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Notes

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NOTES

Mental Health—*Pennhurst State School & Hospital v. Halderman:* Back to the Drawing Board for the Developmentally Disabled†

Throughout the past decade, the judiciary has been struggling to define the extent of the legal and constitutional rights of the developmentally disabled. In 1972 a federal court in *Wyatt v. Stickney*[1] declared for the first time that the civilly committed mentally retarded have a constitutional right to habilitation. In 1975 Congress created a statutory right to habilitation by passing the Developmentally Disabled Assistance and Bill of Rights Act.[2] Section 6010 of this Act states that the developmentally disabled have a right to appropriate treatment provided in an environment that is the "least restrictive of the individual's personal liberty."[3] This "Bill of Rights" section was interpreted by the lower federal courts as providing developmentally disabled individuals

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† For a discussion of the constitutional issues raised in the district court opinion, Halderman v. Pennhurst State School & Hosp., 446 F. Supp. 1295 (E.D. Pa. 1977), see Note, Constitutional Law—Rights of the Mentally Retarded: *Halderman v. Pennhurst* Closes State Institution and Mandates Community Care, 57 N.C.L. Rev. 336 (1979).

1. 344 F. Supp. 387 (M.D. Ala. 1972), aff'd in part, remanded in part, and decision reserved in part sub nom. Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974). *Wyatt* involved a class action brought on behalf of the residents of an Alabama state school for the mentally retarded. Plaintiffs alleged that the school was being operated in a constitutionally impermissible manner, raising the issue whether the mentally retarded (now labeled "developmentally disabled") have a right to adequate habilitation (since mental retardation cannot be cured, the term "habilitation" is more appropriate than treatment to describe the care of the mentally retarded). The court held that "[b]ecause the only constitutional justification for civilly committing a mental retardate, therefore, is habilitation, it follows ineluctably that once committed such a person is possessed of an inviolable constitutional right to habilitation." Id. at 390.

Since 1974 several other courts also have held that there exists a right to habilitation. See, e.g., Goodman v. Parwatikar, 570 F.2d 801 (8th Cir. 1978) (constitutional right to safe and humane living environment); Harper v. Cserr, 544 F.2d 1121 (1st Cir. 1976) (right extended to voluntary inmates if they are so helpless that they are confined de facto if not de jure); Eckerhart v. Hensley, 475 F. Supp. 908 (W.D. Mo. 1979) (right to habilitation exists for the criminally dangerous as well as for the involuntarily committed); Welsch v. Likins, 373 F. Supp. 487 (D. Minn. 1974) (right embodied within concept of due process).

The United States Supreme Court so far has refused to rule whether there is a constitutional right to habilitation. When given the opportunity in O'Connor v. Donaldson, 422 U.S. 563 (1975), the Court avoided the issue and based its decision on a right to liberty. The Court, however, soon will have to face the question squarely in Romeo v. Youngberg, 644 F.2d 147 (3d Cir. 1980), cert. granted, 451 U.S. 982 (1981). The court of appeals dealt only with the constitutional right of the mentally retarded to habilitation.

2. Pub. L. No. 94-103, 89 Stat. 486 (1975), as amended by Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978, Pub. L. No. 95-602, 92 Stat. 3003 (codified at 42 U.S.C. §§ 6000-6081 (1976 & Supp. III 1979)) [hereinafter cited as the Developmentally Disabled Act]. The purpose of the federal-state grant program was to help states to develop new programs in otherwise unaided areas, to achieve more effective program planning, to help states to use existing funds better and to fill any gaps in current efforts. The program was meant to supplement funds already available. H.R. Rep. No. 1188, 95th Cong., 2d Sess. 5, reprinted in 1978 U.S. Code Cong. & Ad. News 7355, 7359.

3. 42 U.S.C. § 6010 (1976 & Supp. III 1979). Section 6010 provides:

with a statutory private cause of action.[4] In 1981, however, the United States Supreme Court held in *Pennhurst State School & Hospital v. Halderman*[5] that section 6010 did not establish affirmative rights upon which the developmentally disabled could base a private cause of action.

In 1974 Terri Lee Halderman filed suit against Pennhurst, an institution

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Congress makes the following findings respecting the rights of persons with developmental disabilities:

(1) Persons with developmental disabilities have a right to appropriate treatment, services, and habilitation for such disabilities.

(2) The treatment, services, and habilitation for a person with developmental disabilities should be designed to maximize the developmental potential of the person and should be provided in the setting that is least restrictive of the person's personal liberty.

(3) The Federal Government and the States both have an obligation to assure that public funds are not provided to any institutional or other residential program for persons with developmental disabilities that—

(A) does not provide treatment, services, and habilitation which is appropriate to the needs of such persons; or

(B) does not meet the following minimum standards:

(i) Provision of a nourishing, well-balanced daily diet to the persons with developmental disabilities being served by the program.

(ii) Provision to such persons of appropriate and sufficient medical and dental services.

(iii) Prohibition of the use of physical restraint on such persons unless absolutely necessary and prohibition of the use of such restraint as a punishment or as a substitute for a habilitation program.

(iv) Prohibition on the excessive use of chemical restraints on such persons and the use of such restraints as punishment or as a substitute for a habilitation program or in quantities that interfere with services, treatment, or habilitation for such persons.

(v) Permission for close relatives of such persons to visit them at reasonable hours without prior notice.

(vi) Compliance with adequate fire and safety standards as may be promulgated by the Secretary.

(4) All programs for persons with developmental disabilities should meet standards which are designed to assure the most favorable possible outcome for those served, and—

(A) in the case of residential programs serving persons in need of comprehensive health-related, habilitative, or rehabilitative services, which are at least equivalent to those standards applicable to intermediate care facilities for the mentally retarded promulgated in regulations of the Secretary . . . as appropriate when taking into account the size of the institution and the service delivery arrangements of the facilities of the programs;

(B) in the case of other residential programs for persons with developmental disabilities which assure that care is appropriate to the needs of the persons being served by such programs, assure that the persons admitted to facilities of such programs are persons whose needs can be met through services provided by such facilities, and assure that the facilities under such programs provide for the humane care of the residents of the facilities, are sanitary, and protect their rights; and

(C) in the case of nonresidential programs, which assure the care provided by such programs is appropriate to the persons served by the programs.

The rights of persons with developmental disabilities described in findings made in this section are in addition to any constitutional or other rights otherwise afforded to all persons.

4. Beginning with Naughton v. Bevilacqua, 458 F. Supp. 610 (D.R.I. 1978), aff'd, 605 F.2d 586 (1st Cir. 1979), in cases involving inadequate habilitation, courts began to rely heavily on what they perceived to be a right to treatment guaranteed by section 6010. See also Medley v. Ginsberg, 492 F. Supp. 1294 (S.D.W. Va. 1980); In re Petition of Ackerman, — Ind. App. —, 409 N.E.2d 1211 (1980). *Naughton* was cited extensively by the Court of Appeals for the Third Circuit in Halderman v. Pennhurst State School & Hosp., 612 F.2d 84 (3d Cir. 1979).

5. 451 U.S. 1 (1981).

owned and operated by the State of Pennsylvania for the mentally retarded, in 1974 on behalf of herself and the other residents. Halderman alleged that the conditions at Pennhurst violated her eighth and fourteenth amendment rights, that she was being denied her rights under section 504 of the Rehabilitation Act of 1973[6] and that the institution was violating both the Developmentally Disabled Act and the Pennsylvania Mental Health and Mental Retardation Act.[7] The District Court for the Eastern District of Pennsylvania found that unsanitary conditions, assaults on patients by other residents and staff members, and instances of self-abuse existed at Pennhurst.[8] The trial court also found that members of the Pennhurst staff, for their own convenience rather than for treatment, subjected residents to dangerous physical restraints, psychotropic drugs and solitary confinement, and that the administration of the institution, particularly with respect to recordkeeping and evaluations, was inadequate.[9] The district court held that the developmentally disabled have a federal constitutional right to minimally adequate habilitation in the least restrictive environment.[10] Accordingly, it ordered that Pennhurst be closed and that all the residents be placed in community living arrangements.[11] The Court of Appeals for the Third Circuit essentially affirmed[12] the district court's decision, basing its opinion on a finding that section 6010 of the Developmentally Disabled Act does provide an implied private cause of action.[13]

Upon review, the Supreme Court, in an opinion by Justice Rehnquist,

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6. 29 U.S.C. § 794 (Supp. III 1979): "No otherwise qualified handicapped individual in the United States . . . shall, solely by reason of his handicap, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . . ."

7. Pa. Stat. Ann. tit. 50, §§ 4101-4704 (Purdon 1969).

8. Halderman v. Pennhurst State School & Hosp., 446 F. Supp. 1295 (E.D. Pa. 1977). The opinion provides a detailed examination of the institution and its conditions and practices. See id. at 1302-11.

9. Id. at 1306.

10. Id. at 1319.

11. The Supreme Court noted that, although at the time of the suit Pennsylvania had set up a Community Living Arrangements (CLAs) Program and intended to transfer Pennhurst residents to CLAs, the institution still housed 1200 people, 75% of whom were severely retarded. 451 U.S. at 5.

12. Halderman v. Pennhurst State School & Hospital, 612 F.2d 84 (3d Cir. 1979). The court of appeals reversed the district court's order that Pennhurst be closed. Instead it ordered that the case be remanded for individual determinations by the court or a special master concerning the appropriateness of institutionalization for each patient (given that the conditions at Pennhurst would be improved). Id. at 114.

13. Id. at 97-98. The Supreme Court in Cort v. Ash, 422 U.S. 66 (1974), listed four factors to be considered in determining whether individuals have an implied private remedy: (1) Is the plaintiff one of the class for whose benefit the statute was enacted (does the statute create a federal right in favor of the plaintiff)? (2) Is there any showing of legislative intent, whether express or implied, to create or deny a remedy? (3) Is it consistent with the underlying purposes to imply a private remedy? and (4) Is the cause of action traditionally one of state law for which a federal cause of action would be inappropriate? Id. at 78. The Court of Appeals for the Third Circuit found that each of the *Cort* standards had been met. Plaintiffs were developmentally disabled and thus qualified as the recipients of the right to treatment granted by section 6010. 612 F.2d at 97-98. The conference report to the Developmentally Disabled Act expressed a desire that the right be enforced by the courts. Conf. Rep. No. 473, 94th Cong., 1st Sess. 42, reprinted in 1975 U.S. Code Cong. & Ad. News 943, 961. The private cause of action clearly would further the purposes of the Act. Moreover, states traditionally have been responsible for the health of their citizens, and Congress has not interfered in this instance. 612 F.2d at 97-98.

held that section 6010 does not create a substantive right to appropriate treatment in the least restrictive environment; thus, there can be no basis for an implied private cause of action. The Court founded its narrow holding on three grounds: the contractual nature of a federal-state grant program; the legislative history of the Developmentally Disabled Act; and the language and structure of the Act itself.[14]

First, regarding the contractual nature of the federal-state grant program, the Supreme Court reasoned that the Developmentally Disabled Act was enacted by Congress solely pursuant to its spending power[15] and that the Act itself provides for an ordinary federal-state grant program. According to the Supreme Court's interpretation, there is no language in the Act referring to the fourteenth amendment, nor is there any indication in the legislative history that Congress intended to act under the fourteenth amendment.[16] The Court concluded that any federal-state funding program enacted under the authority of Congress' spending power is a contract between the federal government and a state whereby the state agrees to fulfill certain conditions in exchange for federal funds. Because of this contractual nature, any conditions must be clear and unambiguous. Therefore, in the Court's view, if Congress intended to establish in section 6010 affirmative rights that would be binding on states taking part in the program, it had to make this intention plain to the states before they accepted the funds.[17]

The second basis for the Supreme Court's holding was the legislative history of the Developmentally Disabled Act. According to the Court, there was nothing in the legislative history to suggest that Congress intended the Act to be anything more than a funding statute.[18] Justice Rehnquist quoted several Senators[19] and interpreted their remarks as showing that Congress meant

14. 451 U.S. at 18-20.

15. Id. at 17. The Court of Appeals for the Third Circuit had reasoned that Congress acted under both the spending power and section 5 of the fourteenth amendment when it enacted the Act. 612 F.2d at 98.

16. The Court noted that it had never developed a test to determine when Congress was enforcing the guarantees of the fourteenth amendment, but since any action pursuant to that amendment is binding on all states and often involves state concerns, courts should not infer an intent to enforce the fourteenth amendment without support from the statute and its legislative history. 451 U.S. at 15-16.

Past cases dealing with the source of Congress' authority did not require such a test because either the acts themselves or their legislative histories expressly mentioned the fourteenth amendment. See, e.g., Fitzpatrick v. Bitzer, 427 U.S. 445 (1976) (Civil Rights Act of 1964 authorizing courts to award money damages against state governments for employment discrimination); Oregon v. Mitchell, 400 U.S. 112 (1970) (banning voter literacy tests as racially discriminatory); Katzenbach v. Morgan, 384 U.S. 641 (1966) (upholding Voting Rights Act banning literacy tests).

17. 451 U.S. at 17-18.

18. Id. at 22.

19. Among the Senators' remarks were the following: "We have developed a bill whose thrust, like the 1970 Act, is *to assist* states in developing a comprehensive plan to bring together available resources in a coordinated way so developmentally disabled individuals are appropriately served. Our goal is more thorough and careful planning and more effective evaluation." Id. (quoting 121 Cong. Rec. 16,514 (1975) (statement of Sen. Randolph)) (emphasis added by Court); "Title II of the Conference agreement establishes a *clear federal policy* that the mentally retarded have a right to appropriate treatment, services, and habilitation." Id. (quoting 121 Cong. Rec. 29,820 (1975) (statement of Sen. Javitts)) (emphasis added by Court).

merely to establish a federal policy that the developmentally disabled have a right to appropriate treatment in the least restrictive environment. The Court emphasized that the Senate's version of the bill,[20] containing 400 pages of standards designed to protect the developmentally disabled's rights, was rejected by the Conference Committee in favor of the more general "findings" of section 6010.[21] The Court argued that this action showed that Congress considered and expressly rejected the possibility of making section 6010 a true bill of rights that would be binding on the states.[22]

The third basis for the Court's decision was the language and structure of the Act itself as an indication of Congress' intent. The Court pointed to the lack of any clear "conditional language" in section 6010.[23] According to the Court, without such language, states cannot knowingly consent to any conditions imposed by section 6010. Furthermore, the Court noted that the conditions arising in other sections of the Act, namely sections 6011 and 6063, would be redundant if section 6010 were binding on states.[24] Under section 6011, a state may not receive funds without providing assurances that each state program has in effect an individualized habilitation plan for each developmentally disabled person in the program.[25] Section 6063(b)(5)(C) requires that each state plan "contain or be supported by assurances satisfactory to the Secretary [of Health and Human Services] that the human rights of all persons with developmental disabilities . . . who are receiving treatment, services, or habilitation, under programs assisted under this chapter will be protected consistent with § 6010 of this Title (relating to rights of the developmentally disabled)."[26] If section 6010 were binding on the states, both of these provisions would be unnecessary. Finally, an interpretation of section 6010 requiring deinstitutionalization for most developmentally disabled individuals renders section 6063(b)(4)(A)(ii) meaningless.[27] This latter section requires the state to develop a comprehensive plan to address unmet needs in at least one of four areas of priority service.[28] Only one of these stipulated areas involves deinstitutionalization.[29]

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20. See S. Rep. No. 160, 94th Cong., 1st Sess. 34 (1975).

21. Conf. Rep. No. 473, 94th Cong., 1st Sess. 41-42, reprinted in 1975 U.S. Code Cong. & Ad. News 919, 960.

22. 451 U.S. at 23.

23. Id. Other sections of the Act contain clear conditional language. Section 6005 requires affirmative action in employment of handicapped. 42 U.S.C. § 6005 (1976). Section 6011 conditions allotment on assurances that the state has a habilitation plan for each person in its program. Id. § 6011 (1976 & Supp. III 1979). Section 6012 requires that the state put into effect an advocacy system for the developmentally disabled. Id. § 6012. Section 6063 covers the state plans, which must contain objectives for the program, describe services to be provided, set up a plan to address unmet needs in one of the priority service areas and provide assurances that human rights are protected. Id. § 6063.

24. 451 U.S. at 25-26.

25. 42 U.S.C. § 6011 (1976 & Supp. III 1979).

26. Id. § 6063(b)(5)(C) (Supp. III 1979).

27. 451 U.S. at 26-27.

28. 42 U.S.C. § 6063(b)(4)(A)(ii) (Supp. III 1979).

29. Congress wished states to have flexibility in the spending of federal grants but at the same time wanted to set particular service goals. It did not intend that a state would remain committed to only one service area. Instead Congress expected the states to review the priority service areas

The Supreme Court's holding in *Pennhurst* that section 6010 contains merely precatory language and does not provide affirmative rights for the developmentally disabled[30] was not unexpected in light of a series of prior cases decided by the Court. In *Cannon v. University of Chicago*,[31] in which the Court held that there was an implied private cause of action under section 901 of Title IX of the Education Amendments of 1972[32] prohibiting discrimination on the basis of sex in educational programs receiving federal aid, Justice Rehnquist had foreseen cases such as *Pennhurst* when he stated in his concurring opinion:

> Not only is it "far better" for Congress to so specify when it intends private litigants to have a cause of action, but for this very reason this Court in the future should be extremely reluctant to imply a cause of action absent such specificity on the part of the Legislative Branch.[33]

In *Maine v. Thiboutot*,[34] which held that a section 1983 suit[35] may be brought based on federal statutory violations, the dissenters had expressed a strong fear that individuals would bring private suits under statutes such as the Developmentally Disabled Act.[36] In *O'Connor v. Donaldson*,[37] in refusing to rule on whether the involuntarily committed have a right to treatment, the Court demonstrated its unwillingness to be "thrust into the middle of sensitive policy determinations which it is ill-equipped to handle by virtue of its inexperience in the administration of programs for the mentally retarded."[38]

Although the holding in *Pennhurst* was not surprising in light of *Cannon*, *Thiboutot* and *O'Connor*, it did require the Court to introduce contract theory into federal-state funding programs by requiring that all conditions placed by Congress on the receipt of federal funds be clear and unambiguous. Previously the Court had held that Congress could fix the terms on which it allocated money,[39] but never had it placed any limitations on this power other than that the conditions be appropriate and plainly adapted to a permitted end.[40] The

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each year and reallocate funds as needed. None of the service areas was ranked higher than the others. H.R. Rep. No. 1188, 95th Cong., 2d Sess. 10-11, reprinted in 1978 U.S. Code Cong. & Ad. News 7312, 7364-65.

30. See 451 U.S. at 31-32.

31. 441 U.S. 677 (1979).

32. Pub. L. No. 92-318, § 901, 86 Stat. 235 (codified at 20 U.S.C. § 1681 (1976)).

33. 441 U.S. at 718 (Rehnquist, J., concurring).

34. 448 U.S. 1 (1980).

35. 42 U.S.C. § 1983 (Supp. III 1979).

36. 448 U.S. at 22-23 (Powell, J., dissenting). The majority declared that section 1983 encompasses claims based solely on violations of statutory federal law. Id. at 4. The dissent attached, by way of an appendix, a list of statutes that arguably could give rise to a suit under section 1983. Id. at 34-37 (Powell, J., dissenting). This list included the Developmentally Disabled Act. The dissent urged that this cause of action be limited to equal rights claims. Id. at 12 (Powell, J., dissenting). See also text accompanying notes 57-62 infra.

37. 422 U.S. 563 (1975).

38. Schoenfeld, A Survey of the Constitutional Rights of the Mentally Retarded, 32 Sw. L.J. 605, 625 (1978).

39. See Lau v. Nichols, 414 U.S. 563 (1974); King v. Smith, 392 U.S. 309 (1968); Oklahoma v. United States Civil Serv., 330 U.S. 127 (1947).

40. Oklahoma v. United States Civil Serv., 330 U.S. 127, 143 (1947). The Court, in Lau v. Nichols, 414 U.S. 563 (1974), did foreshadow *Pennhurst* when it stated that the school district had

Pennhurst Court cited *Employees v. Department of Public Health and Welfare*[41] and *Edelman v. Jordan*[42] as support for its holding that the conditions imposed by the contract be express and clear.[43] These cases, however, dealt with the issue whether a state had knowingly waived its immunity from suit under the eleventh amendment.[44] Traditionally, when a contract has involved the waiver of a fundamental right, the courts have required that the waiver be made expressly and knowingly.[45] By its decision in *Pennhurst* the Court expanded the scope of this requirement beyond the waiver of fundamental rights to acceptance of conditions to federal funding in general.[46]

The Court's decision in *Pennhurst* also required it to apply a very narrow interpretation to the "least restrictive environment" standard of section 6010(2),[47] which mandates that habilitation for the developmentally disabled should be provided in a setting that is the least restrictive of an individual's liberty. The Court accepted without question the interpretation of the federal district court that "least restrictive environment" is synonymous with deinstitutionalization.[48] This interpretation contrasts sharply with that of the Court of Appeals for the Third Circuit, which ruled that section 6010 stated a clear preference for deinstitutionalization but did not prohibit institutions. The court of appeals' holding would permit the institutionalization of some individuals if the institutions could provide adequate habilitation and living conditions.[49] Such an interpretation would eliminate any conflict between sections 6010 and 6063(b)(4)(A)[50] and would counter the Supreme Court's

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"contractually agreed" to meet the requirements of the Civil Rights Act when accepting funds. Id. at 568.

41. 411 U.S. 279 (1973).

42. 415 U.S. 651 (1974).

43. 451 U.S. at 17.

44. See Edelman v. Jordan, 415 U.S. at 673-74; Employees v. Department of Pub. Health & Welfare, 411 U.S. at 285.

45. See, e.g., Fuentes v. Shevin, 407 U.S. 67, 95 (1972) (signing a conditional sales contract does not by itself constitute a waiver of procedural due process rights); D.H. Overmyer Co. v. Frick Co., 405 U.S. 174, 185-87 (1971) (in a transaction between merchants a waiver of constitutional rights had been "voluntarily, intelligently, and knowingly" made with "full awareness of the legal consequences").

46. *Pennhurst* has been cited for this precise proposition. See University of Tex. v. Camenisch, 451 U.S. 390, 399 (1981) (Burger, C.J., concurring).

47. 42 U.S.C. § 6010(2) (1976 & Supp. III 1979).

48. See 446 F. Supp. at 1319-20. The district court was not considering section 6010 of the Developmentally Disabled Act. Rather it was forced to interpret "least restrictive environment" because of its finding that there is a constitutional right to minimally adequate habilitation in the least restrictive environment.

49. See 612 F.2d at 114-15. See also Romeo v. Youngberg, 644 F.2d 147, 166-69 (3d Cir. 1980), cert. granted, 451 U.S. 982 (1981).

50. 42 U.S.C. § 6063(b)(4)(A) (Supp. III 1979):

> The plan must—
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> (i) provide for the examination not less often than once every three years of the provision, and the need for the provision, in the State of the four different areas of priority services . . . ; and
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> (ii) provide for the development, not later than the second year in which funds are provided under the plan after . . . [November 6, 1978], and the timely review and revision of a comprehensive statewide plan to plan, financially support, coordinate, and otherwise better address, on a statewide and comprehensive

fear that section 6010 imposes too great a financial burden on the states.

The court of appeals' interpretation of "least restrictive" also would resolve an ambiguity in the legislative history. The majority opinion of the Supreme Court pointed to statements by Senators as support for its belief that Congress intended only to create a federal policy.[51] The dissenters, however, included quotations from some of the same Senators that led them to conclude that Congress had meant to establish specific rights.[52] Under the court of appeals' interpretation, however, these seemingly contradictory congressional purposes are not actually inconsistent. Congress was distinguishing between a right to appropriate treatment and a policy of encouraging deinstitutionalization. Congress set forth this concept in the conference report's statement of the purpose of the substituted section 6010:

> These rights are generally included in the conference substitute in recognition by the conferees that the developmentally disabled, particularly those who have the misfortune to require institutionalization, have a right to receive appropriate treatment for the conditions for which they are institutionalized, and that this right should be protected and assured by the Congress and the courts.[53]

The statement of purpose clearly declares a right to appropriate treatment, but at the same time it also recognizes institutionalization as an ongoing method of care. The final sentence seems to suggest that Congress expected this right to appropriate treatment to be a basis for a private cause of action.

The ultimate effect of the *Pennhurst* decision is to prohibit the developmentally disabled from bringing a private cause of action under section 6010 of the Developmentally Disabled Act. The developmentally disabled must look to other theories in seeking redress for improper and inadequate conditions in mental institutions. The Supreme Court remanded *Pennhurst*[54] for consideration of these theories: suits brought under 42 U.S.C. § 1983[55] and section 504 of the Rehabilitation Act,[56] and violations of the eighth and fourteenth amendments.

With respect to the first theory—a suit brought under 42 U.S.C. § 1983 to force compliance with sections 6011 and 6063(b)(5)(C) of the Developmentally Disabled Act—Justice Rehnquist strongly suggested that the Court would not view favorably such an approach.[57] He doubted that there would be a private

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> basis unmet needs in the State for the provision of at least one of the areas of priority services, such area or areas to be specified in the plan and (at the option of the State) for the provision of an additional area of services for the developmentally disabled, such area also to be specified in the plan.

See text accompanying notes 28-29 supra.

51. 451 U.S. at 21-22.

52. Id. at 43-44 nn.9-11 (White, J., dissenting).

53. Conf. Rep. No. 473, 94th Cong., 1st Sess. 42, reprinted in 1975 U.S. Code Cong. & Ad. News 943, 961.

54. 451 U.S. at 31.

55. 42 U.S.C. § 1983 (Supp. III 1979).

56. 29 id. § 794. See note 6 supra.

57. 451 U.S. at 27-30.

cause of action under *Maine v. Thiboutot*[58] because plaintiffs could claim only that the state plan did not provide adequate assurances to the Secretary of Health and Human Services and because there might be an exclusive express remedy under the Act.[59] Justice Rehnquist also questioned whether Pennsylvania had violated the Act since Pennhurst did not receive federal funds.[60] He intimated that there was not an available remedy since the Court would not force a state to carry such a heavy financial burden. Justice Rehnquist's comments concerning a section 1983 suit, however, may be viewed as mere dictum. Thus, it is not certain that a suit under section 1983 would be without merit. *Pennhurst* was a six-to-three decision,[61] with Justice Blackmun concurring on the ground that he considered a section 1983 suit appropriate.[62] With the intervening departure of Justice Stewart, a member of the majority, the key vote on this issue may belong to the newly appointed Justice, Sandra Day O'Connor.

The developmentally disabled person who is denied a private cause of action under section 6010 of the Act may be able to resort to section 504 of the Rehabilitation Act of 1973.[63] The rationale supporting a cause of action under section 504 is that unnecessary institutionalization represents illegal discrimination.[64] To date, the Supreme Court has been reluctant to impose upon an institution affirmative obligations based on section 504.[65] Because of the Court's emphasis in *Pennhurst* on the expense of deinstitutionalization and the resultant additional administrative burdens, it is unlikely that the Court readily would allow a developmentally disabled person to recover under section 504. An additional obstacle to the successful use of section 504 is that it applies only to programs or activities receiving federal assistance.[66] In *Pennhurst* the institution itself was not receiving federal funds. Arguably, however, sec-

58. 448 U.S. 1 (1980). See text accompanying notes 34-36 supra.

59. Justice Rehnquist suggests that this could be the elimination of federal funds. 451 U.S. at 29.

60. Id. at 28. The district court suggested that counties had a financial incentive to send their retarded to institutions rather than placing them in community living arrangements (CLAs). The state reimbursed the counties 100% if the individuals were placed in an institution. For CLAs, which are federally funded, the county had to supply 10% of the funds. 446 F. Supp. at 1312.

61. Justice Rehnquist wrote the majority opinion, joined by Chief Justice Burger and Justices Powell, Stewart and Stevens. Justice Blackmun concurred in part and concurred in the judgment. Justice White dissented, joined by Justices Brennan and Marshall.

62. 451 U.S. at 33 (Blackmun, J. concurring).

63. See note 6 supra. For cases recognizing a private cause of action under section 504, see NAACP v. Medical Center, Inc., 599 F.2d 1247 (3d Cir. 1979); Leary v. Crapsey, 566 F.2d 863 (2d Cir. 1977) (per curiam); Lloyd v. Regional Transp. Auth., 548 F.2d 1277 (7th Cir. 1977).

64. Halderman v. Pennhurst State School & Hosp., 446 F. Supp. at 1323.

65. See Southeastern Community College v. Davis, 442 U.S. 397 (1979). The Court held that a nursing school did not have to admit a deaf student. Although the Court stated that section 504 was not meant to require affirmative action, it distinguished illegal discrimination. It stressed that, under the particular facts, the requirement that the applicant meet certain physical standards was reasonable in light of the financial burden, but the Court expressly left open the possibility that a situation could arise in which a refusal to modify a program was unreasonable and thus discriminatory. Id. at 411-13.

66. 29 U.S.C. § 794 (Supp. III 1979). See note 6 & text accompanying note 60 supra.

tion 504 would be applicable if it could be shown that the institution was a part of a federally-supported state program, although not itself receiving federal moneys.

In addition to relying upon suits brought under 42 U.S.C. § 1983 and section 504 of the Rehabilitation Act, a developmentally disabled person could rely on the constitutional theories developed by courts prior to the Developmentally Disabled Act. In the past, residents of institutions have brought suits alleging that the conditions of their institutional care violated their eighth amendment right to be free from cruel and unusual punishment.[67] The Supreme Court, however, has stated that "[a]n examination of the history of the Amendment and the decisions of this Court construing the proscription against cruel and unusual punishment confirms that it was designed to protect those convicted of crimes."[68] A more productive approach may be for plaintiff to assert that she has a right, arising out of the fourteenth amendment, to treatment or habilitation. Lower federal courts have been quite willing to recognize such a right,[69] but the Supreme Court thus far has yet to rule on the issue. This issue, however, is currently before the Court.[70]

In *Pennhurst* the Court once again refused to clarify the legal and constitutional rights of the developmentally disabled: "In many ways, this very limited decision simply muddies the water, providing the states and developmentally disabled with minimal guidance for making immediate policy recommendations."[71] While the holding in *Pennhurst* is narrow and appears to deny developmentally disabled plaintiffs only one possible theory in their suits against institutions, that theory—a private cause of action under section 6010—not only avoided any constitutional issues but also represented a direct and simple approach. In the absence of a cause of action under section 6010, a plaintiff must rely on multiple theories, none of which is very effective. While lower federal courts, Congress and the Executive Branch have been moving forward rapidly in establishing and protecting rights for the de-

67. See, e.g., Welsch v. Likins, 373 F. Supp. 487, 502-03 (D. Minn. 1974) (seclusion, physical restraints, excessive use of tranquilizers, and overall conditions may amount to an eighth amendment violation). But see Romeo v. Youngberg, 644 F.2d 147 (3d Cir. 1980), cert. granted, 451 U.S. 982 (1981) (eighth amendment inappropriate in civil context).

68. Ingraham v. Wright, 430 U.S. 651, 664 (1977). See also Bell v. Wolfish, 441 U.S. 520, 535 n.16 (1979).

69. See note 1 supra.

70. Romeo v. Youngberg, 644 F.2d 147 (3d Cir. 1980), cert. granted, 451 U.S. 982 (1981). *Romeo*, like *Pennhurst*, is a suit against Pennhurst State School & Hospital. The Court of Appeals for the Third Circuit described the parameters of the right to treatment. This right arises when a person is involuntarily committed. Treatment must be provided for patients who need treatment and are willing to accept it. The right to treatment limits the state's power to impose treatment on unwilling patients. The form of treatment must be that which is acceptable for the patient given the current medical or scientific knowledge. 644 F.2d at 165, 169. The Supreme Court's ruling in *Romeo* will be very important for the developmentally disabled since section 6010 is no longer a viable approach.

71. Summary & Analysis, 5 Mental Disability L. Rep. 139, 139 (1981).

velopmentally disabled, the Supreme Court seems to be both lagging behind and increasing the confusion. After *Pennhurst* the developmentally disabled are back where they were when *Wyatt v. Stickney*[72] was decided in 1972.

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72. 344 F. Supp. 387 (M.D. Ala. 1972). See note 1 supra.

Tort Law—*Foster v. Winston-Salem Joint Venture*: Duty of Mall Owners to Take Measures to Protect Invitees from Criminal Acts

In a time of rising crime rates, courts are often presented with the difficult task of drawing the line between the business owner's duty to provide security for his patrons and the customer's obligation to accept the risks associated with venturing into public places. In *Foster v. Winston-Salem Joint Venture*,[1] the North Carolina Supreme Court faced this task and held that the owner of a shopping mall had a duty to provide security measures to protect its customers from criminal assaults in the mall parking lot if the criminal assaults were reasonably foreseeable and could have been prevented by the exercise of reasonable care.[2] This appears to be the first time that the court has found explicitly that a business invitor has the duty to protect his patrons from the foreseeable criminal conduct of a third party.[3]

Defendant, Winston-Salem Joint Venture, is a general partnership that owns Hanes Shopping Mall in Winston-Salem, North Carolina. On December 20, 1976, plaintiff, Irene B. Foster, drove to the mall to do some Christmas shopping. After making some purchases, Ms. Foster returned to her car at approximately 4:30 p.m., while it was still light.[4] As Ms. Foster was placing her packages in her car, two unidentified males suddenly appeared, violently pushed Ms. Foster into her car, then grabbed her by her feet and pulled her out of the car onto the pavement where she was kicked, beaten and robbed of $145.00.[5]

In the ensuing action against the mall owner, Ms. Foster alleged that the defendants negligently represented that the parking lot was in a reasonably safe condition and free from dangers;[6] that they negligently failed to warn plaintiff of the risk of harm from criminal assaults although they had knowledge of prior criminal incidents;[7] that they negligently failed to provide ade-

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1. 303 N.C. 636, 281 S.E.2d 36 (1981). .

2. Id. at 640, 281 S.E.2d at 39.

3. Cf. Manganello v. Permastone, Inc., 291 N.C. 666, 231 S.E.2d 678 (1977); Aaser v. City of Charlotte, 265 N.C. 494, 144 S.E.2d 610 (1965). Both of these cases addressed a landowner's duty to protect his invitees from injury by third parties; neither case, however, involved intentional criminal conduct. In *Manganello*, plaintiff, a patron at defendant's lake, was injured by the "rough or boisterous" horseplay of other swimmers. 291 N.C. at 671, 231 S.E.2d at 681. In *Aaser*, plaintiff, a paying spectator at an ice hockey game, was injured when she was struck by a puck that a group of young boys were slapping back and forth in a corridor of the arena. 265 N.C. at 495, 144 S.E.2d at 612.

4. Record at 31-32, Foster v. Winston-Salem Joint Venture, 50 N.C. App. 516, 274 S.E.2d 265, aff'd in part, rev'd in part, 303 N.C. 636, 281 S.E.2d 36 (1981).

5. Id. at 32-36.

6. In his deposition, the manager of the mall indicated that prior to the attack, he had told a staff writer for the local newspaper that security had been "beefed up," id. at 24, but he could "not recall any specifics about how [he] increased the security." Id. at 26.

7. The record indicated that there were 31 reported criminal incidents at the mall in the year prior to Ms. Foster's assault. Id. at 36-38. Although larceny of property was the more common crime, six or seven physical assaults had been reported. Id.

quate security protection for mall patrons;[8] and that these negligent acts were the proximate cause of her injuries.[9] The trial court granted defendants' motion for summary judgment and dismissed the action.[10] Plaintiff then prosecuted an appeal to the North Carolina Court of Appeals.

The court of appeals found that the pleadings stated a cause of action,[11] but nevertheless, affirmed the trial court's grant of summary judgment for defendant.[12] In finding that summary judgment was properly granted, the court determined that the record presented insufficient evidence that the defendant had either actual or constructive knowledge of the existence of a dangerous condition in the parking lot.[13]

On appeal,[14] the North Carolina Supreme Court affirmed the court of appeals' finding that plaintiff had stated a proper claim for relief but reversed the affirmance of summary judgment and remanded the case to the trial court for a trial on the merits.[15] Justice Copeland, writing for the court, found that

> [i]f an invitee . . . alleges in a complaint that he or she was on the premises of a store owner, during business hours for the purpose of transacting business thereon, and that while he or she was on the premises injuries were sustained from the criminal acts of a third person, which acts were reasonably foreseeable by the store owner, and which could have been prevented by the exercise of ordinary care, then the plaintiff has set forth a cause of action in negligence which,

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8. From the time the mall opened until Ms. Foster's assault, the usual security was a single guard patrolling the parking lot. Id. at 18-20. The lot was also equipped with a series of mercury vapor lights. Id. at 19. At least one patron had complained to the manager that the lighting intensity was inadequate and less than that provided at another mall in the Winston-Salem area. Id. at 39.

9. Brief for Appellant at 4, Foster v. Winston-Salem Joint Venture, 50 N.C. App. 516, 274 S.E.2d 265, aff'd in part, rev'd in part, 303 N.C. 636, 281 S.E.2d 36 (1981).

10. 50 N.C. App. at 517, 274 S.E.2d at 266. The trial judge dismissed the action under N.C.R. Civ. P. 12(b)(6). The court of appeals found this to be error because defendant had not moved to dismiss for failure to state a claim upon which relief could be granted. This error was harmless, however, in light of the court's finding that the trial judge correctly granted summary judgment for the defendant. Id.

11. Noting the general rule "that the criminal acts of third parties are entirely unforeseeable" the court nonetheless found that "such [a rule], . . . when applied to . . . a shopping center setting where large amounts of money and merchandise are exchanged and numerous people with no apparent purpose in being at the shopping center . . . loiter about, is fallacious." 50 N.C. App. at 517, 274 S.E.2d at 266-67. Consequently, the court found "that it is entirely consistent with the mainstream of North Carolina law to hold landowners responsible for protecting their business invitees from the foreseeable criminal action of third parties." Id.

12. Id. at 519, 274 S.E.2d at 267.

13. Id. While acknowledging that "at first blush" the record of prior criminal acts might warrant the conclusion that the defendant had actual or constructive notice of foreseeable criminal activity, the court was not willing to let the factual issue of foreseeability go to the jury. Rather, it found that neither "the numerous petty larcenies in the 76-acre parking lot . . . [nor the] six or seven assaults in such a large and heavily trafficked area gave defendants knowledge of a dangerous condition." Id. In contrast, Judge Wells in dissent found the evidence sufficient to establish the element of foreseeability of risk of harm from criminal conduct, and would have allowed the case to go to the jury. Id. at 520, 274 S.E.2d at 267-68 (Wells, J., dissenting).

14. Plaintiff appealed the court of appeals' decision pursuant to N.C. Gen. Stat. § 7A-30(2) (1981) which provides, in pertinent part, for appeals of right "from any decision of the Court of Appeals rendered in a case . . . (2) In which there is a dissent."

15. Foster v. Winston-Salem Joint Venture, 303 N.C. 636, 281 S.E.2d 36 (1981).

if proved, would entitle that plaintiff to recover damages from the store owner.[16]

Having determined as a matter of law that the duty to exercise ordinary care existed,[17] the court turned to the question of whether the criminal acts of these third persons were foreseeable and, if so, whether the defendant exercised reasonable care under the circumstances to fulfill its duty.[18] In contrast to the court of appeals, the supreme court found that plaintiff's evidence raised sufficient issues of fact for jury determination. On the issue of foreseeability, the court could not "hold as a matter of law that the thirty-one criminal incidents reported as occurring on the shopping mall premises within the year preceding the assault on plaintiff were insufficient to charge defendants with knowledge that such injuries were likely to occur."[19] The supreme court also found "that a jury could reasonably find that by providing only one guard to patrol the large parking area during the busy shopping period five days before Christmas, defendants breached their duty to exercise reasonable care to maintain the . . . premises in such a manner that they might be used safely by the customers invited thereon."[20]

Dissenting, Justice Carlton emphasized that the imposition of this duty should be a question of fairness, rather than of foreseeability. On the issue of fairness, one "should take into account the relationship of the parties, the na-

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16. Id. at 640, 281 S.E.2d at 39. In reaching this holding, the court relied heavily on the Restatement (Second) of Torts, which provides as follows:

> A possessor of land who holds it open to the public for entry for his business purposes is subject in liability to members of the public while they are upon the land for such a purpose, for physical harm caused by the accidental, negligent, or intentionally harmful acts of third persons or animals, and by the failure of the possessor to exercise reasonable care to
>
> (a) discover that such acts are being done or are likely to be done, or
>
> (b) give a warning adequate to enable the visitors to avoid the harm, or otherwise to protect them against it.

Comment f:

> *Duty to police premises.* Since the possessor is not an insurer of the visitor's safety, he is ordinarily under no duty to exercise any care until he knows or has reason to know that the acts of the third person are occurring, or are about to occur. He may, however, know or have reason to know, from past experience, that there is a likelihood of conduct on the part of third persons in general which is likely to endanger the safety of the visitor, even though he has no reason to expect it on the part of any particular individual. If the place or character of his business, or his past experience is such that he should reasonably anticipate careless or criminal conduct on the part of third persons, either generally or at some particular time, he may be under a duty to take precautions against it, and to provide a reasonably sufficient number of servants to afford a reasonable protection.

Restatement (Second) of Torts § 344 & comment f (1965).

17. Duty is a question of law for the court to determine. See, e.g., McNair v. Boyette, 282 N.C. 230, 192 S.E.2d 457 (1972); Ashe v. Acme Builders, Inc., 267 N.C. 384, 148 S.E.2d 244 (1966); Redding v. F.W. Woolworth Co., 9 N.C. App. 406, 176 S.E.2d 383 (1970).

18. Once the duty is found to exist, it is a question of fact for the jury whether the defendant exercised reasonable care under the circumstances to fulfill that duty. See, e.g., Kekelis v. Whitin Mach. Works, 273 N.C. 439, 160 S.E.2d 320 (1968); Lassiter v. Williams, 272 N.C. 473, 158 S.E.2d 593 (1968); Brewer v. Majors, 48 N.C. App. 202, 268 S.E.2d 229 (1980).

19. 303 N.C. at 642, 281 S.E.2d at 40.

20. Id. at 643, 281 S.E.2d at 40-41.

ture of the risk, and the public interest in the proposed solution."[21] The ultimate test of fairness is whether "a man [can] ascertain in advance of a jury's verdict whether the duty is his and whether he has performed it."[22] Carlton found a duty predicated merely on foreseeability too vague and uncertain, and expressed the fear that the duty was of "potentially limitless scope."[23]

The vigorous dissent of Justice Carlton in *Foster* highlights the difficult issues presented in this area of tort law. Generally, courts have been hesitant to find a duty to protect another against the intentional criminal acts of third parties. Such acts usually cannot be anticipated, and ordinarily one has the right to assume that others will obey the law. In other words, criminal acts are usually unforeseeable, and one does not have the duty to protect against an unforeseeable risk of harm.

Courts have recognized, however, that under special circumstances, one has the duty to anticipate dangers and take precautions for the protection of another. This duty typically arises in situations in which one stands in a special relationship to another and the other may reasonably be expected to believe that such protection is forthcoming. Thus, the common carrier,[24] the innkeeper,[25] the employer[26] and the public utility[27] all have a general duty to take active measures to see that certain individuals are protected from an unreasonable risk of harm.

Yet even in those special relationships in which one has a duty to take precautions for the protection of another, an intervening criminal act is often found to supersede any initial negligence and terminate defendant's liability.[28] The defendant's initial negligence is seen as the remote cause of the injury; his

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21. Id. at 644, 281 S.E.2d at 41 (Carlton, J., dissenting).

22. Id. at 644, 281 S.E.2d at 41-42 (Carlton, J., dissenting) (quoting Goldberg v. Housing Auth., 38 N.J. 578, 589, 186 A.2d 291, 297 (1962)).

23. 303 N.C. at 643, 281 S.E.2d at 41 (Carlton, J., dissenting).

24. See, e.g., Mann v. Virginia Dare Transp. Co., 283 N.C. 734, 743, 198 S.E.2d 558, 565 (1973) ("[A] carrier owes to the passengers whom it undertakes to transport 'the highest degree of care for their safety so far as is consistent with the practical operations and conduct of its business.' ") (quoting White v. Chappell, 219 N.C. 652, 659, 14 S.E.2d 843, 847 (1941)).

25. See, e.g, Rappaport v. Days Inn of Am., Inc., 296 N.C. 382, 383, 250 S.E.2d 245, 247 (1979) ("[A]n innkeeper is not an insurer of the personal safety of his guests but is required to 'exercise due care to keep his premises in a reasonably safe condition and to warn his guests of any hidden peril.' ") (quoting Barnes v. Hotel O'Henry Corp., 229 N.C. 730, 731, 51 S.E.2d 180, 181 (1949)).

26. See, e.g., Whitaker v. Blackburn, 47 N.C. App. 144, 148, 266 S.E.2d 763, 765 (1980) (An employer's "duty is to exercise ordinary care to keep the premises in a reasonably safe condition and to give warning or notice of hidden perils or unsafe conditions insofar as they can be ascertained by reasonable inspection and supervision.").

27. See, e.g., Graham v. North Carolina Butane Gas Co., 231 N.C. 680, 685, 58 S.E.2d 757, 761-62 (1950) ("Where a gas company . . . becomes aware that . . . gas is escaping from the gas fixtures on the premises into the building, it becomes the duty of the gas company to shut off the gas supply until the further escape of gas from the fixture can be prevented, even though the fixtures do not belong to the company and are not in its charge or custody.").

28. See, e.g., Ward v. Southern Ry., 206 N.C. 530, 532, 174 S.E. 443, 444 (1934) (employee killed by coal thieves; criminal act of third party broke "causal chain between the original negligence and the accident"); Chancey v. Norfolk & W. Ry., 174 N.C. 351, 354, 93 S.E. 834, 836 (1917) (passenger robbed and assaulted on overcrowded and poorly lit train; "there was no causal connection between the supposed negligent act of the defendant and the injury which it is alleged resulted therefrom").

liability is insulated by the unforeseeable, intervening criminal act.[29] If, however, the defendant could anticipate the intervening criminal act, the criminal act will not insulate the negligence which created the opportunity for the criminal activity.[30]

Therefore, the initial inquiry in *Foster* is whether defendant had a duty to provide security against criminal attack. If it did have this duty, it would be for the jury to determine whether reasonable care was exercised in fulfilling this duty.[31] If negligent conduct is found, further inquiry must be made to determine whether the injury that occurred was a foreseeable result of that negligence. The question then becomes whether defendant's conduct was the "proximate cause"[32] of the injury.

As a customer of the retail establishments of the mall, Ms. Foster's visit was for the mutual advantage of both her and defendant mall owners. Consequently, she held the common law status of an invitee.[33] Defendant therefore

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29. See Phelps v. City of Winston-Salem, 272 N.C. 24, 30, 157 S.E.2d 719, 723 (1967) ("If the connection between negligence and the injury appears unnatural, unreasonable and improbable in the light of common experience, the negligence, if deemed a cause of the injury at all, is to be considered a remote rather than a proximate cause."); Nance v. Parks, 266 N.C. 206, 211, 146 S.E.2d 24, 28 (1966) ("To exculpate a negligent defendant by insulating his negligence, the intervening cause must be one which breaks the connection between defendant's negligence and the injury alleged in such a manner that it itself becomes the proximate cause of the injury.").

30. See, e.g., Wesley v. Greyhound Lines, Inc., 47 N.C. App. 680, 268 S.E.2d 855 (1980). In *Wesley* the party who attacked plaintiff had committed other crimes in the bus station and had been removed from the station "approximately 50 times" by defendant's employees. Id. at 699, 268 S.E.2d at 867. Also, "[p]imps, prostitutes, transvestites, bums, winos, and loiterers . . . were allowed to linger in the bus station where they frequently pestered defendant's passengers." Id. at 700, 268 S.E.2d at 867. The court of appeals found this evidence "more than sufficient" to show that a criminal assault upon defendant's passengers was foreseeable. Id. The Restatement (Second) of Torts takes a similar approach:

> *Intentionally Tortious or Criminal Acts Done Under Opportunity Afforded by Actor's Negligence*
>
> The act of a third person in committing an intentional tort or crime *is a superseding cause* of harm to another resulting therefrom, although the actor's negligent conduct created a situation which afforded an opportunity to the third person to commit such a tort or crime, *unless the actor at the time of his negligent conduct realized or should have realized the likelihood that such a situation might be created, and that a third person might avail himself of the opportunity to commit such a tort or crime.*

Restatement (Second) of Torts § 448 (1965) (emphasis added).

31. See note 18 supra.

32. "Proximate cause is that cause which produces the result in continuous sequence and without which it would not have occurred, and one from which any man of ordinary prudence could have foreseen that such a result was probable under all the facts then existing." Kanoy v. Hinshaw, 273 N.C. 418, 426, 160 S.E.2d 296, 302 (1968). See also Hall v. Coble Dairies, Inc., 234 N.C. 206, 214, 67 S.E.2d 63, 68-69 (1951); Goode v. Harrison, 45 N.C. App. 547, 548-49, 263 S.E.2d 33, 34 (1980).

33. "To constitute one as an invitee there must be some mutuality of interest. Usually an invitation will be inferred where the reason for the visit is of mutual advantage to the parties. To be an invitee, the purpose of the visit must be of interest or advantage to the invitor." Briles v. Briles, 43 N.C. App. 575, 577, 259 S.E.2d 393, 395, cert. denied, 299 N.C. 329, 265 S.E.2d 394 (1980).

North Carolina has not followed the minority of jurisdictions that have abrogated the common-law classifications of invitee, licensee and trespasser in favor of a general negligence test of reasonableness under the circumstances. See, e.g., Starr v. Clapp, 40 N.C. App. 142, 143, 252 S.E.2d 220, 221, aff'd, 298 N.C. 275, 258 S.E.2d 348 (1979) ("The duty owed a person on the premises of another depends upon whether that person is an invitee, licensee or trespasser."). For formulations of the minority view, see Smith v. Arbaugh's Restaurant, Inc., 469 F.2d 97 (D.C. Cir.

had the duty to provide a reasonably safe place for plaintiff to do that which was within the scope of her invitation, or to provide warning of hidden dangers discoverable by reasonable inspection.[34] The theory is that the "invitation" by defendant to enter gives an implied assurance that the premises have been made safe for their intended use.[35]

Expressed in these terms, the duty imposed upon business invitors in *Foster* is not a radical departure from accepted concepts in invitee-invitor case law.[36] The invitor has the duty to "exercise ordinary care to keep his premises . . . in a safe condition."[37] There is no distinction made in the rule between danger created by a physical condition on the land and danger created by a third party's act.[38]

It is fundamental that the existence of the invitor's duty is judged by the foreseeability of unreasonable risk of harm to the invitee.[39] Thus, a finding that "foreseeability is the test in determining the extent of a landowner's duty to safeguard his business invitees from the criminal acts of third persons"[40] is

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1972), cert. denied, 412 U.S. 939 (1973); Rowland v. Christian, 69 Cal. 2d 108, 443 P.2d 561, 70 Cal. Rptr. 97 (1968); Mile Fence Co. v. Radovich, 175 Colo. 537, 489 P.2d 308 (1971); Pickard v. City of Honolulu, 51 Hawaii 134, 452 P.2d 445 (1969); Ouellette v. Blanchard, 116 N.H. 552, 364 A.2d 631 (1976); Basso v. Miller, 40 N.Y.2d 233, 352 N.E.2d 868, 386 N.Y.S.2d 564 (1976); Marionorenzi v. Joseph DiPonte, Inc., 114 R.I. 294, 333 A.2d 129 (1975).

34. [An invitor is] under the legal duty to his patrons to exercise ordinary care to keep his premises, and all parts thereof to which persons lawfully present may go, in a safe condition for the use for which they are designed and intended, and to give warning of hidden dangers or unsafe conditions in so far as can be ascertained by reasonable inspection and supervision.

Revis v. Orr, 234 N.C. 158, 160, 66 S.E.2d 652, 653 (1951). There is no question that the scope of the owner's duty extends to the parking lot provided for the convenience of the invitees. See Game v. Charles Stores Co., 268 N.C. 676, 151 S.E.2d 560 (1966); Berger v. Cornwell, 260 N.C. 198, 132 S.E.2d 317 (1963).

35. See W. Prosser, Handbook of the Law of Torts § 61, at 388-91 (4th ed. 1971).

36. In fact, the court of appeals recognized "that it is entirely consistent with the mainstream of North Carolina law to hold landowners responsible for protecting their business invitees from the foreseeable criminal action of third parties." 50 N.C. App. at 518, 274 S.E.2d at 266.

37. See note 34 supra.

38. This is consistent with prior cases in which third persons may have negligently created dangerous conditions. See, e.g., Aaser v. City of Charlotte, 265 N.C. 494, 499, 144 S.E.2d 610, 615 (1965) ("[W]hen the dangerous condition or activity . . . arises from the act of third persons, whether themselves invitees or not, the owner is not liable for injury resulting unless he knew of its existence or it had existed long enough for him to have discovered it by the exercise of due diligence and to have removed or warned against it."); Long v. National Food Stores, Inc., 262 N.C. 57, 60, 136 S.E.2d 275, 278 (1964) ("[W]here the unsafe or dangerous condition is created by a third party, . . . an invitee proximately injured thereby may not recover, unless he can show that the unsafe or dangerous condition had remained there for such a length of time that the inviter [*sic*] knew, or by the exercise of reasonable care should have known, of its existence."); Stafford v. Food World, Inc., 31 N.C. App. 213, 216, 228 S.E.2d 756, 757, cert. denied, 291 N.C. 324, 230 S.E.2d 677 (1976) ("If the unsafe condition is created by third parties . . . a showing must be made that it had existed for such length of time that the store proprietor knew or by the exercise of reasonable care should have known of its existence in time to have removed the danger or given warning of its presence."); Gaskill v. Great Atl. & Pac. Tea Co., 6 N.C. App. 690, 693, 171 S.E.2d 95, 97 (1969).

39. Foreseeability is a major variable in the initial judicial determination whether a duty exists. See W. Prosser, supra note 35, § 33. Foreseeability also plays a crucial role in determining whether negligent conduct was the cause of plaintiff's injury. See text accompanying notes 77-79 infra.

40. 303 N.C. at 640, 281 S.E.2d at 39.

neither novel nor unsupportable in the case law.[41]

There is some concern, however, that foreseeability is an inadequate test of duty when the cause of injury is intentional criminal conduct. Due to the pervasive nature of criminal activity in our society, "[e]veryone can foresee the commission of crime virtually anywhere and at any time."[42] Thus, a duty predicated on foreseeability might have "potentially limitless scope."[43]

These fears are in most cases unfounded. Since the general rule is that criminal activity is unforeseeable, any claim that it was foreseeable will be subject to strict scrutiny by the court. Therefore, questionable claims should rarely reach the jury.

Also, foreseeability is tied directly to the "place or character of the business, or . . . past experience."[44] These variables are figured into the calculus to determine whether any duty exists. *Foster* is illustrative of the use of these variables. It is recognized that suburban shopping malls attract both shoppers and those who prey on shoppers. Activity, both legal and illegal, is known to increase during the holiday season.[45] Recognizing the existence of these problems and the likelihood that they would continue, the Hanes mall owners represented to the public that they were taking extra security measures.[46] The special nature of mall activity put defendants on notice of the need to anticipate and take reasonable precautions against criminal activity.

Actual past occurrences of criminal conduct provide further evidence on the issue of foreseeability. While the court of appeals found that the thirty-one reported criminal incidents in the year prior to the assault were insufficient evidence of foreseeability, the supreme court determined that the matter should go to the jury. When the jury does hear evidence on foreseeability, it will be presented with the conceptually difficult issue of determining how many criminal acts must occur before the unforeseeable becomes foreseeable.[47] Yet when coupled with the special circumstances found in the mall

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41. See, e.g., Tyndall v. United States, 295 F. Supp. 448, 452-53 (E.D.N.C. 1969).

42. 303 N.C. at 644, 281 S.E.2d at 41 (Carlton, J., dissenting) (quoting Goldberg v. Housing Auth., 38 N.J. 578, 583, 186 A.2d 291, 293 (1962)). See also Cook v. Safeway Stores, Inc., 354 A.2d 507, 509 (D.C. 1976):

> This court is all too familiar through daily police reports of the high incidence throughout the entire city of such crimes as mugging, purse-snatching, assault and robbery—a constant hazard to all law-abiding persons who use the streets and public places of business. But simply because this hazard exists, it does not follow that the common law of negligence imposes an obligation upon private enterprises to provide armed guards to insure the safety of persons invited to do business with them.

43. 303 N.C. at 643, 281 S.E.2d at 41 (Carlton, J., dissenting).

44. Restatement (Second) of Torts § 344, comment f (1965). See note 16 supra.

45. Ms. Foster was assaulted on December 20, 1976. 303 N.C. at 637, 281 S.E.2d at 37.

46. See note 6 supra.

47. The uncertainties inherent in this evaluation led one court to inquire:

> [H]ow many criminal acts are necessary to invoke the duty to warn and how many are necessary to impose the duty to hire a private police force? Is the Court to determine the number, or is the jury to be permitted to speculate upon the appropriate number of criminal acts to give rise to the duty? Is it not also appropriate to consider the time element? After a lapse of six months, one year or two years without an incident or a criminal act, can a merchant disband his private police force?

Cornpropst v. Sloan, 528 S.W.2d 188, 197 (Tenn. 1975).

environment, and the general duty of a business invitor,[48] it is reasonable to find that the mall owners were put on sufficient notice to raise a duty to protect against this type of harm.[49]

In an effort to limit the scope of the foreseeability test, the dissent would inquire into both the invitee's *and* the mall owners' actual or constructive notice of foreseeable risk of harm. Under this view a comparison of the criminal activity of the parking lot with the crime rate of the surrounding neighborhood is necessary.[50] If the parking lot and the surrounding neighborhood experience similar criminal activity, "no duty on the part of the owner should arise because the foreseeability of criminal activity is equally obvious to the owner or the patron . . . and . . . the patron is simply taking a *known* and *accepted* risk in venturing out."[51] This analysis recognizes the scope of criminal activity in society, and looks beyond past occurrences to the general risks of venturing out into a particular location. The underlying rationale seems to be that an invitee should not expect the business owner to make his premises any safer than those of the surrounding community.[52]

There are at least two flaws in the dissent's approach. First, this analysis clearly would be inappropriate if used to determine invitor liability for injuries caused by physical conditions. It would, for example, deny relief to an invitee who patronizes a business located in a deteriorating section of town. An invitor could claim he had no duty to keep the premises in a reasonably safe condition since the surrounding neighborhood would have put the invitee on notice that the premises would likely be in disrepair. Such a result is clearly objectionable. Second, the dissent's approach would be contrary to the public interest which is served by requiring the private sector to supplement govern-

48. See note 34 supra.

49. Compare Atamian v. Supermarkets Gen. Corp., 146 N.J. Super. 149, 369 A.2d 38 (1976) (patron assaulted and raped in parking lot of supermarket; similar occurrences immediately prior to attack on plaintiff gave rise to duty to provide reasonable security measures to deter foreseeable criminal acts); and Murphy v. Penn Fruit Co., 274 Pa. Super. 427, 418 A.2d 480 (1980) (patron assaulted, stabbed in parking lot of grocery store; past criminal acts in vicinity of store created inference that plaintiff's injury was foreseeable) with Drake v. Sun Bank & Trust Co., 377 So.2d 1013 (Fla. Dist. Ct. App. 1979) (bank customer kidnapped in bank parking lot, robbed and murdered; plaintiff failed to allege facts sufficient to meet test of foreseeability); McClendon v. Citizens & S. Nat'l Bank, 155 Ga. App. 755, 272 S.E.2d 592 (1980) (bank customer robbed at gunpoint in parking lot of bank; defendant had no notice of dangerous condition in lot as no robberies had occurred there previously); O'Brien v. Colonial Village, Inc., 119 Ill. App. 2d 105, 255 N.E.2d 205 (1970) (patron of shopping center assaulted in parking lot; plaintiff failed to allege previous incidents or special circumstances that would charge owners with knowledge of dangers); and Shipes v. Piggly Wiggly St. Andrews, Inc., 269 S.C. 479, 238 S.E.2d 167 (1977) (customer assaulted in parking lot; plaintiff failed to prove that defendant knew or had reason to know of such attacks).

50. In North Carolina, evidence of crime in the surrounding area is admissible to show constructive knowledge of the need for security measures. See Wesley v. Greyhound Lines, Inc., 47 N.C. App. 680, 685, 268 S.E.2d 855, 859 (1980). Contra, Cornpropst v. Sloan, 528 S.W.2d 188, 197 (Tenn. 1975) ("Conditions in the area are irrelevant.").

51. 303 N.C. at 647, 281 S.E.2d at 43 (Carlton, J., dissenting) (emphasis in original). If a dangerous condition is apparent to both the invitor and invitee, the invitor usually has no duty to take affirmative action to warn the invitee of the danger. See, e.g., Long v. Methodist Home for the Aged, Inc., 281 N.C. 137, 187 S.E.2d 718 (1972) (invitee slipped and fell on wet floor that was the result of the invitee's overstuffing the commode with toilet paper).

52. See 303 N.C. at 647, 281 S.E.2d at 43 (Carlton, J., dissenting) ("What right does a patron have to demand that the store premises be safer than the general area in which it is situated?").

mental efforts to fight crime.[53]

Finding that a duty exists does not resolve the issue of whether it is wise or reasonable to impose it. "Duty" is a term of art expressing a court's evaluation that the creation of a particular legal obligation is determined to be in the public interest.[54] Therefore, any meaningful analysis of *Foster* requires an inquiry into the various policies which would be reflected in an imposition of this duty on mall owners.

To ensure the greatest benefit to society, liability should be limited by a cost-benefit analysis. This analysis is not alien to the law of torts; it is implicit in Learned Hand's classic formulation of the factors determining the existence of the duty,[55] and various courts have accepted this analysis.[56] The public interest is served only if the costs of imposing the duty are less than or equal to the benefits received.[57] The desired result of the imposition of a duty is to reduce the overall costs to society of a particular activity. While the various unknown contingencies involved in these circumstances make a quantitative cost-benefit analysis impossible, the qualitative aspects of this duty can be scrutinized.

Cost-benefit analysis requires that the desired economic and social policies be taken into consideration and assigned their appropriate weight.[58] Though not articulated by the supreme court, the public policy rationale implicit in the *Foster* decision was expressed by the court of appeals when it

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53. See notes 58 & 59 infra.

54. Dillon v. Legg, 68 Cal. 2d 728, 734, 441 P.2d 912, 916, 69 Cal. Rptr. 72, 76 (1968) (" '[D]uty' is not sacrosanct in itself, but only an expression of the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection.") (quoting W. Prosser, Handbook of the Law of Torts § 53, at 333 (3d ed. 1964)).

55. "[T]he owner's duty . . . to provide against resulting injuries is a function of three variables: (1) The probability [of harm]; (2) the gravity of the resulting injury, if [it occurs]; (3) the burden of adequate precautions." United States v. Carroll Towing Co., Inc., 159 F.2d 169, 173 (2d Cir. 1947).

56. See, e.g., Raymond v. Paradise Unified School Dist., 218 Cal. App. 2d 1, 8, 31 Cal. Rptr. 847, 851-52 (1963):

> An affirmative declaration of duty simply amounts to a statement that two parties stand in such relationship that the law will impose on one a responsibility for the exercise of care toward the other. Inherent in this simple description are various and sometimes delicate policy judgments. The social utility of the activity out of which the injury arises, compared with the risks involved in its conduct; the kind of person with whom the actor is dealing; the workability of a rule of care, especially in terms of the parties' relative ability to adopt practical means of preventing injury; the relative ability of the parties to bear the financial burden of injury and the availability of means by which the loss may be shifted or spread; the body of statutes and judicial precedents which color the parties' relationship; the prophylactic effect of a rule of liability; in the case of a public agency defendant, the extent of its powers, the role imposed upon it by law and the limitations imposed upon it by budget; and finally, the moral imperatives which judges share with their fellow citizens—such are the factors which play a role in the determination of duty.

See also Phillips v. Croy, 173 Ind. App. 401, 405, 363 N.E.2d 1283, 1285 (1977) ("[T]he quantum of care exercised must be proportionate to the danger to be avoided and the fatal consequences involved in its neglect compared to the importance of the right the claimant is seeking to advance.").

57. See generally Calabresi, Some Thoughts on Risk Distribution and the Law of Torts, 70 Yale L.J. 499 (1961); Posner, A Theory of Negligence, 1 J. Legal Stud. 29, 33-48 (1972).

58. See Bazyler, The Duty to Provide Adequate Protection: Landowners' Liability for Failure to Protect Patrons from Criminal Attack, 21 Ariz. L. Rev. 727, 737-54 (1979).

noted that the very nature of the activity generated by the modern shopping mall required that general rules of tort liability should be reevaluated.[59] The court thus determined that the special conditions found in the mall setting which might aid, abet or entice criminal activity require that a particular type of responsibility be imposed on mall owners.

Other social and economic goals should be noted. Along with affording plaintiff Foster the opportunity to prove and recover damages,[60] the court's decision requires the private sector to take steps to deter criminal activity.[61] Additionally, the court imposed the duty upon the party best able to prevent the loss[62] and efficiently allocated the costs of deterrent measures among the members of society.[63] While the result will of course lead to greater expense for all mall patrons, the court implicitly determined that it is more cost effec-

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59. 50 N.C. App. at 518, 274 S.E.2d at 266. See note 11 supra. See also Cornpropst v. Sloan, 528 S.W.2d 188, 199 (Tenn. 1975) (Henry, J., dissenting) ("Having thus caused enormous congregations of potential and actual shoppers in relatively compact areas, certain duties devolve upon the invitors for the benefit and protection of the invitees.").

60. The general purpose of tort law is to compensate an injured party and make him whole for the injuries he has suffered. W. Prosser, supra note 35, § 2, at 7. However, in these circumstances, recovery is not had from the criminal, but from the owner of the premises upon which the injury occurred. As a consequence, some observers question the propriety of "shifting the financial loss caused by crime from one innocent victim to another innocent victim." Davis v. Allied Supermarkets, Inc., 547 P.2d 963, 965 (Okla. 1976).

61. In dissent, Justice Carlton questioned the propriety of obligating the mall owner to create a private police force to patrol its parking area. In his opinion, "the creation of myriad private police forces and the shift of law enforcement duties to the private sector amounts to taking the law into one's own hands and contravenes public policy." 303 N.C. at 645, 281 S.E.2d at 42 (Carlton, J., dissenting). These feelings are echoed by the insurance industry, which recommended that its defense attorneys "emphasize . . . that the defendant is not an insurer and that society has vested in the government the responsibility for protecting the public from criminal attack. The fact that government and law enforcement authorities cannot prevent criminal attacks does not justify transferring such responsibility to business proprietors." Fager, Liability of Business Proprietors for Criminal Acts of Third Persons, 29 Fed'n Ins. Couns. Q. 29, 33 (1978).

However, "in the fight against crime the police are not expected to do it all; every segment of society has obligations to aid in law enforcement and to minimize the opportunities for crime." Kline v. 1500 Mass. Ave. Apt. Corp., 439 F.2d 477, 484 (D.C. Cir. 1970) (footnotes omitted). Courts have recognized this obligation and have not been hesitant to require certain private parties to provide police protection for another. See, e.g., Dilley v. Baltimore Transit Co., 183 Md. 557, 562, 39 A.2d 469, 471 (1944) ("[C]arrier is required to furnish sufficient police force to protect its passengers from the assaults or violence of other passengers or strangers which might reasonably be expected . . . .") (quoting Maryland Dredging & Contracting Co. v. Hines, 269 F. 781, 782 (4th Cir. 1920)); Dean v. Hotel Greenwich Corp., 21 Misc. 702, 193 N.Y.S.2d 712 (1959).

62. [O]f all the involved parties, the cost of crime reduction is cheapest to the landowner. For the criminal, imposing civil liability on him in addition to existing criminal sanctions does not deter him from committing the crime. Imposing duty on the patron, so that he must protect and compensate himself, may result in crime reduction, but only at the expensive cost of the patron staying home. While the patron can prevent crime by not going out at night, the price of staying home is high not only for him but also for society in general. As opposed to the transient patron, who has little information about the crime problem on the landowner's premises and little ability to directly influence it, the landowner can be much more effective in dealing with the problem. While the patron holds just one expensive option, staying home, the landowner holds many options, ranging from installation of better lighting, fences, or guard service, to even varying hours of operation. All of these options should be less expensive and much more effective in deterring crime than the patron's sole choice of staying home.

Bazyler, supra note 58, at 747-48 (footnotes omitted).

63. The mall owner can distribute the costs of deterrence equitably to all mall patrons through the pricing mechanism.

tive for the consuming public to share the costs of security measures than to allow patrons such as plaintiff Foster to bear their losses individually.

While the imposition of this duty may be cost effective in the factual setting of *Foster*, unless this duty is further refined and limited to circumstances similar to a mall setting, the costs of performing the duty may outweigh the benefits society receives from its imposition.

The court's holding requires that an injured business invitee allege and prove two elements of the cause of action: (1) "the criminal acts of a third person . . . were reasonably foreseeable," and (2) these acts "could have been prevented by the exercise of ordinary care."[64] Thus, the parameters of the duty are the foreseeability of the criminal act and the probability that this act could have been deterred.

As noted above,[65] using foreseeability as a construct in determining the extent of the business invitor's duty is entirely consistent with fundamental tort doctrine. Thus, an inquiry into the foreseeability of criminal conduct will proceed along traditional lines of analysis. The difficulty inherent in the *Foster* holding lies with the deterrence and causation issues presented. Deterrence and causation problems are necessarily intertwined, for plaintiff must allege and prove that her "injuries were sustained from the criminal acts of a third person, . . . which [acts] could have been prevented by the exercise of ordinary care."[66] In other words, the issue is whether defendant's failure to provide security measures was the actual and proximate cause of plaintiff's injury. This issue presents much conceptual difficulty, creating the potential that liability will be found in inappropriate circumstances, with a subsequent misallocation of resources.[67]

Once plaintiff has proved defendant's negligence, she must then prove that this negligence was the actual[68] as well as proximate cause[69] of the injury complained of. The usual test of actual causation is the "but for" test: if plaintiff's injury would not have occurred but for defendant's negligence, actual causation exists.[70] Plaintiff need not prove that the defendant absolutely and beyond a doubt caused her injuries, rather, she must demonstrate that it is

64. 303 N.C. at 640, 281 S.E.2d at 39.

65. See text accompanying notes 39-41 supra.

66. 303 N.C. at 640, 281 S.E.2d at 39.

67. Due to plaintiff's difficulties in proving causation, there is some concern that liability will be automatically imposed if prior criminal acts on or near the premises suffice to give the owner notice of a foreseeable danger. This concern is expressed in the amicus curiae brief filed by the North Carolina Merchants Association. The Association believed that in those jurisdictions where liability has been recognized, "the results appear to be founded more upon strict liability than traditional notions of negligence." Amicus Curiae Brief (N.C. Merchants Ass'n) at 5, Foster v. Winston-Salem Joint Venture, 303 N.C. 636, 281 S.E.2d 36 (1981).

68. See, e.g., Battley v. Seaboard Airline Ry., 1 N.C. App. 384, 161 S.E.2d 750 (1968).

69. See, e.g., Tyndall v. United States, 306 F. Supp. 266 (E.D.N.C. 1969), aff'd, 430 F.2d 1180 (4th Cir. 1970); Meyer v. McCarley & Co., 288 N.C. 62, 215 S.E.2d 583 (1975); Clarke v. Holman, 274 N.C. 425, 163 S.E.2d 783 (1968).

70. See, e.g., Hoyle v. Southern Bell Tel. & Tel. Co., 474 F. Supp. 1350 (W.D.N.C. 1979), aff'd, 631 F.2d 728 (4th Cir. 1980); Kanoy v. Hinshaw, 273 N.C. 418, 160 S.E.2d 296 (1968); Barefoot v. Joyner, 270 N.C. 388, 154 S.E.2d 543 (1967); Ratliff v. Duke Power Co., 268 N.C. 605, 151 S.E.2d 641 (1966).

more probable than not that the injuries were caused by defendant's conduct.[71] When other causes have contributed to plaintiff's injury, the court has indicated that defendant's conduct will not be insulated so long as it "played a substantial and proximate part in plaintiff's injury."[72] Therefore, plaintiff must present proof that the lack of security played a substantial role in giving her unknown assailants the motivation and opportunity to assault her. Plaintiff must also demonstrate that these unknown parties probably would have been deterred by the presence of security measures. Yet these proofs rest upon the tenuous assumption that criminals are motivated or deterred by the same factors which drive noncriminal behavior.

On remand, the jury shall determine the causation issue. The court determined that the evidence presents an issue upon which reasonable men may differ.[73] The experience in other jurisdictions supports this conclusion. Courts that have considered the issue have reached various conclusions. Some find that it is difficult, if not impossible, to determine what precautions will deter unknown parties from often irrational criminal behavior. As a result, they find that as a matter of law, plaintiff has failed to prove actual causation.[74] Other courts have relied on these same considerations to find that the conduct of the third party was the superseding independent cause of plaintiff's injuries.[75] In contrast, a minority of courts have determined that "it is not unreasonable to infer that reasonable security measures would have served as a deterrent and that defendants' failure to take such measure [*sic*] constituted a substantial factor in the assault."[76]

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71. W. Prosser, supra note 35, § 41, at 242.

72. Porter v. Pitt, 261 N.C. 482, 483, 135 S.E.2d 42, 43 (1964). See, e.g., Henderson v. Powell, 221 N.C. 239, 243, 19 S.E.2d 876, 879 (1942). This test is to be distinguished from the "substantial factor" test often used when two causes coalesce to cause harm and neither acting alone would have caused the identical injury. See W. Prosser, supra note 35, § 41, at 239-40; Restatement (Second) of Torts §§ 431, 433 (1965).

73. Thus, the court has implicitly determined that the "legal cause" of plaintiff's injury is not so highly speculative as to take the matter from the jury. See, e.g., Restatement (Second) of Torts § 435(2) (1965) ("The actor's conduct may be held not to be a legal cause of harm to another where after the event and looking back from the harm to the actor's negligent conduct, it appears to the court highly extraordinary that it should have brought about the harm.").

74. See, e.g., Shaner v. Tucson Airport Auth., 117 Ariz. 444, 448, 573 P.2d 518, 522 (1977) (patron abducted in parking lot of airport; issue of causation "left to sheer speculation"); Goldberg v. Housing Auth., 38 N.J. 578, 590, 186 A.2d 291, 297 (1962) (deliveryman assaulted in elevator of housing project; court found "exceptional uncertainty with respect to the issue of causation. This is so because of the extraordinary speculation inherent in the subject of deterrence of men bent upon criminal ventures. It would be quite a guessing game to determine whether some unknown thug of unknowable character and mentality would have been deterred if the owner had furnished some additional policemen.").

75. See, e.g., Cornpropst v. Sloan, 528 S.W.2d 188 (Tenn. 1975) (patron assaulted in shopping center parking lot; defendants did not owe plaintiff duty to guard against third party's criminal act unless they knew or had reason to know such acts were occurring and would pose immediate harm to plaintiff; in any event, third party's attack was an efficient, intervening and unforeseeable cause of the injury); Davis v. Allied Supermarkets, Inc., 547 P.2d 963 (Okla. 1976) (customer's purse snatched in supermarket parking lot; even if defendant were negligent in its failure to provide adequate lighting and personnel, plaintiff's injuries were caused by independent intervening criminal acts of third party).

76. Atamian v. Supermarkets Gen. Corp., 146 N.J. Super. 149, 159, 369 A.2d 38, 43 (1976) (patron assaulted and raped in parking lot of supermarket). See also Butler v. Acme Markets, Inc., 177 N.J. Super. 279, 287, 426 A.2d 521, 525 (1981) (patron attacked in supermarket parking lot; "It

Once the plaintiff has passed the barrier of the "substantial factor" test of actual causation, the issue of proximate cause presents little difficulty. Foreseeability is the test of proximate cause.[77] The defendant need not "foresee the precise injury; the particular consequences it produces; nor the exact manner in which it occurs. All that is required is that defendant 'in the exercise of . . . reasonable care . . . should have foreseen that some injury . . . or . . . consequences of a generally injurious nature should have been expected.' "[78] Therefore, defendant's liability cannot go beyond that which was "unusual and unlikely to happen or . . . was only remotely and slightly probable."[79]

The facts of *Foster* present a strong foreseeability issue for the jury. While the majority of prior criminal activity involved larceny of property, there were also a number of serious personal assaults reported in the year prior to the accident.[80] Even if the facts had indicated that a patron's property was the only interest threatened by defendant's alleged negligence, the fact that a different interest of the plaintiff was actually injured should not allow an exculpation from liability.[81] It is for the jury to determine whether the harm

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is a matter of common knowledge that the presence of security guards or similar personnel . . . will have a deterrent effect upon criminal activity."); Slapin v. Los Angeles Int'l Airport, 65 Cal. App. 3d 484, 135 Cal. Rptr. 296 (1976) (patron of airport parking lot assaulted; plaintiff could not recover from city for failure to provide adequate security as this is a discretionary decision by city, yet could recover for failure to provide adequate lighting if this created a foreseeable condition which allowed assaults to occur); Morgan v. Bucks Assocs., 428 F. Supp. 546 (E.D. Pa. 1977) (employee of shopping center owned by defendant assaulted in parking lot after work; jury verdict for plaintiff sustained; reasonableness of defendant's security measures, defendant's actual or constructive knowledge of past criminal conduct and defendant's ability to anticipate future criminal conduct were issues for the jury).

In *Foster* defendant's mall manager indicated in his deposition that an increase in security measures would often reduce criminal activity. He stated:

> As for robberies and/or larcenies in the parking lot, I would say we probably average somewhere between one to one and a half larcenies a month . . . . You might have a spurt of activity and you react to it and you stop it . . . . It is correct that when I say we react to it, that means we increase our security in the parking lot . . . . When I say you stop it, I mean that you cut it back. We never have stopped all crime in the parking lot. What I mean is, that if there is a pattern or something, sometimes you make an arrest and that will cease that particular activity.

Record at 21-22.

77. See, e.g., Williams v. Carolina Power & Light Co., 296 N.C. 400, 403, 250 S.E.2d 255, 258 (1979) ("The test of proximate cause is whether the risk of injury, not necessarily in the precise form in which it actually occurs, is within the reasonable foresight of the defendant."); McNair v. Boyette, 282 N.C. 230, 236, 192 S.E.2d 457, 461 (1972) ("Foreseeability of injury is an essential element of proximate cause."); Clarke v. Homan, 274 N.C. 425, 429, 163 S.E.2d 783, 786 (1968) ("Reasonable foreseeability is an essential element of proximate cause . . . .").

78. Partin v. Carolina Power & Light Co., 40 N.C. App. 630, 633, 253 S.E.2d 605, 609, cert. denied, 297 N.C. 611, 257 S.E.2d 219 (1979) (citations omitted) (quoting Hamilton v. McCash, 257 N.C. 611, 618-19, 127 S.E.2d 214, 219 (1962)). Therefore, Justice Carlton's opinion that the mall owner should be required to foresee criminal activity "only as broad as the type of criminal activity which had occurred in the past" has no support in the case law. See *Foster*, 303 N.C. at 646, 281 S.E.2d at 42 (Carlton, J., dissenting). See also note 81 infra.

79. Phelps v. City of Winston-Salem, 272 N.C. 24, 30, 157 S.E.2d 719, 723 (1967).

80. These included attempted armed robbery, various assaults and a kidnapping. Record at 36-38.

81. See W. Prosser, supra note 35, § 43; Restatement (Second) of Torts § 281, comment j (1965) ("[T]he fact that the interest to which harm results is a different interest, or a different kind of interest, from that which was threatened with harm, will not prevent the actor from being liable, so long as the interest in fact harmed is one entitled to legal protection against negli-

which in fact occurred was within the scope of the risk created by the mall's allegedly negligent conduct.

Because of the uncertain nexus between security measures and deterrence, the *Foster* court did not articulate a "standard of performance to which the owner may look for guidance,"[82] other than the standard of "ordinary care."[83] Is this standard so vague that a merchant will know he has breached the duty only after the jury verdict against him?[84] Is this duty applicable to all merchants or only to those that are similar to a mall in size and mode of operation? Most small merchants do not have the financial resources to provide anything but the minimal security measures, such as lighting. A true cost-benefit analysis might exempt such small businesses from this positive duty if the cost of performing this duty threatens the very existence of the business. Yet the court's holding is not so limited, referring only to "a store owner."[85] Much finer distinctions must be drawn if the business owner and his attorney are to know with certainty the scope of this obligation.

Furthermore, the court required that only "ordinary care" be used in attempting to deter criminal activity. Ordinary care is defined as "such care as an ordinarily prudent person would exercise under the same or similar circumstances to avoid injury."[86] In the owner/invitee situation of *Foster*, ordinary care is the duty "to keep that portion of his premises designed for use by his invitees in a reasonably safe condition so as not to expose them unnecessarily to danger."[87]

Thus, the business owner is not held to the higher degree of care imposed on certain other parties to anticipate and protect another from the criminal acts of third parties.[88] No extraordinary efforts are required to fulfill the duty. Whether ordinary care is sufficient to deter criminal conduct is problematical. If most criminal conduct is thwarted by only the most sophisticated security

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gence."). These authorities were relied on by one court in rejecting "defendant's position . . . that its knowledge that car thefts were being committed obligated it to protect against cars being stolen from the Mall's parking lot but did not obligate it to protect against patrons being attacked on the parking lot." Morgan v. Bucks Assocs., 428 F. Supp. 546, 550 (E.D. Pa. 1977).

82. Goldberg v. Housing Auth., 38 N.J. 578, 590, 186 A.2d 291, 297 (1962).

83. 303 N.C. at 640, 281 S.E.2d at 39.

84. This concern is expressed in the amicus curiae brief filed by the North Carolina Merchants Association. Amicus Curiae Brief (N.C. Merchants Ass'n) at 2, Foster v. Winston-Salem Joint Venture, 303 N.C. 636, 281 S.E.2d 36 (1981). See also Goldberg v. Housing Auth., 38 N.J. 578, 589, 186 A.2d 291, 297 (1962) ("Fairness ordinarily requires that a man be able to ascertain in advance of a jury's verdict whether the duty is his and whether he has performed it.").

85. 303 N.C. at 640, 281 S.E.2d at 39.

86. Smith v. Fiber Controls Corp., 300 N.C. 669, 673, 268 S.E.2d 504, 507 (1980) (quoting Clark v. Roberts, 263 N.C. 336, 343, 139 S.E.2d 593, 597 (1965)).

87. Rappaport v. Days Inn of Am., Inc., 296 N.C. 382, 387, 250 S.E.2d 245, 249 (1979) (quoting Wrenn v. Hillcrest Convalescent Home, Inc., 270 N.C. 447, 448, 154 S.E.2d 483, 484 (1967)).

88. Consider the various degrees of care imposed on the common carrier. Mills v. Atlantic Coast Line Ry., 172 N.C. 266, 267, 90 S.E. 221, 221 (1916) ("high degree of care"); Hollingsworth v. Skelding, 142 N.C. 246, 249, 55 S.E. 212, 213 (1906) ("as far as human care and foresight could go"); Daniel v. Petersberg R.R., 117 N.C. 592, 602, 23 S.E. 327, 327 (1895) ("the utmost human skill and foresight"). See generally Wesley v. Greyhound Lines, Inc., 47 N.C. App. 680, 691-95, 268 S.E.2d 855, 863-64 (1980); Note, Torts—Negligence—Common Carriers—Degree of Care Owed Passengers, 17 N.C.L. Rev. 453 (1939).

measures, ordinary care would prevent few crime-related injuries. If the assault would have occurred even if defendant had exercised ordinary care, defendant's failure to provide ordinary care cannot be the actual or the proximate cause of the injury.[89]

If the relation between security measures and deterrence is so tenuous, the imposition of this duty seems unjustified. Costs are exacted from the business owner on the uncertain assumption that benefits are received. On the other hand, by requiring the business owner to meet a standard of ordinary care, the court forces the owner to take certain minimum security measures. More likely than not these will be relatively inexpensive, highly visible deterrent measures which do not interfere with the normal conduct of business.[90] Though the evidence is inconclusive, it can reasonably be assumed that various environmental changes would affect criminal activity as well as patrons' fear of crime.[91]

In the final analysis, *Foster* presented a strong set of facts where the court would have found it difficult to avoid imposing the duty to protect another from the criminal acts of a third party. Once the duty is imposed, finding liability stretches the concept of causation to its outer limit. In spite of these problems, the imposition of the duty may further the important social goal of reducing crime. In response to the uncertain standard to which they will be held, business owners probably will institute the most economical and efficacious protective measures. Yet until the court further defines the standard to be met, there is a risk that in some cases, the burden of the duty will outweigh the potential benefit.[92]

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89. See, e.g., Holland v. Malpass, 255 N.C. 395, 121 S.E.2d 576 (1961) (high rate of speed of defendant's car was not the cause of a collision that could not have been avoided even if defendant was driving at proper rate of speed); Lane v. Eastern Carolina Drivers Ass'n, 253 N.C. 764, 117 S.E.2d 737 (1961) (lack of protective barrier at race track was not actual cause of plaintiff's injury since barrier would have provided no protection when racecar left track at excessive speed). See generally Byrd, Actual Causation in North Carolina Tort Law, 50 N.C.L. Rev. 261, 263-65 (1972).

90. The court has recognized that a business owner should not be "required to take precautions for his invitees' safety such as will . . . destroy the attractiveness of his establishement." Hendrick v. Tigniere, 267 N.C. 62, 67, 147 S.E.2d 550, 554 (1966). See also Aaser v. City of Charlotte, 265 N.C. 494, 499, 144 S.E.2d 610, 614 (1965).

91. See, e.g., Nat'l Comm'n on the Causes and Prevention of Violence, Crimes of Violence—A Staff Report 774-77 (1969); Nat'l Inst. of Law Enforcement and Criminal Justice, U.S. Dep't of Justice, No. 21 (Series A), Street Lighting Projects 93 (1979).

92. As this Note went to press, *Foster* was settled out of court after two days of trial. Telephone conversation with Richard D. Ramsey, attorney for plaintiff (Mar. 24, 1982).

Communications Law—*CBS v. FCC*: The Supreme Court Upholds FCC Regulations Restricting Broadcaster Discretion in Accepting Political Advertising

Candidates for federal office have a significantly greater right of access to the broadcast media, but individual broadcasters have much less discretion in refusing such access as a result of the decision by the United States Supreme Court in *CBS v. FCC*.[1] Ruling that the Federal Communications Commission's regulations interpreting 47 U.S.C. § 312(a)(7)[2] are constitutional and within the statutory objectives, the Court approved a finding by the FCC[3] that the statute created a new right of access instead of codifying a less pervasive standing right of access arising out of a generalized public interest standard. The majority agreed with the Commission's conclusion that section 312(a)(7) creates a special right of access that "makes a significant contribution to freedom of expression by enhancing the ability of candidates to present, and the public to receive, information necessary for the effective operation of the democratic process."[4] But, as the dissent in *CBS* pointed out, the price of promptly enforceable, increased access for federal candidates is greater Commission responsibility in political matters and a substitution of the judgment of the Commission for the historically protected judgment of the individual broadcaster.[5]

The case arose out of an October 11, 1979 request by the Carter-Mondale Presidential Committee (Committee) to purchase air time from the three major television networks. The Committee intended to present a documentary outlining the administration's record in conjunction with President Carter's formal announcement of his candidacy. Gerald Rafshoon, acting for the Committee, requested a thirty-minute program between 8 p.m. and 10:30 p.m. on any day between December 4 and 7, 1979.[6] Citing the large number of candidates for the presidential nomination and the potential for disruption of regular programming should all the candidates request equal time, CBS offered to sell only a five-minute segment at 10:55 p.m. on December 8 and a five-minute segment in the daytime.[7] Both ABC and NBC indicated that they

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1. 101 S. Ct. 2813 (1981).
2. The statute in pertinent part is as follows:

   (a) The commission may revoke any station license or construction permit—

   . . . .

   (7) for willful or repeated failure to allow reasonable access to or to permit purchase of reasonable amounts of time for the use of a broadcasting station by a legally qualified candidate for Federal elective office on behalf of his candidacy.

47 U.S.C. § 312(a)(7) (1976).
3. Carter-Mondale Presidential Comm., 74 F.C.C.2d 631 (1979).
4. 101 S. Ct. at 2830.
5. Id. at 2838-39 (White, J., dissenting) (quoting 74 F.C.C.2d at 682).
6. Id. at 2817.
7. Id. at 2818.

had not yet begun to sell time for the 1980 campaign,[8] although ABC did note that it would begin sales in January 1980.[9] Charging that the networks had violated their obligation under section 312(a)(7) to provide "reasonable access," the Committee filed a complaint with the FCC on October 29, 1979.[10] The FCC, in a four-to-three vote, found that the networks had violated the statute and that their reasons for refusing to sell time were "deficient" under FCC standards of reasonableness.[11] The FCC also asked the networks to indicate by November 26, 1979, how they would fulfill their statutory obligations. On their petition for reconsideration, the networks, by the same split vote, again were found to have acted unreasonably, and the FCC issued a clarifying memorandum.[12] The United States Court of Appeals for the District of Columbia affirmed the Commission's orders.[13] The court of appeals concluded that section 312(a)(7) created a new right of access and that the Commission had the authority to determine when a campaign has begun. The court upheld the conclusion that the networks did not apply proper standards and that the 1980 campaign had begun by November 1979.[14]

The Supreme Court affirmed the court of appeals decision, finding that both on its face and in light of its legislative history, section 312(a)(7) grants an affirmative right of access. The Court rejected the argument that the statute merely codifies the prior public interest standard.[15] The Court found the stat-

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8. Id.

9. Id.

10. Id. at 2819.

11. 74 F.C.C.2d at 649. Equal time requirements have been a part of communications law since the first federal statute that regulated broadcast media, the Radio Act of 1927, ch. 169, § 18, 44 Stat. 1162 (current version at 47 U.S.C. § 315(a) (1976)). Section 315(a) now provides the following:

> (a) If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station: *Provided*, That such licensee shall have no power of censorship over the material broadcast under the provisions of this section. No obligation is imposed under this subsection upon any licensee to allow the use of its station by any such candidate. Appearance by a legally qualified candidate on any—
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> (1) bona fide newscast,
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> (2) bona fide news interview,
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> (3) bona fide news documentary (if the appearance of the candidate is incidental to the presentation of the subject or subjects covered by the news documentary), or
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> (4) on-the-spot coverage of bona fide news events (including but not limited to political conventions and activities incidental thereto),
>
> shall not be deemed to be use of a broadcasting station within the meaning of this subsection. Nothing in the foregoing sentence shall be construed as relieving broadcasters, in connection with the presentation of newscasts, news interviews, news documentaries, and on-the-spot coverage of news events, from the obligation imposed upon them under this chapter to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance.

12. 74 F.C.C.2d at 657. The memorandum rejected arguments that the Commission improperly substituted its judgment for petitioner's. The Commission memorandum also held that section 312(a)(7) was intended to create a new right of access.

13. CBS v. FCC, 629 F.2d 1 (D.C. Cir. 1980), aff'd, 101 S. Ct. 2813 (1981).

14. Id.

15. For a description of the access requirements under a general public interest standard, the

ute's focus on the individual candidate to be an indication that Congress intended more than a codification of a general duty. In addition, the Court saw the sanction for failure to afford reasonable access—license revocation—as evidence of Congress' intent to create a new right.[16]

Further, the Court viewed the somewhat scanty legislative history of the provision as support for its finding of a new and additional right. The Court noted that the broad intent of the three campaign reform bills taken up by Congress in 1971 was "to increase a candidate's accessibility to the media and to reduce the level of spending for its use."[17] The purpose of the Federal Election Campaign Act of 1971 was to "give candidates for public office greater access to the media so that they may better explain their stand on the issues, and thereby more fully and completely inform the voters."[18] The Court also found compelling the so-called "conforming amendment"[19] to section 315(a). This section, providing that broadcast licensees are not common carriers to anyone wishing use of the airwaves, had, prior to the addition of section 312(a)(7), read as follows: "No obligation is imposed upon any licensees to allow the use of its stations by any such candidate.[20] The conforming amendment changed section 315(a) to read: "No obligation is imposed *under this subsection* upon any licensee . . . ."[21] According to the majority, the amendment is "the most telling evidence of congressional intent" to broaden access for federal candidates beyond former public interest standards.[22]

Acknowledging the judicial deference paid to agency decisions in the absence of clear mistake, the Court found that the Commission had "consistently construed the statute as extending beyond the prior public interest policy."[23] The Court also noted that, because Congress had been made aware of the Commission's interpretations of section 312(a)(7), "Congress' failure to repeal or revise [the statute is] persuasive evidence that that interpretation is the one intended by Congress."[24]

In a review of Commission policies concerning section 312(a)(7), the Court held the Commission's action "a reasoned attempt to effectuate the statute's access requirement, giving broadcasters room to exercise their discretion

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Court cited Commission Policy in Enforcing Section 312(a)(7) of the Communications Act, 68 F.C.C.2d 1079 (1978) [hereinafter cited as 1978 Report & Order]. Prior to the statute, "[n]o legally qualified candidate had . . . a specific right of access to a broadcasting station. However stations were required to make reasonable, good faith judgments about the importance and interest of particular races." Id. at 1088.

16. 101 S. Ct. at 2821.

17. Federal Elections Campaign Act of 1971: Hearings on S. 1, S. 382, and S. 956 Before the Subcomm. on Communications of the Senate Comm. on Commerce, 92d Cong., 1st Sess. 2 (1971) (remarks of Sen. Pastore).

18. S. Rep. No. 96, 92d Cong., 2d Sess. 20 (1971), reprinted in 1972 U.S. Code Cong. & Ad. News 1773, 1774.

19. S. Conf. Rep. No. 580, 92d Cong., 1st Sess. 221 (1971); H. Conf. Rep. No. 752, 92d Cong., 1st Sess. 22 (1971) (discussed as a conforming amendment).

20. Communications Act of 1934, ch. 652, § 315, 48 Stat. 1064 (amended 1972).

21. 47 U.S.C. § 315(a) (1976) (emphasis added).

22. 101 S. Ct. at 2822.

23. Id. at 2823.

24. Id. at 2824 (quoting Zemel v. Rusk, 381 U.S. 1, 11 (1965)).

but demanding that they act in good faith."[25] The Court found that the Commission had not become involved improperly in the electoral process, although under the ruling the agency would now have the power to determine whether a campaign has begun and thus whether the obligations of section 312(a)(7) attach.[26] It further noted that the Commission does not set the starting date for the campaign but instead " 'take[s] into account the position of the candidate and the networks as well as other factors.' "[27] The Court found no merit in petitioners' argument that the Commission's policies attach inordinate significance to candidates' desires, noting that the Commission requires "careful consideration of, not blind assent to, candidates' desires for air time."[28]

Applying Commission policies to the facts before it, the Court decided that petitioners did not provide reasonable access. The Court found that ABC and NBC had "blanket policies" of refusing access before a certain time, despite Commission warnings that such policies, without counteroffers, would be deemed unreasonable.[29] On the other hand, CBS, which had offered five-minute slots on two days, did not have sufficient justification for refusing the Committee's request, according to the Court. CBS had cited program disruption and potential equal time burdens as reasons for refusing the Committee, but the Court upheld the Commission's view that such claims were "speculative and unsubstantiated at best."[30]

Finally, the Court rejected petitioners' assertion that their first amendment rights had been violated by the trimming away of their broadcaster discretion. The Court reaffirmed the notion that "[i]t is the right of the viewers and listeners, not the right of the broadcasters, which is paramount."[31] The Court essentially decided that the advantages of network presentation of information were "necessary for the effective operation of the democratic process" and justified the creation of a limited right of access to the media.[32]

Although the history of broadcast media regulation is short,[33] several major guiding principles have been developed. Central to the concepts governing

25. Id. at 2827 (footnote omitted).

26. 74 F.C.C.2d at 665-66.

27. 101 S. Ct. at 2826 (emphasis omitted) (quoting 74 F.C.C.2d at 665).

28. Id.

29. Id. at 2828. See 1978 Report & Order, supra note 15, at 1090.

30. 101 S. Ct. at 2828 (quoting 74 F.C.C.2d at 674.)

31. Id. at 2829 (quoting Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969)). An important decision that discussed at length the so-called "fairness doctrine" in broadcasting, *Red Lion* concerned a challenge to the constitutionality of the FCC's promulgation of rules governing broadcasters' obligation to provide free reply time to an individual who had been the subject of a personal attack on the air. The *Red Lion* Court upheld the rules, deciding that the first amendment does not protect the private censorship of broadcasters who are licensed by the government to use a scarce resource. 395 U.S. at 400.

32. 101 S. Ct. at 2830.

33. For a brief history of the development of law governing radio and television, see Coase, The Federal Communications Commission, 2 J.L. & Econ. 1 (1959). For a survey—elsewhere in this issue—of FCC regulation practice, see Chamberlin, Lessons in Regulating Information Flow: The FCC's Weak Track Record in Interpreting the Public Interest Standard, 60 N.C.L. Rev. 1057 (1982).

regulation of the broadcast media is the fairness doctrine,[34] articulated in the 1949 FCC report *Editorializing by Broadcast Licensees.*[35] That report concluded that the broadcast licensees' duty to the public is two-fold—broadcasters must (1) devote a reasonable amount of time to the coverage of controversial and important issues and (2) provide reasonable opportunity for contrasting viewpoints to be heard.[36] The report emphasized the importance of broadcasters' discretion in meeting the goals of the doctrine. The Commission noted that the Communications Act rejected both censorship by the Commission and common carrier status for would-be users of air time.[37] In an important Supreme Court decision on rights of access, *CBS v. Democratic National Committee*,[38] Chief Justice Burger analyzed the development and mechanics of the fairness doctrine as it relates to licensee responsibility:

> The regulatory scheme has evolved slowly, but very early the licensee's role developed in terms of a "public trustee" charged with the duty of fairly and impartially informing the public audience. In this structure the Commission acts in essence as an "overseer" but the initial and primary responsibility . . . rests with the licensee.[39]

So long as a licensee meets its "public trustee" obligation to provide balanced coverage of the issues, it would appear to have broad discretion to decide what that obligation will be.

The fairness doctrine requires adequate coverage of significant and controversial issues and fairness in presenting opposing views. Broadcast licensees must present such views at their own expense if no other sponsor is available.[40] Personal attack rules fall within the mandate of the fairness doctrine. When a personal attack has been made on a figure involved in a public issue, a licensee must notify the individual attacked of the the date and time of the particular broadcast, furnish a script or tape of the attack and provide a reasonable opportunity for the individual to respond.[41] Exempted from this requirement are attacks on foreign figures, those made by legally qualified candidates or their spokesmen, and those made during bona fide newscasts or

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34. For general background on the fairness doctrine, see B. Schmidt, Freedom of the Press vs. Public Access 157-82 (1976); Houser, The Fairness Doctrine—An Historical Perspective, 47 Notre Dame Law. 550 (1972). See also Chamberlin, supra note 33, at 1059 nn. 3, 5 & 26.

The doctrine was codified into the Communications Act of 1959. Exempting news coverage from the general requirements of equal opportunities it added the following language: "Nothing in the foregoing sentence shall be construed as relieving broadcasters . . . from the obligations imposed upon them under this Act to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance." Communications Act of 1959, § 1, Pub. L. 86-274, 73 Stat. 557 (1959) (codified as amended at 47 U.S.C. § 315 (1976)).

35. 13 F.C.C. 1246 (1949).

36. Id. at 1249.

37. Id. at 1247-48. See note 56 infra.

38. 412 U.S. 94 (1973). This case tested the legality of a broadcaster's refusal to accept political broadcasts unrelated to a campaign. Both the Democratic National Committee and the Business Executives' Move for Vietnam Peace sought air time. A divided Court held that the first amendment did not obligate broadcasters to air any particular sponsor's message. Id. at 121-23.

39. Id. at 117 (opinion of Burger, C.J., joined by Stewart & Rehnquist, JJ.).

40. Cullman Broadcasting Co., 40 F.C.C. 573 (1966).

41. 47 C.F.R. § 73.1920(a) (1980).

on-the-spot coverage.[42] In addition, when a licensee endorses a candidate, the licensee must notify all other candidates for the office, and when the licensee opposes a candidate the licensee must notify that candidate of its position. The licensee also must provide tapes or transcripts and offer to all affected candidates reasonable opportunities to respond.[43]

The discretion allowed broadcasters under the fairness doctrine narrowed somewhat during the sixties. In *Red Lion Broadcasting Co. v. FCC*[44] the Commission's rules concerning free replies to personal attacks were upheld by the Supreme Court. The Court held that the listener's right to be informed is more important than the broadcaster's right of discretion.[45] Further, the Court distinguished the area of electronic media from print media by emphasizing the limited numbers of frequencies available for electronic broadcasters. Because frequencies are scarce resources, "to deny a station license because 'the public interest' requires it 'is not a denial of free speech.' "[46]

The fairness doctrine complements the statutory equal time provisions.[47] Section 315 requires licensees to provide equal time to any legally qualified candidate after another candidate for the same office has used the station for campaign purposes.[48] Subsection (a) of section 315 exempts newscasts from the equal time requirement,[49] and subsection (b) prohibits licensees from charging an amount for equal time slots that exceeds the price of comparable advertising for other purposes.[50]

Access rights created under the personal attack rules, equal time provisions and section 312(a)(7) have become a wedge between first amendment protections of freedom of speech and freedom of the press. If freedom of speech fully protects the right to speak effectively, the press loses its freedom to decide what it will and will not print or air. Journalistic freedom in the print media in this country has been curtailed primarily only by libel or obscenity laws and for the most part has remained unregulated.[51] The broadcast media, on the other hand, because of limits on the number of frequencies available, has endured explicit access requirements from the beginning of its development. The very reply right declared unconstitutional in *Miami Herald Publishing Co. v. Tornillo*,[52] a case dealing with access to the print media, was upheld by the *Red Lion* Court because in a broadcast context the Court believed such

42. Id. § 73.1920(b).
43. Id. § 73.1930 (1980).
44. 395 U.S. 367 (1969).
45. Id. at 390.
46. Id. at 389 (quoting NBC v. United States, 319 U.S. 190, 227 (1943)).
47. 47 U.S.C. § 315 (1976).
48. Id.
49. Id. § 315(a).
50. Id. § 315(b).
51. The Court rejected controls on the print media in Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974), in which the Court declared unconstitutional a Florida statute that granted access to newspaper space for candidates to reply to personal attacks. The Court recognized that a responsible press is not mandated by the Constitution and cannot be legislated. Id. at 257.
52. 418 U.S. 241 (1974).

access would enhance public debate.[53]

It is evident that rights of access such as those permitted under the personal attack doctrine and the equal time requirements of section 315(a) evolved from the fairness doctrine. However, they undermine the licensee discretion that historically has been a substantial part of the doctrine.[54] Notions of public trusteeship dictate the airing of controversial subjects, the delivery of balanced coverage and the provision of a right of access to individuals best suited to presenting competing viewpoints. On the other hand, a right of access triggered by an event such as a personal attack may vest in an individual, regardless of a licensee's judgment about the fairness in, or the public interest in, granting access.[55]

Ultimately, the relevant question in examining the extent of rights of access is one of control of the media. At one extreme are the notions of the broadcast licensees as common carriers, rejected by Congress in both the Radio Act of 1927 and the Communications Act of 1934.[56] At the other extreme is total broadcaster autonomy, labeled a form of private censorship by the *Red Lion* Court.[57] Access rights that cut against broadcaster freedom, however, of necessity involve enforcement, bringing into play the "tightrope" of the access question.

> This role of the Government as an "overseer" and ultimate arbiter and guardian of the public interest and the role of the licensee as a journalistic "free agent" call for a delicate balancing of competing interests. The maintenance of this balance for more than 40 years has called on both the regulators and the licensees to walk a "tightrope" to preserve the First Amendment values written into the Radio Act and its successor, the Communications Act.[58]

Four years after the *Red Lion* Court legitimized rights of access in a personal attack context, the Court in *CBS v. Democratic National Committee* backed away from requiring that broadcasters accept non-candidate-oriented political advertisements on the same basis as commercial advertisers.[59] The access rights were to be overseen by the FCC, an idea that members of the Court found frightening.

In this sensitive area, so sweeping a concept of Government activity

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53. 395 U.S. at 390, 392.

54. See B. Schmidt, supra note 34, at 157.

55. Id. at 17. Schmidt characterizes rights of access that are triggered by a prior publication, such as the equal time provision, as contingent rights of access. Affirmative rights of access exist independent of prior triggering events. See CBS v. FCC, 629 F.2d at 10-11.

56. A proposal that would permit a broadcasting station to be used as a common carrier by any candidate for public office was rejected. Senator Clarence Dill urged the Senate to strike the common carrier provision because the stations "would have to give all their time to that kind of discussion." 67 Cong. Rec. 12,504 (1926). Instead, Dill successfully urged the Senate to pass the equal time proposal. A similar pattern of discussions occurred in 1934, but common carrier status for broadcasters again was rejected. See S. 2910, 73d Cong., 2d Sess. (1934); H.R. 7716, 72d Cong., 1st Sess. (1932); CBS v. Democratic Nat'l Comm., 412 U.S. at 110.

57. 395 U.S. at 392.

58. CBS v. Democratic Nat'l Comm., 412 U.S. at 117.

59. Id. at 94.

> would go far in practical effect to undermine nearly a half century of unmistakable Congressional purpose to maintain—no matter how difficult the task—essentially private broadcast journalism held only broadly accountable to the public interest in the Communications Act.[60]

Congress in 1972 enacted the Federal Elections Campaign Act of 1971,[61] a reform law aimed at curtailing large campaign contributions and expenditures. Title I included the provision codified as 47 U.S.C. § 312(a)(7). Three bills were introduced into the Senate that were intended to increase a candidate's accessibility to the media, to reduce the level of spending for its use and "to give candidates for public office greater access to the media so that they may better explain their stand on the issues, and thereby more fully and completely inform the voters."[62] The Senate report provides little explanation of the amendment but notes that the duty of broadcasters under this provision is inherent "in the requirement that licensees serve the needs and interests of the [communities] of licensees."[63] Section 312(a)(7) was included to "emphasize the public interest obligation inherent in making broadcast time available to candidates covered by the spending limitation."[64] The Senate report indicates that the spending limitations should not result in "diminution in the extent of such programming."[65] The conforming amendment, mentioned above,[66] provides that no obligation is imposed upon any licensee *"under this subsection"*[67] to grant rights of access, implying, according to the majority view, that rights of access had been created elsewhere.[68] The dissent in *CBS v. FCC* argued that the statute originally stated that "no obligation is hereby imposed,"[69] and that "hereby," the equivalent of "under this subsection," was omitted by the codifier of the United States Code. The dissent, therefore, suggests that the amendment restored the statute to its original state.[70] In the final analysis, the legislative history of section 312(a)(7) is of little, if any, help in determining the true purpose of the provision.

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60. Id. at 120 (opinion of Burger, C.J., joined by Stewart & Rehnquist, JJ.). For general background of the access arguments and an extensive list of citations on the question, see Lange, The Role of the Access Doctrine in the Regulation of the Mass Media, 52 N.C.L. Rev. 1, 2 n.5 (1973) (Lange is basically an opponent of increased access). See also Barron, Access to the Press—A New First Amendment Right, 80 Harv. L. Rev. 1641 (1967); Johnson & Weston, A Twentieth Century Soapbox: The Right to Purchase Radio and Television Time, 57 Va. L. Rev. 574 (1971) (Barron, Johnson and Weston are vocal advocates of access rights).

61. Pub. L. No. 92-225, 86 Stat. 3 (codified in scattered sections of 2, 18, 47 U.S.C.).

62. S. Rep. No. 96, 92d Cong., 1st Sess. 20 (1971), reprinted in 1972 U.S. Code Cong. & Ad. News 1773, 1774; see also Federal Elections Campaign Act of 1971: Hearings on S. 1, S. 382, and S. 956 Before the Subcomm. on Communications of the Senate Comm. on Commerce, 92d Cong., 1st Sess. 1-2 (1971) (remarks of Sen. Pastore).

63. S. Rep. No. 96, 92d Cong., 1st Sess. 34 (1971), reprinted in 1972 U.S. Code Cong. & Ad. News 1773, 1787.

64. Id. at 28, reprinted in 1972 U.S. Code Cong. & Ad. News 1773, 1782.

65. Id., reprinted in 1972 U.S. Code Cong. & Ad. News 1773, 1781.

66. See note 19 and text accompanying notes 19-22 supra.

67. Pub. L. No. 92-225, § 103(a)(2)(B) (codified at 47 U.S.C. § 315 (1976)) (emphasis added).

68. 101 S. Ct. at 2822-23.

69. Id. at 2835 (White, J., dissenting).

70. Id.

Perhaps as a result of the "mixed signals" sent by Congress regarding the intent behind section 312(a)(7) the Commission's administration of the section does not set a clear course for broadcasters. Three major reports issued by the FCC and a number of cases considered under section 312(a)(7) provide extensive, if not conclusive, precedent. The Commission quickly established that it did not interpret the section to be a codification of the public interest standard.[71] The Commission's *1978 Report and Order*[72] spells out what it considers to be relevant criteria for broadcasters to consider when deciding their obligations under section 312(a)(7).[73] After a candidate becomes "legally qualified,"[74] the broadcaster must consider in good faith and on an individual basis requests from federal candidates.[75] Broadcasters must consider the candidate's purpose in seeking air time and seek to accommodate the candidate's interests as closely as possible. Other permissible considerations include the amount of time previously sold to the candidate, the disruptive impact on other programming and the potential for requests by opposing candidates for equal time.[76] The Commission report discourages across-the-board policies and concludes that if a broadcaster demonstrates a consideration of these factors in reasonable good faith, the licensee is entitled to deference.[77] An earlier interpretation of section 312(a)(7) asserted that "[t]he Commission will not substitute its judgment for that of the licensee, but, rather, it will determine in any case that may arise whether the licensee can be said to have acted reasonably and in good faith in fulfilling his obligations under this section."[78] The Commission reports and orders indicate that the agency was unable to glean much guidance from the legislative intent behind the provision.[79]

The final impact of *CBS v. FCC* is difficult to gauge, but there may be a

71. Use of Broadcast and Cablecast Facilities by Candidates for Public Office, 34 F.C.C.2d 510, 537-38 (1972) [hereinafter cited as 1972 Policy Statement]; accord, Concerning Licensee Responsibility Under Amendments to the Communications Act Made by the Federal Election Campaign Act of 1971, 47 F.C.C.2d 516 (1974) [hereinafter cited as 1974 Public Notice] (overruled on different grounds in Anthony Martin-Trigona, 64 F.C.C.2d 1087, 1091 (1977)); see also Public Notice: The Law of Political Broadcasting and Cablecasting, 69 F.C.C.2d 2209, 2286-89 (1978) [hereinafter cited as 1978 Primer]; 1978 Report & Order, supra note 15, at 1089-92.

72. See note 15 supra.

73. 1978 Report & Order, supra note 15, at 1090-91.

74. A legally qualified candidate is one who (a) is eligible under the law for the office, (b) announces his candidacy or (c) qualifies for the nominating primary. 1978 Primer, supra note 71, at 2216-18. Although President Carter did not meet these criteria at the time of his request, this issue was not raised.

75. 1978 Report & Order, supra note 15, at 1089.

76. See CBS v. FCC, 629 F.2d at 19.

77. 1978 Report & Order, supra note 15, at 1089-94. See Summa Corp., 43 F.C.C.2d 602, 604 (1973).

78. 1972 Policy Statement, supra note 71, at 536.

79. See 1974 Public Notice, supra note 71, at 517. Case precedents also demonstrate an unwillingness on the part of the Commission to set forth any specific rules for licensees to follow. See, e.g., Summa Corp., 43 F.C.C.2d 602 (1973). The licensee refused to grant five-minute spots to a congressional candidate because of its policy against selling advertising exceeding one minute in length, except during early-morning hours. The Commission, in its first opportunity to decide a section 312(a)(7) case, found Summa's across-the-board policies unreasonable. Id. at 605. Still, the opinion, in strong language, asserted that Congress intended to accord "complete freedom . . . to the broadcaster and candidates to develop specific program formats for the appearance of a candidate." Id. (quoting S. Rep. No. 96, 92d Cong., 1st Sess. 26 (1970)). The Commission empha-

basis for FCC Commissioner Washburn's view that the governmental intrusion that results from the case "will have far-reaching consequences that will come back to haunt the Commission and the public again and again."[80] The Supreme Court's majority opinion in *CBS v. FCC* is not a particularly compelling one. Although the legislative history of section 312(a)(7) provided substantial support for the majority's reasoning in upholding the FCC, the dissent argued that the legislative history does not support the broad powers assumed by the agency. As Justice White noted in his dissent, the majority's reliance, in reaching its decision, on the 1971 Act's overall goal of providing greater candidate access may have been misplaced. This goal was achieved by other provisions in the Act, such as the provision requiring the sale of time at the lowest unit charge available during specified periods.[81] Justice White viewed section 312(a)(7) instead as a protective device to prevent broadcasters from limiting access otherwise available but for the lowest-unit-charge limitations: "Section 312(a)(7) was primarily a device to insure that other provisions of the bill would not dilute the preexisting public interest standard as applied to federal elections."[82] Prior, unsuccessful attempts to codify a reasonable access requirement demonstrated that Congress on at least two other occasions had intended to legislate access provisions that essentially codified the public interest standard.[83] The dissent argued that section 312(a)(7) was included in the bill to emphasize the public interest obligation "inherent in making broadcast time available to candidates covered by the spending limitation."[84] Justice White conceded that the statute "put teeth" into public interest obligation, but did not believe that it created the broad rights granted federal candidates by the FCC.[85] The true intent of Congress in enacting section 312(a)(7) is unclear, but in the face of a lack of clarity, the Commission took an extreme position regarding access.

Acknowledging that deference must be paid to agency interpretation of a statute, Justice White argued that the appropriate amount of deference is determined by the validity of the agency's reasoning and the consistency of prior rulings.[86] Justice White concluded compellingly that the Commission has been neither consistent nor persuasive in its arguments concerning this issue.[87]

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sized that it wished to formulate no specific rules because of a commitment to leaving the licensee free to work out such judgments. Id. See also Anthony Martin-Trigona, 67 F.C.C.2d 743 (1978).

80. Carter-Mondale Presidential Comm., 74 F.C.C.2d at 682 (Washburn, Comm'r, dissenting).

81. 101 S. Ct. at 2830 (White, J., dissenting). The provision to which Justice White referred, 47 U.S.C. § 315(b)(1) (1976), provides that during the forty-five day period preceding primary dates or runoffs and during the sixty-day period preceding elections, the cost per unit of time sold by a broadcaster may not exceed the station's lowest available charge for the same period, class and amount of time.

82. 101 S. Ct. at 2834.

83. Id. at 2833.

84. Id. at 2834 (quoting S. Rep. 96, 92d Cong., 1st Sess. 28 (1971), reprinted in 1972 U.S. Code Cong. & Ad. News 1773, 1781).

85. Id.

86. Id. at 2835 (citing Martin Evangelical Lutheran Church v. South Dakota, 101 S. Ct. 2142, 2148 n.13 (1981)).

87. Id.

At least one scholar who has considered FCC policy in this area would no doubt agree:

> The best that can be said of Commission policy precedent in this area [section 312(a)(7)] is that it is inconsistent. The worst to be said is that the Commission has vascillated, changed directions, reversed itself often, blown hot and cold, and bent like a frail reed subject to only the changing winds that each successive, changeable majority of the Commissioners brings to the decisionmaking.[88]

Although the Commission in this case found CBS's five-minute counteroffers of non-prime time CBS insufficient,[89] the Commission generally has stated that candidates may not demand a certain length of time or a certain period in the day for broadcasting purposes. In a 1976 ruling, *Honorable Donald W. Riegle*,[90] the FCC upheld a licensee who refused to sell five-minute ads during prime time, but instead offered five-minute and thirty-minute programs in non-prime time. The Commission ruled that "[t]here is no evidence to suggest that through the passage of the reasonable access provision, the licensee is now required to sell specific periods of time for political broadcasts."[91] In the *1978 Report and Order*, the Commission reiterated its stand that although some access to prime time should be afforded, candidates are not entitled to a particular placement of his or her political announcement on a station's broadcast schedule. "It is best left to the discretion of a licensee when and on what date a candidate's spot announcement or program should be aired."[92] CBS offered the committee in this case non-prime-time and shorter program lengths than the committee requested.[93] According to prior policy, however, those offers could be considered well within the realm of reasonableness.

The triggering of a right of access for a candidate under section 312(a)(7) is the "start" of a campaign.[94] In this area, too, the FCC decision in this case seems somewhat inconsistent with prior decisions holding firm for broadcaster discretion. In a ruling on a complaint by Anthony Martin-Trigona,[95] in which petitioner alleged that he had requested and was refused access in August 1977

88. Albert, The FCC Assumes a New Role as Regulator of Broadcast Advertising and Candidates' Access, 54 St. John's L. Rev. 279, 295 (1980). The quotation refers to section 312(a)(7) and to section 315, but the article discusses another FCC ruling, Senator Wendell Anderson, 69 F.C.C.2d 1265 (1978). See generally Chamberlin, supra note 33.

89. Carter-Mondale Presidential Comm., 74 F.C.C.2d at 650.

90. 59 F.C.C.2d 1314 (1976).

91. Id. at 1314-15. See Anthony Martin-Trigona, 64 F.C.C.2d 1087 (1977) (A candidate requested and was refused program-length advertisements in prime time. The FCC ruled that the candidate, who had instead been offered prime time one-minute spots, had not been denied reasonable access); Don C. Smith, 49 F.C.C.2d 678 (1974) (candidate enjoyed no right to purchase a time of any particular or minimum duration); Honorable Pete Flaherty, 48 F.C.C.2d 838 (1974) (Commission declined to recognize right by a federal candidate to program time of any particular or minimum duration).

92. 1978 Report & Order, supra note 15, at 1091.

93. See 101 S. Ct. at 2818.

94. See 101 S. Ct. at 2825; 47 U.S.C. § 312(a)(7) (1976).

95. Anthony Martin-Trigona, 66 F.C.C.2d 968, application for review denied, 67 F.C.C.2d 33 (1977).

for air time in preparation for a March 1978 primary, the FCC upheld the licensee's judgment:

> A licensee's discretion in providing coverage of elections extends not only to the type and amount of time to be made available . . . but to the date on which its campaign coverage will commence. A licensee's decision not to accept political advertising until 45 days before a primary election cannot be said to be . . . unreasonable.[96]

The *1978 Report and Order* somewhat confuses the FCC's position on this point. Noting that section 312(a)(7) and the "lowest unit charge" portion of section 315[97] were passed concurrently, the Commission suggested that the time periods when the latter provision becomes applicable (sixty days before an election and forty-five days before a primary) are also controlling on a decision determining when a campaign has begun for section 312(a)(7) purposes.[98] The Commission decided that it would be unreasonable for a licensee to deny a federal candidate access within those periods, and perhaps before, depending on circumstances. "We expect licensees to afford access at a reasonable time prior to a convention or caucus. We will review a licensee's decision in this area on a case-by-case basis."[99] In contrast, the Commission's finding in *CBS v. FCC* and the Court's decision upholding that finding, in effect make the decision whether a campaign has begun "based on a independent evaluation of the status of the campaign, taking into account the position of the candidates and the networks as well as other factors."[100] As Justice White argues, this evaluation undercuts broadcaster discretion and makes the determination of the start of a campaign a matter of law for the FCC, which is a clear departure from earlier practice.[101]

In an earlier explanation of section 312(a)(7), the FCC placed equal emphasis on individual candidates' needs and the other factors to be considered. "In tailoring access to meet the needs of candidates for a particular office, licensees may consider such factors as the unavailability of particular classes of time; a multiplicity of candidates; *the specific desires of candidates*; and etc."[102] Earlier in the report the Commission concluded, "We continue to believe that the best method for achieving balance between the desires of candidates for air time and the commitments of licensees to the broadcast of types of programming is to rely on the reasonable good faith discretion of individual licensees."[103] In the Supreme Court's ruling in this case, the candidates' desires are given much more weight. Broadcasters are to

> tailor their responses to accommodate, as much as reasonably possible, a candidate's stated purposes. . . . In responding to access re-

96. Id. at 969.
97. 47 U.S.C. § 315(b)(1)(a) (1976).
98. 1978 Report & Order, supra note 15, at 1091.
99. Id. at 1092.
100. 74 F.C.C.2d at 665.
101. 101 S. Ct. at 2837 (White, J., dissenting).
102. 1978 Report & Order, supra note 15, at 1090 (emphasis added).
103. Id. at 1089.

> quests, however, broadcasters may also give weight to such factors as the amount of time previously sold to the candidate, the disruptive impact on regular programming, and the likelihood of requests for time by rival candidates under the equal opportunities provision of § 315(a). These considerations may not be invoked as pretexts for denying access; to justify a negative response, broadcasters must cite a realistic danger of substantial program disruption—perhaps caused by insufficient notice to allow adjustments in the schedule or of an excessive number of equal time requests.[104]

The Court affirmed the Commission's rather cursory consideration of broadcaster concern over the number of candidates and the likelihood that these candidates will demand equal time.[105] Although the race was the presidential race, and 122 candidates had announced, the Commission and the Court concluded that excessive demands for equal time were unlikely.[106]

Inconsistencies are evident in the Commission's policies, and the Commission in essence has carved a path out of precedent that is not clearly mandated by that precedent. As one writer in reference to another decision stated, "It is readily apparent that precedent could have been gleaned from the Commission's four major political broadcasting statements for any result the majority chose."[107]

Perhaps it is more important, then, to turn directly to what the Commission has "gleaned" from the *CBS v. FCC* decision. It becomes clear that under the *CBS* decision, at every step of the process it is the Commission or the candidate, rather than the broadcaster, who makes access determinations in the final analysis. The Commission initially determines whether a candidate fits under section 312(a)(7) by deciding when a campaign has begun. The Court argued that the FCC does not begin the campaign but rather makes an independent objective decision whether it has begun.[108] But when media coverage is as important as it is to campaigning in this country, it is naive to suggest that the opening of the "season" for political advertising will have little effect on the commencement of campaign activities. In fact, since regular programming clearly attracts and keeps more viewers than political advertisements, it is conceivable that licensees might provide less overall coverage of potential candidates before the official start of the campaign to delay the signs of a campaign that would lead the Commission to determine that a campaign has begun. Obviously, a delay of overall coverage will lead to less total exposure of candidates to the public, a result clearly contrary to what the Commission perceives to be the purpose of section 312(a)(7).

After crossing the threshold question of campaign commencement, broadcaster discretion gives way to candidate needs. The FCC originally proscribed broadcasters from instituting a flat ban on all access to media time for

104. 101 S. Ct. at 2825.
105. Id. at 2829.
106. Id. at 2828; 74 F.C.C.2d at 674.
107. Albert, supra note 88, at 301.
108. 101 S. Ct. at 2826; Carter-Mondale Presidential Comm., 74 F.C.C.2d at 665.

candidates for federal public office, instead encouraging the broadcasters to engage in a balanced weighing of a number of factors in reaching their access decisions.[109] Justice White, in dissent in the *CBS v. FCC* decision, suggested that the new emphasis on individual candidate needs undermines the equal treatment mandate of section 315(a)(7).[110] It is not unlikely that one candidate's needs require that a licensee grant him or her greater access than it would to another candidate. The licensee's obligation to provide equal access does not disappear, however. Since the penalty under section 312(a)(7) is the revocation of license, the licensee under this decision may be forced to provide reasonable access to one candidate at the price of unequal access overall. The Commission and the Court have insisted that broadcaster discretion remains intact. Commission Lee dissented from this conclusion in the Commission's opinion, stating,

> I have listened carefully to my colleagues explain how this decision leaves broadest discretion with the networks. However, the decision doesn't have this effect. By the time the majority finishes its analysis of the networks' reasons for not giving time, the networks do not have any choice other than to give the requested time. No other weighing of factors is reasonable in the view of the majority.[111]

Finally, after the threshold start-of-the-campaign issue is resolved and candidate needs are assessed in a request for access, the Commission reviews a licensee's decision. The Court indicates that if the licensee takes appropriate factors into consideration, the Commission will defer to that judgment even if the Commission's analysis would differ in the first instance. It is evident, however, that in this case the Commission substituted its judgment for that of the licensee in considering CBS's reasons for its counteroffer to the Committee.[112] CBS, the network that did not flatly ban access before a certain date, cited the multiplicity of candidates and potential for requests for equal access as reasons for its refusal to grant the Committee's request. The Commission, however, decided that it was unlikely that many of the 122 candidates would request equal time, thereby rejecting CBS's experienced judgment as "speculative and unsubstantiated at best."[113]

The above discussion examines the reduction of broadcaster discretion by the Commission and by the Court in this case, a result that frightens proponents of a communications system controlled largely by independent licensees. On the other hand, proponents of access will no doubt laud the decision, viewing it as an opening to the largely closed world of electronic media. In particular, they may see it as a contribution to overall voter awareness and responsibility because of the public's increased exposure to debate among federal candidates. Access proponents urge that with as powerful a tool as nationwide broadcasting capabilities, networks should not be allowed to provide

109. 1978 Report & Order, supra note 15, at 1090.
110. 101 S. Ct. at 2838 (White, J., dissenting).
111. 74 F.C.C.2d at 681 (Lee, Comm'r, dissenting) (footnote omitted).
112. Compare 1972 Policy Statement, supra note 71, at 536.
113. 74 F.C.C.2d at 674.

a voice only to those able to pay for it.[114] Increased access may be an effective weapon against the increasingly powerful and monopolistic networks, which many believe to be a concentration of power in the most dangerous position possible. As Professor Barron, an active advocate of access, argues,

> Our constitutional theory is in the grip of a romantic conception of free expression, a belief that the "marketplace of ideas" is freely accessible. But if ever there were a self-operating marketplace of ideas, it has long ceased to exist. The mass media's development of an antipathy to ideas requires legal intervention if novel and unpopular ideas are to be assured a forum. . . .[115]

However compelling the arguments for increasing access may seem, it is important to question whether the Supreme Court's affirmation of increased access is worth the price of increased FCC intervention in the operation of individual stations.[116] First, there is no guarantee that an increased number of voices will bring greater amounts of intelligent debate and discussion to the public. As one author has suggested, "it is not at all clear why we should want the media converted into sterile academics of balanced debate."[117] Lange predicts that increased access in public debate will bring about a "new centrism" regarding target issues at the cost of suppressing serious dissent in other areas of public interest. Lange suggests that access rights may give rise to a false sense that the nation is guarding against credulity. That false sense of security will provide no protection against a resulting American orthodoxy.[118]

Increased access may also lengthen and increase the cost of campaigns dramatically. Candidates may even be expected to campaign heavily early in the political season to trigger the FCC's campaign commencement starting-pistol. Clearly, a longer and thus more expensive campaign season is contrary to the original purpose of the Federal Election Campaign Act of 1971.[119] For those frightened by the increasing use of television marketing in campaigning, with its attendant emphasis on selective and narrow political issues, broadened access rights tend to increase fears of a media-blitzed, but uninformed, electorate. Further, a mandated right of access for federal candidates may cause licensees to reduce time devoted to local campaigns in an effort to preserve regularly scheduled broadcasting.

Probably the most disturbing aspect of this decision is the combination of reduced broadcaster discretion and increased government intervention. That access to the electronic media is limited is undeniable, but as Justice Douglas argued in his concurrence in *CBS v. Democratic National Committee*:

> [U]navailability of the press does not give courts carte blanche to design systems of supervision and control or empower Congress to

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114. See B. Schmidt, supra note 34, at 37-54.

115. Barron, supra note 60 at 1641.

116. See Note, The Right of "Reasonable Access" for Federal Political Candidates Under Section 312(a)(7) of the Communications Act, 78 Colum. L. Rev. 1287 (1978).

117. See Lange, supra note 60, at 79.

118. Id. at 89.

119. 101 S. Ct. at 2834 n.2 (White, J., dissenting).

> read the mandate in the First Amendment that "Congress shall make no law abridging the freedom . . . of the press" to mean Congress may, by acting directly or through any of its agencies such as the FCC make "some" laws abridging the freedom of the press.[120]

Douglas voices in this concurrence his fears of the far-reaching consequences of federal supervision in the even more generalized fairness doctrine area. Though somewhat extreme in reference to the fairness doctrine, his fears bring to mind a disturbing truth. Commissioners are appointed for seven-year terms by presidents,[121] who are political creatures, past candidates for political offices and often future reelection candidates.[122]

As one judge expressed it, "In evaluating the danger of government non-neutrality, we cannot ignore the fact that members of the Federal Communications Commission may well have more than a passing interest in the outcome of federal elections, particularly presidential elections."[123] Judge Tamm, who concurred with the majority in the court of appeals opinion in *CBS v. FCC*, noted that "[r]egrettably there is some evidence that the Commission has, on occasion, been subjected to direct political pressure."[124] Specifically, in the Watergate tapes of the Nixon administration, President Nixon is heard to threaten to try to block a license renewal for a *Washington Post*-owned radio station for political reasons.[125] In another setting Charles Colson indicated that to create an inhibiting impact on the networks, he would "pursue with Dean Burch (FCC Commissioner) the possibility of getting a ruling by the FCC as soon as we have a majority."[126] Judge Tamm warned that the "inherently political nature of the questions to be considered will draw the Commission into a situation where the impartiality will be subject to obvious questions. The danger that standards will not be applied neutrally necessarily suggests the unconstitutionality of the system of government regulation."[127]

In conclusion, the Supreme Court has affirmed a Commission interpretation of section 312(a)(7) that involves a much greater degree of government intervention in the operation of a broadcasting station than did the general public interest standard. The Supreme Court, basing its decision on legislative history and prior commission rulings, agreed with the FCC that the statute creates a general affirmative right of access for federal candidates. Weighing the importance of maintaining a high level of broadcaster discretion with the importance of opportunities for robust political debate, the Court came out on

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120. CBS v. Democratic Nat'l Comm., 412 U.S. at 160 (Douglas, J., concurring).

121. 47 U.S.C. § 154(a) (1976).

122. See Robinson, The Federal Communications Commission: An Essay on a Regulatory Watchdog, 64 Va. L. Rev. 169, 183-84 (1978).

123. 629 F.2d at 32 (Tamm, J., concurring).

124. Id. at 33 n.16. (Tamm, J., concurring).

125. Id. (quoting Taped Statement of Richard Nixon to H.R. Haldeman & John Dean (Sept. 15, 1972)), quoted in Senate Select Comm. on Presidential Campaign Activities, S. Rep. No. 981, 93d Cong., 2d Sess. 149 (1974)).

126. Id. (quoting Memorandum from Charles W. Colson to H.R. Haldeman (Sept. 25, 1970)), reprinted in Bazelon, FCC Regulation of the Telecommunications Press, 1975 Duke L.J. 213, 247.

127. Id. at 32 (quoting CBS Brief at 44).

the side of greater access. Considering the variety of possible interpretations of the legislative history and Commission precedent, the Court's conclusions seem sweeping, overly broad and somewhat frightening. Justice Stewart in *CBS v. Democratic National Committee* stated, "[T]here is never a paucity of arguments in favor of limiting the freedom of the press."[128] Justice Douglas in the same case argued that federal supervision in general is contrary to our constitutional mandate and warned of the consequences of too much regulation at the cost of individual licensee discretion. He argued that government intervention makes

> the broadcast licensee an easy victim of political pressures and reduces him to a timid and submissive segment of the press whose measure of the public interest will now be echoes of the dominant political voice that emerges after every election. The affair with freedom of which we have been proud will now bear only a faint likeness of our former robust days.[129]

His fears perhaps should be our own.

ANDREA DENISE SMITH

128. 412 U.S. at 144 (Stewart, J., concurring).
129. Id. at 164-65 (Douglas, J., concurring).