eight categories indicated]." ILLINOIS CODE DR 2-101(a) (emphasis added). But the accompanying Committee Comments sharply contradict this language and suggest the list is merely a guide and does not limit advertising to specific disclosures. *Id.* DR 2-101 Comments to Rule 2-101. Even if the eight elements were exhaustive, which the Committee clearly discounts, the listing has a "catch-all" provision allowing "other information. . . which a reasonable person might regard as relevant in determining whether to seek the lawyer's services." *Id.* DR 2-101(a)(8).

The primary discrepancy between the Illinois and Indiana Rules concerns advertising under trade names. *See supra* note 49.

54. Kentucky allows broadcast advertising that is "designed to inform the public" but is not "misleading," "deceptive," "unfair," or "self-laudatory." KENTUCKY SUPREME COURT RULES, Rule 3.135(2)(a), (4) (1984) [hereinafter cited as KENTUCKY RULES]. Advertisements cannot contain "a misrepresentation of fact or law" and cannot omit "a fact necessary to make the [commercial's] statement considered as a whole not misleading." *Id.* Rule 3.135(5)(a)(i). Kentucky's Rules outline 26 items that may be included in an advertisement, and these essentially mirror the Indiana scroll. *Compare id.* Rule 3.135(6)(a)(i) *with* THE CODE DR 2-101(B)(1)-(19). If an attorney advertises specific areas of practice, the commercial must state the following: "Kentucky law does not certify specialties of legal practice." KENTUCKY RULES Rule 3.135(5)(b)(ii).

On May 9, 1984, the Board of Governors of the Kentucky Bar Association, which administers the State's disciplinary rules, approved a regulation that would forbid lawyers' use of the term "reasonable" in advertisements to describe fees. 48 KY. BENCH & B. 4 (1984). The Board felt that the adjective was too vague and misleading to the public. *Id.*

For an excellent evaluation of the perplexing quirks in the Kentucky Rules regarding solicitation, see Gaetke, *Solicitation and the Uncertain Status of the Code of Professional Responsibility in Kentucky*, 70 KY. L.J. 707 (1981-82). See also Gaetke & Casey, *Professional Responsibility*, 70 KY. L.J. 325 (1981-82), for a critique of the Kentucky Supreme Court's inconsistent application of disciplinary mandates.

55. In Ohio lawyers advertising on television or radio must avoid "any form of public communication containing a false, fraudulent, misleading, deceptive, self-laudatory or unfair statement or claim." OHIO CODE OF PROFESSIONAL RESPONSIBILITY DR 2-101(A) (1984). This section's language is identical to paragraph one of Indiana's DR 2-101(B). Broadcast commercials must "be presented in a dignified manner *without* the use of drawings, illustrations, animations, portrayals, dramatizations, slogans, music, lyrics or the use of pictures, except the use of pictures of the advertising lawyer, or the use of a portrayal of the scales of justice." *Id.* DR 2-101(B) (emphasis added). Attorneys must derive their advertisements' contents from an *exclusive* slate of 20 acceptable subjects duplicative of the Indiana examples. *Compare id.* DR 2-101(B)(1)-(20) *with* THE CODE DR 2-101(B)(1)-(19). Given Ohio's stricter standards, the danger of ethical infringements due to multistate transmissions is greater from Hoosier commercials beamed into Ohio rather than vice versa.

56. Michigan advertising cannot be "false," "fraudulent," "misleading,"

should also meet Indiana's requirements. Therefore, the possibility of an undue competitive advantage such as that found by the New Jersey Court is greatly minimized, since such a commercial edge would more easily be acquired for an out-of-state broadcaster if Indiana attorneys were still prohibited from competing on television. If other Hoosier law offices can utilize that medium to advertise with comparable style, the multistate commercial would stand on equal ground with its domestic counterpart. The potential unauthorized practice tickler can easily be avoided if attorneys insert a geographic reference into their commercials to identify which state they serve.

C. Positive Developments Under the New Rules

The Code's new provision permitting attorneys to advertise the general fields of law in which they practice should assist persons in selecting appropriate counsel. A national survey conducted by the American Bar Foundation and the American Bar Association has demonstrated that as much as 83 percent of the public felt that "people do not go to lawyers because they have no way of knowing which lawyers are competent to handle their particular problems."[57] Commercials listing areas of practice should alleviate this stigma. Also, enabling attorneys under the new rules to clarify the scope of their pursuits bolsters their attempts to reach those most in need of their specific services. Many lawyers consider themselves to be limited practioners and prefer to attract clientele within certain specialized areas. Another national study indicated that 65 percent of young attorneys responding to the survey "considered themselves specialists,"[58] and 73 percent devoted over 40 percent of their efforts to a single legal subject.[59] The complexities of the modern legal arena necessitate acknowledgement of practice specialization. There is a substantial social value to be achieved through guiding the public in its selection of qualified counselors, and advertising fields of practice serves to accomplish this goal.

"deceptive," or "self-laudatory." MICHIGAN CODE OF PROFESSIONAL RESPONSIBILITY DR 2-101 (1984). Pursuant to a Michigan Supreme Court Administrative Order, attorneys may advertise using "any form of public communication" which satisfies the above restrictions and the general requirements of the State's ethical precepts. 3 MICHIGAN LAW PRACTICE ENCYCLOPEDIA *Attorneys & Counselors* § 65, at 382 (West 1970).

57. Andrews, *supra* note 28, at 809. *See also* B. CURRAN & F. SPALDING, THE LEGAL NEEDS OF THE PUBLIC, PRELIMINARY REPORT 94 (1974) (over 70 percent surveyed agreed with this statement); Note, *Broadcast Media, supra* note 7, at 780; Note, *Kansas Advertising, supra* note 27, at 626.

58. Andrews, *supra* note 28, at 810.

59. *Id.*

Other benefits will accrue from the introduction of televised commercials. Broadcast advertising of fee schedules will augment the print media's efforts to reduce public anxiety and misunderstanding of legal expenses.[60] Price competition through advertising will continue with the application of the electronic media, resulting in more affordable legal assistance to larger segments of the public.[61] The volume of clientele for all lawyers also should expand as more people become aware of the availability of economical legal aid. Fear of high costs prevents many citizens from ever consulting attorneys.[62] A major benefit of televised commercials is the reduction of that fear.

Another plus is that use of television will provide information regarding legal services for those persons who are typically isolated from published communications—namely, the illiterate, the undereducated, and the vision-impaired.[63] Actually *overall* public cognizance will improve from television commercials. As one commentator concisely stated, "Broadcast attorney advertising is the most effective means of disseminating" details concerning fees and the existence and essence of legal guidance.[64] More importantly, televised commercials will stimulate viewers about the law *before* they may realize that they need counsel. It is easy for an individual to consult the telephone directory when he already appreciates his legal quandaries. However, many laypersons rarely ponder their legal rights or duties and might not recognize the need to make a timely visit to an attorney. After seeing or hearing a television or radio advertisement, the subject of "the law" would at least briefly flicker through the audience's thoughts.

Whether or not broadcast advertising will engender any of these benefits or burdens will depend primarily upon the directions in which the commercial is developed. The subsequent sections will attempt to tunnel through the complex morass of delivering the message to the potential client.

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60. Attorney Grievance Comm'n v. Hyatt, Nos. 83-1479, 83-1845 (Prince George's County, Md. Cir. Ct., April 11, 1984), *as summarized in* ABA/BNA LAWYERS' MANUAL, *supra* note 27, *Current Reports*, at 183 (May 2, 1984). *See generally* Bates, 433 U.S. at 376, 377 n.35; Note, *Broadcast Media*, *supra* note 7, at 761-62, 766.

61. *See generally* Bates, 433 U.S. at 377; Note, *Broadcast Media*, *supra* note 7, at 780.

62. Note, *Broadcast Media*, *supra* note 7, at 766, 780.

63. Grievance Comm. for Hartford-New Britain Judicial Dist. v. Trantolo, No. 10775 (Conn. Jan. 3, 1984), *reprinted in* ABA/BNA LAWYERS' MANUAL, *supra* note 27, *Current Reports*, at 30 (Feb. 8, 1984); *In re* Petition, 564 S.W.2d at 643-44; ABA/BNA LAWYERS' MANUAL, *supra* note 27, *Practice Guide*, at 81:502 (1984); Note, *Broadcast Media*, *supra* note 7, at 766.

64. Note, *Broadcast Media*, *supra* note 7, at 766.

A BROADCAST ADVERTISING PRIMER

A. *To Advertise or . . . That is the Question*

In *Bates* the Supreme Court did not instantly exorcise the profession's lengthy repugnance toward lawyer advertising. Since 1977 attorneys have been extremely hesitant to advertise far beyond the Yellow Pages.[65] Much of this reluctance stems from the dread of impropriety, discipline, or disapproval of one's colleagues.[66] After seventy years of prohibition, prejudicial perceptions of advertising perpetuate among the bar. Lawyers today might summarily dismiss the prospect of broadcast commercials simply because of this amorphous stigma. If a firm wishes to incorporate electronic advertising into its arsenal of client communication, this demon must first be dispelled.

Why should attorneys advertise? Despite the lofty inspiration of the Code and caselaw, there remains one *honest* answer: to encourage the customer to purchase one lawyer's services over another's. This admission does not betray the public interest. Rather, it dispatches the hypocrisy that a lawyer's primary purpose in practicing is to resolve society's interpersonal conflicts. That might be, or perhaps should be, the quixotism toward which attorneys strive; however, few firms actually view their daily activities so philanthropically. If they did, then the majority of their clientele would be represented pro bono. Since the *business* of practicing law is an accepted attitude among the bar, then *advertising one's law business* must be viewed with a comparable perspective. There is ample opportunity to incorporate the idealism of the profession into the commercial message. In deciding whether or not to advertise, attorneys must always distinguish the purely *economic* analysis from the *ethical* implications of the communication's contents. Fear of the latter's abuse should not fog the former.

B. *Marketing Decisions*

Once a lawyer has decided to consider advertising she must initially decide whether to employ a professional advertising agency to create a commercial campaign. Depending upon the proposed breadth of one's advertising and the depth of one's pocketbook, hiring

65. "Since June 1977, approximately ten percent of attorneys have advertised." Note, *Kansas Advertising, supra* note 27, at 626 (citing *Lawpoll*, 67 A.B.A.J. 1618 (1981). However, this was a substantial increase from three percent in 1979. Slavin, *Lawyers and Madison Avenue*, 6 BARRISTER 46,47 (Summer 1979).

66. Laev, *The Right Way to Advertise*, in INDIANA CONTINUING LEGAL EDUCATION FORUM, LAWYER ADVERTISING RULE CHANGES X-2 to -3 (1984) [hereinafter cited as Laev, *The Right Way*].

consultants may prove beneficial to the development of effective commercials.[67] The greater the saturation of the media, the more valuable the agency's guidance. Whether a law firm opts for professional or "in-house" production of advertisements, several considerations must be assessed in selecting the appropriate advertising media.[68]

A frequently overlooked criterion in choosing a commercial medium is the lawyer's goals to be achieved through advertising. Until his objectives are clearly formulated the direction of his advertising cannot be properly initiated. While the primary directives must be determined by the individual, some generalizations can be suggested. For example, the central purpose of all commercials is persuasion, and advertisements typically are generated "to create awareness, to promote understanding, to shape attitudes, to enhance recall, and to motivate action."[69] With these functions in mind, an attorney can begin to evaluate which types of commercials within a constrained budget would most efficiently communicate to potential clients the nature of her practice.

Perhaps the single most crucial matter the potential advertiser must confront is how to channel commercials toward prospective customers. There are various classification schemes used to segment target audiences.[70] Populations may be categorized in terms of the legal crises they encounter, the media to which they are exposed, the types of media material that they prefer (such as the varieties of television programs they watch or sections of the newspaper they read), or the time of day or frequency with which they use the media.[71] Advertising agencies often conduct extensive research to isolate target markets. Data regarding consumer demographics,[72] sociopsychological qualities[73] and service usage

67. *See id.* at X-10 to -20 (factors to evaluate in selecting advertising agency).

68. For an analysis of considerations in choosing advertising media, see *id.* at X-1 to -38.

69. HEIGHTON & CUNNINGHAM, *supra* note 41, at 62 (emphasis in original deleted). *See also* ANDERSON & BARRY, *supra* note 1, at 244-45.

70. Targeting is sometimes referred to as market segmentation. *See* ANDERSON & BARRY, *supra* note 1 at 225-27.

71. *See* DUNN & BARBAN, *supra* note 29, at 49, 59.

72. Demographic data include age, sex, income, education, occupation, family size and orientation, geographic location, race, and religion of the average consumer for a given good or service. *See* ANDERSON & BARRY, *supra* note 1, at 84, 227; BALDWIN, *supra* note 32, at 47-48; DUNN & BARBAN, *supra* note 29, at 206, 243-51; HEIGHTON & CUNNINGHAM, *supra* note 41, at 67-68, 82.

73. Such qualities as one's motivations, perceived affiliation with a certain social class or subculture, personality traits ("such as leadership, independence, compulsiveness, conformity, and gregariousness"), and life-style indicators can assist the advertiser in devising a commercial aimed at a certain section of the populace. *See* DUNN & BARBAN, *supra* note 29, at 219-23, 251. *See also* ANDERSON & BARRY, *supra* note 1, at 84,

trends[74] enable the advertiser to tailor the commercial to address those particular groups most likely to engage or require a select legal service. Unfortunately, most attorneys will lack sufficient financial fortitude to underwrite such elaborate research ventures. However, many broadcast facilities and advertising agencies have already accumulated much of this information and might permit advertisers to access their stockpiles, particularly for a small consideration.

Once the attorney knows who and where his possible clients are, he must elect a *media mix* which can most cogently contact the target audience.[75] The broadcast media clearly are more pervasive than publications. As of 1980, 98 percent of American households owned a television, and 99 percent had a radio.[76] Moreover, the average American family watches over six hours of television each day, and the typical adult listens to over three hours of radio daily.[77] Broadcasting obviously has the reach, but will the *desired* target groups be exposed to its commercials? Persons at work or in transit are more likely to tune in radio than television,[78] though radio listeners frequent only a few specific stations that offer a limited programming fare, such as news, rock-and-roll, or country music.[79] Television viewers "channel-hop" in search of favorite shows,[80] particularly with the increasing popularity of cable systems. Newspapers and magazines are often only diversions to be skimmed as readers await other engagements or enjoy a meal. Consequently, various media must be employed at different times utilizing diverse styles if contact is to be made with particular portions of the populace.[81]

The frequency with which an advertisement is broadcast or printed will heavily influence its effectiveness even if several media

277; BALDWIN, *supra* note 32, at 48-49; HEIGHTON & CUNNINGHAM, *supra* note 41, at 69-70, 82.

74. *See* ANDERSON & BARRY, *supra* note 1, at 84, 227; BALDWIN, *supra* note 32, at 49; DUNN & BARBAN, *supra* note 29, at 251-54; HEIGHTON & CUNNINGHAM, *supra* note 41, at 67.

75. DUNN & BARBAN, *supra* note 29, at 497.

76. *Id.* at 547, 565.

77. *Id.* at 561, 569; HEIGHTON & CUNNINGHAM, *supra* note 41, at 86, 89.

78. DUNN & BARBAN, *supra* note 29, at 569. Automobile drivers play the radio "60 percent of the time the car is in use." HEIGHTON & CUNNINGHAM, *supra* note 41, at 89.

79. *See* DUNN & BARBAN, *supra* note 29, at 486; HEIGHTON & CUNNINGHAM, *supra* note 41, at 89-91; Kahn, *The Practical Experience of Radio Advertising*, in INDIANA CONTINUING LEGAL EDUCATION FORUM, LAWYER ADVERTISING RULE CHANGES VIII-3 (1984) [hereinafter cited as Kahn, *Practical Experience*].

80. HEIGHTON & CUNNINGHAM, *supra* note 41, at 88-89.

81. "Communicators, even at their best, reach only a fraction of the total potential audience." DUNN & BARBAN, *supra* note 29, at 59.

are engaged. Often commercials must be transmitted numerous times before the bulk of the target audience has been exposed, and further repetition is essential before the communication "sinks into" the public memory.[82] Generally, the greater the reach of the media, the less often an advertisement must be run.[83] Thus, with broadcasting, fewer commercials would have to be developed and purchased.

Matching market segments with media carriers necessitates a keen evaluation of the communicator's capabilities. Some stations or periodicals can be eliminated quickly because of their restricted subject matter that appeals to very few people. Conversely, a narrow reader- or viewership might be the attorney advertiser's primary pool from which possible clients may emerge. Given the increasing number of cable systems that specialize programming, some lawyers might prefer such media to reach targeted viewers.[84] Obviously broadcasting provides sight-and/or-sound stimulus that the written word cannot, and therefore more individuals may encounter a T.V. or radio commercial even while pursuing other endeavors than would a person who has only a few minutes each day to devote to reading. Unfortunately, this "viewer/listener flexibility" can also doom fleeting broadcast commercials that must compete with attentions focused elsewhere.[85] Thus, complex over-the-air explanations of legal services could confuse an audience[86] while a similar published commercial would provide the reader time for reflection.

For "bottom-liners" advertising costs will dictate the choice of most lawyers. Media prices vary depending upon frequency, time slot, duration, and geographic coverage.[87] Most television commercials run 30-seconds, though 10- and 60-second versions are also utilized.[88] As one would anticipate, 60-second advertisements are twice as expensive as half-minute commercials and four times the cost of the ten-second variety.[89] Thirty second radio advertisement rates are only 25 to 30 percent lower than the minute figure.[90] Very few lawyers could bankroll network commercials, as these regularly require tens of

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82. ANDERSON & BARRY, *supra* note 1, at 483.

83. HEIGHTON & CUNNINGHAM, *supra* note 41, at 92.

84. *See generally id.* at 87.

85. *See* DUNN & BARBAN, *supra* note 29, at 432; HEIGHTON & CUNNINGHAM, *supra* note 41, at 88-89, 91.

86. DUNN & BARBAN, *supra* note 29, at 432. *See generally* BALDWIN, *supra* note 32, at 10; HEIGHTON & CUNNINGHAM, *supra* note 41, at 85.

87. *See* Kahn, *Practical Experience, supra* note 79, at VIII-3 to -4.

88. BALDWIN, *supra* note 32, at 187; DUNN & BARBAN, *supra* note 29, at 490; HEIGHTON & CUNNINGHAM, *supra* note 41, at 96.

89. HEIGHTON & CUNNINGHAM, *supra* note 41, at 97.

90. *Id.*

thousands of dollars to produce.[91] Volume discounts are available for both local television and radio, although they tend to be more substantial with the latter medium.[92] Undoubtedly television advertisements carry the steepest price tag, even at the local level. Most product manufacturers take solace by dissecting large television expenditures into cost-per-units-sold analysis,[93] and this interpretation can make mammoth outlays palatable. For attorneys, however, unit pricing has little practical application, as post-advertising sales increases cannot be easily tabulated for legal services as for many consumer goods. Since there may be a considerable time lag between initial media purchases and an influx of new clients, a lawyer must carefully consider how much revenue she can afford to sink into her commercial ventures. Local radio and cable television programming might be the most economical investment for the novice advertiser, as their prices rival newspaper classifieds in terms of relative affordability.[94] Much money can be saved if studio facilities or the firm's law offices are used to film or record the commercial.[95] Videotaped advertisements are also less expensive than those filmed, and they also can be instantly reviewed and reshot if necessary.[96]

Despite these bleak prospects attorneys should avoid exaggerating the spectre of expense. The objective is *extensive* communication, and the exposure delivered by the electronic media often justifies a heftier payment.

Having struggled through this labyrinth in adopting a suitable advertising campaign, the lawyer must proceed to formulate the commercial itself. Styles obviously will vary per an individual's tastes or lack thereof. There are several proper advertising methods available. Yet, as this article will suggest in the following section, there is one

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91. *See, e.g.,* BALDWIN, *supra* note 32, at 187-89; Middleton, *supra* note 22, at 894-95.

92. HEIGHTON & CUNNINGHAM, *supra* note 41, at 235.

93. ANDERSON & BARRY, *supra* note 1, at 275; DUNN & BARBAN, *supra* note 29, at 551; HEIGHTON & CUNNINGHAM, *supra* note 41, at 95. This analysis has been applied to radio commercials as well. DUNN & BARBAN, *supra* note 29, at 567.

94. *See generally id.*; HEIGHTON & CUNNINGHAM, *supra* note 41, at 20, 41, 90.

95. *See* HEIGHTON & CUNNINGHAM, *supra* note 41, at 148-49. One of radio's central advantages is this ease with which commercials can be produced. *Id.* at 137-38, 142.

96. BALDWIN, *supra* note 32, at 94; DUNN & BARBAN, *supra* note 29, at 475; HEIGHTON & CUNNINGHAM, *supra* note 41, at 155. Videotape is becoming increasingly popular among large advertisers. BALDWIN, *supra* note 32, at 93; DUNN & BARBAN, *supra* note 29, at 474. Attorneys are also utilizing videotape to tackle numerous legal chores. *See* Buckley & Buckley, *Videotaped Wills*, 89 CASE & COM. 3 (Nov.-Dec. 1984); Buckley & Buckley, *Videotaping Wills: A New Frontier in Estate Planning*, 11 OHIO N.U.L. REV. 271 (1984).

technique which best accommodates the intentions of the Disciplinary Rules and the purposes of advertising.

C. *Educational Broadcast Advertising*

Regardless of the format of an attorney's commercials, several principles apply to all advertising. Simplicity of content is paramount, especially with broadcasting. Subtlety is artistic but will lose the vast majority of any audience. An effective commercial arouses the person's attention with simple, familiar messages that are sufficiently intriguing to retain that attention.[98] The introduction of *pizzazz* into an advertisement may capture the viewers' interest, though the verbal and visual communications should be closely correlated if television is employed.[99] What is seen should supplement the narrative, as it is vital that the audience comprehends the message expressed rather than fixate on an irrelevant visual component such as a dancing hippo or synchronized swimmers. Perhaps most significant for attorney advertising is spokesperson attractiveness and credibility.[100] The counselor appearing in the television commercial should exude confidence, composure, and trustworthiness.[101] Obviously, if on radio the lawyer's voice should express these qualities and should also be clearly articulate.

The commerical's eventual time slot may influence the preparation of the substance of the message. Many attorneys advertise during television's "graveyard shift" as several potential clients who are kept awake at night because of nagging economic or marital difficulties view the early morning offerings.[102] Other lawyers elect slots during popular local programming, such as the late night news,[103] presumably because audiences tune in to such shows primarily to acquire information. Viewers frequenting each time slot will probably desire different legal information, and commercials must be devised accordingly.

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97. BALDWIN, *supra* note 32, at 15-16; DUNN & BARBAN, *supra* note 29, at 431.

98. BALDWIN, *supra* note 32, at 14-16.

99. *Id.* at 16.

100. "There is extensive literature that shows that people tend to agree with those whom they like more than those they dislike." ANDERSON & BARRY, *supra* note 1, at 255. *See also* McQuire, *Source Variables in Persuasion,* in HANDBOOK OF COMMUNICATION 225-32 (1973). Even though identical information is conveyed by two sources, one may be accepted as superior authority merely because of the impression made upon the recipient of the communication. For example, law review editors and judges frequently frown upon legal encyclopedia references while praising string citations of cases which, coincidentally, happen to appear in the encyclopedia.

101. *See* ANDERSON & BARRY, *supra* note 1, at 50.

102. Slavin, *supra* note 65, at 50.

103. *See, e.g.*, Middleton, *supra* note 22, at 895.

Television and radio advertisements typically can be categorized by their essential ingredients: singing, demonstration, testimonial, dramatization, dialogue, humor, animation, or narrative.[104] While each style has its merits or flaws, the narrative has been the lawyer's favorite over the years. Predictably, this "preference" largely has been a function of the past and present Disciplinary Rules which have virtually eliminated the other varieties from an attorney's repertoire. While any of these techniques possibly may be combined to produce an ethical commercial under the Code, there is one species that has proven historically acceptable and dignified. This is the educational or "public service" advertisement. This approach has been pursued successfully be several practitioners.[105]

For decades Ethical Opinions have permitted and encouraged the profession's use of broadcast media to conduct educational programs in which a myriad of legal issues has been explained to the public.[106] A critical distinction must be made between commercials that tutor and educational pursuits such as Terry English's legal newspaper columns in the Bloomington Herald-Telephone/Sunday Herald-Times and Alfred Buckley's *On the Law* segments on WRTV-Channel Six (Indianapolis) and WASK-AM radio (Lafayette).[107] These are *purely*

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104. ANDERSON & BARRY, *supra* note 1, at 250-51; DUNN & BARBAN, *supra* note 29, at 433-35, 440-49.

105. *See, e.g.*, Middleton, *supra* note 22, at 893-97; Note, *Kansas Advertising, supra* note 27, at 650-51.

106. *See, e.g.*, Belli v. State Bar of California, 10 Cal. 3d 824, 112 Cal. Rptr 527, 519 P.2d 575 (1974), *application for stay denied,* 416 U.S. 965 (1974) (radio and television); ABA Comm. on Professional Ethics, Formal Op. 298 (1961) (radio); ABA Comm. on Professional Ethics and Grievances, Formal Op. 179 (1938) (radio); ABA Comm. on Professional Ethics and Grievances, Formal Op. 148 (1935) (radio); ABA Comm. on Professional Ethics, Informal Op. 1179 (1971) (television); ABA Comm. on Professional Ethics, Informal Op. C-764 (1964) (radio); ABA Comm. on Professional Ethics, Informal Op. 528 (1962) (radio); Dallas Ethics Op. 1980-5, *as summarized in* ABA/BNA LAWYERS' MANUAL, *supra* note 27, at 801:8402 (1984) (radio); Mississippi Ethics Op. 74, *as summarized in id.* at 801:5103 (1984) (television); New York City Ethics Op. 80-8, *as summarized in id.* at 801:6303-04 (1984) (radio); Oregon Ethics Op. 465, *as summarized in id.* at 801:7108 (1984) (television); *Giving Human Interest to the Lawyers' Message: Two Successful Experiments,* 23 A.B.A.J. 939, 940-41 (1937) (radio dramatizations).

107. Terry L. English practices law in Bloomington and has written a legal-consumer affairs newspaper column since 1977. Letter from Terry L. English to the author (Sept. 11, 1984). Alfred W. Buckely is a partner of the law firm of Buckley, Buckley & Buckley in Lafayette and has broadcast his *On the Law* series since 1982, initially with WFTE-AM radio (Lafayette). He has also published an *On the Law* column in Farmweek, a central Indiana newspaper.

public affairs presentations intended to enlighten and heighten individual cognizance of important legal matters. Advertisements, whether informational or otherwise, are still designed to solicit customers.[108] Yet applying the educational motif embosses legal commercials with a scholarly ornament that transcends the supposedly "lesser" or vulgar commercial ilk presented by other businesses. A public need and an advertising pursuit can be simultaneously accomplished. As one commentator aptly expressed, "Lawyer advertising at its best can inform people about their legal rights and help them make an informed choice of attorneys to exercise those rights."[109]

Public service advertising usually strives to generate goodwill for both institutional and individual services and often corrects popular misconceptions about organizational projects or policies.[110] Commercials of this mold typically are least infested with the advertising abuses most dreaded among the bar. Educational advertisements most closely correspond with the spirit of the Code's Ethical Considerations[111] while possibly shielding the lawyer from potential disciplinary sanction.

The informational format affords a plethora of topics to discuss. Regrettably, one cannot engage in lengthy elaborations within a half-minute commercial. Still, a tersely phrased advertisement can supply the audience with a comprehensible if minute summary of a certain point of law. More importantly, a pedagogical commercial entices the viewers and listeners at least momentarily to consider general legal problems and perhaps ponder their own personal legal concerns. So the message need not exhaustively explain legal concepts to produce the desired positive results.

Of course, advertising that does not embody such scholastic goals is no less satisfactory, ethical, or beneficial to the layperson. People also will prosper from commercials which increase awareness of the diversity of practice among competing law firms or which clarify that one need not mortgage the homestead for generations to consult an attorney. But educational overtones best dissociate legal commercials from the gimmickry of other advertisements while appearing to contribute a valuable service to the public well-being. As the ABA Committee on Professional Ethics and Grievances stated forty-six years ago:

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108. ABA Comm. on Professional Ethics and Grievances, Formal Op. 179 (1938).

109. Andrews, *supra* note 28, at 809.

110. DUNN & BARBAN, *supra* note 29, at 647, 649, 651-52, 659; R. SIMON, PUBLIC RELATIONS: CONCEPTS AND PRACTICES 9, 11-12 (2d ed. 1980).

111. *See supra* note 21 and accompanying text.

> Advertising which is calculated to teach the layman the benefits and advantages of preventive legal services will benefit the lay public and enable the lawyer to render a more desirable and beneficial professional service. . . . [B]ecause of the trouble, disappointments, controversy, and litigation it will prevent, it will enhance the public esteem of the legal profession and create a better relation between the profession and the general public. . . .It will lessen the instances in which the lay public may feel that a person's honest intentions and desires have been frustrated by what the layman chooses to call the "technicalities" of the law. It will result in the public acquiring a higher regard for the legal profession, the judicial process, and the judicial establishments.[112]

Despite the fact that advertising remained forbidden fruit for attorneys for 39 more years, the Committee's lesson is applicable today with equal vigor. Considering the continuing popular impression of lawyers is often bloated with suspicion and distrust, any advertising that dispels public misinterpretations seems welcome and long overdue.

CONCLUSION

Television commercials could become an indispensable tether between attorneys and the public unless rigid interpretations of the revised Code squelch pioneering efforts. While some degree of regulation will be necessary to tackle perplexities such as the interstate transmission problem, the Supreme Court must guard against excessive enforcement. Otherwise the Code's new freedoms would become hollow options. Broadcast advertising initially promises to be an expensive and arduous undertaking that will never flower into an effective mode of client communication should early users be throttled into submission. With the electronic media large portions of the population that have rarely consulted a lawyer will increasingly discover that appropriate legal assistance can be affordable. Broadcast law commercials will prominently contribute to advertising's continuing elimination of prejudice and misunderstanding which an uninformed public has assembled since 1908. Whether the modified Rules become a panacea or a Pandora's Box depends entirely upon the path the profession elects. "Advertising does not corrupt—it communicates."[113] Practitioners throughout the state should harvest the vast opportunities now available through broadcast advertising.

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112. ABA Comm. on Professional Ethics and Grievances, Formal Op. 179 (1938).

113. Laev, *The Right Way, supra* note 66, at X-32 (emphasis in original deleted).

NOTES

CONSTITUTIONALITY OF THE INDIANA MEDICAL MALPRACTICE ACT: RE-EVALUATED

In the early 1970's insurance companies declared a nationwide "medical malpractice crisis."[1] Insurance carriers feared that excess jury verdicts would result in extensive losses due to the insurance industry's inability to anticipate future awards.[2] As a result, insurance carriers refused to guarantee future insurance coverage to all health care providers.[3] The Indiana Legislature responded to this "crisis" by enacting the Indiana Medical Malpractice Act.[4]

Indiana's Medical Malpractice Act was designed to guarantee that health care providers would continue to receive malpractice insurance coverage.[5] In order to accomplish this guarantee, the Legislature enacted several limiting provisions. A monetary limitation on the amount of damages of $500,000 per incident[6] and a reduction in the

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1. The "medical malpractice crisis" was not brought about by medical practice but by malpractice insurance carriers. *See generally* L. LANDER, DEFECTIVE MEDICINE: RISK, ANGER, AND THE MALPRACTICE CRISIS (1978).

2. Questions have been raised as to the validity of the "fears" of the insurance industry. In 1974, the average pay out per doctor was $750, while the average premium paid per doctor was $3,500. Aitken, *Medical Malpractice: The Alleged "Crisis" in Perspective*, 637 INS. L. J. 90, 97 (February, 1976). *See also* Note, *Alternatives To Litigation: Pretrial Screening and Arbitration of Medical Malpractice Claims: Has Missouri Taken a Giant Step Backward?* 50 UMKC L. REV. 182 (1982).

3. Insurance companies argued that the increased cost of providing health care services, the increase in the number of claims and suits against health care providers, and the unusual size of such claims were forcing them to withdraw from the insuring the high risk health care providers. Hoodenpyl, *Medical Malpractice Litigation in Indiana*, 20 RES. GESTAE 126, 127 (March 1976).

4. Medical Malpractice Act of 1975, IND. CODE § 16-9.5 et seq (1976).

5. Indiana's Legislature failed to state a purpose for the Medical Malpractice Act, however, the Indiana courts have explained the purpose of the legislation. *See, e.g.*, Rohrabaugh v. Wagoner, ___ Ind. ___, ___, 413 N.E.2d 891, 894 (1980) (the legislature enacted this legislation to prevent the loss of insurance to health care providers); Johnson v. St. Vincent Hosp., ___Ind. ___, ___, 404 N.E.2d 585, 590 (1980) (the limitations of the Act were written to allow health care insurance carriers to better anticipate their expenses and to guarantee insurance to all health care providers).

6. IND. CODE § 16-9.5-2-2 (1982).

age of disability for minors to age six[7] are the harshest of the limitations placed on the health care tort victim. Moreover, the legislature defined a statute of limitations for the filing of claims to begin two years from the date of "occurrence" instead of the date of "discovery."[8] In addition to these limitations, the Legislature created a review panel to screen malpractice claims.[9] The purpose of the review panel process is to expedite the review of malpractice claims which ordinarily proceed to trial, as well as screen out non-meritorious claims.[10] As a result of these provisions, the Legislature hoped to increase the delivery of health care services and decrease the costs of medical care.[11]

This note discusses the constitutional implications of the Indiana Medical Malpractice Act. Limitations on the amount of damages available to an injured patient, the age of disability for minors, and the two years from "occurrence" statute of limitations have resulted in classifications which violate the patient's equal protection rights as guaranteed by the Fourteenth Amendment.[12] Admissibility of the review panel's decision in a future court action denies the patient his right to trial by jury.[13] Actual application of the review panel process has resulted in oppressive delays contrary to the intent of the Legislature.[14] These delays are a violation of both the patient's right to trial by jury and the patient's right of access to the courts.[15] Constitutional implications of the Indiana Medical Malpractice Act make it an invalid method of dealing with the "medical malpractice crisis."

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7. IND. CODE § 16-9.5-3-1 (1982). Prior to the Medical Malpractice Act the age of disability for minors was eighteen.

8. *Id.*

9. IND. CODE § 16-9.5-9-3 (1982).

10. The rational behind legislative provisions establishing review panels or arbitration panels was to screen out unmeritorious claims and to encourage parties to settle valid claims, thereby, expediting the review of malpractice claims. *See supra* note 2 at 185.

11. Sakayan, *Arbitration and Screeing Panels: Recent Experiences and Trends*, 17 FORUM 682, 683 (1982).

12. *See infra* notes 123-39 and accompanying text. The two-year statute of limitations is beyond the scope of this Note. Indiana courts have questioned the constitutionality of this limitation. "We have not though, ruled out the possibility of deciding in a future case that this occurrence rule must be applied as though it was a discovery rule due to the questionable constitutionality of the occurrence rule." Alwood v. Davis, ___ Ind. App. ___, ___, 411 N.E.2d 759, 761 (1980). *See also* Chaffin v. Nicosia, 261 Ind. 698, 310 N.E.2d 867 (1974).

13. *See infra* notes 162-67 and accompanying text.

14. *See supra* note 5.

15. *See infra* notes 198-201 and accompanying text.

THE INDIANA MEDICAL MALPRACTICE ACT

Patients' claims against health care providers[16] were originally governed by the same statutes governing other tortfeasors.[17] The statute of limitations for filing a malpractice complaint was two years from the date the "cause of action accrued."[18] This statute of limitation was construed to run from the date the injury resulted and damages were ascertainable.[19] A malpractice plaintiff would file his complaint in a court of law and had the right to demand a jury trial.[20] An injured patient could recover, without limitation, any amount of damages which the jury awarded and the court found to be reasonable.[21] However, in 1975 the Indiana legislature enacted the Indiana Medical Malpractice Act which separated "medical malpractice" tort feasors from all other tortfeasors. In order to understand the implications of separately classifying the "medical malpractice" tortfeasor, one has to be familiar with the procedures involved.

A. Procedure under the Malpractice Act

A health care provider qualifies for protection under the Indiana Medical Malpractice Act by meeting the minimal prerequisites of the Act.[22] First, the health care provider is required to file proof of financial responsibility[23] with the Indiana Commissioner of Insurance.[24] Secondly, the health care provider must pay an annual surcharge[25] within thirty days after the premium for malpractice insurance

16. The term "health care provider" includes a person, partner, corporation, registered or licensed nurse, officer or employee, college, university, blood bank and mental health center. IND. CODE § 16-9.5-1-1 (a)(1)(2)(3) (1982).

17. IND. CODE § 34-4-19-1 (1982).

18. IND. CODE § 34-1-2-2 (1982).

19. Montgomery v. Crum, 199 Ind. 660, 679, 161 N.E. 251, 259 (1928).

20. *Id.; see also* IND. CODE § 34-1-54-8 (1971).

21. IND. CODE § 34-1-22-1 (1982).

22. IND. CODE § 16-9.5-2-1 (1982).

23. Proof of financial responsibility requires that the health care provider's insurance carrier file proof of the health care provider's policy of malpractice liability insurance. Each health care provider is required to have liability insurance of at least $100,000 per occurrence and $300,000 in annual aggregate insurance. A hospital with 100 or fewer beds is required to keep an annual aggregate policy of $2,000,000, while a hospital with over 100 beds is required to have a minimum of $3,000,000 in annual aggregate liability insurance. *See* IND. CODE § 16-9.5-2-6 (a)(1) (1982).

24. A health care provider may also qualify his officers, agents and/or employees for malpractice insurance. In order to qualify they must be named individually or by class in the statement of proof of financial responsibility. Such insurance covers only malpractice within the scope of employment *See* IND. CODE § 16-9.5-2-1(b) (1982).

25. IND. CODE § 16-9.5-4-1(b)(1982). The annual surcharge is determined by the Commissioner of Insurance based upon actuarial principles.

coverage is received by the health care provider's insurer.[26] Failure to pay the surcharge within the time limit results in the suspension of the Act's protection until payment is made.[27] If a health care provider fails to meet the prerequisites of the Malpractice Act, a malpractice victim will not be restricted by the terms of the Act.[28]

The patient of a health care provider that has qualified under the Malpractice Act is similarly required to follow the requirements of the Act to initiate a claim. The injured patient must file a complaint with the Commissioner of Insurance[29] within two years of the alleged act, omission, or neglect of the health care provider.[30] If the patient is under six years of age at the time of the alleged malpractice, he has until his eighth birthday to file a claim.[31] After filing the complaint, the patient and the health care provider must wait at least twenty days, at which time either party may file a request for the formation of a medical review panel.[32] After the complaint is heard by the medical review panel,[33] the patient has ninety days to refile the complaint with a state court.[34]

The medical review panel consists of one attorney and three health care providers.[35] Time constraints are set for the selection of the panel members to expedite the selection process. The attorney member sits in an advisory capacity, as chairman, and has no vote

26. IND. CODE § 16-9.5-4-1(d)(1982).

27. IND. CODE § 16-9.5-4-1(g)(1982).

28. If a health care provider does not qualify under the Act, the patient's right of action would be governed by the same statutes as other tort claimants' actions. Thus there is no cap on recovery. IND. CODE § 16-9.5-1-5 (1982).

29. IND. CODE §16-9.5-9-1 (1982). In addition, the statute provides, "no dollar amount or figure shall be included in the demand in any malpractice complaint, but the prayer shall be for such damages as are reasonable in the premises." IND. CODE § 16-9.5-1-6 (1982).

30. IND. CODE § 16-9.5-3-1 (1982). Indiana courts interpret this statute of limitations to be based on an "occurrence" rule rather than a "discovery" rule. Therefore, if the patient fails to discover the malpractice within two years of the day of the physicians conduct, the patients cause of action is lost. *See* Colbert v. Waitt, ___ Ind. App. ___, ___, 445 N.E. 2d 1000, 1002 (1982). The only exception to the statute of limitations is the doctrine of fraudulent concealment. To invoke this doctrine the health care provider must have defrauded the patient in such a manner as to mislead the patient or elude the investigation of the patient who claims the cause of action. *Id.* at 1003.

31. IND. CODE § 16-9.5-3-1 (1982).

32. IND. CODE § 16-9.5-9-1 (1982).

33. Before any action can be commenced in state court, the plaintiff's complaint must be heard by a review panel. IND. CODE § 16-9.5-9-2 (1982).

34. As the statute is written, a defendant cannot file a complaint in a state court. The statute only provides for a filing by the plaintiff. *Id. See also* IND. CODE § 16-9.5-5-6 ((1976).

35. IND. CODE § 16-9.5-9-3 (1982).

in the panel's decision.[36] The parties must agree upon a chairman within fifteen days after the request for formation of the panel.[37] If the parties fail to agree on a chairman the Clerk of the Supreme Court will draw at random a list of five qualified attorneys.[38] After a chairman is selected, the Clerk of the Supreme Court has five days to inform the chairman of the selection.[39] Within fifteen days after notification, the chairman must inform the Clerk of his acceptance or make a showing of good cause as to his inability to serve.[40] Once the chairman is confirmed, each party has fifteen days to choose a health care provider to sit on the panel.[41] The third health care provider is selected by the first two health care providers[42] within fifteen days of their selection.[43] After all the members are selected, the chairman must notify the Commissioner of Insurance within five days.[44] Therefore, the selection process encompasses seventy to ninety days from the request for a formation.[45]

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36. It is the chairman's duty to expedite the selection of the panel members, convene the panel, and the panel's decision. The chairman may also schedule reasonable dates for submission of evidence. *Id.*

37. IND. CODE § 16-9.5-9-3(a)(1976).

38. Once the clerk of the Supreme Court has compiled a list of five attorneys, both parties alternatively strike names until only one name remains. If a party fails to strike a name within five days, the opposing party must request the Clerk of the Indiana Supreme Court to strike for them. *Id.*

39. *Id.*

40. IND. CODE § 16-9.5-9-3(a)(2)(1982). The requirements for showing "good cause" are found in subsection (c).

41. If a party is unable to select a health care provider in the prescribed time limit the chairman will choose someone and notify both parties. IND. CODE § 16-9.5-9-3(b)(1)(1982).

42. *Id.*

43. IND. CODE § 16-9.5-9-3(b)(2)(1982). If the two panel members fail to choose the third health care provider within 15 days, he will be chosen by the chairman. *Id.* Either party can challenge the selection of any panel member within ten days of his selection without cause. The party whose member was challenged shall select a replacement. If the challenge involved the third health care provider, the first two health care providers make another selection. If two such challenges are made the chairman shall choose three members and each side shall strike one, the remaining one will take that position. IND. CODE § 16-9.5-9-3(b)(3)(1982).

44. IND. CODE § 16-9.5-9-3(b)(4)(1982).

45. Addition of the minimum number of days under each subsection of section 3 results in 70 days:

Number of days	Subsection
15	(a)
5	(a)
15	(a)
15	(b)(2)
15	(b)(2)
5	(b)(4)

Total 70 days

The medical review panel's sole duty is to determine the validity of the patient's complaint against the defendant health care provider.[46] Each party may submit evidence to the review panel, including: medical charts, depositions of witnesses, x-rays, lab reports, and excerpts from treatises.[47] All evidence must be submitted by the parties in written form.[48] Panel members will review the submitted evidence and may also request additional information, consult with medical authorities, and examine reports prepared by other health care providers.[49] After submission of the evidence, either party may convene the panel and ask questions concerning any relevant issues before the panel.[50] The panel has thirty days in which to render an opinion after receiving all of the information and meeting with the parties.[51] The panel has a maximum of 180 days from the date of the selection of the last member to render its expert opinion.[52] Therefore, the entire panel process should take a maximum of nine months from the date the complaint is filed to the date the decision is rendered.[53]

A determination by the panel that the defendant's care fell below the community standard of care is followed by the patient's claim for

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An additional 20 days can be added to the selection process if lack of agreement between parties causes the clerk of the supreme court to strike names or the chairman to choose names of qualified members. IND. CODE § 16-9.5-9-3 (1982).

46. IND. CODE § 16-9.5-9-7 (1982).

47. IND. CODE § 16-9.5-9-4 (1982).

48. *Id.*

49. IND. CODE § 16-9.5-9-6 (1982).

50. The chairman is the presiding member of the informal meetings of the review board. IND. CODE § 16-9.5-9-5 (1982).

51. One or more of the following expert opinions must be rendered by the panel:

> (a) The evidence supports the conclusion that defendant or defendants failed to comply with the appropriate standard of care as charged in the complaint.
>
> (b) The evidence does not support the conclusion that the defendant or defendants failed to meet the applicable standard of care as charged in the complaint.
>
> (c) That there is a material issues of fact, not requiring expert opinion, bearing on liability for consideration by the court or jury.
>
> (d) The conduct complained of was or was not a factor of the resultant damages. If so, whether the plaintiff suffered: (1) any disability and the extent and duration of the disability, and (2) any permanent impairment and the percentage of the impairment.

IND. CODE § 16-9.5-9-7 (1982).

52. IND. CODE § 16-9.5-9-3.5 (1982).

53. The total of 270 days or nine months for the panel process includes a maximum of 90 days for the panel selection and 180 days for the panel to render its decision.

damages. If the claim is in excess of one hundred thousand dollars ($100,000.00),[54] the plaintiff must file a petition in the court named in the proposed complaint.[55] The petition will either seek approval of an agreed settlement,[56] or demand payment of damages from the patient's compensation fund.[57] After the petition is filed, the Commissioner and either the health care provider or his insurer may agree to settle with the claimant from the compensation fund or file written objections to the payment of the amount demanded.[58] The judge of the court then sets a court date for the approval of the petition[59] or a hearing if objections were filed by the health care provider.[60]

A hearing will result in a decision by the court of the amount of the plaintiff's damages. Relevant evidence may be submitted by the Commissioner of Insurance, the claimant, the health care provider, and the health care provider's insurer.[61] After hearing the relevant evidence, the court decides what damages, if any, will be paid by the health care provider and the patient's compensation fund.[62]

The maximum award the patient can recover from the health care provider and the patient's compensation fund is $500,000.00. The first $100,000.00 of the court's judgment or approved settlement is paid by the health care provider's insurance.[63] Judgments or settlements in excess of $100,000.00 are paid from the patient's compensation fund up to the Act's $500,000.00 limitation.[64] To receive payment, the patient's attorney must report the judgment or approved settlement to the Commissioner of Insurance within sixty days of the

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54. A maximum amount of up to $100,000 in damages is paid by the health care provider or his insurer. Therefore, damage settlements below $100,000 do not require review by the Commissioner of Insurance. IND. CODE § 16-9.5-4-3 (1982).

55. IND. CODE § 16-9.5-4-3(1) (1982). A Petition can be filed, in any case, in the circuit or superior courts of Marion County. *Id.*

56. Settlement of the claim at any time during the proceedings is encouraged, the only requirement is that the settlement be approved by the court. *Id.* § 16-9.5-4-2.

57. *Id.*

58. IND. CODE § 16-9.5-4-2 (1982).

59. Any settlement approved by the court cannot be appealed. IND. CODE § 16-9.5-4-3(6) (1982).

60. IND. CODE § 16-9.5-4-3(4) (1982).

61. IND. CODE § 16-9.5-4-3(5) (1982).

62. Any amount awarded in excess of the insurer's liability of $100,000 is assessed against the patient' scompensation fund. *Id.*

63. IND. CODE § 16-9.5-2-2(d) (1982).

64. A balance of $400,000 is the total portion assessable against the patient's compensation fund. This figure equals the $500,000 cap on recoveries less the amount of $100,000 assessable to the health care provider or his insurer. IND. CODE § 16-9.5-2-2(c) (1982).

final disposition.[65] All claims received by the Commissioner will be computed as of the last day of the year of the decision.[66] If the full payment of all claims would exhaust the patient's compensation fund, the fund will be prorated over the number of unpaid judgments and the balance paid in the following year.[67]

A patient has ninety days after the panel's decision to file a complaint in a court of law demanding trial by jury.[68] The complaint cannot include a demand for specific damages, but can include a prayer for "reasonable damages."[69] At trial the panel's decision is admissible as evidence[70] and, in addition, either party may call any member of the panel as a witness.[71] The jury may award an appropriate amount of damages up to the $500,000.00 limitation.[72] The jury's decision is appealable by either party.[73]

Indiana Medical Malpractice legislation was drafted to expedite the reviewing of malpractice claims.[74] All of the steps of the review process are to be completed within prescribed time limits. If one party fails to meet a time limit in the panel selection process, the other party may have the Clerk of the Supreme Court expedite the selection. However, the legislature has failed to provide a remedy if the panel members or non-party participants do not follow the prescribed time limits.[75] Lack of a remedy for failure to meet prescribed time limitations has resulted in delays in the panel process and, therefore,

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65. The statute provides that the report to the commissioner must state: "(a) nature of the claim; (b) damages asserted and alleged injury; (c) attorney's fees and expenses incurred in connection with the claim or defense; and (d) the amount of any settlement or judgment." IND. CODE § 16-9.5-6-1 (1982).

66. IND. CODE § 16-9.5-4-1(j) (1982).

67. *Id.*

68. A decision by a medical review panel is a prerequisite to filing a complaint in state courts. IND. CODE § 16-9.5-1-6 (1982).

69. *Id.* After a panel decision, the complaint must be filed in a court of law having requisite jurisdiction.

70. IND. CODE § 16-9.5-9-4 (1982).

71. *Id.*

72. IND. CODE § 16-9.5-2-2 (1982).

73. IND. CODE § 16-9.5-4-3 (1982). Appeal of a state court decision can be made by either and is governed by the Indiana Rules of Civil Procedure. IND. CODE § 34-1-47-1 (1982).

74. *See supra* notes 5, 10 and accompanying text.

75. The statute provides that "a party, attorney or panelist who fails to act as required by this chapter without good cause shown is subject to mandate or appropriate sanctions upon application to the court designated in the proposed complaint as having jurisdiction." IND. CODE § 16-9.5-9-3.5 (1982). However, this has not been proven to be an adequate remedy for keeping the panel process within the prescribed time limitations. *See infra* notes 76-90 and accompanying text.

few claims receive a review panel decision within the nine month prescribed limitation.

B. Statistical Analysis of the Operation of the Act

Following the legislative procedures, a review panel decision should be rendered within nine months of a request for a panel formation.[76] However, this nine-month legislative scheme is rarely met due to various delays occasioned during the process.[77] These delays have been exacerbated by the growing strain on the system caused by the yearly increase in the number of complaints filed.

Complaints against health care providers have steadily increased since the Medical Malpractice Act's inception. In 1975, only one complaint was filed.[78] The following year the number of complaints increased to eighteen and in 1983 a total of 629 complaints were filed.[79]

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

77. *See infra* note 176 and accompanying text.

78. 1983 Ind. Dept. of Ins., Patients Compensation Division year end report [hereinafter cited as INSURANCE REPORT].

79. STATUS OF COMPLAINTS FILED PER YEAR AS OF DECEMBER 31, 1983

YEAR	COMPLAINTS FILED PER YEAR	COMPLAINTS PENDING (A)	COMPLAINTS PROGRESSING (B)	PROBLEM STATUS (C)	CLOSED (D)	PANEL OPINIONS (E)
1975	1	0(.00)	0(.00)	0(.00)	1(1.0)	0(.00)
1976	18	0(.00)	2(.11)	0(.00)	8(.44)	8(.44)
1977	142	3(.02)	5(.04)	4(.03)	75(.53)	55(.30)
1978	272	11(.04)	13(.05)	2(.01)	151(.55)	95(.35)
1979	319	13(.04)	22(.07)	9(.03)	159(.50)	116(.36)
1980	401	34(.08)	56(.14)	19(.05)	179(.45)	113(.28)
1981	431	63(.15)	112(.26)	16(.04)	143(.33)	97(.22)
1982	556	131(.24)	230(.41)	14(.03)	130(.23)	51(.09)
1983	629	377(.60)	191(.30)	18(.03)	39(.06)	4(.01)
CUMM. TOT.	2,769	632(.23)	631(.23)	82(.03)	885(.32)	539(.19)

(A) (B) (C) - Current active cases filed with the Patients Compensation Division.

(A) PENDING - Complaint has been filed, and a request for a medical review panel has been received.

(B) PROGRESSING - Complaint has been filed, and a request for a review panel has been received. The file will remain in this stage until all the members of a panel have been selected.

(C) PROBLEMS - Complaint has been filed, but either a dollar amount has been referred to in the prayer, or the health care provider did not comply with the Malpractice Act, or a possible statute of limitations problem.

Accordingly, the number of complaints awaiting panel decisions has also increased.[80]

A total of 2,769 complaints have been filed with the Commissioner of Insurance since July 1, 1975.[81] Of the total number of complaints filed, 1,345 (49 percent) are still awaiting completion.[82] Only 1,424 (51 percent) of the complaints filed have been completed, and 539 (38 percent) of these completed have received panel decisions. The remaining 885 (62 percent) complaints have been settled prior to the rendering of a panel decision.[83] Almost twenty-five percent of the cases filed prior to 1981 are still awaiting a panel decision.[84] Thirty-six percent of the complaints filed have been pending for a year or longer.[85] This backlog of complaints can be attributed, in part, to the system's inability to cope with the ever increasing need for decisions.

(D) CLOSED — Complaint was filed, but it was closed prior to the rendering of a panel opinion.

(E) PANEL OPINION - Complaint was filed and a medical review panel rendered an opinion..

1983 Ind. Dept. of Ins., Patient Compensation Division year end report.

80. *See supra* note 79. Each year the number of complaints pending decision has increased significantly.

81. Information available on the status of complaints filed prior to January 1, 1984, is as follows:

	Number of complaints	% of Total number of complaints filed
Opinions rendered	539	19
Settled prior to opinion	885	32
"Problem status" unsettled	82	3
Review panel requested	631	23
Review panel not yet requested	632	23
TOTAL	2,769	100%

See INSURANCE REPORT, *supra* note 78.

82. The figure of 1345 complaints awaiting completion is computed by adding complaints where a review panel has been requested to the number of complaints where a review panel has yet to be requested and those considered to be in a "problem" status. Of those complaints where a review panel has been requested, 175 have completed the selection process and 456 are still in the selection process.

83. *See* INSURANCE REPORT, *supra* note 78; *see also supra* note 79.

84. By 1981, a total of 1584 cases had been filed . As of 1983, only 1200 had been completed through settlement or panel decision. The remaining 384 (24%) had yet to be completed. *See* INSURANCE REPORT, *supra* note 78.

85. In 1982, a total of 2,140 cases had been filed. Of these cases, 759 had yet to be completed as of December 31, 1983. *See* INSURANCE REPORT, *supra* note 78.

The total number of decisions rendered in any one year has failed to equal the number of complaints pending decisions in that year.[86] The percentage of panel decisions was at its highest in 1983 when it equalled twenty-seven-and-one-half percent of the complaints filed that year.[87] As of December 31, 1983, the percentage of complaints requiring panel decisions equalled thirty-eight percent of the total number of causes filed.[88] If the percentage of panel decisions per complaint continues to increase at the rate of three-and-one-half percent per year,[89] the backlog of complaints will continue to increase until the year 1986.[90] Efficient operation of the panel process, as envisioned by the legislature, cannot be achieved until the number of decisions rendered equals the caseload presented and the massive backlog is alleviated.

Medical review panels were established to expedite the procedures involving medical malpractice complaints. Each segment of

86. *See infra* notes 86-90 and accompanying text.

87. MEDICAL MALPRACTICE PANEL OPINIONS

YEAR	COMPLAINTS FILED	MALPRACTICE	NO MALPRACTICE	MATERIAL ISSUE OF FACT	VARIATIONS	OPINIONS RENDERED (%)
1975	1	0	0	0	0	0(.00)
1976	18	1	0	0	0	1(.05)
1977	142	1	2	0	0	3(.02)
1978	272	1	13	0	1	17(.06)
1979	319	6	33	1	0	40(.12)
1980	401	7	55	1	6	69(.17)
1981	431	16	94	4	4	118(.27)
1982	556	25	85	6	7	123(.22)
1983	629	21	133	6	13	173(.275)

1983 Ind. Dept. of Ins., Patients Compensation Division year end report.

88. The total number of cases completed as of December 31, 1983 was 1424. Of these 1424 cases, 539 (38.5%) required the rendering of a panel decision. *See supra* note 87.

89. On average, the number of panel decisions per complaint has increased at the rate of 3.5% per year. This figure is computed by taking the percentage of panel opinions in 1983 (27.5%) dividing by the total number of years the Act has been in operation (8.5). *See supra* note 87.

90. Complaints have increased at the rate of 74 per year:

629 (complaints filed in 1983)
(divided by) 8.5 (number of years Act has been in operation)
74 (average amount of additional complaints each year)

Using this figure, as well as the increase percentage of 3.5% as constants, it is possible to estimate when the number of panel decisions will equal the number needed. However, several assumptions must be made. First, the number of complaints needing panel decisions will remain at 38.5 percent. Second, the number of complaints will continue to increase at 74 per year. *See supra* note 90. Third, the number of decisions

the procedure has a prescribed time limitation. However, due to the absence of a penalty for failure of a party to meet a deadline, the number of complaints continue to backlog. Presently, an average of two years is needed for a complaint to pass through the panel process which is far in excess of the statutory nine-month guideline. Therefore, medical review panels in Indiana have failed to expedite the review of claims against health care providers.

THE STATUTORY LIMITATIONS OF THE INDIANA MEDICAL MALPRACTICE ACT AND THE EQUAL PROTECTION CLAUSE

The Indiana Medical Malpractice Act imposes three limitations upon patients injured by health care providers. The first is a two-year statute of limitations for filing claims.[91] A second limitation is a lowered age of disability for minors, from age eighteen to age six, where a health care provider is the tortfeasor.[92] The third is a $500,000.00 limitation on the amount of damages a malpractice victim can recover.[93] All three of these limitations are constraints on a malpractice victim's equal protection rights as guaranteed by the Fourteenth Amendment.

The equal protection clause of the Fourteenth Amendment guarantees that no state shall "deny to any person within its jurisdiction the equal protection of the laws."[94] Courts have interpreted this clause to mean that all those who are similarly situated must be

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will continue to increase at the rate of 3.5 percent of complaints filed. The following is a mathematical analysis of these assumptions:

Year	% of opinions/ complaint filed	% short of the needed 38.5%
1984	31%	7.5
1985	34.5%	4.0
1986	38%	.5

Following the given assumptions the number of opinions rendered equal the number of cases needing decision in 1986. Continuing this analysis one step further, the backlog created prior to 1987 would not be completed until 1994.

91. IND. CODE § 16-9.5-3-1 (1982). The statute of limitations reads: "No claim, whether in contract or tort, may be brought against a health care provider based upon professional services of health care rendered or which should have been rendered unless filed within two (2) years from the date of the alleged act, omission, or neglect . . ." *Id.* The doctrine of fraudulent concealment is the only means by which to get an extended period to file. *See supra* note 30.

92. IND. CODE § 16-9.5-3-1 (1982).

93. A plaintiff cannot receive in excess of $500,000 per injury or death. IND. CODE § 16-9.5-3-1 (1976).

94. U.S. CONST. amend. XIV, § 1.

similarly treated.[95] Under this interpretation, all victims of tortfeasors are similarly situated since all tort victims have been harmed by the action or inaction of another.[96] Victims of health care tortfeasors are a lesser-included classification of the larger classification of tort victims. Medical malpractice claimants are dissimilarly treated since they are the only classification regulated by the Indiana Medical Malpractice Act.[97]

The initial question in an equal protection analysis is what standard of review is to be used. Courts traditionally use two standards of review to determine whether a legislative classification violates the equal protection clause.[98] These standards of review are the "strict scrutiny" and the "rational basis" test.[99] The Supreme Court over the last fifteen years has been searching for an intermediate standard of review for legislation which does not easily fit under either of the traditional standards.[100] This search has produced a third level of scrutiny which falls somewhere between "strict scrutiny" and "rational basis" tests. This third approach has been referred to as a "means scrutiny" test.[101]

The "strict scrutiny" standard has the most exacting requirements. A "strict scrutiny" approach is invoked only when a suspect classification or a fundamental right is involved.[102] When a court invokes the "strict scrutiny" standard, the legislature is forced to show a great justification for the classification involved.[103] For a

95. Frost v. Corporation Comm'n, 278 U.S. 515, 522 (1929).

96. All tort victims are harmed due to the negligent action or inaction of another. Under the Medical Malpractice Act those victims who suffer injury due to the negligence of a "health care provider" are treated separately from other tort victims.

97. IND. CODE § 16-9.5-1-1 (1982).

98. *See* Comment, *Constitutional Challenges to Medical Malpractice Review Board*, 46 TENN. L. REV. 203, 208 (1978-79); Taylor and Shields, *The Limitation on Recovery in Medical Negligence Cases in Virginia* 16 U. RICH. L. REV. 799, 835 (1982).

99. *See supra* note 98.

100. *See* Redish, *Legislative Response to the Medical Malpractice Insurance Crisis: Constitutional Implications*, 55 TEX. L. REV. 759, 771-72 (1977).

101. A similar test is the "means focused" test. Both tests are an intermediate approach to Equal Protection analysis. For a more detailed discussion on this evolving doctrine, *see* Gunther, *In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972). The reason given for the title "Means Scrutiny" is "[a] 'substantial relationship' must be established between the means and ends of the challenged legislation." *Id.* at 20.

102. In the past, suspect classifications have been based on race and national origin. Rights that have been considered fundamental are voting, procreation, interstate travel, and the ability to present a defense in criminal actions. Johnson v. St. Vincent Hosp. Assn., ___ Ind.___, ___ 404 N.E.2d 585, 596-97 (1980).

103. Horton v. Califano, 472 F.Supp. 339, 343 (W.D.Va. 1979).

statute to remain valid under a "strict scrutiny" approach the legislature is forced to prove that the statute's classification is required by a "compelling state interest" and that no "less drastic means" are available to accomplish the "compelling state interest."[104]

Legislation that involves neither a suspect class nor a fundamental right[105] is reviewed under the "rational basis" test. Under the "rational basis" approach a statute is valid as long as the legislation is not arbitrary and is reasonably suited to achieve the legislature's objective.[106] In applying the rational basis test, the court need only find a rational nexus between the legislative classification and a permissible government goal.[107] The governmental goal identified by the court need not be the goal intended by the legislature.[108] Due to the minimal level of scrutiny and the court's ability to find a permissible governmental goal, classifications which are analyzed under the "rational basis" test are almost always upheld.[109]

Review under a "means scrutiny" approach falls between that of the "strict scrutiny" and "rational basis" approaches. "Means scrutiny" analysis was first used by the United States Supreme Court in *Reed v. Reed*,[110] when it declared an Idaho statute unconstitutional because it gave preference to men over women as estate administrators.[111] Under the "means scrutiny" test a legislative "classification must be reasonable, not arbitrary, and must rest upon

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104. *See* Britton v. Rogers, 631 F.2d 572, 576 (8th Cir. 1980) (governmental action against blacks as a racially defined class is subject to "strict scrutiny"); Fullilove v. Kreps, 584 F.2d 600, 603 (2d Cir. 1978) (public works employment does not require "strict scrutiny" evaluation).

105. *See* note, *Legislative Purpose, Rationality and Equal Protection*, 82 YALE L.J. 123 (1972).

106. McGowan v. Maryland, 366 U.S. 420 (1961). The Supreme Court explained, "A statutory discrimination will note be set aside if any statement of facts reasonably may be conceived to justify it." *Id.* at 425-26.

107. *See supra* note 104, at 144; *see also, e.g.*, Ohio Bureau of Employment Serv. V. Hodory, 431 U.S. 471 (1977).

108. The rational basis test allows the court to find a justifiable purpose for a particular statute. Thus an imaginative reviewing court could validate any discriminatory legislation depending on its adherence to the theory of judicial restraint. Jones v. State Board of Medicine, 97 Idaho 859, 871, 555 P.2d 399, 411 (1976).

109. "A statutory discrimination 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).

110. 404 U.S. 71 (1971).

111. 404 U.S. at 77. "Regardless of their sex, persons within any one of the enumerated classes of [administrators of estate] are similarly situated with respect to that objective. By providing dissimilar treatment for men and women who are thus similarly situated, the challenged section violates the Equal Protection Clause." *Id.*

some ground of deference having a fair and substantial relationship to the object of the legislation."[112] The legislature must show the means utilized are reasonable.[113] If the legislature fails to state a rational objective for the means used, the court will not search for a legitimate state purpose, and will hold that the legislative classification is violative of the equal protection clause and, therefore, unconstitutional.[114]

Indiana's Supreme Court has not found the classifications of the Indiana Malpractice Act to be a violation of the equal protection clause.[115] Indiana's Supreme Court has always applied the "rational basis" test when analyzing equal protection questions involving medical malpractice legislation.[116] "Strict scrutiny" analysis has not been applied because the courts have never found a fundamental right to exist in collecting damages for medical malpractice injuries,[117] nor have the courts found a suspect class in health care tort victims.[118] Due to the court's ability to find a permissible legislative goal under the "rational basis" approach, the Indiana Medical Malpractice Act has not been found to be a violation of the equal protection clause.[119] However, Indiana courts should reach a different conclusion if the "means scrutiny" analysis were applied to the classifications resulting from the limitations of the Indiana Medical Malpractice Act.[120]

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112. *Id.* at 76. The Idaho Supreme Court opined that Medical Malpractice legislation needs to be analyzed under a stricter standard than the traditional "rational basis" analysis and applied the "means scrutiny" analysis in evaluating its Medical Malpractice legislation. The "means scrutiny" analysis was also used by the North Dakota Supreme Court in Arneson v. Olson, 270 N.W.2d 125 (N. D. 1978) to evaluate a medical malpractice act.

113. *See supra* note 101, at 21.

114. Taylor and Shields, *supra* note 98, at 843. The Act violates the equal protection clause if the court fails to find that the "means reasonably, fairly, and realistically achieve the objectives of the legislation." *Id.*

115. *See* Rohrbaugh v. Wagoner, ___Ind.___, 413 N.E.2d 891 (1980); Johnson v. St. Vincent Hosp., ___Ind.___, 404 N.E.2d 585 (1980).

116. *Id.*

117. *Rohrabaugh*, ___Ind. at ___, 413 N.E.2d at 893.

118. *See supra* note 102. The challenged classifications under the medical malpractice act do not fall among those listed as "suspect" by the United States Supreme Court.

119. *See supra* note 114.

120. [T]hose courts striking down medical malpractice legislation on equal protection grounds have all utilized a more exacting standard of review than mere rationality. Although these courts have explicitly concentrated on the factual nexus between purpose and means, an implicit evaluation of conflicting interests also appears to play a prominent role in the judicial decisionmaking process. The courts have balanced state goals, assuring adequate health care and lowering malpractice insurance costs, with the

The great significance of the right to recover for bodily injury justifies application of the intermediate, "means scrutiny" standard. Full compensation for tort injuries is a state-created right.[121] Since, as a state-created right, the right to collect for bodily injury is not considered a "fundamental" right the "strict scrutiny" standard cannot be applied.[122] However, as a state-created right, the right to collect for bodily injury warrants application of a stricter standard than "rational basis."[123] Therefore, the Medical Malpractice Act should be examined under a "means scrutiny" approach.[124]

Following a "means scrutiny" examination, the disability age for minors classification of the Act is a violation of equal protection. The Act grants children a "disability" classification until the age of six.[125] If the malpractice occurred any time prior to the child's sixth birthday, he can file a claim until he reaches his eighth birthday.[126] The victims of other types of tortfeasors receive a disability until they reach age eighteen allowing them the ability to file a claim until age twenty.[127] Under "means scrutiny" analysis the legislature must show that the different treatment of minor tort victims is legitimately related to an objective of the malpractice statute.[128]

The aim of the Indiana Medical Malpractice statute is to keep

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interests of victims of medical malpractice. In each instance, the constitutional balance has favored those victims.

Note, *California's Medical Injury Compensation Reform Act: An Equal Protection Challenge*, 52 S. CAL. L. REV. 829, 880 (1979).

121. A plaintiff is entitled to damages for injuries proximately caused by the breach of a duty owed to him. Indiana Bell Tel. Co., Inc., v. O'Bryan, ___ Ind. App. ___, ___, 408 N.E.2d 178, 184 (1980).

122. See *supra* note 102, for a list of rights the Supreme Court has considered "fundamental."

123. Carson v. Maurer, 12 N.H. 925, 930, 424 A.2d 825, 830 (1980). *See also* Redish, *Legislative Response to the Medical Malpractice Insurance Crisis: Constitutional Implications*, 55 TEX. L. REV. 759 (1977)

124. *See* Redish, *supra* note 6, at 774. For a discussion of the two year statute of limitations, *see generally* Carmichael v. Silbert, ___ Ind. App. ___, ___, 422 N.E.2d 1330, 1332 (1981).

125. *See supra* note 92.

126. *Id.*

127. The New Hampshire Supreme Court found a reduced minority classification under the Medical Malpractice Act to be unconstitutional. "It extinguishes rights conferred by RSA 508:8, which provides: 'An infant or mentally incompetent person may bring a personal action within two years after such disability is removed.'" (In New Hampshire minority under the Medical Malpractice Act was eight years of age). *Carson* at 933, 424 A.2d at 833.

128. *See supra* note 111 and accompanying text.

down medical malpractice insurance costs.[129] Restricting the amount of time in which a minor can file suit is intended to enable insurance carriers to better determine the amount of losses and thus provide more reasonable insurance prices to health care providers.[130] However, studies show that the number of recoveries by minors is only a few percent of the total number of recoveries.[131] The incidental number of additional claims that may arise under the Indiana minor's disability statute for tort victims does not justify the harsh penalty inflicted upon those minors, who because of their age, limited experience, and lack of knowledge, do not learn of their injury until after the statute of limitations has expired.[132] Therefore, the separate classification of minors is not a "reasonable" means of keeping down medical malpractice costs. Under "means scrutiny" analysis the classification does not have a fair and substantial relationship to the object of the legislation and is a violation of the victim's right of equal protection guaranteed by the Fourteenth Amendment.

Similarly, the limitation on recoveries under the Indiana Medical Malpractice Act also results in a classification which should be analyzed under a "means scrutiny" approach of equal protection analysis.[133] The $500,000.00 cap on recoveries separates out a small

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129. The Legislative purpose of the Indiana Medical Malpractice Act is to limit the awards to injured patients in order to appease the insurance industry and guarantee future insurance to health care providers. *See supra* note 5.

130. *Carson* at 934, 424 A.2d at 834.

131. See C. Hoodenpyl, *Medical Malpractice Litigation in Indiana - a Ten Year Survey*, 20 RES GESTAE 126, 128 (1976).

132. Carson v. Maurer, ___ N.H. ___, 424 A.2d 825, 834 (1980). The Indiana Supreme Court, discussed the old minority disability, one year before the Malpractice Act was enacted, and stated,

> It makes practical sense particularly with respect to infants who, because of their youth, cannot be expected to articulate their physical and mental condition or to realize and act timely to preserve their legal rights. It is not difficult to conceive of situations where the results of medical malpractice upon an infant could remain undiscovered for a number of years.

Chaffin V. Nicosia, ___ Ind.___, ___, 310 N.E.2d 867, 871 (1974).

133. *See supra* note 111 and accompanying text. The concept of due process is not discussed as an individual topic of this Note. Arguments of due process violations can be found in the equal protection, right to jury trial, and access to court sections, as well as in the following discussion.

The Indiana Supreme Court addressed the constitutionality of Indiana's Medical Malpractice Act in Johnson v. St. Vincent Hosp., ___ Ind. ___, 404 N.E.2d 585 (1980) including a comparison to the Price-Anderson Act. 42 U.S.C. § 2200 et. seq. (1957). The Price-Anderson Act sets a 560 million dollar ceiling on the aggregate liability of licensed private nuclear power companies and the government per nuclear incident. The limit on liability is a legislative assurance given to the nuclear power industry

group of medical malpractice victims and denies them the same opportunities for monetary recovery possessed by all other tort

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that it will not be exposed to unlimited liability in case a nuclear incident occurs. This ceiling provision was motivated by the legislature's desire to encourage continued research and development by the nuclear power industry.

The Price-Anderson Act's ceiling on liability includes several statutory provisions. Each licensee is required to keep up to $60 million of private financial protection per incident. The United States Government is responsible for keeping an additional $500 million available for damages in excess of $60 million. Thus, the aggregate liability, under the Act, is limited to $560 million per single nuclear incident. In addition, the Price-Anderson Act also provides that in the event that the damages from a single nuclear incident exceeds the aggregate limitation the Congress will review the situation and take any action necessary to protect the public from the consequences.

The reasonableness of the legislature's $560 million ceiling was later examined under both the due process and equal protection clauses of the Fifth Amendment. Duke Power Co. v. Carolina Environmental Study Group, Inc., 438 U.S. 59 (1978). In *Duke* the Supreme Court predicated its decision on two major presumptions. The first was the correctness of expert appraisals that the risk of a nuclear incident with damage claims in excess of $560 million was slight. The second was that in the event of a large scale nuclear incident Congress would likely enact extraordinary relief. *Id.* A House report supported the Court's second presumption. This report asserted, "The limitation of liability serves primarily as a device for facilitating further congressional review of such a situation rather than a bar to further relief of the public." H.R. Rep. No. 833, 89th Cong. 1st Sess. 6-7 (1965). The Court recognized that the individuals that resided around nuclear power plants had a property right in receiving damages but balanced the right against the need for nuclear power and the protection provided by the two presumptions and found the Act was not a violation of the due process clauses of the Fifth Amendment.

The Indiana Medical Malpractice Act's ceiling does not include the presumptions found by the Supreme Court in the Price-Anderson Act. The malpractice fund operates in a similar fashion as the Price-Anderson Fund. Each health care provider is responsible for the first $100,000 in damages per incident after which the fund pays the balance of damages up to the $500,000 ceiling. However, this is the only similarity. The fund, itself, is not supported by any government money; instead, each health care provider pays an annual surcharge to finance the fund. In addition, there is not a government agency that will step in and review a patient's damages if it exceeds $500,000. Thus, no matter what amount a patient's damages exceed the limitation, the patient is forced to pay this excess expense on his own.

The failure of the Indiana Medical Malpractice Act to provide a review for patients whose damages exceed $500,000 prevents it from being justified by a comparison to the Price-Anderson Act. The Price-Anderson Act did not violate property owners' due process rights because of the legislative commitment to take whatever action was necessary and appropriate to protect the public from the consequences of a nuclear disaster. A malpractice victim has a property interest in his right to recover for bodily injury. However, a malpractice victim does not have the same legislative commitment to take whatever action is necessary to protect him from the consequences of a malpractice disaster. Therefore, the Indiana Malpractice Act's ceiling on liability cannot override due process and equal protection challenges in light of the *Duke Power* decision.

victims.[134] Only this group is denied the opportunity for full recovery for expenses and pain and suffering possessed by all other victims of tortfeasors.[135] The legislative purpose behind this cap was to keep down the costs of malpractice insurance and to provide adequate compensation for those with meritorious claims.[136]

The cap on recoveries is not a reasonable means of meeting the objectives of the malpractice Act. The legislature has argued that this cap benefits all injured patients since it reduces medical costs and guarantees the continued availability of medical care in Indiana.[137] While few claims exceed the $500,000.00 limitation, in extreme cases the victims medical costs alone may greatly exceed $500,000.00[138] These unfortunate malpractice victims are denied full recovery so that all other injured patients may enjoy slightly lower medical costs. Under "means scrutiny" analysis the $500,000.00 limitation is arbitrary and is an unreasonable means[139] by which to meet the objectives of the legislation. There is no statistical information proving that the cap

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134. For the purpose of this Note, malpractice victims with claims under $500,000 are included in the group of all other tort victims.

135. A health care tort victim with expenses over $500,000 is injured twice. He must not only suffer at the hands of the negligent doctor, but also must pay for the cost of medical expenses in excess of $500,000. *See* Note, *Malicious Prosecutions and Medical Malpractice Legislation in Indiana: A Quest For Balance*, 17 VAL U.L. REV. 877, 885 (1983).

136. See supra note 3.

137. Health care providers argue that the unequal treatment, of the cap on recoveries, is necessary due to the "crisis." Thus, the legislature can set such limits even if it denies some plaintiffs full compensation for their injuries. *See, e.g.*, Wright v. Central Du Page Hosp. Ass'n, 63 Ill. 2d 313, 318, 347 N.E.2d 736, 741 (1976). However, the burden of keeping down health care provider's insurance falls exclusively on those unfortunate victims who need the most financial protection. See *supra* note 133 and accompanying text.

138. Arneson v. Olson, 270 N.W.2d 125, 135-36 (N. D. 1978). "[T]he very seriously injured malpractice victim, because of the recovery limitation, might be unable to recover even all the medical expenses he might incur, in which event he would recover nothing for any other loss suffered." *Id.* at 136.

Does the "medical malpractice crisis" justify telling a malpractice victim that he may not have full recovery of even expenses when if he had been in a "rear-end collision of a fiery Pinto" he would have received full compensation, as well as pain and suffering? *See* Note, *Medical Malpractice Act: Limit on Damages for Noneconomic Losses Held Unconstitutional*, 22 ATL. L. REV. 39, 40 (1979).

139. *See* Note, *Medical Malpractice Statute-Medical Malpractice Statute Declared Unconstititutional*, 1977 WIS. L. REV. 203, 224 (1977). The $500,000 limitation on recoveries of the Illinois Malpractice Act is invalid on traditional equal protection grounds because there is no reasonable basis for its distinguishing medical malpractice victims with more than $500,000 damages from those with less than $500,000 damages. *Id. See also* Wright V. Central Du Page Hosp. Ass'n., 63 Ill. 2d 313, 347 N.E.2d 736 (1976). The

on recoveries is a valid solution to keep down the rising costs of malpractice insurance.[140] Victims with valid claims in excess of $500,000.00 are discriminated against in an unfair and illegitimate manner and there exists, therefore, a violation of the equal protection clause under "means scrutiny" analysis.

Classifications imposed by the Indiana Medical Malpractice Act fail to meet the standards of the "means scrutiny" test. These classifications are the result of statutory limitations prescribed in the Medical Malpractice Act. Without these limitations the Act cannot operate as the legislature intended and, therefore, they are not severable from the Act.[141] Due to these classifications, the Indiana Medical Malpractice Act is unconstitutional as a violation of the equal protection clause.

Classifications resulting from the limitations of the Indiana Medical Malpractice are a violation of the Fourteenth Amendment right of equal protection under the laws. Actual operation of the Act also results in a violation of the right to trial by jury. Although the federal constitutional right to trial by jury has not been extended to the States, the Indiana Constitution guarantees such a right.[142]

PANEL DECISIONS AND THE RIGHT TO TRIAL BY JURY

The Indiana Medical Malpractice Act provides that a review panel's decision is admissible in later court hearings.[143] A plaintiff may submit his complaint to a court of law and demand a right of trial by jury once a panel decision is rendered.[144] At a trial, the conclusion

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initial legislative judgment was a prediction and with the passage of time new information about the operation of the Act has shown that what was originally considered a rational balance is irrational. Therefore, this original legislation should be evaluated in light of this new information. *See* Bennet, "*Mere*" *Rationality in Constitutional Law: Judicial Review and Democratic Theory*, 67 CALIF. L. REV. 1049, 1065 (1979).

The insurance industry requested changes in the legislation in order to guarantee that health care providers could be provided with insurance. They argue that without such provisions they are unable to determine what the future "payouts" will be and, therefore, certain health care providers are too risky to insure. *See supra* note 5.

140. The North Dakota Supreme Court failed to find an insurance crisis and concluded that the drastic limitation on recovery of $300,000 was a violation of Equal Protection. *See Arneson*, 270 N.W.2d at 136.

141. Ind. Educ. Employment Relations Bd. v. Benton Community School Corp., 266 Ind. 491, 510, 365 N.E.2d 752, 762 (1977). Absence of a severability clause creates the presumption that legislature intends statute to be effective in its entirety or not at all. *Id.*

142. *See infra* note 145.

143. *See supra* note 70 and accompanying text.

144. *See supra* note 68 and accompanying text.

of the review panel is admissible.[145] Constitutional, as well as evidentiary questions[146] are raised by the admission of a panel decision to the jury. Conclusions of the panel that the health care provider acted within the appropriate standard of care effectively removes the factfinding process from the jury.[147] Therefore, the result is a stripping away of the patient's right to a trial by jury.[148]

A claimant who feels that the panel's decision is improper may elect that his cause of action be heard by a jury of his peers.[149] This jury should be composed of members of the community who are not health care providers.[150] As such, they must rely on the testimony of those who are more familiar with the field of medicine.[151] The injured patient-plaintiff will carry the burden of showing that the defendant was negligent in providing care.[152] After hearing all of the expert testimony, the jury must determine whether the plaintiff has met his burden.[153]

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145. *See supra* note 70.

146. Evidentiary issues are beyond the scope of this Note; however, the admissibility of panel decisions is essentially a rule of evidence. For further discussion *see* Quinn, *The Health Care Malpractice Claims Statute: Maryland's Response to the Medical Malpractice Crisis*, 10 U. BALT. L. REV. 74, 87 (1980).

147. The jury gives great weight to the panel's decision due to the number of experts on the panel. Therefore, the factfinding process of the jury is severely handicapped or totally removed. *See infra* notes 139-60 and accompanying text.

148. *Ind. Const.* art. I, § 20, guarantees that every person shall have a right to trial by jury. The right to a jury trial for personal injury (tort) was triable at common law and, therefore, is triable by a jury under the Indiana Constitution. Tompkins v. Erie R.R. Co., 98 F.2d 49, 52 (2d Cir.), *cert. denied*, 305 U.S. 673 (1938).

149. IND. CODE § 16-9.5-1-6 (1976). A health care provider does note have the opportunity to bring an adverse opinion to a trial court. *Id.*

150. A health care provider would be dismissed for cause or through peremptory challenge from serving on most juries reviewing malpractice claims due to possible prejudice. Brinkman v. Hovermale, 106 Ind. App. 70, 73, 13 N.E.2d 885, 886 (1938).

151. Due to the complexities of modern day medical technology, persons not involved in the medical science field do not usually have the background to decipher the technical evidence presented it.

152. The plaintiff must prove three elements to establish a prima facie case of medical malpractice. He must first show that the physician owed him a duty. Second, that the defendant-physician breached that duty by allowing his conduct to fall below the community's standard of care. Thirdly, that the defendant's breach of duty caused compensable damages to the plaintiff. Dolezal v. Goode, ___ Ind. App. ___, ___, 433 N.E.2d 828, 831 (1982). The doctrine of *res ipsa loquitor* is applicable if the injury is of such a nature that it would not occur without an act of negligence. *See* Carpenter v. Campbell, 149 Ind. App. 189, 194, 271 N.E.2d 163, 165 (1971).

153. See, e.g., Kranda v. Houser-Norborg Medical Corp., ___ Ind. App. ___, 419 N.E.2d 1024, *reh'g. denied*, 424 N.E.2d 1064 (1981).

The admission of a negative panel finding[154] creates a presumption of the defendant's innocence and, thus increases the plaintiff's burden of proof.[155] In order to show liability on the part of the defendant, the patient must prove that the physician's conduct fell below the community standard of care.[156] Admission of a finding by a panel of three experts,[157] that the physician's conduct fell within the appropriate standard of care, will necessarily carry great weight in the jury's decision.[158] Therefore, the plaintiff is required to prove not only that the defendant's conduct was below the requisite standard, but also, that the panel of experts was incorrect.

Proponents of the admissibility of the review panel findings advance three supportive assumptions. First, the panel decision is necessary to aid the jury's fact-finding process and help the jury properly weigh this evidence against other evidence presented it.[159] Secondly, they assume that allowing the panel decision to be admitted into evidence will add more credibility to the review process, thereby causing the litigants to take the process more seriously and to come to the panel better prepared.[160] Finally, proponents assume that a disappointed litigant will be more amenable to settlement knowing

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154. The panel can render one or more of the four required decisions. *See supra* note 51 and accompanying text. A defendant is found liable by the panel if "defendant failed to comply with the appropriate standard of care. . . ." IND. CODE § 16-9.5-9-7 (1982).

155. The plaintiff must prove the defendant's guilt by a preponderance of the evidence. Kiger v. Arco Auto Carriers, Inc., 144 Ind. App. 239, 247, 245 N.E.2d 677, 682 (1969).

156. *See supra* note 149 and accompanying text.

157. The three health care providers are the only voting members of the panel; the attorney merely sits in an advisory capacity. IND. CODE § 16-9.5-9-3 (1982).

158. In Simon v. St. Elizabeth Medical Center, 3 Ohio Op. 3d 164, 355 N.E.2d 903 (1976), the Ohio Court of Common Pleas discussed the weight of arbitration decisions on the jury of medical malpractice cases:

> However . . . by permitting the decision of arbitrators to be introduced into evidence, in addition to permitting the individual arbitrators to testify effectively and substantially, reduces a party's ability to prove his case, because the party must persuade a jury that the decision of the arbitrators was incorrect, a task not easily accomplished in view of the added weight which juries have traditionally accorded the testimony of experts.

Id. at 169, 355 N.E.2d at 908.

159. The Indiana Supreme Court argued that the jury will draw upon its collective experiences and good sense to try the cause and is fully capable of giving the panel opinion only the credibility it is justly entitled. Johnson v. St. Vincent Hosp. Ass'n. ___ Ind.___, ___, 404 N.E.2d 585, 593 (1980).

160. *See* Alexander, *State Medical Malpractice Screening Panels in Federal Diversity Action*, 21 ARIZ. L. REV. 959, 971 (1979).

that the panel's finding will be admissible in court.[161] These three assumptions must be analyzed in light of the patient's right to a trial by an impartial jury.

Opponents of the admissibility of panel findings argue that the benefits of the panel process and the jury's fact-finding process are outweighed by the effects on the plaintiff's right to a jury trial.[162] Opponents assert that the jury is forced to accept the review panel's findings of liability, or lack thereof, due to the jurors lack of knowledge in the complex field of medicine.[163] Acceptance of the panel's findings effectively deprives the plaintiff of his right to have the jury make an independent finding of all facts at issue.[164] Therefore, the opponents argue that the admission of the panel findings is an effective denial of the patient's right to trial by jury.

The patient's right to trial by jury is to be kept "inviolate."[165] The right of a jury trial contains two relevant elements. First, the plaintiff's right to present his case before an impartial jury.[166] Second, is the jury's power to determine any and all issues of fact.[167] As admission of the panel's decision has a prejudicial effect on the jury, the admission violates the patient's right to a full trial by jury.[168] A jury relies heavily on the testimony of experts.[169] A decision rendered

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161. *Id.* at 971.

162. *See* Lenore, *Mandatory Medical Malpractice Mediation panels - A Constitutional Examination*, 44 INS. COUNS. J. 416, 422 (1977).

163. Prejudice on the jury of panel decisions was appropriately discussed in Comiskey v. Arlen, 55 A.D.2d 304, 390 N.Y.S.2d 122 (1976).

> Determinations of physician negligence virtually always involve the resolution of technical and complex issues. Couched in medical terminology and buttressed on either side by expert evidence, the burden on the petit juror to decipher and absorb such information is substantial. Enter now a recommendation with respect to liability of a panel composed of the most highly respected members of the community which has predigested the complexities and technicalities of the case. . . . one is inexorably led to the conclusion that the jurors will be passively drawn to adopt this prize panel's recommendation.

Id. at 308, 390 N.Y.S.2d at 131.

164. Lenore, *supra* note 159, at 422.

165. For a detailed discussion on the effect of the $500,000 limitation on recovery and the plaintiff's right to trial by jury, *see* Note, *The Indiana Medical Malpractice Act: Legislative Surgery on Patients' Rights*, 10 VAL. U.L. REV. 303 (1976).

166. IND. CONST. Art. I, § 20.

167. Lenore, *supra* note 159, at 420.

168. A parties right to a jury trial is "inviolate" means "freedom from substantial impairment." Allowing the review panel decision to be heard by the jury impairs its ability to find the facts at issue and, thus, impairs the plaintiff's right to trial by jury.

169. *See supra* notes 155, 160 and accompanying text.

by three experts will necessarily be afforded greater weight than the testimony of an individual expert. Therefore, the admission of the review panel's decision is a violation of the patient's right to have a jury determine any and all issues of fact.

Indiana's Constitution guarantees each individual the right to a jury trial in civil cases.[170] Admissibility of a panel decision is a violation of the right to trial by jury. The right to a jury trial is also violated by excessive delays in completing the review panel process.

RE-EVALUATING THE CONSTITUTIONALITY OF THE MEDICAL REVIEW PROCESS

The Indiana legislature designed the review panel process for the purpose of providing a short and inexpensive summary proceeding.[171] The entire process was structured to require a period of less than nine months from the request of a panel formation.[172] At the time the legislation was drafted, there was no information available on the operation of medical malpractice review panels,[174] therefore, the legislature could only speculate as to its actual operation. Eight-and-one-half years have passed since enactment of the Medical Malpractice Act, and now there is extensive information available on the practical application of the review panel process. Thus, it is necessary to re-evaluate the review panel process and determine whether its actual operation denies a malpractice victim of his due process rights.

The operation of Medical Malpractice legislation is an exercise of the State's police power for the promotion of the health and welfare of the public.[174] Courts have upheld the operation of such legislation,

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170. Although the Seventh Amendment guarantee of the right to a jury trial has not been made applicable to the states through the Fourteenth Amendment, every state but Colorado and Louisiana provides for a jury trial in civil cases in their statutes or constitutions. Note, *Medical Malpractice Mediation Panels: A Constitutional Analysis*, 46 FORDHAM L. REV. 322, 328 (1977).

171. *See supra* notes 36-53 and accompanying text. *See also* Aldana v. Holub, 381 So. 2d, 231, 238 (Fla. 1980).

172. *See supra* notes 36-53 and accompanying text.

173. As a result of the supposed "medical malpractice crisis," many states enacted similar legislation, protecting health care tortfeasors, in 1975. Prior to 1975, no state had enacted such legislation and no information was available on practical operation.

174. The Indiana legislature has inherent power or "police power" to enact laws, within constitutional limits, to promote health and general welfare. Foreman v. State ex. rel. Dep't. of Natural Resources, 180 Ind. App. 94, 100-01, 387 N.E.2d 455, 460 (1979). However, the methods or means used by the legislature must have some

as long as it is a proper exercise of the State's police power.[175] A legislative exercise of the State's police power will not be improper unless it operates in an arbitrary and unreasonable manner.[176] Under the arbitrary and unreasonable test, Indiana courts have found the review panel provisions to be a proper exercise of the State's police power.[177] However, these decisions have been predicated on facts exhibited in the legislative design and not on the statistics of actual complaints.[178]

Actual applications of the review panel process have shown that the legislative design does not expedite medical malpractice claims as the legislature intended. Delays in the operation of the review panel process cause the average complaint to proceed far longer than the statutory nine month guideline. Causes of these delays can be equally attributed to "the Act, the plaintiffs' attorneys, defendants' attorneys, and appointed chairmans,"[179] in their attempts to comply with the panel provisions of the Act.[180] Due to the combination of causes the average complaint takes two years to complete.[181] Therefore, what the legislature originally considered to be a rational means of expediting and screening malpractice claims has resulted in lengthy delays in processing malpractice complaints.

Florida's Supreme Court discussed the constitutionality of the Florida Medical Mediation Act based on the results of its actual operation. Under Florida's Act, the panel is required to have a final hearing on the merits within ten months from the date the claim is filed.[182]

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reasonable or rational relation to the purpose or ends sought. *Id.* at 101, 387 N.E.2d at 461.

175. Johnson v. St. Vincent Hosp., ____Ind.____, ____, 404 N.E.2d 585, 598 (1980).

176. Arneson v. Olson, 270 N.W.2d 125, 133 (N. D. 1978).

177. *See supra* note 114 and accompanying text.

178. *See supra* notes 5, 170 and accompanying text.

179. Warnick v. Cha, No. SD 83-163, slip op. at 5 (Cir. Ind. Nov. 2, 1983). The reasons for the delays were discussed in Sakayan, *Arbitration and Screening Panels: Recent Experience and Trends*, 17 Forum 682-89 (1982).

> There are several reasons for these delays. One of the major causes is the panel member selection process. The system has failed to attract enough willing panelists due to inadequate compensation. In addition, some nonpopulous states have difficulty finding specialists in the field of health care practicing within the state. There are concomittant problems of professional bias and friendship, failure of attorneys to complete discovery procedures promptly and scheduling problems when all panelists are practicing professionals.

Id.. at 688.

180. *Warnick*, S.D. 83-163 at 5.

181. *Id.* at 4.

182. FLA. STAT. ANN. 786.44(3) (West Supp. 1983).

Failure of the panel to meet the ten month limitation results in the panel's lack of jurisdiction over the cause.[183] As practical result, the parties, through no fault of their own, are forced into court.[184] Effects of the loss of jurisdiction fall heavily on the defendant who loses the protections of the mediation panel process. In its review, the Florida Supreme Court found that application of this strict ten month limitation period is "arbitrary and capricious" and, therefore, violates the defendant's due process rights.[185] Florida's Supreme Court also determined that an extension of the statutory time period would be an "effective denial of one's access to the courts.[186] Thus, the Florida Act was held to be unconstitutional as a result of the Act's inability to operate as legislatively designed.

A similar medical malpractice evaluation was conducted by the Pennsylvania Supreme Court. In 1978, the Court declared that the Pennsylvania Health Care Service Malpractice Act was constitutional.[187] Two years later, the Pennsylvania Supreme Court overruled its earlier decision and found that the Pennsylvania Act, as applied, was unconstitutional.[188] Five years of statistical data was reviewed by the Court in this later decision.[189] This statistical data disclosed extensive delays which resulted from the application of the review system.[190] In its analysis of the statistical information, the Pennsylvania Supreme Court concluded that "[T]he delays occasioned by the arbitration system therein does in fact burden the right to a jury trial. . . ."[191] Pennsylvania's Health Care Service Malpractice Act failed to operate as prescribed and, therefore, its deficiencies were held to constitute a violation of a patient's constitutional rights.[192]

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183. "If no hearing on the merits is held within 10 months of the date the claim is filed, the jurisdiction of the mediation panel on the subject matter shall terminate, and the parties may proceed in accordance with the law." *Id.*

184. *Aldana*, 381 So.2d at 236.

185. *Id.* at 238.

186. *Id.*

187. Parker v. Children's Hosp. of Philadelphia, 483 Pa. 106, 394 A.2d 932 (1978).

188. Mattos v. Thompson, 491 Pa. 385, 421 A.2d 190 (1980).

189. The statistical information considered by the Supreme Court was first presented to the Commonwealth Court. This information is included in the Supreme Court's opinion. At that time, the act had been in existence for less than five years and only 27 percent of the cases filed had been completed. The court also noted that six of the original eight cases had yet to be resolved. *Id.* at 400, 421 A.2d at 194-195.

190. As a part of its opinion the Supreme Court included parts of the statistical data it considered. *Id.* at 400, 421 A.2d at 194-195.

191. *Id.* at 401, 421 A.2d at 196.

192. The Pennsylvania court stated, "Such delays are unconscionable and irreparably rip the fabric of public confidence in the efficiency and effectiveness of our judicial system." *Id.* at 401, 421 A.2d at 196.

Indiana's Supreme Court evaluated the Indiana Medical Malpractice Act without reviewing the actual delays caused by its operation. In *Johnson v. St. Vincent's Hospital*,[193] the court found that the delays occasioned by the medical malpractice panel process are like those to be expected in any malpractice case.[194] In arriving at this conclusion, the Indiana Supreme Court failed to discuss the delays that had become inherent in the panel process.[195] Instead, the court relied on the erroneous assumption that the panel process was operating within the legislative guidelines, and, that the delays involved in the prescribed process were not unconstitutional.[196]

Indiana's Medical Malpractice Act is burdened with the same types of unconstitutional delays as both the Florida and Pennsylvania Medical Malpractice Acts. The Florida Supreme Court found that an extension of the process far in excess of ten months is a denial of the parties' right of access to the courts.[197] An average complaint is in the Indiana panel review process far in excess of the ten months considered to be unconstitutional in Florida.[198] Pennsylvania's Supreme Court felt that the fact that six cases had remained in the process for more than four years was unconscionable, intolerable, and a denial of the patient's right to a jury trial.[199] At the end of 1983, there were more than eighty malpractice cases still awaiting decision, that had been pending in the Indiana review process for more than four years.[200] The delays found to exist in Indiana are identical to those found to be unconstitutional in both Florida and Pennsylvania. Thus, the Indiana

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193. ___Ind.___, 404 N.E.2d 585 (1980).

194. The Indiana Supreme Court explained that the nine month review process delay was like the "Delay in the commencement of a trial and the expense of investigating and marshalling evidence are part and parcel of the preparation of any piece of civil litigation." *Johnson*, ___Ind. at ___, 404 N.E.2d at 592.

195. The Indiana Supreme Court, in deciding the Act was constitutional, discussed only those delays involved with the actual provisions of the Medical Malpractice Act. In addition, the court stated that the legislature has great deference in enacting legislation involving the public health and welfare and, therefore, if such legislation is rational it is not unconstitutional. *Id.* at ___, 404 N.E.2d at 594.

196. *Id.* at ___, 404 N.E.2d at 591.

197. *See supra* notes 182-83 and accompanying text and charts.

198. An average complaint has been in the panel review process for 24 months. *Warnick*, SD 83-163, at 3.

199. *See supra* note 189 and accompanying text.

200. As of December 31, 1983, two cases were in the system for over 7 years. Over 80 cases have not been closed or received a panel decision in over 4 years. These figures do not take into consideration cases that took in excess of four years but were completed prior to 1983 since this information is presently not available. *See supra* note 79.

Medical Malpractice Act is unconstitutional when properly evaluated in actual practice.

Indiana's Supreme Court must re-evaluate the Indiana Medical Malpractice Act in light of the information available on the operational delays. An average complaint is now in the review process approximately twenty-four months.[201] Indiana's legislature prescribed a review system that was to be completed in nine months.[202] However, complaints may pend for as long as seven years[203] without a review panel decision. Only half of the claims filed since 1975 had been completed as of December 31, 1983.[204] Therefore, Indiana's Supreme Court re-evaluation should conclude that the panel review process is a denial of a patient's right to trial by jury and access to the court.

CONCLUSION

Limitations of the Indiana Medical Malpractice Act result in classifications which violate the equal protection clause of the Fourteenth Amendment. Admissibility of the panel's decision may result in a violation of the patient's right to a trial by jury. Moreover, actual application of the review panel process result in oppressive delays in violation of both the patient's right to trial by jury and access to the courts. The Indiana Supreme Court must reassess the Indiana Medical Malpractice Act and in light of the excessive delays and constitutional violations must determine that the Act is unconstitutional.

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201. *See supra* note 195.
202. *See supra* notes 36-53 and accompanying text.
203. *See supra* notes 79 and 197.
204. *See supra* notes 262-63 and accompanying text.

"FAIR VALUE" DETERMINATION IN CORPORATE "FREEZE-OUTS," AND IN SECURITY AND EXCHANGE ACT SUITS: *WEINBERGER*, OTHER, AND BETTER METHODS

INTRODUCTION

Objective of Note

Federal and state courts[1] have struggled with the task of establishing an adequate remedy[2] for both minority shareholders[3] in freeze-out[4] situations and for plaintiffs[5] in civil actions involving violations of the Security Acts.[6] In both freeze-out and civil SEC violation cases the courts have tested[7] the price at which the minority

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1. *See infra* text accompanying notes 120-349, 485-572.

2. A major objective of this note is to propose flexible guidelines which can assist in providing an adequate remedy in both state freeze-out actions and private civil actions involving violations of the Security and Exchange Act of 1934. 15 U.S.C. §§ 78a-78jj (1976). *See also infra* text accompanying notes 573-624.

3. For the purposes of this note, a minority shareholder is a shareholder who owns less than 50 percent of the equity in the company at issue.

4. Some jurisdictions have made the term freeze-out and the term squeeze-out synonymous:

> [E]limination of a minority shareholder is commonly referred to as a 'freeze-out' or a 'squeeze-out.' It may be defined as the use of corporate control vested in the statutory majority of shareholders or the board of directors to eliminate minority shareholders from the enterprise or to reduce to relevant insignificance their voting power or claims on corporate assets.
> . . .

Gabhart v. Gabhart, 267 Ind. 370, 383, 370 N.E.2d 345, 353 (1977). In Miller v. Steinbach, 268 F. Supp. 255, 270 (S.D.N.Y. 1967), the court stated that the term "freeze-out" implies a forced liquidation of a minority shareholder's stock by the controlling shareholder. While the courts have viewed freeze-out as a forced sale with no legitimate business purpose, the Delaware Supreme Court in Weinberger v. UOP Inc., 426 A.2d 1333 (Del. Ch. 1981), *rev'd*, 457 A.2d 701 (Del. 1983), eliminated the "business purpose" requirement. *See infra* notes 238-349 and accompanying text.

5. Parties injured by violations of the Securities and Exchange Act of 1934, 15 U.S.C. §§ 78a-78jj (1976), might have an implied cause of action in the federal courts. Federal courts have recognized a civil implied cause of action for violations of the anti-fraud section 10(b) since 1946. Kardon v. National Gypsum Co., 69 F. Supp. 512 (E.D. Pa. 1946). *See also infra* text accompanying notes 485-572.

6. *See infra* text accompanying notes 485-572.

7. The courts have tried to first determine whether the transaction was "fair." If the transaction was not found to be fair, the courts tried to determine the fair value of the minority shareholder's stock. *See infra* text accompanying notes 562-72, 577-604.

shareholder sold his stock against the stock's "fair value."[8] The courts have proceeded on a case-by-case basis looking for the elusive fair value.[9] Unfortunately, the case-by-case approach has provided few guidelines for future fair value determinations.[10]

The concept of protecting the minority shareholder in freeze-out situations has recently undergone a substantial change in the Delaware courts.[11] While the Delaware courts have changed the character of evidence allowed to prove fair value[12] and have expanded the concept of fair value,[13] they have not established guidelines to facilitate the planning capability of either the corporation, the majority shareholders, or the minority shareholders.[14] On the other hand, the federal courts in actions under the Securities Acts have established some guidelines for testing the fairness of a transaction.[15] However, the usefulness of these guidelines are limited.[16]

This note develops potential judicial guidelines for determining "fair value." The guidelines proposed by this note are consistent with the new Delaware methods for determining fair value. The proposed guidelines use modern financial analysis and promotes the policies of both state and federal jurisdictions. Some policy concerns and objectives are illustrated by looking at the historical development of minority shareholder protection in freeze-out actions.[17]

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8. Defining "fair value" is one of the objectives of this note. The earlier decisions interchanged the terms "fair value," "intrinsic value," and "true value," as in Bell v. Kirby Lumber Corp., 395 A.2d 730 (Del. Ch. 1978), *modified*, 413 A.2d 137 (Del. 1980).

9. The note will illustrate the evolution of the concept of fair value from the earlier notions of intrinsic value to the concept of fair value suggested by this note. *See infra* text accompanying notes 573-623.

10. The "fair value" concept evolved through a seemingly structured analysis termed the "Delaware block" valuation method. *See infra* text accompanying notes 68-102. However, the final step of the Delaware block valuation procedure consisted of a subjective weighing process, which cast the entire analysis into a case-by-case analysis and provided few guidelines for either corporate or shareholder planning. *See infra* text accompanying notes 102-08.

11. In 1983, the Delaware Supreme Court eliminated the Delaware block valuation method, modifying the appraisal remedy. The modified appraisal remedy allows the use of modern financial analysis to determine fair value. Further, the entire concept of "fair value" has been expanded, making the modified appraisal more flexible. *See infra* text accompanying notes 238-349.

12. *Id.*

13. *Id.*

14. The modified appraisal, while more flexible, provides few guidelines. *See infra* text accompanying notes 333-49.

15. *See infra* text accompanying notes 562-72.

16. *See infra* text accompanying notes 562-72.

17. *See infra* text accompanying notes 54-349.

Historically, Delaware courts and the courts of many other jurisdictions used the appraisal remedy[18] to protect the minority shareholders' interest.[19] The purpose of the appraisal was to insure that the minority shareholder would receive a fair value for his stock.[20] The structured procedure for conducting the appraisal was termed the "Delaware block" valuation method.[21]

The traditional[22] remedy of appraisal, which incorporated the Delaware block valuation method, was replaced by the Delaware Supreme Court with an expanded, more flexible appraisal remedy.[23] The purpose of the appraisal remedy continues to be the determination of what constitutes fair value.[24] But the Delaware Supreme Court subsequently expanded both the procedure used in finding fair value and the conceptual definition of fair value.[25] The new remedy allows values derived from modern financial analysis to be admitted into evidence.[26] The resulting values are then used to test the fairness of the proposed price[27] advocated by the majority shareholder, corporation, on any potential acquirer.[28] Further, the new remedy expands the restricted "going concern"[29] concept by allowing the consideration of other possible values that might result from an arm's length negotiation.[30] By this new test, Delaware has relaxed the struc-

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18. The appraisal remedy is a process of demanding a judicial determination of fair value for a dissenting shareholder.

> The dissenting shareholder's appraisal remedy is essentially a statutory creation to enable shareholders who object to certain extraordinary matters to dissent and to require the corporation to buy their shares at the value immediately prior to the approval of such matter and thus to withdraw from the corporation. In different jurisdictions, the appraisal remedy often applies to sales of substantially all corporation assets other than in the regular course of business, mergers and consolidations, more rarely to certain amendments of the articles of incorporation or miscellaneous matters, but not to dissolution.

Black's Law Dictionary 92 (5th ed. 1979).

19. The appraisal remedy "was exacted to protect the minority interest, when the common law rule of unanimity was abolished." Gabhart v. Gabhart, 267 Ind. 370, 382, 370 N.E.2d 345, 353 (1977).

20. *See infra* notes 338, 339.
21. *See infra* text accompanying notes 54-119.
22. *See infra* text accompanying notes 54-119.
23. *See infra* text accompanying notes 238-349.
24. *See infra* text accompanying notes 333-49.
25. *See infra* text accompanying notes 333-49.
26. *See infra* text accompanying notes 333-42, 348.
27. *See infra* text accompanying note 337.
28. *See infra* text accompanying note 337.
29. *See infra* text accompanying notes 343-49, 424-55.
30. *See infra* text accompanying notes 424-55.

tured Delaware block valuation procedure in favor of a more flexible and expanded remedy.

Scope of Note

First, the procedures used to apply the traditional Delaware block valuation method will be discussed.[31] The traditional method of valuation used as the basis of the appraisal remedy was a structured approach with little flexibility.[32] This made the appraisal remedy suitable only for limited applications.

As the courts attempted to apply the appraisal remedy to new situations, its limitations became apparent.[33] The limitations of the appraisal remedy will be illustrated by examining its usefulness in determining the "fair value" of the natural resource companies' equity.[34] The three cases examined in this note[35] illustrate the factors which led to the Delaware courts' change in the appraisal remedy.[36] In order to make the appraisal remedy more widely applicable, the Delaware Supreme Court expanded the remedy by making it more flexible.[37]

The flexibility of the appraisal remedy was enhanced by eliminating its highly structured approach[38] and by allowing the use of modern financial analysis to help test the fairness of the cash out price.[39] By looking at some of the more widely accepted valuation

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31. The note examines the evolution in appraisals and fairness procedures with respect to natural resource companies where the majority shareholder dealt both fairly and unfairly with the minority shareholders. From a case analysis, this note proposes some flexible guidelines for determining fair value by first examining fair dealing. *See infra* text accompanying notes 573-624.

32. Under the traditional Delaware block approach, flexibility only existed in the weighing of the component analysis values; in this area, virtually no guidelines existed. *See infra* text accompanying notes 102-08. In addition, no flexibility existed with regard to what types of component analyses could be considered under the traditional Delaware block valuation.

33. *See infra* text accompanying notes 109-349.

34. *See infra* text accompanying notes 109-349.

35. Bell v. Kirby Lumber Corp., 395 A.2d 730 (Del. Ch. 1978), *modified*, 413 A.2d 137 (Del. 1980) (Judgment for defendants); Lynch v. Vickers Energy Corp., 351 A.2d 570 (Del. Ch. 1976) (Judgment for defendants), *rev'd and remanded*, 383 A.2d 278 (Del. 1978), *on remand*, 402 A.2d 497 (Del. Ch. 1979); Weinberger v. UOP, Inc., 426 A.2d 1333 (Del. Ch. 1981) (found for defendants), *rev'd*, 457 A.2d 701 (Del. 1983).

36. *See infra* text accompanying notes 238-349.

37. *Weinberger*, 457 A.2d 701 (Del. 1983).

38. *Id.*

39. *Id.*

theories,[40] this note points out arguments for and against the appropriateness of individual valuation theories.[41] However, before any theory can be helpful in determining fair value, the current definition of fair value must be established.[42]

The Delaware block method defined fair value as the minority shareholder's interest in a "going concern."[43] The new appraisal method does not retreat from the requirement of a going concern;[44] rather, it expands the going concern concept to include values that could result from arm's length negotiations.[45] Four possible values are examined to delineate the range of possible values: the minority ownership value, the controlling interest value, the 100% ownership value, and the value to the acquirer. The note then examines the various methods of determining these values and the ultimate question of which value is the "fair value."

Federal jurisdictions have also tested the fairness of the price paid to a minority shareholder[46] when a majority shareholder was found in violation of the Securities Acts.[47] In testing the fairness of the price paid to the minority shareholder, some federal courts have adopted an approach which uses modern financial analysis.[48] However, the inherent limitations in the underlying theory limit the analysis' applicability.[49]

The fairness test proposed is based on the Delaware court's stated objective of "entire fairness."[50] The amount determined to be the fair value will be an inverse function of the degree of unfair dealing found by the court. This variance in fair value will be limited

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40. *See infra* text accompanying notes 350-423.
41. *See infra* text accompanying notes 350-484.
42. *See infra* text accompanying notes 424-55.
43. *See infra* note 108.
44. *See infra* text accompanying notes 424-55.
45. *See infra* text accompanying notes 424-55.
46. *See infra* text accompanying notes 485-572.
47. *See supra* note 5.
48. *See infra* text accompanying notes 562-72. *See also* Seaboard World Airlines, Inc. v. Tiger Int'l, Inc., 600 F.2d 355, 361 (2d Cir. 1979), *citing*, Mills v. Electric Auto Lite, 552 F.2d 1239 (7th Cir. 1977). The court used the "efficient market theory." For a discussion of the "efficient market hypothesis." *See infra* text accompanying notes 360-74.
49. *See infra* text accompanying notes 571-72.
50. For a definition of entire fairness, *see infra* notes 576 and accompanying text.

by the requirement that fair value should be a possible arm's length negotiated value.[51] However, an arm's length price can vary from high to low, from the value to the acquirer,[52] to the value of a minority interest in the going concern prior to the merger. The lowest possible arm's length value is the value of a minority interest, which was the value sought by the Delaware block method.[53] The proposed guidelines provide a basis for determining fair value within the range of possible arm's length values for both federal Security Acts actions and state freeze-out actions in the jurisdictions that follow the Delaware lead of rejecting the traditional Delaware block valuation method.

SECTION I—DEVELOPMENT AND USE OF THE DELAWARE BLOCK VALUATION METHOD

Under common law, a unanimous shareholder vote was required to approve a major sale of corporate assets or a corporate merger.[54] Since one shareholder could prevent a proposed asset sale or merger, many state legislatures felt that this was an unreasonable restraint on corporate activity.[55] Legislatures, therefore, enacted various statutes allowing mergers with a less than unanimous consent of the shareholders.[56] As a result of a sale of assets or a merger with a less than unanimous shareholder vote, a dissenting shareholder could be put into a precarious position.[57] The shareholder was forced to either sell his stock or participate in the merger.[58] Responding to allegations

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51. *Weinberger*, 457 A.2d at 710 n.7; *citing*, Getty Oil Co. v. Skelly Oil Co., 267 A.2d 883, 886 (Del. 1970) ("Particularly in a parent subsidiary context, a showing that the actions taken was as though each of the contending parties had in fact exerted its bargaining power against the other at arm's length is strong evidence that the transaction meets the test of fairness.")

Further, the *Weinberger* court preferred arm's length dealing and required entire fairness when the majority shareholder was dealing with the minority shareholder. *Weinberger*, 457 A.2d at 710, 711.

52. *See infra* text accompanying notes 424-84.

53. *See infra* note 108.

54. *See* note, *Valuation of Dissenters' Stock Under Appraisal Statutues*, 79 HARV. L. REV. 1453 (1966) (hereinafter cited as *Appraisal Statutes*).

55. *See* Squires, *The Diversity Shareholder's Appraisal Remedy Under the Illinois Business Corporations Act*, 53 ILL. B. J. 482, 483 (1965) (hereinafter cited as Squires).

56. *Id.*

57. *Id.* at 487-89.

58. This result may be viewed as a private eminent domain action Universal City Studios v. Francis I. DuPont & Co., Inc., 343 A.2d 629 (Del. Ch. 1975) (The power of a majority stockholder to override minority dissenters and remit them to the cash remedy is analogous to the right of eminent domain.) *See also Appraisal Statutes, supra* note 54, at 1455.

of abuse, the legislatures provided the dissenting shareholder some assurance of receiving a "fair value" for his stock.[59]

The protection provided was in the form of the appraisal remedy.[60] The purpose of the appraisal was to determine the fair value of the dissenter's stock.[61] If the stock was purchased at a price less than the determined fair value, the dissenting shareholder received the difference plus interest.[62] Armed with the alternative of an appraisal remedy, the dissenting shareholder had the option of receiving a judicial valuation of his equity interest, if he felt the offered price did not represent his stocks' fair value.[63] The valuation right granted by statute[64] was designed to assure the dissenting shareholder receipt of the "intrinsic or fair value"[65] for his interest. In the course of shareholder litigation, the Delaware courts developed a structured valuation method called the "Delaware block"[66] which ultimately gained wide acceptance.[67]

VALUATION USING THE DELAWARE BLOCK METHOD

The Delaware block valuation method was used in Delaware to determine the "fair value" of stock owned by minority shareholders until *Weinberger v. Universal Oil Products (UOP).*[68] The Delaware block method consisted of three component values that were each weighted by the judge according to the attendant circumstances of the case.[69]

59. Stock is defined for the purposes of this note as the equity ownership in a corporation.

60. *See supra* note 18.

61. *See infra* notes 337-39 and accompanying text.

62. *Appraisal Statutes, supra* note 54, at 1453-56.

63. A determination of the value of corporate stock may be commenced by the surviving corporation or any stockholder who makes a timely demand for an appraisal. Kaye v. Pantone, Inc., 395 A.2d 369 (Del. Ch. 1978).

64. The Delaware appraisal rights statute does not grant appraisal in all circumstances. DEL. CODE ANN. tit. 8, § 262(b) (Supp. 1982). This statute specifies when an appraisal remedy is available. For instance, an appraisal is not available in Delaware resulting from a sale of assets or for shares which are traded on a national exchange, unless the facts fall under various exceptions such as a merger under DEL. CODE ANN. tit. 8, § 253 (1973).

65. *See supra* note 8.

66. In 1947, the state of Delaware was the first to use this method of valuation which consisted of weighing three valuation methods by the judge to fit the circumstances of the appraisal. In re General Realty & Utilities Corp., 29 Del. Ch. 480, 52 A.2d 6 (1947).

67. *See Appraisal Statutes, supra* note 54, at 1457.

68. 457 A.2d 701 (Del. 1983).

69. *See supra* note 66. The Delaware block method of valuation was used extensively until February 1983, when modified by *Weinberger. See infra* text accompanying notes 238-349.

The valuation analyses that comprised the Delaware block are usually labled market value analysis,[70] asset value analysis,[71] and discounted earnings value analysis.[72] While other factors may be considered,[73] final determination of fair value was usually based on a weighted average of the values derived from the component analyses.[74] The Delaware block method can be analyzed by first looking at its three component analyses followed by an examination of its weighting procedure.

Examination of the Component Analyses

The analytical component, market value, as used in the Delaware block method, is not necessarily the current market value,[75] but could be a market value averaged over the time period immediately prior to such triggering actions as a major asset sale or a proposed merger.[76] A few early appraisal statutes stated that the purpose of the appraisal was to determine market value; and, if a market value existed, it would be the "fair value."[77] Some of these statutes were later amended by deleting the reference to market value and stating that the purpose of the appraisal was to determine "fair value" or "intrinsic value."[78]

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70. *See infra* text accompanying notes 75-85.

71. *See infra* text accompanying notes 86-92.

72. *See infra* text accompanying notes 93-101.

73. Depending on the facts of the case other factors may be considered such as: the firm's dividend yield, the firm's industry, the firm's standing in the industry, and a comparison of the firm's stock price to that of similar companies. The court in Universal City Studios, Inc. v. Francis I. DuPont, & Co., 312 A.2d 344 (Del. Ch. 1973), *aff'd*, 334 A.2d 216 (Del. 1975), considered other factors such as the firm's industry, but held that since dividends reflect the same value as nonretained earnings, they should not be considered separately.

The Delaware Supreme Court in Weinberger v. UOP Inc., 457 A.2d 701, 713 (Del. 1983), reaffirmed the holding in Tri-Continental Corp. v. Battye, 31 Del. Ch. 523, 74 A.2d 71 (1950), which requires consideration of all relevant factors that affect the value of the company.

74. *See Appraisal Statutes, supra* note 54, at 1468-71. *See also infra* text accompanying notes 102-08.

75. Depending on the court, the market value component could be the market price at the time of the merger or cash-out, as found by the lower court in *Weinberger*. *Weinberger*, 426 A.2d 1333, 1360 (Del. Ch. 1981). If no market value exists, a reconstructed market value can be considered, if it can be constructed. Chicago Corp. v. Munds, 20 Del. Ch. 142, 172 A.2d 452 (1934). Further, the court in Francis I. duPont & Co. v. Universal City Studios, Inc., 312 A.2d 344 (Del. Ch. 1973), *aff'd*, 334 A.2d 216 (Del. 1975) held that the market value, even a reconstructed market value, must be considered whenever available.

76. *See Appraisal Statutes, supra* note 54, at 1460, 1461.

77. *See* Squires, *supra* note 55, at 484 n.9.

78. Illinois dropped the requirement of market value when the state changed its 1919 Corporation Act in 1933. *See* Squires, note 55 at 424. *See also supra* notes 8, 9, 339.

In some jurisdictions, recent statutes state that if the stock is traded on a national exchange, the appraisal remedy is not available.[79]

Federal jurisdictions that make fair value determinations of publicly traded securities generally attribute at least some weight to the securities' market value.[80] Jurisdictions using the Delaware block method of valuation also consider market value an important component of the weighted average determination of "fair value."[81] The degree of significance placed on market value is determined by such factors as the state of the economy,[82] the type of company,[83] and how widely the company's stock is traded.[84] Therefore, a jurisdiction using the Delaware block valuation method considers the stock's market value when it is available.[85] Although market value is an important element, it is not the exclusive factor in the Delaware block method.[86] Earnings value and asset value must also be considered when conducting a Delaware block valuation.

When considering the asset value component, the courts have been careful to distinguish the value of the company's assets as a going concern from their liquidation value.[87] Even so, the asset value analysis generally consists of merely an appraisal of the firm's assets.[88] Normally a firm that is ripe for a merger or asset sale owns assets that are either highly liquid or carried on the books at less than their market value.[89] Therefore, the firm's asset value can be different from the firm's book value. Book value is based on acquisition cost less depreciation, and thus does not reflect the market value of the firm's assets.[90] To determine the market value of the firm's assets, the

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79. *See supra* note 64.

80. The federal courts have considered the market value to be almost conclusive proof of the value to the firm before the merger transaction. *See* Seaboard World Airlines, Inc. v. Tiger Int'l, Inc., 600 F.2d 355, 361 (2d Cir. 1979) (Although Tiger's asset value exceeded its market value, the market value was found to be the stock's fair value.); cf. Mills v. Electric Auto Lite Co., 552 F.2d 1239, 1247-48. (7th Cir. 1977) (The court primarily used the firm's market value to determine "fair value.") *See also infra* note 107.

81. *See supra* note 75.

82. *Appraisal Statutes, supra* note 54, at 1464.

83. *Id.* at 1463.

84. *Id.* at 1460.

85. *See supra* note 75, 107.

86. *See supra* note 73.

87. *Appraisal Statutes, supra* note 54, at 1457.

88. *Id.* at 1460.

89. Fischel, *Efficient Capital Market Theory, the Market for Corporate Control and the Regulation of Cash Tender Offers*, 57 TEX. L. REV. 1, 7 n.19 (1978).

90. *Appraisal Statutes, supra* note 54, at 1457.

appraiser or financial analyst must examine and evaluate each of the firm's major assets and liabilities.[91] The analyst should then be able to explain any discrepancies between the firm's net book value and the market value of its assets.[92]

The third component analysis of the Delaware block method is the discounted earnings analysis.[93] The concept underlying this theory is that a company's value, as a going concern, is a function of its ability to generate earnings.[94] The earnings benefit the shareholders through stock appreciation or increased dividends. This analysis projects a stream of future earnings and then discounts the earnings stream. The discount rate must reflect both the time value of money and the company's business risks.[95] Therefore, the discounted earnings approach is a two step procedure usually starting with projected earnings.

The projected stream of earnings, as used in the Delaware block method, was normally the average earnings of a number of past years.[96] However, some jurisdictions adjust past earnings before they are averaged.[97] The adjustment reflects non-recurring items in either sales or expenses.[98] After the projected stream of earnings is established, the appraiser or analyst must determine the proper discount rate.

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91. The differences between book value and asset market value might result from many other factors, such as: uncollectable accounts receivable carried on the books, long term securities tied into an interest rate which is different than the market rate, undeveloped patents and other trade secrets, depreciation taken on an asset which does not correspond to its value, etc. *See Appraisal Statutes, supra* note 54, at 1457.

92. *Id.* at 1457-60.

93. Some authors term the discounted earnings approach as an investment value. The analysis derives the firm's value from the firm's earnings capacity. *Appraisal Statutes, supra* note 54, at 1464.

94. *Id.*

95. The formula for making a projection is: $V = \Sigma\ E/(1+r)^n$, where:
V = The value of the firm.
E = Projected annual earnings or dividends. (Under the Delaware block method, as used in Delaware, earnings (E) is equal to the average (mean) of earnings for five years immediately prior to the triggering action.) (NOTE: The difference in a value obtained by using earnings rather than dividends would be compensated for by a different discount rate r.)
n = The number of periods. (usually one year or fraction thereof.)
r = The discount rate reflecting the time value of money and the risk of the firm. *Appraisal Statutes, supra* note 54, at 1464-68.

96. *Id.*

97. The court, in Application of Delaware Racing Assn., 42 Del. Ch. 406, 421-22, 213 A.2d 203, 212 (Del. 1965), did not use the year suggested by the appraiser, 1958, when computing the five year earings average, because the court felt the earnings during (1958) were abnormally high.

98. *Id.*

In order to find the appropriate discount rate, analysts have generally used earnings multipliers designated as price/earnings ratios.[99] The appropriate price/earnings ratio is determined by comparing the price/earnings ratios of other similarly situated publicly traded companies.[100] Once the price/earnings ratio is determined, it is then multipled by the firm's average earnings.[101] The product is equal to the earnings value of the firm. The analyst, and ultimately the court, then weights the three values derived from the component analyses to determine the "fair value" of the minority shareholders' stock interest.

The Weighting Procedure

The process used to find fair value from the component analyses is termed weighting.[102] The weighting process is accomplished by multiplying each value derived from the component analyses by a percentage, termed weights. The sum of all three percentages must equal 100%.[103] Therefore, if the court decides to give the discounted earning value a 50% weight and the asset value a 30% weight, the market value would receive a 20% weight.[104] The decision to assign

99. *See infra* note 101. The price/earnings ratio is no more than an imprecise approximation of the capitalization rate.

100. For example, in Swanton v. State Guaranty Corp., 42 Del. Ch. 477, 481, 215 A.2d 242, 246 (1965), the price/earings ratio was determined by use of an industrial analysis conducted by Professor Dewing and contained in his text, THE FINANCIAL POLICIES OF CORPORATIONS (5th ed. 1926). The price/earnings ratio was then adjusted upward to reflect a strong real estate market together with the company's policy of buying real estate and holding for a return in the form of capital appreciation. *Swanton*, at 244.

101. Price/earnings ratio X Earnings = Price. *See supra* note 99.

102. *Appraisal Statutes, supra* note 54, at 1468.

103. It is possible to weight a value by a factor of zero. The court in Application of Delaware Racing Assn., 42 Del. Ch. 406, 423-24, 213 A.2d 203, 213 (Del. 1965), found a 10 percent weight to dividends which amounted to 10 percent of zero. The court in *Delaware Racing* cited Adams v. R.C. Williams, 39 Del. Ch. 61, 158 A.2d 797 (1960), where the court found a zero value for earnings and ordered a reappraisal. *Delaware Racing*, 213 A.2d at 213, *Adams*, 39 Del. Ch. at 71, 158 A.2d at 803. The reappraisal resulted in the appraiser giving a 40 percent weight to the zero earnings value, which was later affirmed by the Chancellor in an unreported opinion. *Delaware Racing*, 213 A.2d at 213.

104. For example, assume the values illustrated by the chart below resulted from the component analyses. Further, assume the court decided to give both discounted earnings and market value a 25 percent weight and asset value a 50 percent weight. The result would be illustrated by the chart below.

COMPONENT ANALYSES	VALUES	WEIGHTS	RESULTS
Earnings value	$100	25%	$ 25
Market value	200	25%	50
Net asset value	300	50%	150
		"Fair Value"	$225

the various percentages is not made pursuant to definite guidelines.

The court examines each component analysis and decides its degree of applicability according to the attendant circumstances. While the courts have on occasion allowed a certain component to be given a weight of zero percent, they required consideration of all three analyses.[105] In *Tri-Continental v. Battye*,[106] the Delaware Supreme Court required consideration of all relevant factors to determine the fair value of the minority shareholders' stock. Delaware courts have interpreted the *Tri-Continental* requirement to mean that basing a fair value determination on only one component analysis is improper.[107] Further, the Delaware courts have pointed out that, when using the Delaware block, the fair value must be the value of the business as a going concern.[108] In sum, the Delaware block valuation method was highly structured in terms of which component analysis must be considered, but guidelines did not exist for the final weighting process.

Application of the "Delaware Block"

Due to the arbitrary weighting process, the structured Delaware block valuation method provided less than satisfactory results when valuing natural resource companies such as timber, paper, or oil companies.[109] Natural resource companies generally have high levels of undervalued assets.[110] Their assets in the form of natural resources

105. *See supra* note 103.

106. 31 Del. Ch. 523, 74 A.2d 71 (Del. 1950).

107. In *Tri-Continental* the court stated that since an actual market value did not exist, the reconstruction of a market value was permissible but not necessary. *Tri-Continental*, 74 A.2d at 74. Further, the Delaware Supreme Court stated, "courts must take into consideration all factors." *Tri-Continental*, 74 A.2d at 72. In Application of Delaware Racing Assn, 42 Del. Ch. 406, 419, 213 A.2d 203, 211 (Del. 1965), the court stated that even if an actual market value of the shares did not exist, a reconstructed market value must be given consideration if a reconstructed market value is ascertainable. *Id.* Further, the court in *Delaware Racing* stating that while market value is an important element, it must not be the sole consideration. *Id.* Liquidation value also cannot be the sole factor used to determine fair value. In re General Realty & Utilities Corp., 29 Del. Ch. at 497, 52 A.2d at 14 (1947) (The Delaware court noted that the appraisal should not be comprised of only one factor.); Chicago Corp. v. Munds, 20 Del. 142, 155, 172 A. 452, 457 (1931) (Neither market value nor net asset value can be the sole factor in establishing value within the statutes).

108. The "going concern" requirement is required by the *Tri-Continental* holding. The concept of value under the appraisal statute is that "the stockholder is entitled to be paid for that which has been taken from him, viz., his proportionate interest in a going concern." *Tri-Continental*, 74 A.2d at 72. The going concern requirement has been interpreted to mean that asset or liquidation value alone can not be the sole determinant of fair value. *See infra* note 146.

109. *See infra* text accompanying notes 120-349.

110. In the three cases cited *infra* note 112, which pertained to natural resource

have market values higher than the values carried on the companies' books. The Delaware block's "going concern" concept, which required consideration of all three component analyses, led to the argument that asset value in natural resource companies did not receive the proper weight.[111]

Three cases illustrate the valuation problem of the Delaware block method both with regard to natural resource companies and to breaches of fiduciary duty.[112] In *Bell v. Kirby Lumber Corp.*,[113] fair value was determined by using an appraisal remedy based on the Delaware block valuation method.[114] The plaintiff, however, argued that asset value was not given adequate weight.[115] In *Lynch v. Vickers Energy Corp.*,[116] a breach of fiduciary duty case, the court held that an appraisal remedy, using the Delaware block valuation method was inadequate to establish satisfactory damages.[117] Finally, in *Weinburger v. UOP Inc.*,[118] another case involving a breach of fiduciary duty, the court eliminated the Delaware block valuation analysis and held that a new appraisal concept should be adopted; one that will provide minority shareholders with an adequate remedy.[119]

Kirby Exemplifies The Weakness Of The Delaware Block Analysis

In *Kirby*, minority shareholders were cashed out[120] by the 95% owner, Santa Fe Industries, Inc.[121] Contemplating the acquisition of

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companies, the plaintiffs argued that more weight should be given to the net asset value, because the net asset value was more reflective of the value of a natural resource company and was considerable above the offered price. *See infra* text accompanying notes 120-349.

111. *Id.*

112. Weinberger v. UOP, Inc., 426 A.2d 1333 (Del. Ch. 1981) (found for defendants), *rev'd*, 457 A.2d 701 (Del. 1983); Lynch v. Vickers Energy Corp., 351 A.2d 570 (Del. Ch. 1976) (judgment for defendants), *rev'd and remanded*, 383 A.2d 278 (Del. 1978), *on remand*, 402 A.2d 5 (Del. Ch. 1979), *aff'd in part, rev'd and remanded*, 429 A.2d 497 (Del. 1981); Bell v. Kirby Lumber Corp., 395 A.2d 730 (Del. Ch. 1978), *modified*, 413 A.2d 137 (Del. 1980) (dealing with a natural resource company).

113. 413 A.2d 137 (Del. 1980).

114. *Id.* at 146.

115. *Id.* at 142.

116. 429 A.2d 497 (Del. 1981).

117. *Id.*

118. 457 A.2d 701 (Del. 1983).

119. *Id.*

120. Cash-out is a term used to signify that the minority shareholders were forced to sell their stock to the majority shareholder for cash, as in *Kirby*, 413 A.2d at 139.

121. Kirby's 5 percent minority shareholders' interest consisted of 25,000 shares. *Kirby*, 413 A.2d at 139.

Kirby's minority shareholders' stock[122] under Delaware's short form merger statute,[123] Santa Fe commissioned both an appraisal of Kirby's assets and a market value opinion of Kirby's stock.[124] The asset appraisal valued Kirby's assets at $320,000,000 ($640.00 per share).[125] The market value opinion of Kirby's stock was $125.00 per share.[126] Based on this data, Santa Fe offered the minority shareholders $150.00 per share.[127] Owners of 5,000 of the 25,000 minority shares dissented and made a formal demand for a stock appraisal.[128] For this reason, the court appointed an appraiser.[129]

The appraiser, using the Delaware block valuation method, determined that the minority shareholders' stock was worth $254.00 per share.[130] The appraiser determined that the asset value was $456.00 per share[131] and the earnings value was $120.00 per share.[132] The appraiser then assigned a 40% weight to the asset value ($456.00) and 60% weight to the earnings value ($120.00), resulting in the overall "fair value" of $254.00.[133] Both Santa Fe and the Kirby minority shareholders objected to the value found by the court-appointed appraiser.[134]

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122. *Id.*

123. DEL. CODE ANN. tit. 8, § 253, (1973) short form merger statute.

124. The Morgan Stanley company was commissioned to perform a stock value opinion. Mr. W. Davis was commissioned to conduct an asset appraisal. However, seven months later, immediately prior to the merger a second asset appraisal was commissioned. *Kirby*, 413 A.2d at 139.

125. The second asset appraisal subsequently found Kirby's asset value was $227,754,000 or $456.00 per share. *Id.* at 147.

126. *Id.* at 149.

127. *Id.* at 139.

128. The dissenters, stockholders who did not think the offered price was adequate, demanded an appraisal under DEL. CODE ANN. tit. 8, § 262 (1973). *Kirby*, 413 A.2d at 139. The court did not deal with the fiduciary aspect because it already had been litigated in federal court. Santa Fe Industries, Inc. v. Green, 430 U.S. 462 (1977). The court held that the fair value, determined by an appraisal remedy, was adequate. Damages, such as rescissory damages, were not appropriate. The court looked to the entire fairness of the merger. *Kirby*, 413 A.2d at 140.

129. *Kirby*, 413 A.2d at 139.

130. *Id.* at 140.

131. The appraiser used the value derived from the second asset appraisal, which valued Kirby's net assets at $277,754,000 or $456.00 per share. *Id.* at 147.

132. *Id.* at 140.

133.

	WEIGHT		VALUE	
ASSET	40%	X	$465.00	$182.40
EARNINGS	60%	X	120.00	72.00
			FAIR VALUE	$254.40

Id.

134. *Id.* at 139.

The minority shareholders argued that the parent corporation owed a fiduciary duty of entire fairness[135] to the minority shareholders.[136] Therefore, damages should have been awarded in the amount the shareholders would have received based on an arm's length transaction.[137] Santa Fe argued that such a stock valuation would be based on the sale or the liquidation of the assets, rather than the traditional "going concern" standard.[138] However, the shareholders argued that the only dispute concerned the relative weights placed on the asset and earnings values.[139] Therefore, the minority shareholders contended that their value was consistent with the concept of the Delaware block and its "going concern" requirement.[140]

The Delaware Supreme Court held that Santa Fe, with a 95% ownership, had virtual control over the Kirby company's operation.[141] At Santa Fe's option, it could liquidate the company and give the shareholders $670.00 per share, the company's net asset value.[142] Alternatively, Santa Fe could cash out the minority shareholders at the pre-merger going concern value.[143] Further, the court held that because there was no market price for the stock,[144] the relevant factor to establish the market value was a $3.00 per share dividend, which would result in a low market value as a going concern, thus making the Kirby company ripe for a cash out.[145] The court held that fair value should be based on the traditional "going concern" concept and rejected the minority shareholders' argument that fair value should approximate the company's asset value.[146]

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135. For a definition of entire fairness, see *infra* notes 576 and accompanying text.

136. *Id.* at 140. *See infra* note 576.

137. The result of an arm's length transaction would be closer to the market value of the assets. *Kirby*, 413 A.2d at 140.

138. The defendant argued that the "going concern" requirement was established in *Tri-Continental* and that damages based on an arm's length value would be an unwarranted extension of the appraisal remedy. *Id.*

139. The plaintiff argued that asset value should be given a 90 percent weight and earnings value a 10 percent weight. *Id.* at 141.

140. *Id.*

141. *Id.* at 140.

142. *Id.*

143. The court rejected the minority shareholders' claim that this was in effect a private eminent domain action. The plaintiff argued that a cash-out under the short form merger statute should be viewed as a forced sale at a distressed price. *Id.*

144. The only market for Kirby's stock was a tender offer for $65 per share and occasional sales at $85 to $95 per share. *Id.* at 141.

145. *Id.*

146. The court in *Kirby* quoted *Tri-Continental* emphasizing that the stock should be valued as a "going concern" and that "intrinsic" or "true value" can not be determined by the exclusive acceptance of only liquidation value. *Id.* at 141.

The minority shareholders in *Kirby* then conformed their arguments to the traditional standards of the Delaware block. They argued that the asset value should have been given more weight.[147] Secondly, they contended that the five year average earnings figure used to compute the earnings value did not represent the potential future earnings because of recent pre-merger changes in Kirby company's product lines and marketing strategy.[148] On the other hand, Santa Fe argued that earnings should be given more weight to adjust for lack of marketability of Kirby's stock.[149]

The court observed that there was no rule of thumb for assigning weights to the component analyses.[150] While acknowledging that asset values can be increased in some instances, the court noted that the lack of stock marketability in this case offset any reason to increase the asset value's weight.[151] Although the court recognized the appraiser's concern that a large spread between asset values and earnings value could result in a bargain for Santa Fe, the court did not inquire into the problem.[152] Rather, the court found that the appraiser's assigned weights adequately compensated for any disparity.[153]

The Delaware Supreme Court, affirming the lower court's finding, found that the weight the appraiser assigned to the asset level was satisfactory.[154] Even though Kirby's main asset, its timberland, was appreciating in value, was saleable on the open market, and was capable of generating cash,[155] the lower court had found that future earnings potential was adequately accounted for through the calculated earnings value.[156] Therefore, based on a concern that earnings value would be given too much weight, the lower court excluded any asset

147. The plaintiff argued that because Kirby was a natural resource company, asset value must be given additional weight. *Id.* at 142.

148. The minority shareholder argued that an earnings value based on a five year average is inappropriate because growth and appreciation are not adequately considered. This is true especially, because Kirby's investors looked to capital appreciation of their stock, rather than dividend income. *Id.* at 144.

149. *Id.* at 145.

150. *Id.* at 143.

151. *Id.* at 146.

152. *Id.* at 145.

153. *Id.* at 145-56.

154. *Id.* at 146.

155. The court acknowledged that: "The investing and trading public . . . give consideration to corporate assets only insofar as they disclose a capability of generating earnings. . . ." *Id.* at 144 (Gibbons v. Schenley Ind., Inc., 339 A.2d 460 (Del. Ch. 1975).

156. Based on a five year average earnings. *Kirby*, 413 A.2d at 145.

value that was based on an earnings analysis.[157] Further, the Morgan Stanley stock value opinion commissioned by Santa Fe reinforced the notion that the earnings potential had been adequately considered.[158] Finally, the lower court examined the Davies' asset appraisal,[159] which was also commissioned by Santa Fe but supported the minority shareholders' position. The lower court found that the Davies' asset appraisal could not be used because it determined Kirby's asset value on a "going concern"[160] basis and not on the basis of a "willing seller/willing buyer"[161] which is the proper method for determining a liquidation price.[162]

The *Kirby* court strictly adhered to the traditional "going concern" concept,[163] and thus to the historical constraints of the Delaware block valuation.[164] The court refused to allow asset value to predominate in the determination of "fair value," primarily because of the court's definition of the "going concern" requirement.[165] In establishing a stream of earnings for the discounted earnings approach, the court used the traditional standard of examining the five year average earnings rather than looking to prospective earnings.[166] This adherence to the Delaware block structure provided what appeared to be a realistic "fair value," because it fell between the differing values which the parties requested.[167] However, the strained application of the appraisal remedy based on the Delaware block, as used

157. *Id.* at 144.

158. The Morgan Stanley opinion compared historical earnings trends and price/earnings ratios with similar companies. The Morgan Stanley opinion then selected a 15.2 multiplier and applied it to average earnings. The court agreed with this concept and termed the report as an "orderly and logical deductive process in accordance with approved methodology." *Id.* at 147.

159. *See supra* note 124.

160. The Court, while requiring the overall "fair value" to be based on a "going concern" value, held that asset value should be based on the liquidation value of the assets. *Kirby*, 413 A.2d at 141, 148.

161. The term "willing buyer/willing seller" was meant to indicate an asset liquidation standard, but the Davies asset appraisal used a going concern standard to determine asset value. Using the Delaware block method, the going concern standard is proper for the final determination of fair value, but it is not proper for finding the net asset value. *Id.* at 147-48.

162. *Id.*

163. *See supra* note 108.

164. *Kirby*, 413 A.2d at 147-48.

165. *See supra* note 108.

166. *Kirby*, 413 A.2d at 147.

167. Kirby company had made offers of $150 per share. *Id.* at 149. The minority shareholders desired a value of approximately $600 per share, which was a little less than the asset value of $670.00 per share. *Id.* The court appraisal using the traditional standards found a fair value to be $254.00. *Id.* at 140.

in *Kirby*, provided an inadequate remedy in *Lynch v. Vickers Energy Corp.*,[168] where the court found a breach of fiduciary duty.

The Inadequacy of The Delaware Block Valuation Method Under Lynch

When the Delaware block was used in *Lynch*, the method resulted in a "fair value" that was less than the purchase price.[169] The Delaware Supreme Court in *Lynch* found that the minority shareholders, who were damaged by a breach of fiduciary duty,[170] should not be limited to the Delaware block valuation method in proving damages.[171] Therefore, the court held that the plaintiff could be awarded a different form of damages.[172]

The controversy in *Lynch* resulted from a purchase of the minority shareholders' stock by the majority shareholder, Vickers Energy Corporation (Vickers), a wholly owned subsidiary of Esmark Company.[173] Through a tender offer of $12.00 per share, Vickers was able to acquire a substantial portion of TransOcean Oil, Inc. (TransOcean).[174] However, after the transaction, the minority shareholders discovered that Vickers had failed to disclose certain facts about the tender offer.[175] In the complaint, the plaintiff[176] alleged that

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168. 351 A.2d 570 (Del. Ch. 1976), (Judgment for defendants), *rev'd and remanded*, 383 A.2d 278 (Del. 1978), *on remand*, 402 A.2d 5 (Del. Ch. 1979), *aff'd in part, rev'd and remanded*, 429 A.2d 497 (Del. 1981).

169. *Lynch*, 402 A.2d at 12. The purchase price was $12.00 per share, the "fair value" of the minority shareholders' stock was found to be $11.85.

170. The breach of fiduciary duty resulted from nondisclosures to the minority shareholders. *See infra* note 175.

171. *Lynch*, 429 A.2d at 500.

172. The Delaware Supreme Court allowed damages to be in the form of the monetary equivalent to rescission, with the objective of putting the parties in the position they were in before the transaction. *Id.* at 501.

173. *Id.* at 499.

174. *Lynch*, 402 A.2d 5, 6 n.1 (1979). The Vickers company owned 53.5 percent of TransOcean's stock before the $12.00 tender offer. After the tender offer Vickers owned 88 percent of TransOcean's stock.

175. The nondisclosures consisted of the following:

a. An asset appraisal by the company valuing the assets at $250,800,000 was omitted. The company in its September, 1974 offer, stated the value of the assets to be approximately $200,000,000. *Lynch*, 351 A.2d at 574.

b. Esmark had authorized purchases of the TransOcean stock for a price up to $15.00 per share. *Id.* at 575.

The Delaware Supreme Court found item (a) and (b) to be critical factors. *Lynch*, 383 A.2d at 280; and 429 A.2d at 499.

176. The plaintiff represented herself and the minority shareholders similarly

Vickers had breached its fiduciary duty as a result of the nondisclosures.[177] The Delaware Chancery court rejected the plaintiff's claim and found for the defendant.[178]

Reversing the chancery court's decision, the Delaware Supreme Court found that Vickers had breached its fiduciary duty owed to the minority shareholders.[179] Although the supreme court resolved the liability issue, it remanded the damages issue.[180] On remand, the chancery court examined three alternative remedies.[181] The plaintiff argued that she should have been able to choose the alternative remedy that gave her and the members of her class the greatest recovery.[182] In contrast, Vickers argued that the plaintiff did not suffer any injury resulting from a material omission in the proxy statement and therefore was not entitled to recovery.[183] The chancery court, after examining the three possible remedies, found that though the defendant had breached its fiduciary duty,[184] the breach did not cause injury to the plaintiff.[185]

The chancery court noted that the only fiduciary duty breached was the duty of complete candor.[186] When dealing with the minority shareholders, the majority shareholders owe a duty of "entire fairness" to the minority shareholders.[187] Since the Delaware Supreme Court had already decided that the information withheld from the minority shareholders might have affected their individual valuation of Trans-Ocean's stock, the chancery court was only to determine an adequate remedy to be accorded the plaintiff.[188] To determine the appropriate

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situated. *Lynch*, 402 A.2d at 6.

177. The chancery court did not find a breach of fiduciary duty, *Lynch*, 351 A.2d at 575-76, but the supreme court reversed the chancellor's finding that a reasonable man could use the information not disclosed to value the stock, and found that Esmark, controlling the majority, had a fiduciary duty to disclose this information to the minority shareholders. *Lynch*, 383 A.2d at 281.

178. *Lynch*, 351 A.2d at 575-76.

179. *Lynch*, 383 A.2d at 281.

180. *Id.*

181. *Lynch*, 402 A.2d at 11, 12.

182. *Id.* at 7.

183. *Id.*

184. Further the chancery court did not find fraud or intentional misrepresentation. *Id.* at 10.

185. *Id.* at 13.

186. "Vickers as the majority shareholder of TransOcean, owed a fiduciary duty to the plaintiff, which required complete candor." *Lynch*, 383 A.2d at 279.

187. *Lynch*, 402 A.2d at 8.

188. *Id.* at 9.

remedy, the chancery court examined *Poole v. N.V. Deli Maatchappi*,[189] a case involving a greater degree of unfairness than in *Lynch*.[190]

In *Poole*, the court found that the defendant had made fraudulent misrepresentations upon which the plaintiffs had relied and sold their stock at an inadequate price.[191] The *Lynch* chancery court noted that even in *Poole*, where fraudulent misrepresentation occurred, the court looked to the "going concern" standard and applied the structured Delaware block valuation method in determining the "intrinsic" or "fair value" of the stock.[192] Therefore, the *Lynch* chancery court deduced that if the Delaware block was an adequate remedy in a case involving fraud, it was also adequate in a case involving mere breach of a fiduciary duty.[193]

The plaintiff in *Lynch* then conformed his argument to the context of the traditional appraisal remedy.[194] He argued that the oil industry was an asset-wasting industry whose value should be based primarily on the value of its major assets, generally oil reserves.[195] The chancery court held that the facts in *Lynch* were analogous to the facts in *Kirby*, which also involved a natural resource company.[196] The *Kirby* court applied the appraisal remedy based on the Delaware block analysis.[197] Although in *Kirby* the asset value was an important element in finding the fair value, the *Lynch* chancery court held that in applying the Delaware block valuation, asset value cannot be the sole determinant of fair value.[198]

After applying the Delaware block method of appraisal, the chancery court determined that the "fair value" was less than the offered price of $12.00 per share.[199] In deriving the fair value, the chancery court based the asset value component on an asset appraisal

189. Poole v. N.V. Maatchappij, 43 Del. Ch. 283, 224 A.2d 260 (Del. 1966).

190. *Lynch*, 402 A.2d at 10.

191. *Id.*

192. The *Poole* court would not allow "fair value" to be determined exclusively by the company's net asset value. The court required a Delaware block weighting of market value, earnings value, and asset value. *Lynch*, 402 A.2d at 9.

193. *Id.* at 10.

194. *Id.*

195. *Id.* An asset wasting industry is one which consumes or sells its non-replenishable resources, primarily minerals.

196. *Id.*

197. *Kirby*, 413 A.2d at 146.

198. *Lynch*, 402 A.2d at 11, 12.

199. *Id.* at 12.

report[200] commissioned by the defendant.[201] The market value component was based on TransOcean's stock market price two days before the offer.[202] The earnings value component was based on the traditional five year average earnings, which was then multiplied by 17.4, the figure found to be the appropriate earnings multiplier.[203] The court then weighed the values derived from the component analyses.[204]

In determining the proper weight for the asset value component, the *Lynch* court considered the *Kirby* court's analysis.[205] Because both Kirby Lumber Company and TransOcean were natural resource companies, the *Lynch* court applied the same 40% weight to asset value that was applied by the *Kirby* court. Market value was also given a 40% weight and earning value was given a 20% weight.[206] The resultant fair value was found to be $11.85 per share, a value less than the $12.00 per share offered.[207] Therefore, the lower court found the plaintiff was not damaged by the defendant's omission of material factors.[208] Since the plaintiff could not show any out-of-pocket loss,[209] the chancery court examined the alternative remedy of rescission.

The chancery court held that even if the plaintiffs were entitled to equitable rescission, which would amount to a return of their stock, they would have to pay the defendant, Vickers, $12.00 per share plus reasonable interest of 13.1% or a total price per share of $19.64.[210] However, the market value of Vickers' stock as of the 1978 judgment

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200. *Id.* at 8.

201. This report was one of the items not disclosed to the minority shareholders. *Id.*

202. *Id.* at 11.

203. *Id.* at 12.

204.

COMPONENT ANALYSIS	VALUES	WEIGHTS	RESULTS
Asset Value	$17.50	40%	$ 7.00
Market Value	9.48	40%	3.80
Earnings Value	5.25	20%	1.05
		Fair Value =	$11.85

Id. at 12.

205. *Id.* at 10.

206. *See supra* note 204.

207. *Lynch*, 429 A.2d at 499.

208. The court in *Lynch* held that the plaintiffs were not damaged by the conduct of the defendant. *Lynch*, 402 A.2d at 13.

209. The *Lynch* court quoted *Poole*, "Plaintiffs seek to recover the difference between the actual value of the stock and the price paid, known as the 'out-of-pocket' measure of damages. . . ." *Poole*, 224 A.2d at 262, cited in *Lynch*, 429 A.2d at 500.

210. *Lynch*, 402 A.2d at 12. Further, the court found that a "prudent investor" can get 13.1 percent on his investment. *Id.* at 12.

date was approximately $14.31,[211] which was below the $19.64 per share level.[212] Consequently, the chancery court found that the plaintiff and members of her class would not benefit from an award of rescissory damages, and thus they were not damaged as a result of any omission made in the tender offer circular.[213]

Lynch's Second Appeal to the Delaware Supreme Court

The plaintiff appealed for a second time to the Delaware Supreme Court. The supreme court, after considering the issue of damages, reversed the chancery court's decision.[214] The court first examined the applicability of the appraisal as propounded by the court in *Poole*.[215] Distinguishing *Poole*, the supreme court noted that the court in *Poole* applied the Delaware block appraisal, which the plaintiffs had specifically requested.[216] However, the plaintiff in *Lynch* did not ask for the same appraisal formula that was applied in *Poole*.[217]

In determining whether the appraisal remedy was adequate, the supreme court found that greater weight should be given to TransOcean's asset value and less weight to TransOcean's market value. The *Lynch* supreme court recognized that TransOcean was a natural resource company whose major asset, oil reserves, was in high demand and scarce supply.[218] Further, Vickers' dominion, control, and announced plan to acquire 100% of TransOcean, had adversely influenced the price of TransOcean's stock.[219] Thus, the court held that TransOcean's stock price should not have been given a 40% weight in determining TransOcean's intrinsic value.[220] Consequently, in *Lynch*, the supreme court found the structured Delaware block appraisal

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211. The price was determined by the following weighting:

COMPONENT ANALYSIS	VALUES	WEIGHTS	RESULTS
ASSET VALUE	$14.31	50%	$ 7.16
MARKET VALUE	15.06	30%	4.52
EARNINGS VALUE	13.41	20%	2.68
		"Fair Value"	$14.36

This is a chart representation of the data used to determine market value. *Id.* at 13. (NOTE $.06 DISCREPANCY IN THE COURT'S CALCULATION)

212. *Id.* at 12-13.
213. *Id.* at 13.
214. *Lynch*, 429 A.2d at 507.
215. *Id.* at 499.
216. *Id.* at 501; *Poole*, 224 A.2d at 262.
217. *Lynch*, 429 A.2d at 501.
218. *Id.* at 505.
219. *Id.* at 504.
220. *Id.* at 505.

remedy did not adequately compensate the plaintiff for her loss.[221] Further, the court held that the statutory limitation of appraisal does not apply in cases of breach of fiduciary duty.[222] Instead, the court found other remedies such as rescission, or its monetary equivalent, were applicable in such cases.[223]

The state supreme court did not order actual rescission because of the lapse of time since the transaction had occurred,[224] but stated that the monetary equivalent of rescission should be awarded.[225] Since the purpose of rescission is to place the parties where they were before the transaction,[226] the monetary equivalent to rescission equals the gain in value Vickers received as a result of acquiring and holding TransOcean's stock.[227] Therefore, the supreme court held that the plaintiffs were entitled to receive from the defendant the equivalent value of TransOcean's stock as of the time of the judgment, less the $12.00 per share already received plus fair interest.[228] The supreme court then established broad guidelines for determining the monetary equivalent of rescission.[229]

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221. *Id.* at 507.

222. In finding breach of fiduciary duty, the Delaware Supreme Court did not require an actual intent to deceive when one party has an advantageous bargaining position with respect to the other party. *Id.* at 503. However, in *Poole*, breach of fiduciary duty was neither alleged or found. *Id.* at 501. A strange result since fraud should also be a breach of a fiduciary duty.

223. *Id.* at 501.

224. The supreme court stated that rescission would be preferable if at an earlier stage, but was not possible at this late date because of the corporate changes that had taken place in Esmark. *Id.*

225. *Id.*

226. *Id.*

227. *Id.* at 501, 502.

228. The rescissory damages should be measured at the time of the judgment. *Id.* at 503. The defendant is entitled to a credit equalling the $12.00 already paid plus the interest equivalent to what they could have "safely earned" by use of the $12.00. The supreme court overruled the court of chancery, which allowed a 13.1% rate. The supreme court stated that a 7% rate would be more fair. The intent is not to reward the wrongdoer. *Id.* at 506.

229. The supreme court stated the stock should not be valued at less than $15.00 per share or more than $41.40 per share. The lower limit was established by the undisclosed information that Vickers was willing to buy TransOcean's stock from anyone for $15.00 per share in September, 1974. The supreme court reasoned that an arm's length transaction with the minority shareholders should not have resulted in a price less than $15.00 per share. In addition, the supreme court set the high limit on the basis that $41.40 per share is the most value the plaintiff ever alleged TransOcean's stock was worth. *Id.* at 505.

In conclusion, the supreme court held that if the majority shareholder breaches its fiduciary duty when dealing with the minority shareholders for the purchase of their stock, the minority shareholders are entitled to rescission or its monetary equivalent.[230] Although the appraisal remedy was appropriate in *Kirby*,[231] the concept of fairness requires rescission or its monetary equivalent when the court finds a breach of fiduciary duty.[232] Therefore, the use of the structured Delaware block method to determine fair value did not provide adequate relief to the minority shareholders, in this instance.[233]

After *Lynch*, the traditional Delaware block method of valuation still existed for standard appraisals of dissenting shareholders' equity, as in *Kirby*. However, the traditional appraisal remedy, which uses the Delaware block method, was found inadequate in cases involving a breach of fiduciary duty.[234] The Delaware Supreme Court's dissatisfaction with the Delaware block appraisal method reached its peak in 1983, when it eliminated the traditional Delaware block valuation method.[235] In *Weinberger v. UOP, Inc.*,[236] the Delaware Supreme Court made the valuation process more flexible, appropriate, and justifiable.[237]

The New Appraisal Remedy Adopted In Weinberger

The controversy in *Weinberger* involved both the value of a natural resource company's stock and a breach of fiduciary duty.[238] Therefore, the facts in *Weinberger* are analogous to both *Kirby* and to *Lynch*.[239] In 1975, Signal Companies, Inc. ("Signal"), the defendant, was looking for additional investments because it had just sold a wholly owned oil subsidiary for $420,000,000 in cash.[240] After examin-

230. *Id.* at 501.

231. *See supra* note 128. No breach of fiduciary duty was found in *Kirby*.

232. *Lynch*, 429 A.2d at 501.

233. *Id.*

234. *See supra* note 128.

235. *See infra* text accompanying notes 238-349.

236. 426 A.2d 1333 (Del. Ch. 1981) (found for defendants), *rev'd*, 457 A.2d 701 (Del. 1983).

237. *See infra* text accompanying notes 333-49.

238. UOP was a diversified oil company traded on the New York Stock Exchange. *Weinberger*, 426 A.2d at 1335. Further, the Delaware Supreme Court found a breach of fiduciary duty. *Weinberger*, 457 A.2d at 703.

239. Because UOP was a natural resource company, the facts in *Weinberger* are analogous to both *Kirby* and *Lynch*. However, breach of fiduciary duty was only found in *Lynch*, thus the facts in *Weinberger* and *Lynch* are the most analogous.

240. *Weinberger*, 426 A.2d at 1336, 1337.

ing Universal Oil Products ("UOP"), Signal began friendly negotiations in 1975 with the hope of acquiring the controlling interest in UOP.[241]

The negotiations began with Signal offering $19.00 per share and UOP asking $25.00 per share. Arm's length bargaining resulted in a price of $21.00. Pursuant to the final agreement, a tender offer for a limited number of shares[242] was made to obtain UOP's controlling interest. Because more than the desired number of outstanding shares were offered,[243] Signal became the majority shareholder, owning 50.5% ownership of UOP's stock.[244]

After becoming the majority shareholder, Signal made board appointments.[245] Signal initially appointed only six of the thirteen directors.[246] However, when the president and chief executive officer retired in 1975, Signal appointed a replacement, Mr. Crawford, giving Signal control of the board.[247] Simultaneously, Signal, still with excess cash, was searching unsuccessfully for additional investments.[248]

After researching the market for other possible acquisitions, Signal decided its best investment opportunity was to purchase the balance of UOP's stock.[249] Therefore, in February, 1978, Signal decided to explore the feasibility of this course of action.[250] Pursuant to this decision, Signal's management ordered a feasibility study to be performed by two of Signal's vice presidents.[251] That study indicated that a purchase price of up to $24.00 per share would provide an acceptable return for Signal.[252]

Based on the information derived from the feasibility study, Signal's management decided to offer UOP's minority shareholders

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241. The purpose of the negotiations was to purchase both issued and unissued stock, giving Signal 50.5% ownership. *Id.* at 1336.

242. Signal only needed 5,800,000 shares to obtain the desired 50.5% controlling interest. The negotiated agreement to buy 1,500,000 unissued shares at $21.00 per share was contingent upon a successful tender offer of 4,300,000 issued shares at $21.00 per share. *Weinberger*, 457 A.2d at 704.

243. The number of outstanding shares tendered to Signal totaled 7,800,000, representing 78.2% of the total outstanding shares. *Weinberger*, 426 A.2d at 1336.

244. *Weinberger*, 457 A.2d at 704.

245. *Id.*

246. *Id.*

247. *Id.* at 705.

248. *Id.*

249. *Id.*

250. *Id.*

251. *Id.*

252. *Id.*

$20 to $21 per share for their stock.[253] Signal then contacted Crawford and made the proposal.[254] While Crawford did suggest some modification with respect to the employee benefits, he did not object to the offered price.[255] Later Crawford suggested that in order to convince the minority board members to vote in favor of the cash out, Signal should offer $21.00 per share, which was still within the proposed range and was the price of the over subscribed tender offer.[256] Consequently, Crawford and Signal's management both thought the $21.00 per share price was fair, and would be approved by the minority board members.[257] This conclusion was based in part on the over subscription of the 1975 tender offer.[258]

Signal's management, believing UOP's minority shareholders would accept their offer, authorized negotiations with UOP's directors, and on February 28, 1978, issued a press release. The press release announced that negotiations were to begin for the purchase by Signal of UOP's 49.5% minority ownership.[259] At that time, UOP's stock was selling for $14.50 per share.[260] Two days later, on March 2, 1978, Signal issued another press release stating that its offering price was in the range of $20 to $21 per share.[261] In order to validate the fairness of Signal's offer, Crawford started negotiating with an investment banking firm to provide a fairness opinion.[262]

Crawford retained Lehman Brothers, an investment banking firm, to do the fairness study.[263] Crawford chose this firm for three stated reasons. First, Lehman Brothers had been UOP's investment banker for years.[264] Second, Mr. Glanville, a partner in Lehman Brothers, was also a director of UOP.[265] Third, Crawford thought time was of the essence and realized that Glanville's present knowledge of UOP's operations would expedite the analysis.[266] After negotiating the price

253. *Id.*
254. *Id.*
255. *Id.*
256. More than the desired amount of stock was tendered. *Id.* at 706. *See also supra* notes 242, 243.
257. *Id.* at 705, 706.
258. *Id.* at 705. *See also supra* notes 242, 243.
259. *Id.* at 706.
260. *Id.*
261. *Id.*
262. *Id.*
263. *Id.*
264. *Id.*
265. *Id.*
266. Mr. Crawford was told by Signal's management that time was of an essence. *Id.*

for the fairness opinion, Glanville accepted the assignment. Crawford and Glanville then discussed the value of UOP's stock.[267]

During the same discussions, Glanville indicated that $20 to $21 per share for UOP's stock was a fair value because it represented a 50% premium over the market price.[268] Believing time was of the essence, Lehman Brothers used three analysts who completed the fairness opinion in only three days.[269] By analyzing public information and interviewing Crawford, Lehman Brothers' team concluded that either $20.00 or $21.00 per share was a fair price.[270] Although it became apparent that the opinion was not needed as urgently as anticipated, Lehman Brothers performed no further analysis.[271] The results of the fairness opinion were given to the board members who represented the minority shareholders.[272] However, Signal never disclosed the hasty manner in which the study was completed.[273]

Based on the information provided, the UOP board members who were not affiliated with Signal voted to accept the offered price of $21.00 per share.[274] However, the non-affiliated board members voted without knowledge of either the manner in which the fairness opinion was conducted, or the existence of the prior study conducted by Signal's management, which indicated that $24.00 per share was a fair price and was still profitable for Signal.[275] The plaintiff, representing all the minority shareholders who did not exchange their stock for the merger price, attacked the validity of the merger seeking to either set the merger aside or to be compensated monetarily.[276] The chancery court found for the defendant, Signal; the plaintiff appealed.[277]

The Delaware Supreme Court reversed.[278] The supreme court found that Signal had breached its fiduciary duty by not disclosing to the non-Signal board members either the manner in which Lehman

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267. *Id.*
268. *Id.*
269. *Id.*
270. *Id.* at 707.
271. A board meeting was convened on March 6, 1978, but the merger was not submitted to UOP's shareholders until their annual meeting May 26, 1978. *Id.* at 707, 708.
272. *Id.*
273. *Id.* at 708.
274. *Id.* at 707.
275. *Id.* at 707-09.
276. *Weinberger*, 426 A.2d at 1335.
277. *Weinberger*, 457 A.2d at 703.
278. *Id.* at 715.

Brothers' fairness opinion was performed or the prior study indicating that $24 per share was still a fair price.[279] The first study, performed internally by Signal's management, indicated that Signal should purchase the remaining stock of UOP for a price between $21 and $24 per share.[280] The analysis indicated that Signal was projecting a return on investment of 15.7% if the stock was purchased for $21 per share and a 15.5% return if purchased for $24 per share.[281] The difference between $21 and $24 per share amounted to a $17,000,000 impact on the minority shareholders.[282] The Delaware Supreme Court indicated that because the .2% difference in the rate of return on investment was very small in relationship to the aggregate difference of $17,000,000, the information should have been given to the non-Signal board members.[283] Therefore, the directors affiliated with Signal, who owed a fiduciary responsibility to the minority directors, breached this duty by not disclosing the earlier study which indicated that $24 per share would be a fair price.[284]

The Delaware Supreme Court in *Weinberger* held that the directors affiliated with Signal and UOP had both dual capacities and dual responsibilities,[285] and thus should have treated the minority shareholders in a fair manner.[286] Further, the court held that the concept of fairness should be viewed as involving two components: "fair dealing and fair price."[287] The Signal affiliated directors had access to inside information which they did not disclose to the minority directors.[288] Neither the study that was prepared for the exclusive use of Signal's directors, nor the circumstances surrounding Lehman Brothers' fairness analysis was disclosed to UOP's minority directors.[289] Therefore, the majority directors were not "dealing fairly" with the minority directors.[290]

279. "Given these particulars and the Delaware law on the subject, the record does not establish that this transaction satisfies any reasonable concept of fair dealing . . . ." *Id.* at 712.

280. *Id.* at 709.

281. *Id.*

282. *Id.*

283. *Id.* at 712.

284. *Id.*

285. *Id.* at 710.

286. "When directors of a Delaware corporation are on both sides of a transaction, they are required to demonstrate their utmost good faith and the most scrupulous inherent fairness of the bargain." *Id.*

287. *Id.* at 711.

288. The inside information refers to the in-house study conducted by Signal's management. *Id.*

289. *Id.* at 712.

290. *See supra* note 279.

The second component of the "fairness" standard is fair price.[291] Price fairness relates to the "fair value" of UOP's stock.[292] In determining the "fair value," the supreme court found that the chancery court had erroneously used an analysis, propounded by the defendant's analyst, which applied the concepts of the traditional Delaware block valuation method.[293] The market value component was determined by looking at the five year market performance of UOP's stock.[294] During the five calendar year period from 1974 through 1978, the highest price at which UOP's stock was traded was $18.75 per share in 1974.[295] The average market price was slightly less than $14.00 per share.[296] Finally, the current closing market price on February 28, 1978, was $14.50 per share.[297] Therefore, based on any criteria, the market value was less than the $21.00 per share offering price.

After analyzing the market value of the stock, the defendant's analyst examined the firm's earnings value.[298] Looking at this component, the analyst noted that, due to the "nature of UOP's business," its earnings were both erratic and unpredictable.[299] The analyst determined the appropriate earnings multiplier by examining comparable companies.[300] The resulting range of values, from $14.31 per share to $16.39 per share, was substantially below the $21.00 per share offering price.[301]

Signal's analyst then turned to the asset value component.[302] Although the analysis of the asset value resulted in the highest value, the value was still less than the offering price of $21.00.[303] The analyst

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291. *Id.* at 711.

292. The Delaware Supreme Court stated that fair price includes " . . . all relevant factors: assets, market value, earnings, future prospects, and any other elements that affect the intrinsic or inherent value of a company's stock." *Id.*

293. *Id.* at 712.

294. *Weinberger*, 426 A.2d at 1364.

295. *Id.*

296. *Id.* at 1365.

297. *Id.*

298. *Id.*

299. Further, UOP's dividend policy was erratic with the 1978 first quarter dividend equal to the 1970 level. *Id.* However, it should be noted that accepted economic theory views diversification as a stabilizing force on earnings.

300. The analyst selected comparable companies and found their earnings values were between 6.5 and 7.0 times that of UOP's 1977 earnings per share and between 80% to 85% of UOP's 1977 book value. *Id.*

301. *Id.*

302. *Id.*

303. "The net asset value or book value was $19.86 at year-end, 1977, and $20.69 as of the end of the first quarter of 1978." *Id.*

equated asset value with book value and concluded that the asset value should be given very little weight because Signal was acquiring UOP as a going concern with no intention of liquidation.[304]

Finally, Signal's analyst departed from the traditional Delaware block analysis by examining the premium paid over the market price of comparable acquisition transactions.[305] In examining the premium paid over the market price of comparable firms, the analyst again concluded that the offered price was fair.[306] The chancery court held that this type of analysis proffered by the defendant's analyst was more in line with the traditional Delaware block method than the analysis propounded by the plaintiff's analyst.[307]

The plaintiff argued that at the time of the merger UOP's stock had a fair value of $26.00 per share.[308] His expert, Mr. Bodenstein, used two techniques to prove the stock's value.[309] First, he compared the premium paid over market price in ten other tender-offer merger combinations of similar size.[310] Secondly, he computed the fair value for UOP's stock based on a discounted cash flow approach.[311] Both analyses were based on the principle that fair value equals the value derived from owning 100% of an ongoing company.[312] The 100% owner would be free from constraint[313] and could do with the company as he pleased.[314] The 100% owner could maximize his wealth by changing the company's dividend policy, its investments, its overall risk, or even by liquidating its assets.[315] Neither of Bodenstein's analytical methods conformed to the established principles of the Delaware block valuation.[316]

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304. *Id.*

305. *Id.*

306. He found that the median premium was 41% and the average (mean) premium was 48%. Comparing the market price of $14.50 (on February 28, 1978) and the offered price of $21.00, the resulting 44.8% premium was deemed a fair premium to pay for the acquisition of UOP's minority interest. *Id.*

307. *Weinberger*, 457 A.2d at 712, 713.

308. *Id.*

309. *Id.*

310. *Id.*

311. *Id.*

312. *Weinberger*, 426 A.2d at 1359.

313. *See infra* text accompanying notes 449-51, 473-75.

314. *Id.*

315. *Id.*

316. As seen in *Kirby* and prior cases, the objective of the Delaware block valuation method is to determine fair value based on a "going concern" prior to the merger. *See supra* text accompanying notes 120-67.

The plaintiff's first approach determined that based on the premium in ten comparable transactions, the premium paid for UOP's stock should have been between 70% and 80%, with the median at 74%.[317] By applying these percentages to UOP's stock price on February 28, 1978, he concluded that the fair value of UOP's stock should have been in the range of $25.65 to $27.30 per share.[318] The discounted cash flow analysis also resulted in comparable values.

Bodenstein's discounted cash flow analysis determined the fair value to be between $25.21 and $30.59 per share.[319] The basic concept of this approach equates fair value to the sum of the net present values of cash generated from operations and from excess liquidity.[320] The first step in this method is to determine the excess liquidity and discount the excess liquidity to present value.[321]

In order to perform this first step, the company's assets were examined and any excess liquidity was assumed to be drained or reinvested in efficient investments.[322] The resultant cash flows from the elimination of the excess liquidity, or the return from the new, more efficient investments, was then discounted to present value.[323] Next, the cash flow from operations was determined and then discounted to its net present value.[324] The fair market value was the sum of the cash flows' net present values.[325] This figure, however, was not an exact calculation due to the imprecise determination of both the cash flows and the discount rate.[326]

The chancellor rejected both the cash flow determination and the determination of the discount rate.[327] The court noted that a small change in the discount rate would make a large difference in the resulting value.[328] Further, the lower court held that neither the concept that the fair value is equal to the value of 100% ownership nor

317. *Weinberger*, 426 A.2d at 1357.
318. *Id.*
319. *Id.* at 1358.
320. Excess liquidity as defined by Mr. Bodenstein is "the working capital that is not required to generate the earnings of the business from its operation." *Id.* at 1357.
321. *Id.*
322. Part of the excess liquidity hypothesized to be drained was the value of the unused timberlands. The analyst hypothesized that the timberland was sold and considered the funds generated cash. *Id.* at 1358.
323. *Id.*
324. *Id.*
325. *Id.*
326. *Id.* at 1358, 1359.
327. *Id.*
328. *Id.* at 1359.

the concept that the fair value is equal to projected discounted cash flows was the established law in Delaware.[329]

The chancellor, abiding by precedent, ruled that the proper method in valuations was the "Delaware Block" method which had been accepted since 1947.[330] Therefore, since the defendant's analysis was both logical and more closely resembled the concepts of the Delaware block method, the chancellor relied on the defendant's analysis and rejected the plaintiff's analysis.[331] However, the Delaware Supreme Court reversed and remanded to the chancery court.[332]

The Delaware Supreme Court ruled that the "Delaware Block" method was outdated and that the time had come for the acceptance of modern valuing techniques using accepted financial theories.[333] The supreme court held that, with the narrow exception that an increase in value resulting solely from the contemplation of a merger cannot be considered in determining fair value,[334] all other "elements of future value, including the nature of the enterprise, which are known or susceptible of proof as of the date of the merger and not the product of speculation, may be considered."[335] Further, a fair price requires consideration of all relevant variables.[336] The court noted that the new valuation concept would be more widely used and flexible, as well as reflective of the intent of the Delaware corporation statutes.[337]

The *Weinberger* court held that a more liberal approach to valuing minority interest must be taken so as to reflect the spirit of Delaware's statutory provisions regulating corporations.[338] The

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329. The chancellor wrote, "I do not find this approach to correspond with either logic or the existing law." *Id.* at 1360.

330. *Weinberger*, 457 A.2d at 712.

331. *Id.*

332. *Id.* at 715.

333. *Id.* at 712, 713.

334. *Id.* at 713.

335. *Id.*

336. *Id.*

337. The following quote illustrates Delaware's concern for fairness and flexibility, but is void of guidelines: "In view of the fairness test which has long been applicable. . . .[T]he expanded appraisal remedy [is] now available to shareholders, and the broad discretion of the Chancellor to fashion such relief as the facts of a given case may dictate . . . " *Id.* at 715. "[T]he Chancellor's discretion, the monetary award, if any, should be in the format of monetary damages, based upon on entire fairness standards, i.e., fair dealing and fair price." *Id.* at 714.

338. After 1981, the term "fair value" was repeatedly emphasized in 8 Del. Code § 262. "Clearly, there is a legislative intent to fully compensate the shareholders for whatever their loss may be, subject only to the narrow limitation that one cannot

legislative history of sections 262(f) and 262(h) of the Delaware Code place increased emphasis on determining the "fair value" of the minority shareholders' interest.[339] The legislative intent is to "fully compensate shareholders for whatever their loss may be, subject to the narrow limitation that one cannot take speculative effects of the merger into account."[340] Therefore, the court found that the analysis of the type offered by the plaintiff's analyst must be considered in determining fair value.[341] Declaring that the determination of fair value using the structured Delaware block method is no longer the law in Delaware,[342] the court stated that more flexible techniques must be used to determine fair value.

The Delaware Supreme Court, by allowing more flexible determinations of fair value, held that damages based on complete monetary rescission were probably not necessary in *Weinberger*.[343] But, the court did not preclude consideration of "elements" of rescissory damages if the chancellor determined that they were appropriate.[344] Although the supreme court found a breach of fiduciary duty as it had in *Lynch*, the court found that the expanded concept of fair value determination makes appraisal an adequate remedy.[345] On remand, the plaintiff would be able to test the fairness of the $21.00 offer by considering all of the relevant factors.[346] No longer are the plaintiff's arguments constrained by the Delaware block valuation method.[347] In summary, the appraisal remedy, as expounded in *Weinberger*, expanded both the use of modern financial analysis[348] to determine "fair value" and the

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take speculative effects of the merger into account." *Weinberger*, 457 A.2d at 714.

339. The old sections of the Delaware Code title 8 § 262 (f) & (h) merely used the term "value" when referring to the objective of the appraisal remedy. However, the sections were changed to state that the objective of the appraisal remedy was to find the "fair value" of the minority shareholders' interest. *Id.*

340. *Id.*

341. *Id.*

342. *Id.* at 712, 713.

343. *Id.* at 714.

344. *Id.*

345. *Id.*

346. *Id.*

347. *Id.* at 714, 715.

348. The court noted:

> We believe that a more liberal approach must include proof of value by any techniques or methods which are generally considered acceptable in the financial community and otherwise admissible in court, subject only to our interpretation.

Id. at 712.

concept of "going concern" to include consideration of the value of 100% company ownership.[349]

SECTION II—VALUATION THEORIES

The *Weinberger* court allowed the use of modern financial analysis to determine the "fair value" of a minority shareholder interest in freeze-out situations.[350] This section will explore some modern valuation techniques that are relevant to finding the "fair value" of minority shareholder interests. This note then examines the range of possible arm's length values where the "fair value" of minority interests might lie.[351] The determination of various "values" is a function of economic theory.

As "positive" micro-economic theory purports,[352] one purpose of financial theory is to find the relationships and relative effects of real world variables.[353] One such relationship is the effect of dividend policy, earnings, cash flow, information, and numerous other factors on the market price of stock.[354] If the world consisted of only two variables, the process would be merely to change one variable and observe the impact on the other. However, in order to determine these relative relationships in a world with many variables, it is necessary to hold constant some variables, while other variables are being tested.[355] One method of accomplishing this makes use of several assumptions.

Financial theory is based on assumptions that are necessary both in its development and operation.[356] As the various theories were developed, they have increased in sophistication by incorporating more variables.[357] However, as a model becomes more complex, its ability

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349. *Id.* at 714.

350. *See supra* note 348.

351. *See infra* text accompanying notes 424-84.

352. For a good discussion of law and economics see: Strasser, Bard, and Arthur, *A Reader's Guide to the Uses and Limits of Economics Analysis with Emphasis on Corporate Law*, 33 *Mercer* LAW REV. 571 (1982). The article describes the concepts of positive and normative economics. [hereinafter cited as Strasser].

353. J. MAO, QUANTITATIVE ANALYSIS OF FINANCIAL DECISIONS 12 (1969) [hereinafter cited as Mao]. Variables may be classified in two broad categories: exogenous variables, those given by the decision maker; and endogenous variables, whose value is determined by the model.

354. Smidt, *A New Look at the Random Walk Hypothesis*, 3 THE JOURNAL OF FINANCIAL AND QUANTITATIVE ANALYSIS 235 (Sept. 1968). [hereinafter cited as Smidt].

355. Strasser, *supra* note 352, at 576.

356. *Id.*

357. The complexity of a mathematical model is limited, among other things, by the number of variables, given the number of equations. C. FRANK JR., STATISTICS AND ECONOMETRICS 317 (1971) (hereinafter cited as Frank).

to portray the relationships between its component variables becomes weakened because of the effects of the interdependence of the variables. This lessens the model's usefulness in predicting the changes in its variables. Therefore, in order to be useful, every economic or financial model must retain a degree of simplicity.[358] No single model or theory can be used to explain all real world variable relationships. Consequently, every financial theory and resultant model used to predict the reaction of a number of variables by varying others must contain certain assumptions, which hold some of the variables at a constant level. In short, even with respect to the widely accepted efficient market hypothesis, assumptions are necessary.[359]

Efficient Market Approach

The efficient market hypothesis' main postulate is that given an array of complex assumptions, the market price of a security is equal to, or nearly equal to, its intrinsic value.[360] The market price might not reflect the intrinsic value, but the price does reflect all past events and available information.[361] Therefore, if the efficient market hypothesis is valid, a security's market price will at least be a good

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358. Strasser, *supra* note 352, at 576.

359. Fama, *Random Walks in Stock Market Prices*, 21 FINANCIAL ANALYST JOURNAL 55 (Sept.-Oct. 1965) [hereinafter cited as Fama 1965].

360. Professor Fama divided the efficient market hypothesis into three operational categories. The divisions were based on the amount of information investors use to evaluate the value of a security. These categories are:

(a) Weak form efficiency: For this, the lowest level of the efficient market hypothesis, to be valid the hypothesis assumes that most investors utilize historical price and financial data to value the securities. Therefore, no investor can make excess returns by using historical data.

(b) Semi-strong efficiency: This level requires the assumption that investors use all publicly available financial information to value securities. Therefore, no investor can make excess profits by using any publicly available information.

(c) Strong form efficiency: This form requires that investors know all information, both public and inside, which they use to value security prices. Therefore, an investor cannot make excess returns even using inside information.

Fama's theory as in most empirical studies, does not contend that the strong form efficiency describes the real world. The strong form is merely an extreme yardstick to measure the degree of efficiency that might exist in a capital market. Fama, *Efficient Capital Markets: A Review of Theory and Empirical Work*, 25 THE JOURNAL OF FINANCE. No. 2, 383 (May 1970) [hereinafter cited as Fama 1970].

However considerable empirical support does exist for both the weak and semi-strong form of the efficient market hypothesis. Fischel, *Efficient Capital Market Theory, the Market for Corporate Control, and the Regulation of Cash Tender Offers*, 57 TEX. L. REV. 1, 3 n.9 (1978).

361. Fama (1965), *supra* note 359, at 56.

estimate of its intrinsic value.[362] Further, the market price will vary randomly around this intrinsic value.[363]

Professor Fama developed the "random walks" hypothesis; a theory that attempts to explain random movements of stock prices.[364] The random movement around the intrinsic value of the stock results from the market participants' different notions of the stock's intrinsic value.[365] Due to the large number of market participants over-valuing and under-valuing the stock, their bidding will cause the stock's price to vary around its intrinsic value.[366] However, to reach this conclusion certain assumptions are necessary.

First, the primary premise in the random walk theory is that the stock market is efficient. An efficient market exists when a large number of rational profit maximizers with free access to information concerning both the firm and outside factors attempt to predict the future market values of the firm's stock.[367] Contained in this definition are four assumptions:

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362. *Id.* at 59.
363. *Id.* at 56.
364. *Id.* at 56-59.
365. *Id.* at 56.
366. *Id.*
367. There are assumptions required in various degrees for each level of the efficient market hypothesis. However, as the assumptions are relaxed, the market, by definition, will be less efficient. Varying degrees of market efficiency can be illustrated by first allowing all investors access to all relevant information about the company, both public and inside information. Each investor, assuming he is economically rational, will form similar notions of risks and returns. Since risk is still present even if all investors calculated identical risk parameters, they still might lose money by purchasing the firm's security.

The analysis does not require seeing into the future. For the efficient market hypothesis to be valid, it only requires that the investors have access to information. The information must be relevant to determining the potential returns and the firm's risk. While a few investors might value the firm extremely high or low, the bidding for the purchase of the securities will cause the securities price to vary around its intrinsic value. Further, most securities are held by institutional investors who, with the same information available, will probably reach similar notions of risks and returns.

If investors perceived only slight variances in risks and returns from an investment, each investor's expected value of the firm would be similar. However, the investors' perceived values would show more variance, if their perception of the investment's risks and returns were different. This might be the result of allowing some investors complete access to relevant information, while withholding information from other investors.

The investor with access to more relevant information could make better judgments as to the firm's potential returns and risk than the investors without such information. Therefore, as the information is released to the other investors, they also will perceive similar risks and returns, reflecting their notions of the firm's value.

1. Market participants are rational profit maximizers.[368]

2. Market participants are numerous.[369]

3. The market participants have perfect or near perfect knowledge.[370]

4. Market competition will both instantaneously cause new information to be known and affect the intrinsic value of the stock, which is reflected in this market price.[371] In summary, the implication of the efficient market theory is that the stock prices are the best estimators of the intrinsic value of the stock. If the "random walk" theory[372] is valid and the market is efficient, the market price of a stock is a good estimate of its intrinsic value.[373] However, if information not available to the market participants was not discounted by the market, the stock's price might not be a good estimate of the stock's intrinsic value.[374]

Discounted Cash Flow—Investment Opportunities Approach

The efficient market hypothesis, at least in its weak and semi-strong form,[375] is generally accepted by the financial community.[376]

For a good discussion on economics of information see: Hirshleifer and Riley, *The Analytics of Uncertainty and Information—an Expository Survey*, THE JOURNAL OF ECONOMIC LITERATURE 1375 (Dec. 1979).

Further, empirical analysis shows that above average "gross returns" can be made with the use of information not available to the general market. However, while gross returns can be increased with additional information, the cost of the information offsets the increase. Therefore, the empirical results are consistent with both the weak and the semi-strong efficient market hypothesis. *See* Cornell and Roll, *Strategies for Pairwise Competition in Markets and Organizations*, THE BELL JOURNAL OF ECONOMICS 201-13 (Spr. 1981) (Shows that the individual using costly information will out perform the market, but only in terms of gross returns.)

368. This is the traditional assumption of economic analysis. Strasser, *supra* note 352, at 581-85.

369. *See supra* note 367.

370. *Id.*

371. Fama, Fisher, Jenson, Roll, *The Adjustment of Stock Prices to New Information*, 10 *International Economics Review* No. 1, 1-21 (Feb. 1969).

372. Fama (1965), *supra* note 359, at 58.

373. This is consistent with all three levels of the efficient market hypothesis.

374. *See supra* note 367.

375. *See supra* notes 359, 360.

376. The efficient market hypothesis was considered bizarre by many in 1960, "but by 1970, it was generally accepted by academicians and by many financial institutions." J. Lorie and R. Brealey, MODERN DEVELOPMENTS IN INVESTMENT MANAGEMENT 101 (1972).

However, even among analysts who accept the efficient market model, its application is limited to situations where a public market price is available.[377] Therefore, in the case of closely held companies or in situations where the efficient market model is not applicable,[378] the analyst might use the discounted cash flow method of firm valuation.[379]

The discounted cash flow method is another alternative to valuing a firm or asset as a going concern.[380] The model consists of the summation of cash flows projected over a period of time discounted back to present value.[381] The model's major premise is that the value of a firm is derived from its ability to generate a return to the investor over a period of time.[382] The cash flows can be in the form of either dividends, earnings, or net cash flows.[383] These cash flows are pro-

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377. The efficient market method would not be applicable where there is a disparity of information. If an analyst were trying to determine the value of a firm to someone with undisclosed inside information, he must look somewhere other than the security's market price. Since the stock market price would not reflect the unknown information, the stock market price would not reflect the value to the insider. The same lack of information occurs with respect to closely held companies, only on a broader scale.

In the case of privately held firms, the discounted cash flow basis can be viewed as an approximation of the market value. The analysis requires the investor to calculate the potential return generated by the firm as well as the risks of the returns materializing. *See supra* note 367.

378. *See supra* note 377.

379. This type of analysis is theoretically performed by a large number of investors with respect to publicly held companies. Their resultant values determine the market price of the security. Fama (1965), *supra* note 359.

380. Investors making investment decisions concerning the acquisition of business assets undergo the same type of analysis. The economic value of an asset is based on its ability to generate a return. Even jurisdictions using the Delaware block valuation method, valued leased property on the basis of the lease payments. Sporborg v. City Speciality Stores, 35 Del. Ch. 560, 123 A.2d 121 (1956).

However, the Delaware court in Francis I. duPont & Co. v. Universal City Studios, Inc., 312 A.2d 344, 352 (Del. Ch. 1973), citing *Poole*, did not allow the market value of fully amortized films to be determined by discounting the film's projected income. *See also infra* note 383.

381. Mathematically the model is the same as the discounted earnings approach used in the traditional analysis. The major difference between the Delaware block concept of discounted earning value is not the theory; the difference is in determining the component parts. Mao, *supra* note 353, at 464-93.

382. This was one of the approaches used by the plaintiff in *Weinberger*. *See supra* text accompanying notes 319-26.

383. Early cash flow methods valued the firm using either dividends or net earnings. The dividend model's premise is that the investor's perception of the firm's value is a result of the firm's ability to pay dividends. The investor perceives a current income stream, rather than capital appreciation as the primary way to realize income. This argument is countered by the analysts who advocate the net earnings method.

jected over the life of the investment.[384] At the termination of the investor's holding period, the firm's market value is the summation

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The net earning advocates point out that capital appreciation is a significant portion of an investor's expected return. As a result of the income tax structure, dividends are not necessarily the optimum method of maximizing shareholder's wealth. The firm's earnings are first taxed on the corporate level. Then the dividends are again taxed as ordinary income to the investor. However, if the investor obtains his income by selling a portion of his stock, he incurs some transaction costs, but he might be able to receive a reduced income tax rate through capital gains. Further, by allowing the corporation to retain earnings, the net earnings can be reinvested and compounded with payment of only one income tax. The significance of retained earnings reinvestment becomes more pronounced as the investor's tax rate becomes larger.

Most investors in public markets are financial institutions, banks, trust companies, insurance companies, etc., thus their marginal tax is forty-six percent. For example, if the corporation has a pre-tax earnings of $100 and a marginal tax rate of forty-six percent, the after-tax balance left for reinvestment or the payment of dividends is $54. If the corporation can receive 10 percent on its investments, the $54 investment would return $5.40 in the first period, which if retained would increase the value of the firm. Now if the $54 is paid to a stockholder also with a 50 percent marginal tax rate only $26.00 is left for reinvestment by the stockholder. Therefore, for the stockholder to receive a return equal to $5.40, he must have investment opportunities returning 21 percent. An investment returning 21 percent will probably have considerably more risk than one returning 10 percent.

Even if the investor has better investment opportunities than the company, he can maximize his return by selling his stock to reinvest in the more profitable endeavors. With proper tax planning, the investor would benefit from capital gains, resulting in reinvestment of a larger gross amount. This line of argument supports the theory that investors value a firm by analyzing the firm's expected net earnings, rather than the firm's dividend payout. *See* Bhattacharya, *Imperfect Information, Dividend Policy and 'The Bird in the Hand' Fallacy*, BELL JOURNAL OF ECONOMICS 259-70 (Spring 1979). Bhattacharya developed a model, which explains why in spite of the tax disadvantage firms pay dividends. The reason for a dividend payout is the favorable signaling effect investors perceive.

However, the net-earnings analysis is not without problems. Net earnings are the result of accounting conventions, which not only can be changed but also might contain non-cash charges. Cash flow analysis considers changes in accounting conventions that have no effect on the firm's disposable cash. By changing accounting conventions, such as the method of inventory accounting or the rate of depreciation, reported net earnings may be changed. Unless the tax records are also changed, there would be no real change to disposable cash.

Two empirical studies show that investors are not misled by changes in accounting conventions. These studies indicate that discounting net cash flows are appropriate. Therefore, cash flow analysis is merely the normalizing of net earnings for changes in accounting conventions that do not affect disposable cash. Kaplan and Roll, *Investor Evaluation of Accounting Information: Some Empirical Evidence*, JOURNAL OF BUSINESS 225-57 (April 1972). Kaplan and Roll examined two types of accounting changes which increased earnings per share, but had no effect on cash flows. The results indicated that investors look beyond the effect on earnings per share to the effect on cash flows.

384. The life of the investment is not the same as the investor's holding period. Rather, the investment life refers to the period of time the investment generates cash, which could be longer than the investor's holding period.

of the remaining discounted cash flows, the value at which the investor could then dispose of his investment.[385] To initiate the cash flow analysis, projecting the cash flows is required.

Cash flow projections may be based on historical data.[386] But a better way to project cash flows is by means of the investment opportunities approach, which examines the firm's capacity to generate cash.[387] Using this approach, the projected cash flows should be derived from three sources: first, the current cash flows generated by the firm's present investments;[388] second, the cash flows generated from the firm's expected present and future investment opportunities;[389] third, in the case of excess liquidity, excess cash can be considered the same as generated cash.[390] The cash flows are then discounted by an interest rate reflecting both the time value of money (risk free rate), and the risk related to the firm's ability to generate the projected stream of cash flows.[391]

The risk free portion of the discount rate is similar to the price

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385. Mathematically, the cash flow model is similar to the earnings model. The equation would be: $V = \Sigma\ CF_n/(1 + r)^n$

V = Value of company.

n = number of periods.

r = discount rate reflecting: (1) time of value money, (2) uncertainty related to the projected cash flows.

CF = projected cash flows.

If the investor sold at the end of year (period) #2, the value of the firm at the time of sale would be equal to the projected stream of cash flows starting with the next period, i.e. year #3.

386. The Delaware block method generally used an average of the firm's preceding five years earnings to determine the projected earnings used in the discounted earnings approach. *Delaware Racing*, 213 A.2d at 212. *Lynch*, 402 A.2d at 12. *See also supra* note 97.

387. The firm's record of past cash generations might be indicative of future performance, but this should not be assumed without examination. The analyst should explain the basis for the past and expected future cash flows. Questions to be considered are: What projects and factors allowed the firm to generate its past cash flow? Are the same projects continuing to generate these cash flows, or will the existing projects require a substantial increase in capital reinvestment to maintain past levels of cash flows? Are new or different cash-generating projects being planned? This type of analysis, together with a statistical analysis of the past record adjusted for future expectations, should provide a more realistic approximation of the firm's future performance.

388. *Id.*

389. *Id.*

390. *Id.*

391. The plaintiff in *Weinberger* used the excess cash as an element of his cash flow projection. This is not inconsistent when finding the value of 100 percent owner-

a consumer demands to forego current consumption.[392] By foregoing present consumption he is entitled to increased consumption in the future.[393] The price of foregoing current consumption has been referred to as the risk free rate or time value of money.[394] This risk free rate might be approximated by the rate of short term government securities.[395] The portion reflecting the firm's business risk is more difficult to estimate.

The second portion of the discount rate must reflect the firm's business risk.[396] When the portion of the discount rate reflecting the firm's business risk is added to the first portion, the risk free rate, the sum equals the firm's cost of equity capital.[397] The cost of equity

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ship. The 100 percent owner could drain off any excess liquidity to maximize his wealth.

The discount rate, which is the sum of the risk free rate and the rate reflecting the firm's risk is equal to the company's cost of equity. The cost of equity is the return a reasonable investor would expect to receive for investing in a venture given its risk. Mao, *supra* note 353, at 466. *See also infra* note 396.

392. Even in a world of certainty, a person would rather receive money today than a promise to receive the money in the future. Therefore, money received today is more valuable than money received at a later date.

393. T. Copeland and J. Weston, FINANCIAL THEORY AND CORPORATE POLICY, 115-18 (2nd ed. 1983) (hereinafter cited as Copeland).

394. *Id.* at 116.

395. Even United States government securities, which have virtually no default risk, are susceptible to interest rate risk. For instance, hypothesize an investor who purchases U.S. government bonds paying 10 percent. But before maturity the effective yield on similar bonds increases. The investor will not be able to sell his bonds unless he discounts their price to the extent that the purchaser will receive the new higher market yield. Therefore, although default risk is minimal, the interest rate risk can be substantial with long-term securities. So to approximate the risk free rate, the yield of very short-term government securities such as 90-day treasury bills should be used.

396. The concept of total firm risk is generally subdivided into two categories; systematic and unsystematic risk. Systematic risk is the risk of the market. If an investor held and equal investment in every market security, his return would fluctuate as the market return fluctuates. This fluctuation of return is caused by systematic risk. However, a single firm or an investor who holds less than a full market portfolio will also experience unsystematic risk. Unsystematic risk reflects the particular characteristics of the firm.

A firm's unsystematic risk reflects on the firm's ability to generate revenues and to control expenditures. The level of unsystematic risk is, among other things, a function of the firm's efficiency and its level of fixed expenses, both operational and financial. Unsystematic risk can be reduced by diversification. An investor who owns a equal share of all market securities only encounters systematic risk. He does not encounter unsystematic risk. Therefore, the more securities held by an investor, the less unsystematic risk he will encounter. But systematic risk will still remain. For a good discussion of systematic risk see Copeland, *supra* note 393, at 191-94.

397. *Id.*

can also be viewed as the rate an investor requires for an equity investment in the firm, given the firm's level of risk.[398] Assuming investors are risk adverse, if the investor felt firm A was more risky than firm B, he would require a greater return from firm A to compensate him for accepting the additional risk.[399]

The following factors are generally believed to result in an increase or decrease in the perception of the firm's business risk.[400] The investor views the volatility of the firm's cash flows as an indicator of the firm's business risk level.[401] That is, an investor will require a chance for a higher return if more uncertainty is associated with the return. Therefore, a firm that has highly volatile cash flows must show more potential for gain to maintain its value than a firm with stable cash flows.[402] Anything that affects the variance of the firm's earnings will be detrimental to the firm's value, unless the increase is associated with a proportional increase in the firm's expected return.[403]

The firm's debt level is one such factor that can increase the volatility of the firm's earnings without decreasing the firm's value.[404] Increased debt level has the effect of increasing the fixed costs of the firm. As fixed expenses are increased, whether from operations or from financing requirements, the firm's cash flows become more volatile given a change in sales volume.[405] However, within limits, the

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398. *See supra* notes 391, 396.

399. Most economic analysis assumes investors are risk adverse. The risk adverse investor prefers certainty and will pay for certain investments by accepting lower expected returns. The magnitude of an investor's risk adverse trait will vary, and can best be measured by utility theory. For example, an investor might have more disutility from losing $3.00, than positive utility from gaining or winning $5.00 in a game of coin toss. Therefore, to induce him to buy a chance to win, to play the game, the prize must be increased or the possible loss decreased. Copeland, *supra* note 393, at 84-92.

400. *See supra* note 396.

401. Empirical evidence indicates that increasing the dividend payout might act as a favorable signal to stockholders and investors about the firm's risk. *See* Ross, *"The Determination of Financial Structure" The Incentive Signaling Approach*, BELL JOURNAL OF ECONOMICS 23-40 (Spring 1977) (hereinafter cited as Ross).

402. *Id.*

403. Although debt increases the firm's risk by increasing the level of the firm's fixed cost, the market views an increase in debt as a positive signal. Assuming the firm is not close to cash insolvency, the market generally perceives that the increase in risk from an increase in the debt level is offset by the potential increase in cash flows. However, an adverse signal regarding the firm's risk might result from increasing both debt levels and dividend levels. *See* Ross, *supra* note 401.

404. *Id.*

405. *Id.*

increase in risk is offset by a perceived increase in investment opportunities. Therefore, an increase in the firm's debt level can result in an increase in the firm's value.[406] The problem then is that given the firm's debt structure, past earnings performance, and future investment expectations, the financial analyst must develop both projected cash flows and an appropriate discount rate.

The analyst has at least a few analytical methods at his disposal. First, the analyst might use the firm's past performances along with annual reports and projections to predict the future cash flows.[407] While most empirical evidence now shows that past cash flows alone are not good indicators of future cash flows,[408] historical data might indicate the firm's risk performance.[409] Unless the firm has recently changed its risk parameters, the appropriate discount rate may be determined from the historical data.

Second, the projections derived directly from the firm's plans, if available, might provide a good basis for projecting future cash flows.[410] They will at least indicate the cash flows the firm is planning to generate. Further, the projections would indicate the type of investments contemplated by the firm, which would indicate the investment's risk, and therefore the firm's risk.[411]

The accuracy of the cash flow projection is accounted for in the discount rate.[412] To determine the appropriate discount rate, the analyst might examine other firms with similar product lines, similar investments, or similar volatility of earnings.[413] Therefore, industrial classification or pseudo-industrial classification can provide forms with similar risk parameters that could be used to determine the appropriate discount rate.[414] Once the projected cash flows are established and the appropriate discount rate is determined, the result

406. *Id.*

407. For a good example see Copeland, *supra* note 393, at 526-31.

408. *Id.*

409. Elton and Gruber, *Improved Forecasting Through the Design of Homogeneous Groups*, 44 JOURNAL OF BUSINESS I, 75 (Oct. 1971) [hereinafter cited as Elton]. This article describes procedures for estimating each of the variables which play a role in stock valuations using earnings. *See also* Alers, *SEM: A Security Evaluation Model, reprinted in* E. ELTON AND M. GRUBER, SECURITY EVALUATION AND PORTFOLIO ANALYSIS 227 (1972).

410. *Id.*

411. *Id.*

412. *See supra* note 391.

413. *See* Elton, *supra* note 409.

414. *See* Elton, *supra* note 409.

is the value of the company under the discounted cash flow method.[415] The tangible asset analysis is a valuation approach less theoretical than the discounted cash flow analysis.

Tangible Asset Analysis

The concept of tangible asset analysis states that the firm's value is equal to the sum of its net tangible asset values.[416] Tangible asset analysis can be divided into two categories: (1) tangible book value[417] and (2) liquidation value.[418] Tangible book value is almost universally found to be a totally inappropriate method of valuing a firm.[419] Assets on the firm's books amy be drastically over or under stated.[420] The market value of assets such as patents, natural resources, real estate, and physical assets, are especially susceptible to wide divergence from the book value. Even if an asset's market value is accurately portrayed by its book value, book value never includes the cost of disposal.

Liquidation value, or net asset market value, examines each major asset and determines what it can be sold for on the market. Therefore, the asset value analysis is equivalent to the sum of the net market values of the firm's liabilities and assets.[421] If large blocks of land or assets exist, the disposal cost must be factored into the analysis. The major drawbacks to this type of analysis are its expense and time consumption.[422] However, net asset value can accurately portray the minimum "fair value" of 100 percent ownership in a "going concern."[423]

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415. After the elements of the model are determined, the final step is the mathematical calculation. *See supra* note 385.

416. Net tangible asset value is the net of the tangible assets' market value, less liabilities. Intangible assets such as goodwill are not included in the calculation.

417. Book value is the value of the assets as shown on the company's books.

418. Liquidation or market value is the value that net assets have on the open market, i.e. the price a willing buyer and a willing seller under no compulsion to buy or sell would pay for the assets.

419. Investors value assets by looking to the cash flows which the assets are capable of producing, not the book value, which results from a variety of accounting principles. *See supra* note 155.

420. Because book value is typically on a cost basis, it is related to the length of time the asset has been held, which might not be relevant to the asset's market value. This is true because depreciation or appreciation schedules are generally unrealistic.

421. Once the component values and liabilities are found, the process becomes merely arithmetic balancing.

422. Appraisals of assets such as land, equipment, and inventory are both time consuming and expensive.

423. *See infra* text accompanying notes 473-75.

SECTION III—EXPANDED FAIR VALUE CONCEPT

In order to decide which valuation theory is most useful with respect to a given set of facts, the question of what is "fair value" must first be considered. Is fair value the value to a minority shareholder before the merger; the "going concern" concept of the Delaware block as in *Kirby*? Or, is fair value the value of 100 percent ownership in the company, as the plaintiff argued in *Weinberger*? The Delaware Supreme Court in *Lynch* resorted to a remedy other than appraisal.[424] The bounds of the rescissory remedy used in *Lynch* are greater than the traditional "going concern" constraints of the Delaware block.[425]

Although the Delaware Supreme Court in *Lynch* chose rescissory damages, the later *Weinberger* decision, also involving a breach of fiduciary duty, did not use the rescissory damages approach.[426] Rather, the *Weinberger* court looked to a middle ground in the form of an expanded valuation remedy, which contains elements of rescissory damages. Therefore, in expanding the appraisal remedy, the Delaware Supreme Court not only allowed the use of modern valuation techniques, but also expanded the traditional definition of "going concern" value to encompass consideration of the value of 100 percent ownership.[427] This section will first examine the possible arm's length "going concern values," which after *Weinberger* may now be considered in freeze-out "fair value" determinations.[428] This section will then examine some methods used to determine the various possible arm's length values, using the types of financial analyses previously discussed.[429]

The Range Of Possible Arms Length Values

As previously detailed, the *Weinberger* decision not only expanded the appraisal remedy to include modern valuation techniques, but also expanded the concept of "going concern" value.[430] The Delaware Supreme Court in *Weinberger* placed the burden of proving fairness on the party breaching the fiduciary duty, because the majority's directors were not dealing with the minority directors at arm's length.[431]

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424. The Delaware Supreme Court in *Lynch* resorted to rescissory damages. *See supra* text accompanying notes 214-37.

425. *Id.*

426. *See supra* text accompanying notes 333-49.

427. *See supra* text accompanying notes 238-349.

428. *See infra* text accomapanying notes 430-55.

429. *See infra* text accompanying notes 456-84.

430. *See supra* text accompanying notes 333-49.

431. *Weinberger*, 457 A.2d at 703.

The court's holding arguably expands the fair value concept, where breach of fiduciary duty is found, from the narrow "going concern" value, the value of the minority ownership, to any value in the range of possible arm's length values supportable by modern financial analysis.[432] The plaintiff in *Weinberger* argued that the fair value should be the value based on 100 percent company ownership.[433] The Delaware Supreme Court held that the plaintiff could test the fairness of the offered price against the value representing 100 percent company ownership.[434]

Under the *Weinberger* analysis, the fair value could equal the value to a 100 percent owner in cases where a breach of fiduciary duty is found. However, the 100 percent ownership value is but one value which could result from an arm's length acquisition of a minority shareholder interest.[435] Therefore, an examination of the possible values resulting from an arm's length transaction is appropriate. To facilitate this analysis, four levels of value, spanning the range of possible arm's length values, will be considered. Ranging from a low value to a high value, the four values considered are: (1) the value of a minority interest,[436] (2) the value of a controlling interest,[437] (3) the value of a 100 percent owner,[438] and (4) the value to an acquirer.[439]

Value Of A Minority Interest (The Lowest Value Considered)

The value of a minority ownership interest in a company is the lowest value on the spectrum of possible arms length values considered.[440] The minority owner's value is derived from his proportional share in the cash flows, which might result from both dividends

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482. *Id.* at 712-15.

433. *Weinberger*, 426 A.2d 1359.

434. *Weinberger*, 457 A.2d at 714.

435. Conceivably, an infinite number of possible arm's length values can result between the value limits of each party. However, the maximum arm's length value would be the value to the buyer. Likewise, the lowest arm's length value would be the value to the seller.

436. Since this note is concerned only with the purchase of the stock from the minority shareholders, the value to the minority shareholder, who is the seller, is the lowest possible arm's length negotiated value.

437. This note will illustrate that the value of the controlling interest is higher than the value of a minority interest.

438. The value of 100 percent ownership was the value argued for by the plaintiff in *Weinberger*. This section will point out where the value to a 100 percent owner lies on the spectrum of arm's length values.

439. Due to the possibility of synergy, the value to the acquirer, or buyer, is the highest possible arm's length negotiated value.

440. The value of a minority interest in a going concern was the objective of the Delaware block valuation method. *See supra* note 108.

and value appreciation of the company.[441] However, the minority owner is at the mercy of management's ability and policies.[442] On occasion the minority owner will not agree with management's policies or efficiency, in which case his most viable alternative is to sell his stock.[443] However, the market in which he sells his stock, will be aware of the firm's level of management efficiency.[444] Therefore, the arm's length value of a minority interest will reflect the potential buyer's limited control over both management's decision making ability and management's level of efficiency. Further, the value of the minority's equity is the lowest possible arm's length transaction value, because the minority owner does not have any control over the company other than his ability to organize other investors in order to achieve a controlling block.

Value of Controlling Interest

The value of the controlling interest is greater than the value of a minority owner, because of the controlling interest's power to change management. While the minority owner generally must accept management's decisions, the controlling interest can force management to change undesired policies, or can simply change management.[445] The value of control is derived from the potential of improving management efficiency, thus increasing the value of the company. However, the controlling interest still has limits.

The controlling shareholder, through his directors, owes certain fiduciary responsibilities to the minority shareholders.[446] For example,

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441. *See supra* text accompanying notes 375-415.

442. H. HENN, LAW OF CORPORATIONS 95 (2d ed. 1970) (hereinafter cited as Henn).

443. Although this area is beyond the scope of this note, the writer recognizes that special veto provisions, giving the minority shareholder more authority, exist in corporations. However, the general rule in public corporations is that of majority shareholder rule. *Id.* at 358-405, 525.

444. Unless a new investor in the same security has additional stock, or control of additional stock, his voting, and therefore control over the corporation, is on the same level as the previous shareholder. *Id.*

445. The controlling interest is limited in a number of ways. These include, for example, when meetings can be called, certain fiduciary duties, etc. However, for the purpose of this note, it is sufficient to point out that the controlling interest has the authority to effectuate a management change, which makes his ownership interest more valuable than a minority shareholder's interest. For limits on control see Henn, *supra* note 442.

446. *Lynch*, 402 A.2d at 7 (Directors representing the controlling shareholder failed to disclose material facts concerning a tender offer); *Weinberger*, 457 A.2d at 703 (The majority shareholder was cashing out the minority shareholders, but failed to disclose relevant information to the directors representing the minority shareholders).

the controlling shareholder cannot expropriate funds and assets from the company for his own interest.[447] If the controlling shareholder has investments in other companies, he must be careful not to divert business or otherwise take advantage of his dual position with both companies at the expense of the minority owners.[448] Consequently, the controlling owner, while having more power and value than the minority owner, is not free to exercise unlimited discretion as is the 100 percent owner.

Value of 100 Percent Owner

Absent any restriction from debt covenants, the 100 percent owner is free to do with a company as he pleases.[449] If the 100 percent owner owns more than one economic entity, he does not have to be concerned with a conflict of interest with respect to any minority ownership. The 100 percent owner has complete and ultimate control of the company.[450] He can liquidate the company, pay dividends, pass through tax savings, retain the earnings sheltered by a lower corporate tax, maximize his wealth, or give the company away. The value of 100 percent company ownership is therefore greater than the value of the controlling interest.[451] Although the value of 100 percent ownership is greater than the value of controlling interest, the highest possible value might be the value to the acquirer.

Value to the Acquirer

A particular shareholder might have a special use for 100 percent ownership of a company which both enhances the value of his present firm, or economic entity, and the value of the acquired firm.[452]

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447. *Id.*

448. Henn, *supra* note 442, at 457.

449. The 100 percent owner does not owe a fiduciary duty to any other equity member. However, he may owe some duties to debt holders via loan covenants.

450. *Id.*

451. How much more valuable 100 percent ownership is than controlling interest depends upon the individual attributes of the parties. The value of the controlling interest and 100 percent ownership could be very close if the shareholder would not greatly benefit from 100 percent ownership. *See infra* note 453.

452. This increase in value could be the result of factors such as:

1. Economies of scale in management, operations, accounting, etc,
2. Monopolistic profits, either vertical or horizontal,
3. Replacement of inefficient management,
4. Tax considerations,
5. Undervalued company—asymmetrical information,
6. Reduction of unsystematic risk through diversification.

Copeland, *supra* note 393, at 561-69.

The increase in value to both entities is commonly referred to as synergy.[453] As a result of synergy, the value of a firm can be more than the value to a 100 percent owner. For example, assume the value of firm A is equal to $100, and the value of firm B is equal to $50. If the firms merge to form firm C, its value without synergy will be $150. However, if the resulting value of firm C is equal to $200, the transaction resulted in the creation of synergy equal to $50. The preceding example could result if, for instance, firms A and B were the only two firms in a particular industry. Therefore, by merging into one firm, C, they will enjoy monopoly profits, which will increase C's value in excess of the individual values of the component firms, A and B. The value of firm B is only $50 to any firm in another industry, but due to the possibility of monopoly profits, firm A considers the value of firm B greater than $50. Consequently to a particular acquiring company, the value of a company might be greater than the value to a 100 percent owner due to the effect of synergy.

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453. Cox, *Acquisitions and Mergers*, 1 CORP. L. REV. 48 (1978).

The Cox article examines Mills v. Electric Auto-Lite. *See infra* text accompanying notes 485-572. More specifically, the article considers the application of Brudney and Chirelstein's valuation of the minority stock's "fair value" in *Mills*. The article states that synergy is found in most mergers, but more often in conglomerate mergers rather than horizontal or vertical mergers. Cox notes that there are many more reasons why intra-industry mergers should result in a synergy value. These reasons include the following: economies of scale, operating efficiency, market expansion, monopolistic power, administrative and managerial efficiencies, and complementing operations in areas such such as technology, marketing, and research.

Cox notes that there is a major source of synergy in conglomerate mergers called financial synergy which includes: "instantaneous synergy," "latent debt capacity," "defensive diversification," or "bargain purchase."

> (1) "Instantaneous synergy" Cox defines as an increase in the conglomerage's earnings per share, accompanied by an increase in the conglomerate's "price-earnings" ratio.
>
> (2) "Latent debt capacity" Cox defines as an increase in the conglomerate's debt capacity resulting from merging with a firm that has a lower debt to equity ratio.
>
> (3) "Defensive diversification" is defined as the stablizing of the conglomerage's earnings fluctuations, which generally are considered an indicator of the conglomerate's risk. The more volatile the conglomerate's earnings the more risk, therefore, the more return it must provide to maintain or increase its price. Such diversification not only increases income but also reduces risk.
>
> (4) "Bargain purchase" is defined as buying the firm for less than what it is worth. Cox discounts this theory. He assumes the market is efficient with perfect information and adequate breadth. Therefore, any "bargain" would probably be bid out of existence.

The final aspect to his article restates the finding in *Mills*, which holds that the proper procedure to find fair value is to first find the synergy value, and then

In sum, the spectrum of possible values that can result from arm's length negotiations between companies contemplating a merger range from the low value, the value of a minority interest, to the high value, the value to the acquiring firm.[454] The analyst and the lawyer must know how to determine these four values through the use of the financial valuation techniques previously discussed.[455]

SECTION IV—DETERMINING POSSIBLE VALUES RESULTING FROM ARM'S LENGTH NEGOTIATIONS

Determining The Value Of A Minority Interest

The value to a minority shareholder reflects both the minority shareholder's right to a proportional share in the firm's present and expected future profits and the minority shareholder's lack of control over the decisions of management.[456] In the case of publicly traded companies, this value is directly reflected in each company's market price.[457] Most economists would apply the efficient market hypothesis in this case.[458] The efficient market hypothesis states that given the information available to the minority shareholder, the market price reflects the risks and returns of minority ownership.[459] However, the market price might not reflect undisclosed information relevant to the firm's future expected profits.[460]

If a court found that management owed a duty to disclose this relevant information, a discounted cash flow approach could be used to establish the value of the information.[461] The value of the information would then be added to the market price to establish the value of the minority ownership.[462] To determine the components of the discounted cash flow analysis, the best source would be the actual plans of management.[463] However, if the actual plans are not available, the

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divide it between the interests on a proportional basis. He considers this to be a "fair allocation," but states that the proportional division of the synergy value may depend in part on why the synergy came about.

454. *See supra* note 435.

455. *See supra* text accompanying notes 350-425.

456. *See supra* notes 443-45.

457. *See supra* text accompanying notes 360-74.

458. *See supra* text accompanying notes 360-74.

459. *See supra* text accompanying notes 360-74.

460. *See supra* note 367.

461. *See supra* text accompanying notes 375-415.

462. In effect the market price is adjusted as if the information were disclosed.

463. The plaintiff in *Weinberger* used UOP's five year business plan to project cash flows. *Weinberger*, 426 A.2d at 1362.

analyst could look to similar projects or product lines implemented by other companies.[464] The comparison to other firms which implemented similar projects would also determine the appropriate discount rate.[465] Therefore, with both components, the expected cash flows and the discount rate, the value of the undisclosed information can be determined.

By multiplying the value of the undisclosed information by the percentage of equity owned by the minority shareholder, the proportional distribution is determined.[466] The minority owner is entitled to a proportional interest in the return of the net expected cash flows[467] adjusted for the project's risk. After the proportional value of the undisclosed information is determined, it should be added to the market price.[468] The result is an approximation of the market value of the minority shareholder's interest after the undisclosed information becomes public. Moreover, this adjusted value should be the minimum value in an arm's length negotiation.[469] As stated above the value of a minority interest reflects the minority shareholders' lack of control over management. Of course, if a shareholder can control management, the value of his stock would be enhanced.

Determining The Value Of Controlling Interest

The value of the controlling interest is difficult to quantify through financial analysis. For instance, if the investment opportunities approach was used, an analysis of all the company's possible investment opportunities would be required.[470] Since the controlling interest can change both the direction of investments and the level of risk, a cash flow analysis would have to consider virtually every known investment opportunity.

However, for the situations examined in this note, the problem

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464. Elton, *supra* note 409, at 78.

465. *Id.*

466. This step is necessary to give the minority shareholder his proportional share of the value of the undisclosed information. *See supra* note 367.

467. Net expected cash flows equals the projected returns minus the projected cash invested and minus projected expenses to be encountered.

468. *See supra* note 367. Also this assumes the market has not already discounted the undisclosed information.

469. *See supra* text accompanying notes 440-44.

470. Since the owner of the controlling interest can change the direction of the company, the analysis would have to relate to how he proposes to change the company. The projected risks and returns relating to such a change, or a comparison of the industry, would be appropriate. *See* Elton *supra* note 409, at 78.

of valuing the controlling interest through financial analysis does not arise. This note considers only instances where the controlling interest is already purchased by the majority shareholder. Therefore, an approximation of controlling interest value might be the actual cost to the majority shareholder.[471] However, for the purposes of this note it is enough to point out the relative value of the controlling interest. The value of the controlling interest is greater than the value of a minority interest, but less than the value of 100 percent ownership.[472]

Determining The Value Of 100 Percent Ownership

The value of 100 percent ownership depends on the efficiency of the 100 percent owner or his management, but at a minimum it is the net market value of the firm's assets.[473] If the 100 percent owner or his management is highly efficient, the market price of the company's equity would be more than the net market value of the firm's assets.[474] However, the 100 percent owner might manage the company's assets less efficiently than other firms. In this case, the market value of his 100 percent interest becomes the net market value of the firm's assets.[475] Consequently, without evaluating the efficiency of management, the minimum value of a 100 percent ownership is the net market value of the firm's assets less its liabilities. Further, the value of 100 percent ownership is the maximum value resulting solely from the attributes of the firm. Any value above the value of the 100 percent ownership results from the expected synergistic value to the acquirer.

Determining The Value To The Acquirer

Since the value to the acquirer is the result of expected synergy, its dollar amount is a function of the factors causing the synergy.[476]

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471. Brudney and Chirelstein, *Fair Shares in Corporate Mergers and Takeovers*, 88 HARV. L. REV. 297 (Dec. 1974) (hereinafter cited as Brudney).

472. *See supra* text accompanying notes 445-48.

473. The 100 percent owner can increase management efficiency or simply sell the company's assets. The market values of the assets are based on their ability to generate cash. Therefore by selling the assets, the 100 percent owner is accepting the general efficiency of the market's management.

474. If the 100 percent owner can increase the management of his firm to a level greater than the market efficiency, the market value of his company as a "going concern" will be greater than the market value of the firm's net asset value.

475. *See supra* note 473. Also the assets might have an operating synergy; thus the market value of the assets would be greater if they are sold as a block, rather than individually.

476. *See supra* notes 452, 453.

The value of the expected synergy can be approximated by looking to the reason for the acquisition.[477] Usually the determination of the value to the acquirer is not necessary, unless the court perceives "fair value" as including the complete benefit of the bargain.[478]

In summary, the Delaware Supreme Court in *Weinberger* opened up a range of possible values for consideration as the fair value.[479] The *Weinberger* court held that, where a breach of fiduciary duty was found, the plaintiff would be allowed to test the fairness of the offered price against the 100 percent ownership value.[480] Further, at the discretion of the chancellor, the court could consider elements of rescissory damages.[481] Delaware has recognized that arm's length negotiations could result in a value equivalent to the value of a 100 percent owner.[482] Consequently, the Delaware Supreme Court does not preclude the use of the value to a 100 percent owner in determining "fair value."[483] State freeze-out actions are not the only situations which require finding "fair value." The issue of finding "fair value" has also been an essential element of civil actions involving violations of the Securities and Exchange Act of 1934.[484]

SECTION V—THE LIMITED FEDERAL APPROACH USED TO DETERMINE "FAIR VALUE"

The issue of fair value determination has also arisen in cases involving proxy statement nondisclosures which constitute violations of the Securities and Exchange Act of 1934.[485] Like state courts, the federal courts have had problems in fleshing out the elusive "fair

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477. *See supra* text accompanying notes 452, 453.

478. *See supra* notes 337-39.

479. *See supra* text accompanying notes 238-349.

480. *Weinberger*, 457 A.2d at 714.

481. *Id.*

482. *Id.*

483. While the court does not define fair value as the value of 100 percent ownership, the court certainly does not preclude fair value from equaling the value of 100 percent ownership.

484. *See infra* text accompanying notes 485-572.

485. Securities Exchange Act of 1934 [hereinafter cited as "the 1934 Act"] This section of the note will deal with section 14(a) (and the Rule promulgated thereunder):

> (a) It shall be unlawful for any person, by the use of the mails or by any means or instrumentality of interestate commerce or of any facility of a national securities exchange or otherwise, in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors, to solicit or to permit the use of his name to solicit any proxy or consent or authorization in respect of any security (other than an exempted

value" concept.[486] Some circuits have adopted the "efficient market" approach of valuation analysis.[487] The Seventh Circuit Court of Appeals has used the efficient market hypothesis as a starting point for the fair value analysis; the resultant fair value was based in part on a sharing of the synergy.[482] The analysis in *Mills v. Electric Auto-Lite Co.*[489] is a good example of this approach.

Auto-Lite was a diversified company engaged primarily in the sale of auto parts.[490] Mergenthaler, which primarily produced typesetting equipment, began purchasing Auto-Lite's stock in 1957.[491] By March of 1962, Mergenthaler owned 54.2 percent of Auto-Lite, and thus was able to obtain control of Auto-Lite's board of directors.[492] In early 1963, Mergenthaler attempted to merge Mergenthaler and Auto-Lite into a new company named Eltra Corporation.[493] On May 28, 1963, Auto-Lite's board of directors, controlled by Mergenthaler, voted to accept the proposed merger.[494] Proxies including a proxy statement were sent the next day to Auto-Lite's shareholders.[495] An additional thirteen percent vote from Auto-Lite's minority shareholders

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security) registered pursuant to section 781 of this title.

15 U.S.C. 178n(a) (1976).

Rule 14a-9 promulgated thereunder.

(a) No solicitation subject to this regulation shall be made by means of any proxy statement, form of proxy, notice of meeting or other communication, written or oral, containing any statement which, at the time and in the light of the circumstances under which it is made, is false or misleading with respect to any material fact, or which omits to state any material fact necessary in order to make the statements therein not false or misleading or necessary to correct any statement in any earlier communication with respect to the solicitation of a proxy for the same meeting or subject matter which has become false or misleading.

17 C.F.R. 240.14a-9.

486. Seaboard World Airlines, Inc. v. Tiger Int'l, Inc., 600 F.2d 355 (2d Cir. 1979). The court in *Mills* used the efficient market hypothesis to establish fair value. Mills v. Electric Auto-Lite Co., 281 F. Supp. 826 (N.D. Ill. 1967), *rev'd on causality issue*, 403 F.2d 429 (7th Cir. 1968), *rev'd*, 396 U.S. 375 (1970); *on remand*, 552 F.2d 1239 (7th Cir. 1977).

487. We hold that when market value is available and reliable, other factors should not be utilized in determining whether the terms of a merger were fair. Although criteria such as earnings and book value are an indication of actual worth, they are only secondary indicia. *Mills*, 552 F.2d at 1247. *See also supra* note 486.

488. *Mills*, 352 F.2d at 1249.

489. 281 F. Supp. 826 (N.D. Ill. 1967), *rev'd on causality issue*, 403 F.2d 429 (7th Cir. 1968), *rev'd*, 396 U.S. 375 (1970); *on remand*, 552 F.2d 1239 (1977).

490. *Mills*, 552 F.2d at 1240.

491. *Id.*

492. *Id.*

493. *Id.*

494. *Id.*

495. *Id.*

was necessary in order to obtain the required two-thirds vote.[496] The merger was approved on June 27, 1963.[497] As a result, the minority shareholders of Auto-Lite instituted a class action suit challenging the corporate merger.[498]

The plaintiffs filed suit in district court on June 26, 1963, alleging that the proxy statement did not disclose that Auto-Lite's board of directors was controlled by Mergenthaler.[499] Therefore, they argued the proxy statement was in violation of section 14(a) of the 1934 Act.[500] The minority shareholders requested that the merger be set aside. The district court found for the plaintiffs, but the appellate court reversed on the issue of causation.[501]

The United States Supreme Court reversed, stating that the plaintiffs had made a sufficient showing of causation by proving that the necessary proxies had been obtained by means of material misrepresentations.[502] Further, the Supreme Court stated that the lower court was not required to set aside the merger, but could look to other remedies, such as monetary relief.[503] The Supreme Court suggested two possible methods of determining potential monetary relief.[504] First, the minority shareholders might be compensated for a reduction in their stock's earnings potential as a result of the merger.[505] However, if the plaintiffs could not show such a reduction in earnings potential, an award could be based on the "fairness" of the merger terms at the time of the merger.[506] The district court, on remand, decided not to rescind the merger, rather it applied the second method of determining damages, as suggested by the Supreme Court.[507]

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496. *Id.*
497. *Id.*
498. *Id.*
499. *Id.*
500. *See supra* note 485.
501. *Mills*, 403 F.2d 429 (7th Cir. 1968).
502. *Mills*, 396 U.S. 375 (1970).
503. The Supreme Court then stated that since, "the misleading aspect of the solicitation did not relate to terms of the merger, monetary relief might be afforded to the shareholders only if the merger resulted in a reduction of the earnings potential of their holdings." However, if this decrease in earnings potential could not be determined, because of the commingling of assets, a "fairness" approach might be used. The fairness approach envisioned an award based on the "fairness" of the merger terms at the time of the merger. Further, the Supreme Court noted that the two methods illustrated for determining monetary relief were not to be considered exclusive. *Mills* 396 U.S. at 388-89.
504. *Mills*, 396 U.S. at 389.
505. *Id.*
506. *Id.*
507. *Mills*, 552 F.2d at 1243.

The district court determined the merger terms were unfair and awarded damages of $1,233,918.35 plus interest.[508] Both parties appealed.[509]

No Reduction In Earnings Potential

On the second appeal, the primary issue was to determine what damages, if any, could be awarded as a result of the proxy nondisclosure.[510] The appellate court examined both suggested methods of determining monetary damages.[511] First, as to whether the plaintiff was entitled to compensation for a loss in potential earnings power, the appellate court compared Auto-Lite's dividend policy with the dividend policy of the newly formed firm.[512] The analysis began by looking at the exchange ratio of the merger offer.[513] For every one share of Auto-Lite stock, the minority shareholder was to receive 1.88 "preferred" shares of Eltra's stock, the new company.[514]

After examining the exchange ratio, the amount of dividends was calculated.[515] At the time of the merger, Auto-Lite was paying a dividend of $2.40 per share and Mergenthaler was paying $1 per share.[516] Under the merger agreement Eltra was to pay dividends of $1 per share for common stock and $1.40 per share for preferred stock.[517] The appellate court determined that the proposed dividends to Auto-Lite's minority shareholders would increase by $.23 per share from $2.40 per share to $2.63 per share.[518] Eltra's preferred stock was more valuable than Auto-Lite's common stock, because the stock paid higher dividends, was more secure, and was convertible into common shares.[519] Therefore, the appellate court concluded that the earnings potential of Auto-Lite's minority shareholders' stock was enhanced, rather than weakened, by the merger.[520]

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508. *Id.* at 1244 n.4.
509. *Id.* at 1241.
510. Part of this major issue is choosing the proper method of determining fairness of merger terms when the solicitor of the merger both controls the board and fails to disclose such control.
511. *Mills*, 552 F.2d at 1242-50.
512. Note the assumption that the company's value is reflective of the company's dividend policy.
513. *Mills*, 552 F.2d at 1241.
514. *Id.* at 1242.
515. *Id.*
516. *Id.*
517. *Id.*
518. Calculated by the following: (1.88 X $1.40 = $2.63) *Id.*
519. *Id.*
520. *Id.*

Next the appellate court looked at the subsequent performance of Eltra's stock and determined that Auto-Lite's shareholders received more than a fair price for their stock in Auto-Lite.[521] Eltra's preferred stock was being sold in the month following the merger for $31.06.[522] Eltra's common stock sold for $25.25 during the same period.[523] Due to the 1.88 exchange ratio afforded Auto-Lite's minority shareholders, they received a cash equivalent of $58.39 per share.[524] Because Mergenthaler's stock was exchanged at a 1 to 1 ratio, Auto-Lite's minority shareholders received 2.31 times the value of Mergenthaler's stock.[525]

Finally, with respect to proving a reduction of potential earnings, Auto-Lite's minority shareholders alleged that Eltra appropriated liquid assets from the old divisions belonging to Auto-Lite and shifted the liquid assets to other divisions.[526] The appellate court pointed out that after the merger the divisions became one economic entity.[527] Therefore, Eltra's management was merely increasing the efficiency of the company by transferring assets to where they would be most productive.[528] This action would benefit both Auto-Lite's minority shareholders and Mergenthaler's shareholders.[529] Auto-Lite's minority shareholders then noted that post merger operations of the division associated with Auto-Lite produced almost 5 times more profit than the divisions associated with Mergenthaler.[530] The minority shareholders contended that this disparity in profitability proved that the price paid for Auto-Lite, which was 2.31 times Mergenthaler's stock value, was inadequate.[531]

However, the appellate court noted that use of post-merger performance assumes the divisions operated independently from each other.[532] Therefore, the profits could have resulted from the input of Mergenthaler's talent, economies of scale, or quality of management.[533]

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521. *Id.*
522. *Id.*
523. *Id.*
524. Calculated by the following: ($1.88 X 31.06 = $58.39) *Id.*
525. Calculated by the following: ($58.39 ÷ $25.25 = 2.31) *Id.*
526. *Id.*
527. *Id.*
528. *Id.*
529. *Id.*
530. *Id.* at 1243.
531. *Id.*
532. *Id.*
533. *Id.*

Since the assets were commingled, post-merger performance could not be indicative of the fairness of the merger.[534]

Even without the commingling of assets, the appellate court held that post-merger evidence could at best create only a rebuttable inference of unfairness.[535] It was impossible to know whether the increase of earnings of one partner to a merger was predictable at the time of the merger.[536] The court found that the plaintiff did not prove that the defendant should have known Auto-Lite's business would become more profitable than the rest of the company.

No Justifiable Damages Based On Unfairness

After finding no reduction in earnings potential, the court reviewed the fairness question.[537] The appellate court first looked to the analysis of the district court.[538] The district court based its damages on the assessment of fairness at the time of the merger.[539] Five factors were considered: (1) The market value of the companies' stock; (2) The companies' earnings; (3) The companies' asset book value; (4) The dividends paid by each company; (5) Other qualitative factors.[540]

The district court found that earnings and book values demonstrated that the merger was unfair.[541] The court determined that a fair exchange ratio would be 2.35 shares of Eltra's stock for each share of Auto-lite's stock.[542] The district court further found that Auto-Lite's minority shareholders actually received an equivalent of 2.25 shares of Eltra common stock for each share of Auto-Lite stock.[543] Therefore, the court awarded damages of $1,233,918.35 based on the .10 difference.[544] Further, the district court found that market value was unreliable and discounted the importance of dividend policy.[545]

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534. *Id.*
535. *Id.* at 1244.
536. *Id.*
537. *Id.*
538. *Id.*
539. *Id.*
540. *Id.*
541. *Id.*
542. *Id.*
543. This calculation of a 2.25 exchange ratio is incorrect. *Id.* at 1244 n.6.
544. *Id.* at 1244.
545. The district court discounted the significance of the comparative market values of Auto-Lite and Mergenthaler, because in the preceding five years there were purchases of Auto-Lite's stock by both Auto-Lite and Mergenthaler and purchases of Mergenthaler's stock by American Manufacturing Co. The appellate court dismissed

The appellate court held that the market price nearest to the merger was reliable and reflected the value of the companies.[546] However, to account for any short term price fluctuations, an average price for a period of six months prior to the merger date was used.[547] The court found the ratio between the average stock prices was 2.1 and was fairly stable over a two year period.[548]

The appellate court then compared the before merger stock prices and the effective exchange ratio. The 2.1[549] ratio of premerger stock prices was compared to the 2.31[550] ratio calculated from the ultimate price[551] of Eltra's preferred stock times the 1.88 exchange ratio given to Auto-Lite's minority shareholders divided by the price of Eltra's

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the assessment of unreliability due to the small nature of the purchases in question when compared to the total stock sales of either company. *Id.* at 1245. Further, a greater number of purchases of Auto-Lite took place during the last three years prior to the merger, which if affecting the stock price at all would tend to inflate the price. *Id.*

> 546. We hold that when market value is available and reliable, other factors should not be utilized in determining whether the terms of a merger were fair. Although criteria such as earnings and book value are an indication of actual worth, they are only secondary indicia. In a market economy, market value will always be the primary gauge of an enterprise's worth. In this case thousands of shares of Auto-Lite and Mergenthaler were traded on the New York Stock Exchange during the first part of 1963 by outside investors who had access to their full gamut of financial information about both corporations, including earnings and book value. If we were to independently assess criteria other than market value in our effort to determine whether the merger terms were fair, we would be substituting our abstract judgment for that of the market. Aside from the problems that would arise in deciding how much weight to give each criterion, such a method would be economically unsound.

Id. at 1247-48.

The plaintiff argued that Mergenthaler used its control over Auto-Lite to force it to pay high dividends, thus depressing its price, i.e., draining Auto-Lite's capital while raising the price of Mergenthaler by giving Mergenthaler funds in the form if dividends?. The appellate court stated that increased dividends should have made Auto-Lite's stock more attractive. *Id.* at 1247.

Because of this dividend policy and a change in the industry, Auto-Lite minority shareholders claimed that only during the period between 1958 and 1960 did the market value reflect an accurate value. The appellate court found this argument unacceptable. The market value in 1961 reflected the uncertainty of Auto-Lite's future and continued to do so until the merger. *Id.*

547. *Id.* at 1246.

548. *Id.* at 1246 n.10.

549. *See supra* note 525.

550. Eltra's preferred stock price X 1.88 ÷ Eltra's common stock price = $31.06 X 1.88 ÷ $25.25 = 2.31.

551. *Mills*, 552 F.2d at 1246.

common stock.[552] Since the ratio comparison assumes that the value of the ultimate company, Eltra, was merely the sum of the two companies' values, it did not take into account synergy.[553] However, the appellate court held that fair value should include an element of the synergy created by the merger.[554]

Effect Of Synergy On Fair Value

The appellate court accepted and applied the analysis propounded by Professor Brudney and Chirelstein, which requires consideration of synergy in finding fair value.[555] Therefore, the court found that ratio analysis alone might lead to incorrect results.[556] Professors Brudney and Chirelstein argued that the minority shareholder should be compensated for not only the market value of his stock, but also a portion of the increase in the value of the ultimate company resulting from the synergy created by the merger.[557] The proportion the minority shareholder should receive is directly related to their proporational share of ownership.[558]

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552. *Id.*

553. *Id.* at 1248. *See also supra* notes 449, 450 and text accompanying notes. Since the ratio's incorporated post merger values, the values already accounted for any synergy resulting from the merger. In short, the post merger values represent the value of a minority equity interest of the post merger concern. Since the *Mills* Court chose a value greater than that based on the post merger market prices, the court was defining "fair value" as a value larger than the value of a minority interest in the post merger firm.

554. *Mills*, 552 F.2d at 1248.

555. Brudney and Chirelstein, *Fair Shares in Corporate Mergers and Takeovers*, 88 HAR. L. REV. 297, 308-09 (1974) [hereinafter cited as Brudney].

556. *Id.*

557. *Id.*

558. The appellate court applied Professors Brudney and Chirelstein's approach through the following calculations:

GIVEN: (AT THE TIME OF THE MERGER)

1. 532,550 share of Auto-Lite were held by the minority shareholders;
2. 2,698,822 shares of Mergenthaler were outstanding;
3. During the first part of 1963 Auto-Lite's average per share price was $52.25;
4. During the first part of 1963 Mergenthaler's average per share price = $24.875;
5. POST MERGER VALUES (one month after merger) Eltra's common = $25.25; Eltra's preferred stock = $58.39 (to Auto-Lite's minority shareholder based on the 1.88 exchange ratio).

CALCULATIONS:

1. 532,550 X 52.25 = $27,825,737 (PREMERGER VALUE OF Auto-Lite)
2. 2,698,822 X 24.875 = $67,133,197 (PREMERGER VALUE OF Mergenthaler)
3. SUMMATION (1. + 2.) = $94,958,934 (POST MERGER VALUE, NO SYNERGY)
4. The minority shareholder owns 29.3 percent of Eltra

Applying the Brudney and Chirelstein approach, the appellate court found that the minority shareholders received more than a fair price for their stock.[559] Auto-Lite's minority shareholders received in excess of the proportion of synergy they were entitled to receive.[560] Therefore, the minority shareholders could not show damages as a result of the "unfair" merger terms.[561]

Summary Of The Approach Adopted By The Court In Mills

The approach adopted in *Mills* defines "fair value" as the market value of the minority shareholder's stock plus a proportional share of any synergy that may result from the merger.[562] It follows that the value sought is greater than the minority value, but less than the value to the acquirer.[563] In determining the fair value, the federal approach begins by using the efficient market hypothesis.[564] The efficient market hypothesis states that the traded price is equal to the minority value of the firm.[565] This federal approach then examines the synergy[566] which might have resulted from the transaction.[567]

ACTUAL POST MERGER VALUE

1. 532,550 X 58.39 = $31,095,594
2. 2,698,822 X 25.25 = $68,145,255
3. SUMMATION (1. + 2.) = $99,240,894 (POST MERGER VALUE WITH SYNERGY)

SYNERGY = $99,240,894 − $94,958,934 = $4,281,915 X 29.3%) + $27,825,737 = $29,080,338. $29,080,338 is equivalent to 1,151,696.5 shares of Eltra at $25.25 per share or a 2.16 ratio.

The Auto-Lite minority shareholders actually received $31,095,594 which is $2,015,256 more than $29,080,338. The court held that 2.16 shares of Eltra common per share of Auto-Lite would have been fair, when in fact the minority shareholder received an equivalent of 2.31 of Eltra's common.

559. *Id.* at 1249.

560. *Id.*

561. *Id.*

562. *Mills*, 552 F.2d at 1248.

563. The *Mills* court used the efficient market hypothesis to establish the market value of the stocks. By definition, this value objective is the value of a minority interest in a going concern prior to the merger or transaction. The court further added a portion of the synergy that resulted from the merger. Because the market price should already reflect synergy, the court might be using the concept of synergy to reflect an objective value greater than the value of the minority shareholder, which would be the market price. However, only a proportional amount of the synergy was awarded to the minority shareholders; thus the resultant value must be less than the value to the acquirer. The value to the acquirer would include all the synergy value.

564. *See supra* notes 487, 546.

565. *See supra* text accompanying notes 360-74.

566. *See supra* note 453.

567. *Mills*, 552 F.2d at 1248.

If synergy did result, the fair value should be based on a proportional split of the synergy between the majority shareholder and the minority shareholders.[568] Consequently, if the price paid for the minority shareholder's stock is less than the stock price plus his proportional share of the synergy, he will be able to prove damages.[569] If, on the other hand, as in *Mills*, the stock is acquired by the majority shareholder at a price in excess of the market price plus the minority shareholder's proportional share of the synergy, the minority shareholder will not be able to show damages.[570] Therefore, the *Mills* court established certain guidelines for finding damages based on the value of a minority shareholder's interest, plus a proportional share of any synergy created by the transaction.[571]

Although *Mills* established a concept of fair value, the guidelines established in finding fair value have limited usefulness. The analysis used in *Mills* requires a market value hindsight approach where two publicly traded companies merge using an exchange of stock to form a third, publicly traded company. In a cash out transaction or in a situation where the resulting companies are no longer publicly traded, the *Mills* analysis would not be useful. However, as in most areas of the law, legal guidelines eliminating uncertainty and providing fair notice even in limited areas are desirable.[572] This note suggests a methodology to establish guidelines in determining "fair value" that are both more flexible and have more applications. The proposed guidelines can be used in both SEC violations and state freeze-out actions.

SECTION VI—A NEW APPROACH TO AN OLD PROBLEM: DETERMINING "FAIR VALUE"

The proposed guidelines utilize the modern valuation principles previously discussed,[573] which are allowed in Delaware freeze-out actions subsequent to *Weinberger* and are used in civil actions under the federal securities laws.[574] The proposed objective of the valuation is to determine fair value within the spectrum of possible arm's length values.[575] The analytical guidelines link the concept of fairness in deal-

568. *See* Brudney *supra* note 555.
569. *Mills*, 552 F.2d at 1248.
570. *Id.* at 1249.
571. *Id.*
572. Brudney, *supra* note 555, at 345-46.
573. *See supra* text accompanying notes 350-423.
574. *See supra* text accompanying notes 238-349, 485-572.
575. *See supra* text accompanying notes 424-84.

ing with the dissenting or minority shareholder to the concept of finding a fair value.[576] Utilizing the proposed guidelines, the degree of unfair dealing determines the level of fair value to the minority shareholder. Therefore, the proposed analysis starts with a fairness determination in dealing with the minority shareholder.

Step 1: Determining The Degree Of Fair Dealing

The determination of fair dealing is currently the necessary first step in both state freeze-out actions as well as actions under the 1934 Securities Act. In federal courts, to sustain an action alleging a violation of section 10(b) under the 1934 Act,[577] the plaintiff must allege a high level of culpability or unfair dealing in the form of reckless or intentional misrepresentation.[578] In the private civil actions such

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576. This is consistent with the entire fairness concept propounded by the Delaware Supreme Court in *Weinberger*. "However, the test of fairness is not a bifurcated one as between fair dealing and price. All aspects of the issue must be examined as a whole since the question is one of entire fairness." *Weinberger*, 457 A.2d at 711.

577. Securities and Exchange Act of 1934 § 10(b); 15 U.S.C. § 78j (1976).

> It shall be unlaw for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange—
>
> (a) To effect a short sale, or to use or employ any stop-loss order in connection with the purchase or sale, of any security registered on a national securities exchange, in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.
>
> (b) To use or employ, in connection with the purchase or sale, of any security registered on a national securities exchange, or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

Rule 10b-5, promulgated thereunder:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange—
>
> (a) To employ any device, scheme, or artifice to defraud,
>
> (b) To make any untrue statement of material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
>
> (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

17 C.F.R. 240.10b-5.

578. The United States Supreme Court reversed the Court of Appeals for the Seventh Circuit, holding that to maintain a civil cause of action under the SEC Rule 10b-5, the plaintiff must allege a scienter, or an "intent to deceive, manipulate or

as *Mills* which involved violations of section 14(a) of the 1934 Act, the required culpable conduct is merely the negligent preparation of a proxy statement which contains material misrepresentations or omissions.[579] Therefore, in order to determine whether the standards of culpability required under section 10(b) and section 14(a) have been met, the court must inquire into the defendant's level of unfair dealing.[580]

In actions involving violations of the anti-fraud provisions of the 1934 Act, section 10(b) and Securities Exchange Commission Rule 10b-5 promulgated thereunder, the court must first determine whether the defendant had the requisite scienter.[581] It then must find either a misrepresentation or omission of a material fact with respect to the purchase or sale of a security.[582] The United States Supreme Court in *Santa Fe Industries v. Green*,[583] an action brought under Rule 10b-5, held that the plaintiff must allege more than breach of fiduciary duty;[584] he must allege that the defendant possessed the scienter required under *Ernst & Ernst v. Hochfelder*.[585] Although the fundamental purpose of the Securities and Exchange Act of 1934 is "to substitute a

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defraud." Ernst & Ernst v. Hochfelder, 425 U.S. 185, 193 (1976). Some lower court cases have held that reckless conduct by the defendant might be enough to sustain a civil cause of action. However, *Ernst* holds that more than mere negligence must be found to sustain a 10b-5 cause of action. *Ernst*, 425 U.S. at 201. *See also infra* note 579.

579. The issue of culpability with respect to civil actions under SEC 14(a) has not yet been decided by the United States Supreme Court. However, courts, such as *Mills*, have allowed actions involving misleading statements or omissions which might have resulted from mere negligence. *See supra* note 485, and text accompanying notes 485-572.

580. *See supra* note 578.

581. *Id.*

582. The plaintiffs met the requirement that they purchased, or in this case sold, their stock relying on the information disclosed. Superintendent of Insurance v. Banker's Life & Cas. Co., 404 U.S. 6, 12-13 (1971), but the nondisclosure was found to be immaterial. Santa Fe Industries v. Green, 430 U.S. 462, 476 (1977), *on remand*, 562 F.2d 4 (2d Cir. 1977).

583. 430 U.S. 462 (1977), *on remand*, 562 F.2d 4 (2d Cir. 1977).

584. *Santa Fe*, 430 U.S. at 473-74. The facts in Santa Fe are the same as the facts in *Kirby*. *See* text accompanying notes 485-563. The plaintiff brought a federal cause of action against Santa Fe for violation of section 10(b) of the 1934 Act. However, the court did not find either "deceptive or manipulative" conduct by the plaintiff. Although the plaintiffs alleged a breach of fiduciary duty, they did not allege any deception, misrepresentation or material nondisclosure. *Santa Fe*, 430 U.S. at 476. *See also supra* note 578.

585. 425 U.S. 185 (1976). To maintain a 10b-5 cause of action the plaintiff must allege deceptive or manipulative conduct on the part of the defendant. *Santa Fe*, 430 U.S. at 473-74. *See also supra* note 578.

philosophy of full disclosure for the philosophy of caveat emptor, ..."[586] The court requires more than unfair fiduciary conduct before a cause of action can be maintained under the anti-fraud provisions of the 1934 Act.[587]

Therefore, the first step in a federal action under section 14(a) or 10(b) of the 1934 Act is to determine whether the defendant was negligent in misrepresenting or omitting a material fact for section 14(a), or whether the defendant had the requisite scienter for section 10(b). Either finding requires the court to determine what level of unfair dealing, if any, was conducted by the defendant, and what, if any, remedy is adequate. State freeze-out cause of actions also require a determination regarding fair dealing.[588]

In state freeze-out actions, unlike federal civil actions under the 1934 Act, the courts must consider all levels of fairness.[589] The *Weinberger* court mandated an examination of the degree of fair dealing in order to determine whether the plaintiff is merely dissatisfied with the price offered, or whether a breach of fiduciary duty occurred, or whether an intentional misrepresentation occurred.[590] When directors with dual responsibilities deal with the minority shareholders, the *Weinberger* decision dictates a two part fairness analysis which explicitly examines first "fair dealing" and then "fair value."[591]

The *Weinberger* court noted that the directors affiliated with the majority shareholder, Signal, possessed dual responsibilities.[592] The directors owed a fiduciary duty of complete candor, or entire fairness, to both parties. The directors' dual function precluded arm's length dealings with the minority shareholders.[593] Therefore, when dealing

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586. Affiliated Ute Citizens v. United States, 406 U.S. 128, 151 (1972), *quoting*, SEC v. Capital Gains Research Bureau, 375 U.S. 180, 186 (1963).

587. The Supreme Court has repeatedly stated that "once full and fair disclosure has occurred, the fairness of the terms of the transaction is at most a tangential concern of the statute." *Santa Fe*, 430 U.S. at 478. Cf, Mills v. Electric Auto-Lite Co., 396 U.S. 375, 381-85 (1970). *See also supra* note 578.

588. *See supra* note 576.

589. A shareholder may be able to demand an appraisal without alleging any unfair dealing. His appraisal right might be granted by statute. *See e.g.*, DEL. CODE ANN. tit. 8, § 262 (1981).

590. *See supra* note 576.

591. *Id.*

592. *Weinberger*, 457 A.2d at 710.

593. The court in dictum suggested that arm's length negotiations might have been possible if UOP would have appointed an independent committee comprised of its outside directors to negotiate with Signal's directors. *Id.* at 709 n.7.

with the minority shareholders the directors, representing the majority shareholder, have a primary obligation of "fair dealing."[594] The court further noted that an arm's length negotiated price was the objective of such "fair dealing."[595] In both *Weinberger* and *Lynch*, the court found the majority did not deal fairly with the minority shareholders.[596] In both cases the majority shareholder was in breach of its fiduciary duty.[597] Thus, both courts at least considered damages beyond those available from the traditional appraisal concept. In *Lynch*, the court found rescissory damages were the appropriate remedy,[598] while in *Weinberger* the court left the application of rescissory damages to the discretion of the chancellor on remand.[599]

Unlike *Lynch* and *Weinberger*, the courts in the earlier *Kirby* and *Santa Fe* cases did not find any major unfair dealing between the majority shareholder and the minority shareholders.[600] Therefore, the application of a traditional appraisal remedy was deemed adequate to assure the minority shareholder would receive the premerger value of a proportional interest in the going concern.[601] This value, the lowest on the spectrum of possible arm's length values, was the objective of the traditional appraisal remedy.[602] In summary, while earlier Delaware cases, such as *Kirby*, recognized a fiduciary duty of entire fairness by the majority shareholder,[603] the *Weinberger* court, in a situation where unfair dealing was found, expanded the fairness concept to a two step analysis which requires an examination of both "fair dealing" and "fair value."[604]

Step 2: Link Fair Dealing With Fair Value

The second part of the proposed analysis links fair dealing with fair value; a variation of the theory "let the punishment fit the

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594. "When directors of a Delaware corporation are on both sides of a transaction, they are required to demonstrate their utmost good faith and the most scrupulous interest in fairness of the bargain." *Weinberger*, 457 A.2d at 710.

595. *Id.* at 711.

596. *See supra* text accompanying notes 168-349.

597. *See supra* text accompanying notes 168-349.

598. *See supra* text accompanying notes 225-34.

599. *See supra* text accompanying notes 338-49.

600. *Kirby*, 413 A.2d at 140. *See also supra* note 587.

601. *See supra* text accompanying notes 163-67.

602. The court's objective was to find the minority shareholder's interest in the premerger value of a going concern. *Kirby*, 413 A.2d at 141.

603. *Id.*

604. *Weinberger*, 457 A.2d at 711.

crime."[605] If a high level of unfair dealing is found by the court, the fair value for the minority shareholder should be found within the spectrum of possible arm's length values, but at a high level. However, if no unfair dealing is found, the fair value for a minority shareholder should likewise be found on the spectrum of possible arm's length values, but at a low level. Although an infinite number of fairness levels exist, this note considers the fair value concept under the following situations:

> 1. Complete fairness level—Where the majority shareholder dealt fairly with the minority shareholders, but the dissenting shareholder merely viewed the consideration for his stock as too low.
> 2. An unfair level—Where the majority shareholder breached a fiduciary duty in his dealings with the minority shareholders.
> 3. A highly unfair level—Where the majority shareholder either recklessly or intentionally misled the minority shareholders.

Using the proposed guidelines, the objective under the first level is to determine the fair value at the lowest level of possible arm's length values, the value of a minority interest.[606] Determination of this value was also the objective of the traditional Delaware block valuation method.[607] In Delaware and jurisdictions which follow Delaware's lead, modern analysis can now be used to determine this value as previously described.[608] The objectives of the corporation statutes are promoted by finding a fair value at the lowest level in cases where fair dealing is found.[609] The result of such a policy should be to promote mergers and cash-out transactions with full disclosure and fairness, while providing the minority shareholders an incentive for not demanding an appraisal merely in hopes of reaping a windfall profit.[610] However, a higher level of unfair dealing would necessitate

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605. *Weinberger* stated that fair dealing and fair value are not bifurcated tests. *See supra* note 576. Therefore, a balancing approach to the components of entire fairness is appropriate.

606. The proposed guidelines are consistent with the *Kirby* holding. Where fair dealing is found, the appropriate value would be the value of a minority interest.

607. *See supra* notes 18, 108.

608. *Weinberger*, 457 A.2d at 712.

609. One purpose of the corporation statutes is to "fully compensate shareholders for whatever their loss may be." *Weinberger*, 457 A.2d at 715. However, the analysis proposed in *Weinberger* is couched in terms of fairness, implying just results.

610. If the minority shareholder knows approximately the price he could expect

a finding of fair value on a higher level of possible arm's length values.

In situations where the majority shareholder breached a fiduciary duty, the fair value should be found at a higher level of value than the value of a minority interest. This value, while difficult to determine precisely, should reflect the degree of unfair dealing which occurred.[611] If a serious violation of fiduciary duty is found, a high arm's length value of an 100 percent owner, would be appropriate.[612] In contrast, if the breach of fiduciary duty or the nondisclosure, though material, was not serious, a lower value should be considered such as the value of a minority interest adjusted for the undisclosed information, or, as in the case of a two-step merger, the value of controlling interest.[613]

By proportionally increasing the finding of fair value to compensate the minority shareholder for the majority shareholder's practice of unfair dealing, the majority shareholder is deprived of any windfall profits resulting from his unfair practices. The majority shareholder should, therefore, be deterred from dealing unfairly with the minority shareholder. At the same time, because the minority shareholder may benefit from stopping (or slowing them down by filing suit) the majority shareholders' unfair practices, he is encouraged to bring a suit when the majority shareholder does deal unfairly.[614] To effectuate this objective, if the unfair dealing reaches an extreme, the highest level of damages would be required to justify "fair value."[615]

If the majority shareholder recklessly or intentionally misled the

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from the courts, he would be discouraged from bringing frivolous appraisal actions when the majority shareholder dealt fairly with him.

611. At the judge's discretion, he would compensate the minority shareholder in terms of fair value for the level of unfair dealing attained by the defendant.

612. Where a breach of fiduciary duty was found, the *Weinberger* court allowed the value of 100 percent ownership ownership to be tested as a fair value. The court stated that the chancellor at his discretion could include elements of rescissory damages, if he found "fraud, misrepresentation, self dealing, deliberate waste of corporate assets, or gross and palpable overreaching . . . ." *Weinberger*, 457 A.2d at 714.

613. A two-step merger is one where the acquiring entity first purchases controlling interest, then shortly thereafter purchases the balance of the firm's equity. Brudney and Chirelstein advocate giving the minority shareholder the value of the controlling interest at a minimum when two-step mergers are involved. Brudney, *supra* note 555, at 340-41.

614. Kardon v. Nat'l Gypsum Co., 69 F. Supp. 512 (E.D. Pa. 1946), was the first private cause of action under section 10(b) and Rule 10b-5. *See supra* note 577. This "private attorney general" concept is encouraged as a means of enforcing the SEC rules.

615. Complete rescission or depriving the wrongdoer of the benefit of the

minority shareholders, the appropriate remedy would be to value the minority interest at the highest possible arm's length value, the value to the acquirer.[616] This value is greater than rescissory damages because it includes value which is solely related to the acquiring company, or majority shareholder. The value to the acquirer includes the value of synergy, a characteristic unique to the acquiring company.[617] The acquiring company might have been able to realize this synergy value by acquiring another similarly situated company. Therefore, by giving this portion of value to the minority shareholder, he is receiving something which was not part of his ownership interest in the firm. Consequently, the minority shareholder actually benefits from the wrongful or fraudulent activity of the majority shareholder, if he institutes legal action. The benefit received will encourage private civil actions against fraudulent activities, while deterring such activities by the majority shareholder.[618]

Summary And Benefits Of The Proposed Analysis

The approach advocated by this note defines fair value as a value within the range of possible arm's length values,[619] but bases the level of fair value on the degree of unfair dealing by the majority shareholder.[620] This concept is consistent with the objectives and findings of fair value in both the federal and state jurisdictions. The guidelines resulting from the proposed concept will reduce uncertainty, and thus promote merger and cash-out activities, but on a fair basis.

Adoption of any guidelines would be beneficial because some uncertainty will be removed from the market.[621] Companies and

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bargain would be appropriate when extreme unfairness occurs.

616. This would require the calculation of the value to the acquirer. Therefore, the reason for the merger would have to be given or hypothesized so that the value of synergy could be determined. *See supra* notes 452, 453.

617. *Id.*

618. Professor Winters argues that the various jurisdictions, in trying to attract new incorporations within their state, will not gravitate to the bottom; that is, provide little or no protection for the minority shareholder in order to protect the firm's management. Rather, each jurisdiction will provide minority shareholder protection because such protection eliminates risk, which enhances the value of the company's stock. An increase in stock value reduces the firm's cost of equity, thereby increasing the value of the firm. Management will, therefore, incorporate in states that provide some management protection, as well as some minority shareholder protection. Winters, *State Law, Shareholder Protection, and the Theory of the Corporation*, 6 J. L. STUD. 251 (1977).

619. *See supra* text accompanying notes 424-84.

620. *See supra* text accompanying notes 573-618.

621. By reducing uncertainty, planning is facilitated.

majority shareholders will have fair notice regarding the possible consequences resulting from their failure to deal fairly with the minority shareholders. The proposed guidelines facilitate planning by relieving some uncertainty about the costs of acquisitions, therefore promoting additional acquisitions and efficient use of available capital. The minority shareholder will also benefit from definite guidelines.

The minority shareholder will know what he can expect from his investment, and will be encouraged to sell his stock if treated fairly or to pursue relief if he is treated unfairly.[622] If the majority shareholder deals fairly and offers a price that represents the value of a minority interest, the minority shareholder will be discouraged from pursuing the expensive and time consuming appraisal remedy. On the other hand, if a majority shareholder deals unfairly with a minority shareholder, the minority shareholder will know he can receive an adequate remedy through the courts, thus promoting private attorney general actions. In sum, the proposed analysis will promote the policies of the state and federal statutes and encourage their enforcement.

SECTION VII—CONCLUSION

In the 1983 *Weinberger* case, the Delaware Supreme Court eliminated an outmoded, misleading, and restrictive valuation analysis termed the "Delaware block." The Delaware Supreme Court has opened the door to the use of modern financial valuation analysis and expanded the traditional restriction of the "going concern value" to other possible arm's length values such as the value of 100 percent ownership. While the court has not clarified whether it is defining fair value in light of possible arm's length values or is merely allowing additional elements to be weighed in determining fair value, it has held the majority shareholders more accountable to the minority shareholders. No matter what form the future appraisals take in Delaware, the wide range of arm's length values can now be considered in the valuation analysis.

Delaware has taken a giant step toward protection of the minority shareholder, a step which should benefit all parties: the minority shareholders, the majority shareholders, the corporations and the state. However, the next important step to be taken is the adoption of a flexible set of guidelines expounding the "fairness" concept. Guidelines such as those propounded by this note will facilitate

622. *See supra* note 612.

planning and provide fair notice through increased consistency in the holdings. They will further the aims of the federal and state statutes, facilitate corporate planning, and provide additional minority shareholder protection.

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